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Federal Register
Vol. 83, No. 151
Monday, August 6, 2018

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0392; Product Identifier 2018–NM–044–AD; Amendment 39–19349; AD 2018–16–09]

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 report indicating that cracks were found on the fuselage frame webs at stations forward and aft of the overwing emergency exits between stringer-7 (S–7) and S–8. This AD requires repetitive high frequency eddy current (HFEC) inspections for cracking of the fuselage frame webs at certain stations between S–7 and S–8 and applicable on-condition actions. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 10, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 10, 2018.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster 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, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0392.

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–2018–0392; or in person at Docket Operations 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 Docket Operations (phone: 800–647–5527) is Docket Operations, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: David Truong, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5224; fax: 562–627–5210; email: *david.truong@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 11, 2018 (83 FR 21946). The NPRM was prompted by a report indicating that cracks were found on the fuselage frame webs at stations forward and aft of the overwing emergency exits between stringers S–7 and S–8. The NPRM proposed to require repetitive HFEC inspections for cracking of the fuselage frame webs at certain stations between S–7 and S–8 and applicable on-condition actions.

We are issuing this AD to address fuselage frame web cracking, which may lead to subsequent failure of the surrounding structure, and ultimately result in rapid decompression and loss of structural integrity of the airplane.

Comments

We gave the public the opportunity to participate in developing this final rule. We have considered the comments received. The Boeing Company Airplanes indicated their support for the NPRM.

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) of this AD 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 except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for addressing 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 Requirements Bulletin 737–53A1371 RB, dated January 19, 2018. This service information describes procedures for repetitive HFEC inspections for cracking of the fuselage frame webs at certain stations between S–7 and S–8 and applicable on-condition actions. The on-condition action is repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 63 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Repetitive inspections	Up to 14 work-hours × $85 per hour = $1,190 per inspection cycle.	$0	Up to $1,190 per inspection cycle.	Up to $74,970 per inspection cycle.

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

Authority for This Rulemaking

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

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

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 and associated appliances 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):

2018–16–09 The Boeing Company Airplanes Amendment 39–19349; Docket No. FAA–2018–0392; Product Identifier 2018–NM–044–AD.

(a) Effective Date

This AD is effective September 10, 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?OpenDocument&Highlight=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

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by a report indicating that cracks were found on the fuselage frame webs at stations forward and aft of the overwing emergency exits between stringer-7 (S–7) and S–8. We are issuing this AD to address fuselage frame web cracking, which may lead to subsequent failure of the surrounding structure, and ultimately result in rapid decompression and loss of structural integrity of the airplane.

(f) Compliance

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

(g) Required Actions for Group 1 Airplanes

For airplanes identified as Group 1 in Boeing Alert Requirements Bulletin 737–53A1371 RB, dated January 19, 2018: Within 120 days after the effective date of this AD, inspect the fuselage frame webs at station (STA) 616 and STA 639 between S–7 and S–8 and do all applicable repairs, using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(h) Required Actions for Groups 2 Through 4 Airplanes

Except for airplanes identified in paragraph (g) of this AD and except as required by paragraph (i) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 737–53A1371 RB, dated January 19, 2018, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 737–53A1371 RB, dated January 19, 2018.

Note 1 to paragraph (h) of this AD: Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 737–53A1371, dated January 19, 2018, which is referred to in Boeing Alert Requirements Bulletin 737–53A1371 RB, dated January 19, 2018.

(i) Exceptions to Service Information Specifications

(1) For purposes of determining compliance with the requirements of this AD: Where Boeing Alert Requirements Service Bulletin 737–53A1371 RB, dated January 19, 2018, uses the phrase ''the original issue date of Requirements Bulletin 737–53A1371 RB,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin 737–53A1371 RB, dated January 19, 2018, specifies contacting Boeing, this AD requires repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) 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 (k) 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.

(k) Related Information

For more information about this AD, contact David Truong, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5224; fax: 562–627–5210; email: *david.truong@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 737–53A1371 RB, dated January 19, 2018.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster 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, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(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 Des Moines, Washington, on July 25, 2018.

James Cashdollar,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–16479 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–0805; Product Identifier 2017–NM–051–AD; Amendment 39–19235; AD 2018–07–04]

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 DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87) airplanes, Model MD–88 airplanes, and Model MD–90–30 airplanes. This AD was prompted by a report of loss of airspeed indication due to icing. This AD requires modifying the air data heat (ADH) system. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 10, 2018.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 10, 2018.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster 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, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–0805.

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–2017–0805; 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: Eric Igama, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5388; fax: 562–627–5210; email: *roderick.igama@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 DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87) airplanes, Model MD–88 airplanes, and Model MD–90–30 airplanes. The NPRM published in the **Federal Register** on August 25, 2017 (82 FR 40505). The NPRM was prompted by a report of loss of airspeed indication due to icing. The NPRM proposed to require modifying the ADH system. We are issuing this AD to prevent operation of unheated air data sensors in icing conditions. Failure to activate the ADH system in icing conditions could result in irregular airspeed or altitude indications, which could possibly result in a runway overrun during a high speed rejected takeoff (RTO) due to failure to rotate before the end of the runway, or a stall/overspeed during flight.

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

Boeing and the Air Line Pilots Association, International (ALPA) expressed support for the NPRM.

Request To Allow the Use of Alternative Ground Terminal Locations

Delta Airlines (DAL) requested that we revise the proposed AD to allow alternative ground terminal locations for certain wires. DAL noted that, during prototype testing, it was unable to relocate ground wire 2EB292B20N or ground wire 1EB292B20N to certain ground termination points because those points were already full of existing wires. DAL noted that Boeing Alert Service Bulletin MD90–30A031, dated June 2, 2017, specifies locating ground wires in specific ground termination points, and that action is required for compliance (RC). DAL suggested that varied wiring configurations on Model MD–90 airplanes would lead it to make multiple requests for alternative methods of compliance (AMOCs), which could require additional out-of-service time for the affected airplanes. For this reason, DAL requested that we add language allowing the use of alternative ground terminal locations as specified in standard wiring practices manual (SWPM) chapter 20 and Boeing Service Request (SR) concurrence that provide an equivalent level of safety.

We disagree with the commenter's request. If an airplane has a different wiring or ground termination configuration than that identified in Boeing Alert Service Bulletin MD90–30A031, dated June 2, 2017, an operator must request an AMOC in accordance with the procedures specified in paragraph (j) of this AD. We have not changed this AD in this regard.

Request To Extend the Compliance Times

DAL requested that the compliance times specified in paragraphs (g)(1) and (g)(2) of the proposed AD (within 28 months after the effective date of this AD and within 27 months after the effective date of this AD, respectively) be extended by 6 months. DAL noted that the actions required by this AD would have to be done outside of regularly scheduled heavy maintenance checks. DAL stated that Boeing is providing a lead time of 174 days to procure the needed kits. For these reasons, DAL requested that the compliance time be extended by 6 months for both Model MD–88 and MD–90 airplanes.

We disagree with the commenter's request. We confirmed with Boeing that the lead time for kit procurement will be 75–90 days, with some components already available, not 174 days as suggested by DAL. If an operator needs additional time to comply with this AD, they may request an AMOC in accordance with the procedures specified in paragraph (j) of this AD. We have not changed this AD in this regard.

Changes to Paragraph (i) of This AD

We have clarified the language of paragraph (i) of this AD. Paragraph (i) of the proposed AD would have allowed for the operation of the airplane even if the modified ADH system is inoperable, so long as the Master Minimum Equipment List (MMEL) and the operator's Minimum Equipment List (MEL) have a provision to allow for this inoperability. The FAA has revised paragraph (i) of this AD to make it clear that, if there is a provision in the operator's MEL that allows for the modified ADH system to be inoperable then the operator can operate the airplane with an inoperable modified ADH system. We have removed the references to the MMEL because it is unnecessary to reference the MMEL, as operators are required in 14 CFR part 91 to have an MEL to operate with inoperable equipment and a provision cannot be in an MEL without first being part of the MMEL. The intent of the provision has not changed.

Conclusion

We reviewed the relevant data, considered the comment received, and determined that air safety and the public interest require adopting this final rule with the change 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 the change 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 MD80–30A132, dated April 28, 2017; and Boeing Alert Service Bulletin MD90–30A031, dated June 2, 2017. This service information describes procedures for modifying the ADH system so that it activates when the left and right fuel switches are in the ON position. 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 553 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
Modification, MD–80 Group 1, 84 airplanes ...	56 work-hours × $85 per hour = $4,760	$4,459	$9,219	$774,396
Modification, MD–80 Group 2, 11 airplanes ...	57 work-hours × $85 per hour = $4,845	11,014	15,859	174,449
Modification, MD–80 Group 3, 336 airplanes	57 work-hours × $85 per hour = $4,845	8,589	13,434	4,513,824
Modification, MD–80 Group 4, 1 airplane	56 work-hours × $85 per hour = $4,760	4,479	9,239	9,239
Modification, MD–80 Group 5, 37 airplanes ...	57 work-hours × $85 per hour = $4,845	11,034	15,879	587,523
Modification, MD–90 Group 1, 84 airplanes ...	37 work-hours × $85 per hour = $3,145	4,395	7,540	633,360

We have received no definitive data that would enable us to provide cost estimates for doing the modification on Model MD–80 Group 6 airplanes.

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):

2018–07–04 The Boeing Company: Amendment 39–19235; Docket No. FAA–2017–0805; Product Identifier 2017–NM–051–AD.

(a) Effective Date

This AD is effective September 10, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87) airplanes, Model MD–88 airplanes, and Model MD–90–30 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and rain protection.

(e) Unsafe Condition

This AD was prompted by a report of loss of airspeed indication due to icing. We are issuing this AD to prevent operation of unheated air data sensors in icing conditions. Failure to activate the air data heat (ADH) system in icing conditions could result in irregular airspeed or altitude indications, which could possibly result in a runway overrun during a high speed rejected takeoff (RTO) due to failure to rotate before the end of the runway, or a stall/overspeed during flight.

(f) Compliance

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

(g) Required Actions

At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD: Do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–30A132, dated April 28, 2017; or Boeing Alert Service Bulletin MD90–30A031, dated June 2, 2017; as applicable; except as required by paragraph (h) of this AD.

(1) For Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and Model MD–88 airplanes: Within 28 months after the effective date of this AD.

(2) For Model MD–90–30 airplanes: Within 27 months after the effective date of this AD.

(h) Exception to Certain Service Information Specifications

Where Boeing Alert Service Bulletin MD80–30A132, dated April 28, 2017, specifies contacting Boeing, and specifies that action as ''RC'' (Required for Compliance): This AD requires using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) Minimum Equipment List (MEL)

In the event that the ADH system as modified by this AD is inoperable, an airplane may be operated as specified in the operator's MEL, provided provisions that address the modified ADH system are included in the MEL.

(j) 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 (k) 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 (h) of this AD: For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(4)(i) and (j)(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.

(k) Related Information

For more information about this AD, contact Eric Igama, Aerospace Engineer, Systems and Equipment Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137;

phone: 562–627–5388; fax: 562–627–5210; email: *roderick.igama@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin MD80–30A132, dated April 28, 2017.

(ii) Boeing Alert Service Bulletin MD90–30A031, dated June 2, 2017.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster 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, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(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 Des Moines, Washington, on March 20, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–16320 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0110; Product Identifier 2017–NM–125–AD; Amendment 39–19345; AD 2018–16–05]

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 certain The Boeing Company Model 757 airplanes. This AD was prompted by reports of bolt rotation in the engine drag fitting joint and fasteners heads; an inspection of the fastener holes revealed that cracks were found in the skin on two airplanes. This AD requires repetitive inspections for skin cracking and shim migration at the upper link drag fittings, diagonal brace cracking, and fastener looseness; and applicable on-condition actions. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective September 10, 2018.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 10, 2018.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster 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, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0110.

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–2018–0110; or in person at Docket Operations 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 Docket Operations (phone: 800–647–5527) is Docket Operations, 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: Chandra Ramdoss, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5239; fax: 562–627–5210; email: *chandraduth.ramdoss@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 certain The Boeing Company Model 757 airplanes. The NPRM published in the **Federal Register** on February 16, 2018 (83 FR 6984). The NPRM was prompted by reports of bolt rotation in the engine drag fitting joint and fasteners heads; an inspection of the fastener holes revealed that cracks were found in the skin on two airplanes. The NPRM proposed to require repetitive inspections for skin cracking and shim migration at the upper link drag fittings, diagonal brace cracking, and fastener looseness; and applicable on-condition actions.

We are issuing this AD to address cracking in the wing upper skin and forward drag fittings, which could lead to a compromised upper link and reduced structural integrity of the engine strut.

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. Micaela Murrugarra and United Airlines stated that they supported the NPRM.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that accomplishing the supplemental type certificate (STC) ST01518SE 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) of this AD and added paragraph (c)(2) to this AD to state that installation of STC ST01518SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01518SE 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.

Request To Include Additional Inspections

American Airlines (AAL) and FedEx requested that we revise the proposed AD to include additional inspections. FedEx stated that releasing the proposed AD using Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, would have potential safety and economic implications on the operator. FedEx stated that the safety concern in its entirety is not addressed in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, and any additional mandated inspections issued later would require a duplication of effort to address the remaining fastener locations. FedEx requested that the proposed AD include additional inspections.

AAL stated that due to the ongoing efforts at Boeing to conduct a safety analysis on cracking found in the upper

link drag fitting layer on multiple airplanes, it encourages the FAA to work together with Boeing to include any new inspection requirements beyond those in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, into the proposed AD. AAL commented that publication of the final rule without incorporating any new inspection requirements could drive additional unnecessary burden to operators by requiring multiple maintenance visits to conduct work that could have been consolidated.

We disagree with the commenters' request. We do not consider that delaying this action until release of new service information is warranted since sufficient data and technology currently exist to justify the requirements in this AD within the required compliance time. We may consider further rulemaking in the future to require additional inspections based on revised service information, and if so, would determine an appropriate compliance time that would provide operators sufficient time to coordinate the inspection intervals. We have not changed this AD in this regard.

Request To Revise the Costs of Compliance

AAL requested that we revise the costs of compliance in the NPRM. AAL stated that based on the inspections and repairs previously accomplished on 5 of its airplanes, it estimated 100 work-hours to complete the inspection requirements, 20 work-hours to complete a minor hole oversize repair, and 800 work-hours to accomplish a more complex hole repair or shim replacement. AAL also stated that the current fastener pricing procured from Boeing averages $445 per fastener.

While we acknowledge AAL's varied work-hour estimates based on its repair experience for the requirements of this AD, we disagree with the commenter's request. The cost estimates and required man-hours are only approximate values and are not necessarily the same for different maintenance organizations and part suppliers. Because operators' schedules vary substantially, we cannot accommodate every operator's optimal scheduling in each AD. We have not changed this AD in this regard.

Request To Revise the Compliance Time

AAL requested that we revise the grace period for the high frequency eddy current (HFEC) hole probe inspection from 3,000 flight cycles to 6,500 flight cycles after the effective date of this AD due to the extent of access that may be required to correct discrepancies. AAL stated that this proposed grace period would allow operators with a 72-month heavy check interval, flying 3 flight cycles per day, to perform the required HFEC hole probe inspections at a visit with adequate span time and structures personnel to correct any possible findings. AAL also proposed adding interim inspections to justify this compliance-time extension.

We disagree with the commenter's request. We have determined that the compliance time, as proposed, represents the maximum interval of time allowable for the affected airplanes to safely operate before the inspection and bolt replacement is done. Since maintenance schedules vary among operators, there would be no assurance that the airplane would be inspected and the bolt replaced during that maximum interval. In terms of adding interim inspections to justify the compliance-time extension, we have not received enough technical data to make this determination. However, under the provisions of paragraph (i) of this AD, we will consider requests for approval of interim inspections if sufficient data are submitted to substantiate that the change would provide an acceptable level of safety. We have not changed this AD in this regard.

Request To Replace the Inspection Type From the Proposed Action

The Boeing Company and FedEx requested that we revise the proposed AD to remove the requirement of the dye-penetrant inspection of the bolts and to include a requirement to perform a detailed inspection of the bolts. Boeing stated that the dye-penetrant inspection of the bolts to look for cracking in the fillet between head and shank is problematic due to the coating on the bolt, creating an unacceptably high chance for false indication. Boeing commented that it has determined that replacing the dye-penetrant inspection with a detailed inspection is as an acceptable means to detect cracking in the fillet between head and shank. Boeing commented that it should be noted that the bolt head cracking is not the unsafe condition specified in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017. Boeing also commented that the bolt head cracking correlates with clamp loss, which can be a predecessor to early fatigue cracking of the wing skin; the condition duly mitigated by Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017.

FedEx stated that the bolt dye-penetrant inspection is not an effective method due to the coating on the bolts. FedEx stated that Boeing indicates that it plans to revise the service information to provide an alternative detailed inspection that will be more effective. FedEx requests that the proposed AD include the revised inspection to allow operators a way to determine if the existing bolts are in a serviceable condition.

We agree with the commenters' request. We have added paragraph (h)(3) to this AD accordingly to allow a detailed inspection for cracks in the fillet between head and shank on the removed fasteners in lieu of the dye-penetrant inspection. Either inspection will provide an adequate level of safety.

Request To Increase Shim Migration Limits

AAL requested that we increase the shim migration limits. AAL stated that according to Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, any shim migration of the horizontal shims greater than 0.200 inch and any shim migration where the migrated shim is greater than 0.020 inch thick are considered ''Major'' shim migration, which, according to paragraph (h) of the proposed AD, would require an approval for an alternative method of compliance for the corrective action.

AAL commented that the shim migration limits noted above are far more conservative than the two-shim migration allowable limits currently contained in Boeing Model 757 Structural Repair Manual (SRM) 54–50–90 for shim locations in the pylon. AAL stated that both SRM allowable limits have no restriction on shim thickness and allow migration of at least 25 percent of the total shim area.

AAL recommended applying these same general principles from these SRM sections to the shims specified in the Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, and increasing the limits for minor shim migration to include full shim thickness, and migration up to 0.5 inch. AAL stated that the inspections contained in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, and proposed in the proposed AD, are already adding additional surveillance of the upper link drag fitting to the upper wing skin joint, which would mitigate any risk associated with the increase in shim migration limits.

We disagree with the commenter's request. Shim inspection procedures do not currently exist for the wing skin joint described in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017. However, under

the provisions of paragraph (i) of this AD, we will consider requests for approval of an AMOC if sufficient data are submitted to substantiate that the change would provide an acceptable level of safety. We have not changed this AD in this regard.

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 addressing 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 Requirements Bulletin 757–57A0073 RB, dated July 14, 2017. This service information describes procedures for repetitive detailed inspections for skin cracking and shim migration at the upper link drag fittings, repetitive general visual inspections for diagonal brace cracking and fastener looseness, and applicable on-condition 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 606 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	83 work-hours × $85 per hour = $7,055 per inspection cycle.	$0	$7,055 per inspection cycle.	$4,275,330 per inspection cycle.

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

Authority for This Rulemaking

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

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

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 and associated appliances 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):

2018–16–05 The Boeing Company: Amendment 39–19345; Docket No. FAA–2018–0110; Product Identifier 2017–NM–125–AD.

(a) Effective Date

This AD is effective September 10, 2018.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to The Boeing Company Model 757–200, –200PF, –200CB, and –300 series airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017.

(2) Installation of Supplemental Type Certificate (STC) ST01518SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01518SE 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 57, Wings.

(e) Unsafe Condition

This AD was prompted by bolt rotation in the engine drag fitting joint and fasteners

heads; an inspection of the fastener holes revealed that cracks were found in the skin on two airplanes. We are issuing this AD to detect and correct cracking in the wing upper skin and forward drag fittings, which could lead to a compromised upper link and reduced structural integrity of the engine strut.

(f) Compliance

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

(g) Required Actions

Except as required by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017.

Note 1 to paragraph (g) of this AD: Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 757–57A0073, dated July 14, 2017, which is referred to in Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017.

(h) Exceptions to Service Information Specifications

(1) For purposes of determining compliance with the requirements of this AD: Where Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, uses the phrase ''the original issue date of the requirements bulletin,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, specifies contacting Boeing, this AD requires repair using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(3) Where Boeing Alert Requirements Bulletin 757–57A0073 RB, dated July 14, 2017, specifies a dye-penetrant inspection for cracks in the fillet between head and shank on the removed fasteners,'' this AD allows a detailed inspection for cracks in the fillet between head and shank on the removed fasteners, as an optional method of compliance with the dye-penetrant inspection.

(i) 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 (j)(1) 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, FAA, 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.

(j) Related Information

(1) For more information about this AD, contact Chandra Ramdoss, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5239; fax: 562–627–5210; email: *chandraduth.ramdoss@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(k) 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 Requirements Bulletin 757–57A0073 RB, dated July 14, 2017.

(ii) Reserved.

(3) For Boeing service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster 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, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(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 Des Moines, Washington, on July 24, 2018.

James Cashdollar,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–16499 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0137; Airspace Docket No. 18–ACE–2]

RIN–2120–AA66

Amendment and Establishment of Class E Airspace; Columbus, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace designated as a surface area and makes the airspace full-time and removes the airspace part-time status and language from the airspace legal description, amends Class E airspace extending upward from 700 feet above the surface, and establishes Class E airspace designated as an extension to the Class E surface area at Columbus Municipal Airport, Columbus, NE. This action is at the request of Minneapolis Air Route Traffic Control Center (ARTCC) and the result of an FAA airspace review. Additionally, the geographic coordinates of the airport are updated to coincide with the FAA's aeronautical database. This action is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

DATES: Effective 0901 UTC, November 8, 2018. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11B, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11B at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace designated as a surface area, amends Class E airspace extending upward from 700 feet above the surface, and establishes Class E airspace designated as an extension to the Class E surface area at Columbus Municipal Airport, Columbus, NE to support IFR operations at the airport.

History

The FAA published a notice of proposed rulemaking (NPRM) in the **Federal Register** (83 FR 13438; March 29, 2018) for Docket No. FAA–2018–0137 to amend Class E airspace designated as a surface area and make the airspace full-time and remove the airspace part-time status and language from the airspace legal description, amend Class E airspace extending upward from 700 feet above the surface, and establish Class E airspace designated as an extension to the Class E surface area at Columbus Municipal Airport, Columbus, NE. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Subsequent to publication, the FAA discovered the following typographical errors: In the Class E airspace designated as a surface area airspace legal description, the airspace radius should be 4.2 vice 4.7; and the geographic coordinates for Columbus Municipal Airport in the classes of airspace shown should be (lat. 41°26′55″ N, long. 97°20′27″ W) vice (lat. 41°26′55″ N, long. 97°20′34″ W). These errors are corrected with this action.

Class E airspace designations are published in paragraph 6002, 6004, and 6005, respectively, of FAA Order 7400.11B, dated August 3, 2017, and effective September 15, 2017, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017, and effective September 15, 2017. FAA Order 7400.11B is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11B lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

The FAA amends Title 14, Code of Federal Regulations (14 CFR) part 71 by: Amending the Class E airspace designated as a surface area to within a 4.2-mile radius (reduced from a 4.7-mile radius) at Columbus Municipal Airport, Columbus, NE; removing the Columbus VOR/DME and the extensions to the southeast and northwest of the airport as they are no longer needed to define this boundary; making the airspace full-time and removing the part-time status and language from the airspace legal description; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Establishing Class E airspace designated as an extension to the Class E surface area at Columbus Municipal Airport within 2.4 miles each side of the Columbus VOR/DME 150° radial from the 4.2-mile radius of the airport to 7.0 miles southeast of the airport, and within 2.4 miles each side of the Columbus VOR/DME 309° radial from the 4.2-mile radius of the airport to 7.7 miles northwest of the airport; and

Amending Class E airspace extending upward from 700 feet above the surface to within a 6.7-mile radius (reduced from a 7.7-mile radius) of Columbus Municipal Airport; removing the Columbus Municipal ILS Localizer, Platte Center NDB, and the associated northwest extension; amending the extension to the southeast to within 2.4 miles (increased from 1.6 miles) each side of the Columbus VOR/DME 150° (previously 157°) radial from the 6.7-mile radius to 7.0 miles (decreased from 11 miles) southeast of the airport; adding an extension 2.4 miles each side of the Columbus VOR/DME 309° radial extending from the 6.7-mile radius to 7.7 miles northeast of the airport; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

The NPRM incorrectly stated the geographic coordinates of the airport noted in the classes of airspace and are corrected in this rule to (lat. 41°26′55″ N, long. 97°20′27″ W).

Airspace reconfiguration is necessary due to a request from Minneapolis ARTCC, to bring the airspace into compliance with FAA Order 7400.2L, Procedures for Handling Airspace, and to support the safety and management of IFR operations at the airport.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017, and effective September 15, 2017, is amended as follows:

Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

ACE NE E2 Columbus, NE [Amended]

Columbus Municipal Airport, NE
(Lat. 41°26′55″ N, long. 97°20′27″ W)

Within a 4.2 mile radius of Columbus Municipal Airport.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

ACE MO E4 Columbus, NE [New]

Columbus Municipal Airport, NE
(Lat. 41°26′55″ N, long. 97°20′27″ W)
Columbus VOR/DME
(Lat. 41°27′00″ N, long. 97°20′27″ W)

That airspace extending upward from the surface within 2.4 miles each side of the Columbus VOR/DME 150° radial extending from the 4.2-mile radius of Columbus Municipal Airport to 7.0 miles southeast of the airport, and within 2.4 miles each side of the Columbus VOR/DME 309° radial extending from the 4.2-mile radius of Columbus Municipal Airport to 7.7 miles northwest of the airport.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ACE NE E5 Columbus, NE [Amended]

Columbus Municipal Airport, NE
(Lat. 41°26′55″ N, long. 97°20′27″ W)
Columbus VOR/DME
(Lat. 41°27′00″ N, long. 97°20′27″ W)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Columbus Municipal Airport and within 2.4 miles each side of the Columbus VOR/DME 150° radial extending from the 6.7-mile radius to 7.0 miles southeast of the airport and within 2.4 miles each side of the Columbus VOR/DME 309° radial extending from the 6.7-mile radius to 7.7 miles northwest of the airport.

Issued in Fort Worth, Texas, on July 17, 2018.

Walter Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2018–16679 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0615]

RIN 1625–AA00

Safety Zone; Fireworks Display, Little Egg Harbor, Long Beach, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Little Egg Harbor off Long Beach, NJ, from 8:30 p.m. through 9:30 p.m. on August 7, 2018, during the Long Beach National Night Out Fireworks Display. The safety zone is necessary to ensure the safety of participant vessels, spectators, and the boating public during the event. This regulation prohibits persons and non-participant vessels from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port (COTP) Delaware Bay or a designated representative.

DATES: This rule is effective from 8:30 p.m. through 9:30 p.m. on August 7, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0615 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MST1 Edmund Ofalt, U.S. Coast Guard, Sector Delaware Bay, Waterways Management Division; telephone (215) 271–4814, email *Edmund.J.Ofalt@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest to do so. There is insufficient time to allow for a reasonable comment period prior to the date of the event. The rule must be in force by August 7, 2018, to serve its purpose of ensuring the safety of spectators and the general public from hazards associated with the fireworks display. Hazards include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris.

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 and contrary to the public interest because immediate action is needed to mitigate the potential safety hazards associated with a fireworks display in this location.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Delaware Bay (COTP) has determined that potential hazards associated with the fireworks display on August 7, 2018, will be a safety concern for anyone within a 200-yard radius of the fireworks barge, which will be anchored in approximate position 39°37′08.34″ N, 074°12′25.60″ W. This rule is needed to protect persons, vessels and the public within the safety zone during the fireworks display.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 8:30 p.m. to 9:30 p.m. on August 7, 2018, on the waters of Little Egg Harbor off Long Beach, NJ, during a fireworks display from a barge. The event is scheduled to take place at 8:45 p.m. on August 7, 2018. The safety zone will extend 200 yards around the barge, which will be anchored at

approximate position 39°37′08.34″ N, 074°12′25.60″ W. No person or vessel will be permitted to enter, transit through, anchor in, or remain within the safety zone without obtaining permission from the COTP Delaware Bay or a designated representative. If authorization to enter, transit through, anchor in, or remain within the safety zone is granted by the COTP Delaware Bay or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the COTP Delaware Bay or a designated representative. The Coast Guard will provide public notice of the safety zone by Broadcast Notice to Mariners and by on-scene actual notice from designated representatives.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this 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 Executive Order 13771.

The rule is not a significant regulatory action for the following reasons: (1) Although persons and vessels may not enter, transit through, anchor in, or remain within the safety zone without authorization from the COTP Delaware Bay or a designated representative, they may operate in the surrounding area during the enforcement period; (2) persons and vessels will still be able to enter, transit through, anchor in, or remain within the regulated area if authorized by the COTP Delaware Bay or a designated representative; and (3) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Broadcast Notice to Mariners, or by on-scene actual notice from designated representatives.

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 will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit persons and vessels from entering, transiting through, anchoring in, or remaining within a limited area on the navigable water in the Delaware Bay, during a fireworks display lasting less than an hour. This rule is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration (REC) supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–0615 to read as follows:

§ 165.T05–0615 Safety Zone; Fireworks, Little Egg Harbor, Long Beach, NJ.

(a) *Location.* The following area is a safety zone: all waters of Little Egg Harbor off Long Beach, NJ, within 200 yards of the barge anchored in position 39°37′08.34″ N, 074°12′25.60″ W. All coordinates are based on Datum NAD 1983.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard petty officer, warrant or commissioned officer on board a Coast Guard vessel or on board a federal, state, or local law enforcement vessel assisting the Captain of the Port (COTP), Delaware Bay in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter or remain in the zone, contact the COTP or the COTP's representative via VHF–FM channel 16 or 215–271–4807. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(3) This section applies to all vessels except those engaged in law enforcement, aids to navigation servicing, and emergency response operations.

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This zone will be enforced from approximately 8:30 p.m. through 9:30 p.m. on August 7, 2018.

Dated: July 31, 2018.

S.E. Anderson,

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

[FR Doc. 2018–16694 Filed 8–3–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2018–0692]

Safety Zones; Annual Events Requiring Safety Zones in the Captain of the Port Lake Michigan Zone—Menominee Waterfront Festival Fireworks

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone on Green Bay in Menominee, MI. This action is necessary and intended to protect the safety of life and property on navigable waters before, during, and immediately after a shore based firework display. During the enforcement period listed below, vessels and persons are prohibited from transiting through, mooring, or anchoring within this safety zone without approval from the Captain of the Port Lake Michigan or his or her designated representative.

DATES: The regulations in 33 CFR 165.929(f)(7) will be enforced from 9:30 p.m. through 10 p.m. on August 4, 2018.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email MSTC Kaleena Carpino, Marine Event Coordinator, U.S. Coast Guard Sector Lake Michigan; telephone 414–747–7148, email *D09-SMB-SECLakeMichigan-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Safety Zone; Waterfront Festival Fireworks listed as item (f)(7) in Table 165.929 of 33 CFR 165.929. Section 165.929 lists annual events requiring safety zones in the Captain of the Port Lake Michigan zone. This safety zone will encompass all waters of Green Bay within an 1,000 foot radius from approximate launch position at 45°06.040 N 087°36.054 W (NAD, 83). This safety zone will be enforced from 9:30 p.m. through 10 p.m. on August 4, 2018.

Pursuant to 33 CFR 165.929, entry into, transiting, or anchoring within the safety zone during an enforcement period is prohibited unless authorized by the Captain of the Port Lake Michigan, or his or her designated on-scene representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Lake Michigan via Channel 16, VHF–FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of the Port Lake Michigan or his or her designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.929, Safety Zones; Annual events requiring safety zones in the Captain of the Port Lake Michigan zone, and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners and Local Notice to Mariners. The Captain of the Port Lake Michigan or his or her designated on-scene representative may be contacted via VHF Channel 16 or at (414) 747–7182.

Dated: July 24, 2018.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. 2018–16756 Filed 8–3–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0194]

RIN 1625–AA00

Safety Zone; Philippine Sea, Tinian

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters off of Chulu and Babui beaches in Tinian. The Coast Guard believes this safety zone is necessary to protect all divers participating in this

underwater military exercise from potential safety hazards associated with vessel traffic in the area. This safety zone will prohibit persons and vessels not involved in the exercise from being in the safety zone unless authorized by the Captain of the Port Guam (COTP) or a designated representative.

DATES: This rule is effective from 5 p.m. on September 10, 2018, to 5 a.m. on September 11, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0194 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Todd Wheeler, Sector Guam Waterways Management Division, U.S. Coast Guard; telephone 671–355–4866, email *WWMGuam@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The purpose of this rulemaking is to ensure the safety of divers in the water during an underwater military exercise in support of the biennial Exercise Valiant Shield from 5 p.m. on September 10, 2018 to 5 a.m. on September 11, 2018.

In response, on May 1, 2018, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Philippine Sea, Tinian (83 FR 19025–19026). There, we stated why we issued the NPRM and requested comments on our proposed regulatory action related to this safety zone. During the comment period that ended May 31, 2018, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Guam (COTP) has determined that potential hazards associated with the exercise will be a safety concern. The purpose of this rule is to protect all divers participating in this underwater military exercise from potential safety hazards associated with vessel traffic in the area.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published May 1, 2018. The Exercise Valiant Shield coordinator did send an updated time and coordinates for where and when the divers will enter the water. The safety zone has moved approximately one mile northeast of the previous safety zone that was proposed in the NPRM. Also the time has moved up by one hour. The changes are reflected in the regulatory text of this rule.

This rule establishes a safety zone from 5 p.m. on September 10, 2018 to 5 a.m. on September 11, 2018. The safety zone will cover all navigable waters two miles off Chulu and Babui beaches in Tinian. This safety zone is necessary to protect all divers participating in this underwater military exercise from potential safety hazards associated with vessel traffic in the area. This proposed rulemaking would prohibit persons and vessels not involved in the exercise from being in the safety zone unless authorized by the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this 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 Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time of day of the safety zone. Vessel traffic would be able to safely transit around this safety zone. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 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 received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct

effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone vessel traffic would be able to safely transit around. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T14–0194 to read as follows:

§ 165.T14–0194 Safety Zone; Philippine Sea, Tinian.

(a) *Location.* The following area is a safety zone: All waters off of Chulu and Babui Beach, Tinian, from surface to bottom, encompassed by a line connecting the following points beginning at 15°04′34″ N, 145°37′03″ E, thence to 15°05′17″ N, 145°36′30″ E, thence to 15°05′42″ N, 145°36′54″ E, thence to 15°05′03″ N, 145°37′36″ E, and along the shore line back to the beginning point. These coordinates are based on NAD 1983.

(b) *Regulations.* (1) The general regulations governing safety zones contained in § 165.23 apply. This proposed rulemaking would prohibit persons and vessels not involved in the exercise from being in the safety zone unless authorized by the Captain of the Port (COTP) Guam or a designated representative.

(2) To seek permission to enter, contact the COTP Guam or the COTP's representative by VHF channel 16 or by telephone at 671–355–4821. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced from 5 p.m. on September 10, 2018, to 5 a.m. on September 11, 2018.

Dated: July 13, 2018.

Christopher M. Chase,

Captain, U.S. Coast Guard, Captain of the Port Guam.

[FR Doc. 2018–16754 Filed 8–3–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2018–0183]

RIN 1625–AA00

Safety Zone; Philippine Sea, Rota

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain waters off the Port of Rota. The Coast Guard believes this safety zone is necessary to protect all divers participating in this underwater military exercise from potential safety hazards associated with vessel traffic in the area. This safety zone will prohibit persons and vessels not involved in the exercise from being in the safety zone unless authorized by the Captain of the Port Guam (COTP) or a designated representative.

DATES: This rule is effective from 11 a.m. to 11 p.m. on September 16, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0183 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email call or email Chief Todd Wheeler, Sector Guam Waterways Management Division, U.S. Coast Guard; telephone 671–355–4866, email *WWMGuam@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The purpose of this rulemaking is to ensure the safety of divers in the water during an underwater military exercise in support of the biennial Exercise Valiant Shield from 11 a.m. to 11 p.m. on September 16, 2018.

In response, on May 21, 2018, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Philippine Sea, Rota (83 FR 23400–23402). There, we stated the

background and proposed regulatory action, and requested comments on our proposed regulatory action related to this safety zone. During the comment period that ended June 20, 2018, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Guam (COTP) has determined that potential hazards associated with the exercise will be a safety concern. The purpose of this rule is to protect all divers participating in this underwater military exercise from potential safety hazards associated with vessel traffic in the area.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published May 21, 2018. The Exercise Valiant Shield coordinator did send an updated time for when the divers will enter the water. The safety zone has moved up seven hours from the previous safety zone that was proposed in the NPRM. The changes are reflected in the regulatory text of this rule.

This rule establishes a safety zone from 11 a.m. to 11 p.m. on September 16, 2018. The safety zone will cover all navigable waters two miles off of the Port of Rota. This safety zone is necessary to protect all divers participating in this underwater military exercise from potential safety hazards associated with vessel traffic in the area. This proposed rulemaking would prohibit persons and vessels not involved in the exercise from being in the safety zone unless authorized by the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this 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 Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time of day of the safety zone. Vessel traffic would be able to safely transit around this safety zone. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 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 received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting for 12 hours that will

prohibit entry into navigable waters 2 miles off the coast of the Port of Rota; however, vessel traffic would be able to safely transit around the safety zone. It is categorically excluded from further review under paragraph L60(c) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T14–0183 to read as follows:

§ 165.T14–0183 Safety Zone; Philippine Sea, Rota.

(a) *Location.* The following area is a safety zone: All waters off of the Port of Rota, from surface to bottom, encompassed by a line connecting the following points beginning at 14°08′07″ N, 145°08′00″ E, thence to 14°08′53″ N, 145°06′51″ E, thence to 14°09′12″ N, 145°07′13″ E, thence to 14°08′16″ N, 145°08′08″ E, and along the shore line back to the beginning point. These coordinates are based on NAD 1983.

(b) *Regulations.* (1) The general regulations governing safety zones contained in § 165.23 apply. This proposed rulemaking would prohibit persons and vessels not involved in the exercise from being in the safety zone unless authorized by the Captain of the Port (COTP) Guam or a designated representative.

(2) To seek permission to enter, contact the COTP Guam or the COTP's representative by VHF channel 16 or by telephone at 671–355–4821. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced from 11 a.m. to 11 p.m. on September 16, 2018.

Dated: July 13, 2018.

Christopher M. Chase,

Captain, U.S. Coast Guard, Captain of the Port Guam.

[FR Doc. 2018–16757 Filed 8–3–18; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2018–0277; FRL–9981–70—Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Removal of Department of Environmental Protection Gasoline Volatility Requirements for the Pittsburgh-Beaver Valley Area; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to receipt of adverse comment, the Environmental Protection Agency (EPA) is withdrawing the direct final rule published on June 15, 2018, to approve a revision to the Commonwealth of Pennsylvania state implementation plan (SIP) requesting removal of Pennsylvania requirements limiting summertime gasoline volatility to 7.8 pounds per square inch (psi) Reid Vapor Pressure (RVP) to address nonattainment under the 1-hour ozone national ambient air quality standard (NAAQS) in the Pittsburgh-Beaver Valley ozone nonattainment area (hereafter Pittsburgh-Beaver Valley Area).

DATES: The direct final rule published at 83 FR 27901 on June 15, 2018, is withdrawn effective August 6, 2018.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, Office of Air Program Planning, Air Protection Division, U.S. Environmental Protection Agency, Region 3, 1650 Arch Street, Philadelphia, PA 19103. Brian Rehn can be reached via telephone at (215) 814–2176 or via electronic mail at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: Please see the information provided in the direct final action published in the **Federal Register** on June 15, 2018 (83 FR 27901) and in the companion proposed rule which was also published on June 15, 2018 (83 FR 27910).

In those actions, EPA proposed to approve a May 2, 2018 SIP revision from Pennsylvania to remove Pennsylvania Department of Environmental Protection (PADEP) requirements for summertime low volatility gasoline (as codified at 25 Pa. Code Chapter 126, Subchapter C) from the Pennsylvania SIP. EPA's June 15, 2018 direct final action served to approve the Commonwealth's supporting analysis, submitted to EPA on May 2, 2018, which demonstrates that removal of the Pittsburgh-Beaver Valley Area low RVP gasoline program does not interfere with the Commonwealth's ability to attain or maintain any NAAQS in the Pittsburgh-Beaver Valley Area. Removal of PADEP volatility requirements would leave in place federal gasoline volatility requirements, as well as separate Allegheny County low-RVP requirements adopted by the Allegheny County Health Department (ACHD) and approved by EPA as a separate part of the Pennsylvania SIP.

In the direct final rule published on June 15, 2018 (83 FR 27901), EPA stated that if we received adverse comments on our action the rule would be withdrawn and would not take effect. EPA subsequently received adverse comments. EPA will address the comments received on our proposed action to remove the PADEP low RVP gasoline requirements from the Pennsylvania SIP in a subsequent final action based upon the proposed action also published on June 15, 2018 (83 FR 27910). EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 52

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

Dated: July 24, 2018.

Cecil Rodrigues,

Acting Regional Administrator, Region III.

■ Accordingly, the amendment to 40 CFR 52.2020(c)(1), published on June 15, 2018 (83 FR 27901), is withdrawn effective August 6, 2018.

[FR Doc. 2018–16604 Filed 8–3–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261 and 262

[FRL–9981–90–OLEM]

Address Change for Waste Import-Export Submittals From the Office of Federal Activities to the Office of Resource Conservation and Recovery

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is making conforming changes to the EPA office and address to which paper documents concerning imports and exports of hazardous waste and conditionally excluded cathode ray tubes must be sent. The change in address is needed to reflect the reorganization of hazardous waste import-export functions on April 29, 2018, from the Office of Federal Activities' International Compliance Assurance Division, in EPA's Office of Enforcement and Compliance Assurance, to the International Branch within the Office of Resource Conservation and Recovery's Materials Recovery and Waste Management Division, in EPA's Office of Land and Emergency Management. The change in address will ensure that such paper documents will continue to be received by the appropriate personnel in a timely manner.

DATES: This rule is effective on August 6, 2018.

FOR FURTHER INFORMATION CONTACT: Laura Coughlan, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery (5304P), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (703) 308–0005; email address: *coughlan.laura@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action relates to the internal reorganization of the EPA. It provides notice directed to the public in general and has particular applicability to anyone who wants to communicate with the EPA office responsible for hazardous waste import-export functions, or to submit information concerning imports and exports of hazardous waste or export of conditionally excluded cathode ray tubes to the Agency. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get additional information, including copies of this document or other related information?

To obtain electronic copies of this document and other related information that is available electronically, please visit *www.epa.gov/hwgenerators.*

II. Background

A. What action is the Agency taking?

This action makes conforming changes to the EPA office and address to which paper documents concerning imports and exports of hazardous waste and conditionally excluded cathode ray tubes must be sent. The notice changes the addresses for U.S. postal service delivery and courier hand delivery of submittals listed in 40 CFR 261.39(a)(5)(xi), 40 CFR 261.41(a)(2), and 40 CFR 262.82(e) from those of the Office of Federal Activities' International Compliance Assurance Division, in EPA's Office of Enforcement and Compliance Assurance, to those of the International Branch within the Office of Resource Conservation and Recovery's Materials Recovery and Waste Management Division, in EPA's Office of Land and Emergency Management. The change in listed addresses is needed to reflect the reorganization of hazardous waste import-export functions on April 29, 2018, from the Office of Federal Activities' International Compliance Assurance Division, in EPA's Office of Enforcement and Compliance Assurance, to the International Branch within the Office of Resource Conservation and Recovery's Materials Recovery and Waste Management Division, in EPA's Office of Land and Emergency Management. The change in address will ensure that such paper documents will continue to be received by the appropriate personnel in a timely manner.

B. What is the Agency's authority for taking this action?

The EPA is issuing this document under its general rulemaking authority, Reorganization Plan No. 3 of 1970 (5 U.S.C. app.). Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(A), provides that ''rules of agency organization, procedure, or practice'' are exempt from notice and comment requirements. This exemption applies to this action. Accordingly, EPA is not taking comment on this action.

In addition, under the good cause exemption in Section 553(d)(3), the EPA is publishing and making this rule immediately effective. A 30-day delay in the rule's effectiveness is unnecessary for updating an EPA office and mailing address; a delay would be contrary to public interest because it could create a short period of public confusion.

III. Do any of the Statutory and Executive Order Reviews apply to this action?

This final rule revises the EPA office and address listed in the regulations to reflect the reorganization of hazardous waste import-export functions from one of the EPA's offices to another of the EPA's offices, and does not otherwise impose or change any requirements. This action is not a ''significant regulatory action'' and is therefore not subject to OMB review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). In addition, this action is not considered an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action, because this action is not significant under Executive Order 12866. Because this action is not subject to notice and comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) or Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments. This action does not create new binding legal requirements that substantially and directly affect tribes under Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not have significant federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994). This action does not involve

technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.,* generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. This final action is exempt from the CRA because it is a rule relating to agency management or personnel and a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects

40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

40 CFR Part 262

Environmental protection, Exports, Hazardous materials transportation, Hazardous waste, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

Dated: July 26, 2018.

Barry N. Breen,

Acting Assistant Administrator, Office of Land and Emergency Management.

For the reasons stated in the preamble, EPA amends title 40, chapter 1 of the Code of Federal Regulations as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

■ 2. In § 261.39, revise paragraph (a)(5)(xi) to read as follows:

§ 261.39 Conditional Exclusion for Used, Broken Cathode Ray Tubes (CRTs) and Processed CRT Glass Undergoing Recycling.

* * * * *

(a) * * *

(5) * * *

(xi) Prior to one year after the AES filing compliance date, annual reports must be sent to the following mailing address: Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, International Branch (Mail Code 2255A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460. Hand-delivered annual reports on used CRTs exported during 2016 should be sent to: Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, International Branch (Mail Code 2255A), Environmental Protection Agency, William Jefferson Clinton South Building, Room 6144, 1200 Pennsylvania Ave. NW, Washington, DC 20004. Subsequently, annual reports must be submitted to the office listed using the allowable methods specified in paragraph (a)(5)(ii) of this section. Exporters must keep copies of each annual report for a period of at least three years from the due date of the report. Exporters may satisfy this recordkeeping requirement by retaining electronically submitted annual reports in the CRT exporter's account on EPA's Waste Import Export Tracking System (WIETS), or its successor system, provided that a copy is readily available for viewing and production if requested by any EPA or authorized state inspector. No CRT exporter may be held liable for the inability to produce an annual report for inspection under this section if the CRT exporter can demonstrate that the inability to produce the annual report is due exclusively to technical difficulty with EPA's Waste Import Export Tracking System (WIETS), or its successor system for which the CRT exporter bears no responsibility.

* * * * *

■ 3. In § 261.41, revise paragraph (a)(2) to read as follows:

§ 261.41 Notification and Recordkeeping for Used, Intact Cathode Ray Tubes (CRTs) Exported for Reuse.

(a) * * *

(2) Notifications submitted by mail should be sent to the following mailing address: Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, International Branch (Mail Code 2255A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460. Hand-delivered notifications should be sent to: Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, International Branch (Mail Code 2255A), Environmental Protection Agency, William Jefferson Clinton South Building, Room 6144, 1200 Pennsylvania Ave. NW, Washington, DC 20004. In both cases, the following shall be prominently displayed on the front of the envelope: ''Attention: Notification of Intent to Export CRTs.''

* * * * *

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

■ 4. The authority citation for part 262 continues to read as follows:

Authority: 42 U.S.C 6906, 6912, 6922–6925, 6937, 6938 and 6939g.

■ 5. In § 262.82, revise paragraphs (e)(1) and (2) to read as follows:

§ 262.82 General conditions.

* * * * *

(e) * * *

(1) For postal mail delivery, the Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, International Branch (Mail Code 2255A), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

(2) For hand-delivery, the Office of Land and Emergency Management, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, International Branch (Mail Code 2255A), Environmental Protection Agency, William Jefferson Clinton South Building, Room 6144, 1200 Pennsylvania Ave. NW, Washington, DC 20004.

[FR Doc. 2018–16774 Filed 8–3–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–9980–82—Region 10]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Frontier Hard Chrome, Inc. Superfund Site

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) Region 10 announces the deletion of the Frontier Hard Chrome, Inc. (FHC) Superfund Site (Site) located in Vancouver, Washington, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability

Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Washington, through the Department of Ecology, have determined that all appropriate response actions under CERCLA have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: This action is effective August 6, 2018.

ADDRESSES:

Docket: EPA has established a docket for this action under Docket Identification No. EPA–HQ–SFUND–1983–0002. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the site information repositories. Locations, contacts, phone numbers and viewing hours are:

Records Center, U.S. EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, Washington, 206–553–4494, Monday through Friday, except Federal holidays, between 9:00 a.m. and 5:00 p.m.

Vancouver Community Library, 901 C Street, Vancouver, Washington, 360–906–5000, between 9:00 a.m. and 8:00 p.m. Monday to Thursday, or 10:00 a.m. and 6:00 p.m. Friday to Sunday.

FOR FURTHER INFORMATION CONTACT: Jeremy Jennings, Remedial Project Manager, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 155, ECL–122, Seattle, Washington 98101–3123, telephone: 206–553–2724, email: *jennings.jeremy@epa.gov.*

SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is: Frontier Hard Chrome, Inc., Vancouver, Washington. A Notice of Intent to Delete for this Site was published in the **Federal Register** (83 FR 23409–23412) on May 21, 2018.

The closing date for comments on the Notice of Intent to Delete was June 20, 2018. One anonymous comment was received. The comment did not oppose deletion of the Site from the NPL, and included a non-Site specific gratuitous statement about the EPA Administrator. Since the comment was not adverse to the intended EPA action, there is no need to evaluate or respond. EPA continues to believe that the Site meets the National Contingency Plan deletion criteria, and is proceeding with deletion of the Site from the NPL. A Responsiveness Summary was prepared and placed in both the docket, EPA–HQ–SFUND–1983–0002, *www.regulations.gov* and in the site information repositories listed above.

EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Deletion from the NPL does not preclude further remedial action. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system. Deletion of a site from the NPL does not affect responsible party liability in the unlikely event that future conditions warrant further actions.

List of Subjects in 40 CFR Part 300

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

Chris Hladick,

Regional Administrator, Region 10.

For reasons set out in the preamble, 40 CFR part 300 is amended as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(d); 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Appendix B to Part 300—[Amended]

■ 2. Table 1 of appendix B to part 300 is amended by removing the listing under Washington for ''Frontier Hard Chrome, Inc''.

[FR Doc. 2018–16775 Filed 8–3–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2018–0002; Internal Agency Docket No. FEMA–8541]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *https://www.fema.gov/national-flood-insurance-program-community-status-book.*

DATES: The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Adrienne L. Sheldon, PE, CFM, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW, Washington, DC 20472, (202) 212–3966.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood

insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region IV				
Alabama:				
Ardmore, Town of, Limestone County.	010306	July 9, 1979, Emerg; April 15, 1986, Reg; August 16, 2018, Susp.	Aug. 16, 2018 ...	Aug. 16, 2018.
Athens, City of, Limestone County.	010146	April 11, 1974, Emerg; September 28, 1979, Reg; August 16, 2018, Susp.	.....do	Do.
Decatur, City of, Limestone and Morgan Counties.	010176	November 5, 1973, Emerg; September 5, 1979, Reg; August 16, 2018, Susp.	.....do	Do.
Falkville, Town of, Morgan County.	010177	May 7, 1974, Emerg; January 3, 1979, Reg; August 16, 2018, Susp.	.....do	Do.
Hartselle, City of, Morgan County.	010178	February 11, 1971, Emerg; July 17, 1978, Reg; August 16, 2018, Susp.	.....do	Do.
Huntsville, City of, Limestone and Madison Counties.	010153	March 8, 1974, Emerg; November 1, 1979, Reg; August 16, 2018, Susp.	.....do	Do.
Limestone County, Unincorporated Areas.	010307	September 2, 1975, Emerg; July 16, 1981, Reg; August 16, 2018, Susp.	.....do	Do.
Madison, City of, Limestone and Madison Counties.	010308	July 23, 1975, Emerg; December 15, 1978, Reg; August 16, 2018, Susp.	.....do	Do.
Madison County, Unincorporated Areas.	010151	August 26, 1974, Emerg; July 2, 1981, Reg; August 16, 2018, Susp.	.....do	Do.
Mooresville, Town of, Limestone County.	010455	December 23, 2008, Emerg; September 21, 2010, Reg; August 16, 2018, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Morgan County, Unincorporated Areas.	010175	N/A, Emerg; March 1, 1991, Reg; August 16, 2018, Susp.	.....do	Do.
New Hope, City of, Madison County.	010154	August 7, 1975, Emerg; November 24, 1978, Reg; August 16, 2018, Susp.	.....do	Do.
Owens Cross Roads, Town of, Madison County.	010218	August 6, 1974, Emerg; March 2, 1981, Reg; August 16, 2018, Susp.	.....do	Do.
Priceville, Town of, Morgan County.	010448	N/A, Emerg; November 2, 2010, Reg; August 16, 2018, Susp.	.....do	Do.
Somerville, Town of, Morgan County.	010363	N/A, Emerg; June 26, 2006, Reg; August 16, 2018, Susp.	.....do	Do.
Triana, Town of, Madison County.	010155	July 21, 1980, Emerg; September 29, 1986, Reg; August 16, 2018, Susp.	.....do	Do.
Trinity, Town of, Morgan County.	010309	July 7, 1977, Emerg; November 24, 1978, Reg; August 16, 2018, Susp.	Aug. 16, 2018 ...	Aug. 16, 2018.
South Carolina:				
Aiken County, Unincorporated Areas.	450002	July 31, 1975, Emerg; March 4, 1980, Reg; August 16, 2018, Susp.	.....do	Do.
Jackson, Town of, Aiken County.	450005	April 12, 1976, Emerg; May 15, 1986, Reg; August 16, 2018, Susp.	.....do	Do.
North Augusta, City of, Aiken and Edgefield County.	450007	March 12, 1975, Emerg; February 1, 1980, Reg; August 16, 2018, Susp.	.....do	Do.

*.....do and Do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: July 25, 2018.

Michael M. Grimm,

Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2018–16696 Filed 8–3–18; 8:45 am]

BILLING CODE 9110–12–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1002

[Docket No. EP 542 (Sub-No. 26)]

Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—2018 Update

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Board updates for 2018 the fees that the public must pay to file certain cases and pleadings with the Board.

DATES: This rule is effective September 5, 2018.

FOR FURTHER INFORMATION CONTACT: David T. Groves, (202) 245–0327, or Andrea Pope-Matheson (202) 245–0363. [TDD for the hearing impaired: 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board's regulations at 49 CFR 1002.3 provide for an annual update of the Board's entire user-fee schedule. Fees are generally revised based on the cost study formula set forth at 49 CFR 1002.3(d), which looks to changes in salary costs, publication costs, and Board overhead cost factors. Applying that formula, 72 of the Board's 133 fees will be increased, two will be decreased, and 59 will remain unchanged.

Additional information is contained in the Board's decision. To obtain a free copy of the full decision, visit the Board's website at *http://www.stb.gov* or call (202) 245–0245. [Assistance for the hearing impaired is available through Federal Information Relay Services (FIRS): (800) 877–8339.]

List of Subjects in 49 CFR Part 1002

Administrative practice and procedure, Common carriers, and Freedom of information.

Decided: July 31, 2018.

By the Board, Board Members Begeman and Miller.

Marline Simeon,

Clearance Clerk.

For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

PART 1002—FEES

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321(a). Section 1002.1(g)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

■ 2. Section 1002.1 is amended by revising paragraphs (a) through (c), (f)(1), and (g)(6) to read as follows:

§ 1002.1 Fees for records search, review, copying, certification, and related services.

* * * * *

(a) Certificate of the Records Officer, $20.00.

(b) Services involved in examination of tariffs or schedules for preparation of certified copies of tariffs or schedules or extracts therefrom at the rate of $45.00 per hour.

(c) Services involved in checking records to be certified to determine authenticity, including clerical work, etc. identical thereto, at the rate of $31.00 per hour.

* * * * *

(f) * * *

(1) A fee of $78.00 per hour for professional staff time will be charged when it is required to fulfill a request for ADP data.

* * * * *

(g) * * *

(6) The search and review hourly fees will be based upon employee grade levels in order to recoup the full, allowable direct costs attributable to their performance of these functions. A listing of the hourly fees by employee grade level is available on the Board's website, *http://www.stb.gov.*

* * * * *

■ 3. In 1002.2, paragraph (f) is revised to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) *Schedule of filing fees.*

Type of proceeding	Fee
PART I: Non-Rail Applications or Proceedings to Enter Into a Particular Financial Transaction or Joint Arrangement:	
(1) An application for the pooling or division of traffic	$5,200.
(2) (i) An application involving the purchase, lease, consolidation, merger, or acquisition of control of a motor carrier of passengers under 49 U.S.C. 14303.	$2,400.
(ii) A petition for exemption under 49 U.S.C. 13541 (other than a rulemaking) filed by a non-rail carrier not otherwise covered.	$3,700.
(iii) A petition to revoke an exemption filed under 49 U.S.C. 13541(d)	$3,100.
(3) An application for approval of a non-rail rate association agreement. 49 U.S.C. 13703	$32,800.
(4) An application for approval of an amendment to a non-rail rate association agreement:	
(i) Significant amendment	$5,400.
(ii) Minor amendment	$100.
(5) An application for temporary authority to operate a motor carrier of passengers. 49 U.S.C. 14303(i)	$550.
(6) A notice of exemption for transaction within a motor passenger corporate family that does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family.	$1,900.
(7)–(10) [Reserved].	
PART II: Rail Licensing Proceedings other than Abandonment or Discontinuance Proceedings:	
(11) (i) An application for a certificate authorizing the extension, acquisition, or operation of lines of railroad. 49 U.S.C. 10901.	$8,600.
(ii) Notice of exemption under 49 CFR 1150.31–1150.35	$2,000.
(iii) Petition for exemption under 49 U.S.C. 10502	$14,900.
(12) (i) An application involving the construction of a rail line	$88,700.
(ii) A notice of exemption involving construction of a rail line under 49 CFR 1150.36	$2,000.
(iii) A petition for exemption under 49 U.S.C. 10502 involving construction of a rail line	$88,700.
(iv) A request for determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. 10902(d).	$300.
(13) A Feeder Line Development Program application filed under 49 U.S.C. 10907(b)(1)(A)(i) or 10907(b)(1)(A)(ii)	$2,600.
(14) (i) An application of a class II or class III carrier to acquire an extended or additional rail line under 49 U.S.C. 10902.	$7,300.
(ii) Notice of exemption under 49 CFR 1150.41–1150.45	$2,000.
(iii) Petition for exemption under 49 U.S.C. 10502 relating to an exemption from the provisions of 49 U.S.C. 10902	$7,800.
(15) A notice of a modified certificate of public convenience and necessity under 49 CFR 1150.21–1150.24	$1,900.
(16) An application for a land-use-exemption permit for a facility existing as of October 16, 2008 under 49 U.S.C. 10909	$7,100.
(17) An application for a land-use-exemption permit for a facility not existing as of October 16, 2008 under 49 U.S.C. 10909.	$25,100.
(18)–(20) [Reserved].	
PART III: Rail Abandonment or Discontinuance of Transportation Services Proceedings:	
(21) (i) An application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof filed by a railroad (except applications filed by Consolidated Rail Corporation pursuant to the Northeast Rail Service Act [Subtitle E of Title XI of Pub. L. 97–35], bankrupt railroads, or exempt abandonments).	$26,300.
(ii) Notice of an exempt abandonment or discontinuance under 49 CFR 1152.50	$4,200.
(iii) A petition for exemption under 49 U.S.C. 10502	$7,400.
(22) An application for authority to abandon all or a portion of a line of a railroad or operation thereof filed by Consolidated Rail Corporation pursuant to Northeast Rail Service Act.	$550.
(23) Abandonments filed by bankrupt railroads	$2,200.
(24) A request for waiver of filing requirements for abandonment application proceedings	$2,100.
(25) An offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment.	$1,800.
(26) A request to set terms and conditions for the sale of or subsidy for a rail line proposed to be abandoned	$26,900.
(27) (i) A request for a trail use condition in an abandonment proceeding under 16 U.S.C. 1247(d)	$300.
(ii) A request to extend the period to negotiate a trail use agreement	$500.
(28)–(35) [Reserved].	
PART IV: Rail Applications to Enter Into a Particular Financial Transaction or Joint Arrangement:	
(36) An application for use of terminal facilities or other applications under 49 U.S.C. 11102	$22,500.
(37) An application for the pooling or division of traffic. 49 U.S.C. 11322	$12,100.
(38) An application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11324:	
(i) Major transaction	$1,773,200.
(ii) Significant transaction	$354,600.
(iii) Minor transaction	$8,500.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,900.
(v) Responsive application	$8,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$11,100.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$6,500.
(39) An application of a non-carrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	$1,773,200.
(ii) Significant transaction	$354,600.
(iii) Minor transaction	$8,500.

Type of proceeding	Fee
(iv) A notice of an exempt transaction under 49 CFR 1180.2(d)	$1,500.
(v) Responsive application	$8,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$11,100.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$6,500.
(40) An application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11324:	
(i) Major transaction	$1,773,200.
(ii) Significant transaction	$354,600.
(iii) Minor transaction	$8,500.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,300.
(v) Responsive application	$8,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$11,100.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$6,500.
(41) An application of a carrier or carriers to purchase, lease, or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	$1,773,200.
(ii) Significant transaction	$354,600.
(iii) Minor transaction	$8,500.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,600.
(v) Responsive application	$8,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$7,800.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$6,500.
(42) Notice of a joint project involving relocation of a rail line under 49 CFR 1180.2(d)(5)	$2,700.
(43) An application for approval of a rail rate association agreement. 49 U.S.C. 10706	$83,000.
(44) An application for approval of an amendment to a rail rate association agreement. 49 U.S.C. 10706:	
(i) Significant amendment	$15,300.
(ii) Minor amendment	$100.
(45) An application for authority to hold a position as officer or director under 49 U.S.C. 11328	$900.
(46) A petition for exemption under 49 U.S.C. 10502 (other than a rulemaking) filed by rail carrier not otherwise covered	$9,500.
(47) National Railroad Passenger Corporation (Amtrak) conveyance proceeding under 45 U.S.C. 562	$300.
(48) National Railroad Passenger Corporation (Amtrak) compensation proceeding under Section 402(a) of the Rail Passenger Service Act.	$300.
(49)–(55) [Reserved].	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1).	$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	$150.
(iv) All other formal complaints (except competitive access complaints)	$350.
(v) Competitive access complaints	$150.
(vi) A request for an order compelling a rail carrier to establish a common carrier rate	$300.
(57) A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates or charges. 49 U.S.C. 10705.	$10,500.
(58) A petition for declaratory order:.	
(i) A petition for declaratory order involving a dispute over an existing rate or practice which is comparable to a complaint proceeding.	$1,000.
(ii) All other petitions for declaratory order	$1,400.
(59) An application for shipper antitrust immunity. 49 U.S.C. 10706(a)(5)(A)	$8,300.
(60) Labor arbitration proceedings	$300.
(61) (i) An appeal of a Surface Transportation Board decision on the merits or petition to revoke an exemption pursuant to 49 U.S.C. 10502(d).	$300.
(ii) An appeal of a Surface Transportation Board decision on procedural matters except discovery rulings	$450.
(62) Motor carrier undercharge proceedings	$300.
(63) (i) Expedited relief for service inadequacies: A request for expedited relief under 49 U.S.C. 11123 and 49 CFR part 1146 for service emergency.	$300.
(ii) Expedited relief for service inadequacies: A request for temporary relief under 49 U.S.C. 10705 and 11102, and 49 CFR part 1147 for service inadequacy.	$300.
(64) A request for waiver or clarification of regulations except one filed in an abandonment or discontinuance proceeding, or in a major financial proceeding as defined at 49 CFR 1180.2(a).	$700.
(65)–(75) [Reserved].	
PART VI: Informal Proceedings:	
(76) An application for authority to establish released value rates or ratings for motor carriers and freight forwarders of household goods under 49 U.S.C. 14706.	$1,400.
(77) An application for special permission for short notice or the waiver of other tariff publishing requirements	$150.
(78) The filing of tariffs, including supplements, or contract summaries	$1 per page ($29 min. charge.)
(79) Special docket applications from rail and water carriers:	
(i) Applications involving $25,000 or less	$75.
(ii) Applications involving over $25,000	$150.
(80) Informal complaint about rail rate applications	$700.

Type of proceeding	Fee
(81) Tariff reconciliation petitions from motor common carriers:	
(i) Petitions involving $25,000 or less	$75.
(ii) Petitions involving over $25,000	$150.
(82) Request for a determination of the applicability or reasonableness of motor carrier rates under 49 U.S.C. 13710(a)(2) and (3).	$250.
(83) Filing of documents for recordation 49 U.S.C. 11301 and 49 CFR 1177.3(c)	$48 per document.
(84) Informal opinions about rate applications (all modes)	$300.
(85) A railroad accounting interpretation	$1,300.
(86) (i) A request for an informal opinion not otherwise covered	$1,700.
(ii) A proposal to use on a voting trust agreement pursuant to 49 CFR 1013 and 49 CFR 1180.4(b)(4)(iv) in connection with a major control proceeding as defined at 49 CFR 1180.2(a).	$6,100.
(iii) A request for an informal opinion on a voting trust agreement pursuant to 49 CFR 1013.3(a) not otherwise covered.	$600.
(87) Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board under 49 CFR 1108:.	
(i) Complaint	$75.
(ii) Answer (per defendant), Unless Declining to Submit to Any Arbitration	$75.
(iii) Third Party Complaint	$75.
(iv) Third Party Answer (per defendant), Unless Declining to Submit to Any Arbitration	$75.
(v) Appeals of Arbitration Decisions or Petitions to Modify or Vacate an Arbitration Award	$150.
(88) Basic fee for STB adjudicatory services not otherwise covered	$300.
(89)–(95) [Reserved].	
PART VII: Services:	
(96) Messenger delivery of decision to a railroad carrier's Washington, DC, agent	$38 per delivery.
(97) Request for service or pleading list for proceedings	$29 per list.
(98) Processing the paperwork related to a request for the Carload Waybill Sample to be used in an STB or State proceeding that:	
(i) Annual request does not require a FEDERAL REGISTER notice:	
(A) Set cost portion	$150.
(B) Sliding cost portion	$56 per party.
(ii) Annual request does require a FR notice:	
(A) Set cost portion	$450.
(B) Sliding cost portion	$56 per party.
(iii) Quarterly request does not require a FR notice:	
(A) Set cost portion	$48.
(B) Sliding cost portion	$14 per party.
(iv) Quarterly request does require a FR notice:	
(A) Set cost portion	$227.
(B) Sliding cost portion	$14 per party.
(v) Monthly request does not require a FR notice:	
(A) Set cost portion	$16.
(B) Sliding cost portion	$4 per party.
(vi) Monthly request does require a FR notice:	
(A) Set cost portion	$176.
(B) Sliding cost portion	$4 per party.
(99) (i) Application fee for the STB's Practitioners' Exam	$200.
(ii) Practitioners' Exam Information Package	$25.
(100) Carload Waybill Sample data:	
(i) Requests for Public Use File for all years prior to the most current year Carload Waybill Sample data available, provided on CD–R.	$250 per year.
(ii) Specialized programming for Waybill requests to the Board	$122 per hour.

* * * * *

[FR Doc. 2018–16742 Filed 8–3–18; 8:45 am]

BILLING CODE 4915–01–P

Proposed Rules

Federal Register
Vol. 83, No. 151
Monday, August 6, 2018

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.

LEGAL SERVICES CORPORATION

45 CFR Part 1607

Governing Bodies

AGENCY: Legal Services Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule revises the Legal Services Corporation (LSC or Corporation) regulation regarding recipient governing bodies. LSC is proposing two revisions to give recipient governing bodies flexibility in how they recruit, appoint, and retain client eligible members while remaining faithful to the LSC Act's requirement to appoint client-eligible board members who may also represent associations or organizations of eligible clients. First, LSC proposes to revise the definition of the term *eligible client* to remove the requirement that a client-eligible board member must be financially eligible ''at the time of appointment *to each term* of office'' (emphasis added). Second, LSC proposes to eliminate the requirement that client-eligible members be appointed by outside groups.

DATES: Comments must be submitted by October 5, 2018.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: lscrulemaking@lsc.gov.* Include ''Comments on Revisions to Part 1607'' in the subject line of the message.
- *Fax:* (202) 337–6519.
- *Mail:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1607 Rulemaking.
- *Hand Delivery/Courier:* Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007, ATTN: Part 1607 Rulemaking.

Instructions: Electronic submissions are preferred via email with attachments in Acrobat PDF format. LSC will not consider written comments sent to any other address or received after the end of the comment period.

FOR FURTHER INFORMATION CONTACT: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street NW, Washington, DC 20007; (202) 295–1563 (phone), (202) 337–6519 (fax), or *sdavis@lsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In December 1977, Congress amended § 1007(c) of the LSC Act. Public Law 95–222, 11, 91 Stat. 1619. Through the amendment, Congress directed LSC to fund only those organizations whose governing bodies consisted of ''one-third . . . persons who are, when selected, eligible clients who may also be representatives of associations or organizations of eligible clients.'' *Id.* at 1622. LSC published a notice of proposed rulemaking (NPRM) to implement the new requirement in May 1978. In that NPRM, LSC proposed to define ''eligible client'' as an ''individual eligible to receive legal assistance under the LSC Act.'' 43 FR 21902, May 22, 1978. The proposed definition was narrower than the LSC Act's definition of the term ''[e]ligible client,'' which the Act defines as ''any person financially unable to afford legal assistance.'' Sec. 1002(3), Public Law 88–452, title X; 42 U.S.C. 2996a(3). LSC also proposed to adopt a requirement that eligible client members ''be selected from, or designated by, a variety of appropriate groups including, but not limited to, client and neighborhood associations and organizations.'' *Id.* This language reflected LSC's ''attempt to insure that programs will be accountable to the communities that they serve.'' On July 28, 1978, LSC adopted the proposed rule without change. 43 FR 32772, July 28, 1978.

The provisions governing the appointment of client-eligible members to recipient governing bodies remained unchanged for 16 years. In 1994, LSC proposed to revise Part 1607 in two relevant ways. First, LSC proposed to amend the regulation to reflect its interpretation of the statutory language requiring one-third of a recipient governing body's members to be ''persons who are, when selected, eligible clients'':

> [T]he language has been revised to make it clear that client board members must be eligible at the time of their appointment to each term of office. Thus, a client member who is financially eligible for services when first appointed to a recipient's board may not be reappointed to a second or subsequent term if, at the time of reappointment, the client board member is no longer financially eligible for LSC-funded services.

59 FR 30885, 30886, June 16, 1994. The second proposed revision ''would codify the current LSC interpretation of the language to require that client board members be selected by client groups that have been designated by the recipient.'' *Id.* at 30886–87.

In a final rule published on December 19, 1994, LSC adopted both proposed changes. LSC revised the proposed definition of ''eligible client'' to make clear that the member had to be financially eligible ''to receive legal assistance under the Act and part 1611'' of LSC's regulations. 59 FR 65249–50, Dec. 19, 1994. In so doing, LSC rejected comments recommending that LSC expand the definition to include individuals whose income exceeds LSC's financial eligibility limit, but who are eligible to receive non-LSC-funded legal assistance from a recipient. LSC limited the definition to individuals who were financially eligible for LSC-funded legal assistance because it ''wished to insure that the focus of the legal services program remains on the indigent population.'' *Id.* at 65250. As it did in 1978, LSC adopted a narrower definition of the term ''eligible client'' than the one provided in § 1002 of the LSC Act.

With respect to LSC's proposal to require that client-eligible members be appointed by organizations or associations, LSC received comments both in support of and opposing the requirement. In the preamble to the final rule, LSC explained that favorable comments ''supported the clarification and the policy choice that it represented.'' *Id.* at 65251. LSC provided more detailed explanations of the comments in opposition. One basis for opposition was that it would be difficult or impossible for some recipients to comply with the requirement because ''often there are no organized client groups within the service area and, even when there are, it is not necessarily true that client groups speak for the client community.'' *Id.* at 65251. The other was that ''recipients often come into contact with program clients or other financially eligible individuals who would make

good client board members but who, for one reason or another, are not involved with any client group.'' *Id.* LSC adopted the language from the NPRM without change.

In 2015, LSC Board Member Julie Reiskin provided Management with a memorandum detailing concerns clients had expressed to her. The primary concerns expressed in the memorandum were that some client governing body members were not truly representative of the population eligible for LSC-funded legal services and that the rule was more prescriptive than § 1007(c) of the LSC Act, which states that client-eligible members (1) must be eligible when selected; and (2) may be representatives of associations or organizations of eligible clients. 42 U.S.C. 2996f(c). Following up on this memorandum, in 2017, the Office of Legal Affairs (OLA) participated in Board Member Reiskin's and President Sandman's client-listening session at the National Legal Aid and Defender Association's annual conference. Recipients and their clients communicated that two provisions in Part 1607 present obstacles to recruiting and retaining qualified client-eligible members: the definition of ''eligible client'' and the requirement that outside organizations appoint client-eligible members.

LSC takes seriously the client community's concerns and believes regulatory action is justified for two reasons. First, LSC believes that the current rule interprets § 1007(c) too restrictively. Second, LSC believes that recipients should have discretion to establish board member appointment procedures that maximize their ability to recruit qualified client-eligible board members.

On April 23, 2017, the Committee approved Management's proposed 2017–2018 rulemaking, which included revising part 1607 as a Tier 2 rulemaking item. On April 8, 2018, the Committee voted to recommend that the Board authorize rulemaking on part 1607. On April 10, 2018, the Board authorized LSC to begin rulemaking. On July 25, 2018, the Committee voted to recommend that the Board authorize publication of this NPRM in the **Federal Register** for notice and comment. On July 26, 2018, the Board accepted the Committee's recommendation and voted to approve publication of this NPRM.

II. Proposed Changes

§ 1607.1 Purpose

LSC proposes to make no changes to this section.

§ 1607.2 Definitions

LSC proposes to remove the requirement that a board member be financially eligible ''at the time of appointment to *each term of office* to the recipient's governing body'' to allow client-eligible members who improve their financial position to serve consecutive terms on a recipient's governing body (emphasis added). Under this interpretation, the member's eligibility status would be evaluated upon first appointment and at any subsequent appointment following a gap in service on the recipient's governing body, but not upon reappointment to consecutive terms of service. This is not intended to require the recipient to reappoint the client-eligible member to another term; it merely permits the recipient to do so. Thus, for example, if a client-eligible board member's income increases negligibly, but nonetheless sufficiently to exceed the applicable financial eligibility income ceiling, the recipient would have the discretion and flexibility to reappoint that client-eligible board member to a successive term. This is consistent with the statutory language of Section 1007(c) of the LSC Act that ''at least one-third of [the recipient's governing body] consists of persons who are, *when selected,* eligible clients . . .'' (emphasis added).

§ 1607.3 Composition

LSC proposes to eliminate the § 1607.3(c) requirement that client-eligible members be appointed by groups. Unlike the requirement that the majority of attorney members of recipient governing bodies be appointed by state, county, or local bar associations, LSC's governing statutes do not require client-eligible members to be appointed by groups. LSC believes that each recipient governing body should have the authority and flexibility to implement an appointment procedure that takes into account its unique client population, including associations and organizations of client-eligible people. Under LSC's proposal, recipients may choose to continue using the procedure required by existing § 1607.3(c), but will no longer be required to have outside organizations appoint client-eligible members to the recipients' governing bodies.

§ 1607.4 Functions of a Governing Body

LSC proposes to make no changes to this section.

§ 1607.5 Compensation

LSC proposes to make no changes to this section.

§ 1607.6 Waiver

LSC proposes to make no changes to this section.

List of Subjects in 45 CFR Part 1607

Grant programs—law, Legal services.

For the reasons set forth in the preamble, the Legal Services Corporation proposes to amend 45 CFR part 1607 as follows:

PART 1607—GOVERNING BODIES

■ 1. Revise the authority citation for part 1607 to read as follows:

Authority: 42 U.S.C. 2996g(e).

■ 2. Revise paragraph (c) of § 1607.2 to read as follows:

§ 1607.2 Definitions.

* * * * *

(c) *Eligible client member* means a board member who is financially eligible to receive legal assistance under the Act and part 1611 of this chapter, without regard to whether the person actually has received or is receiving legal assistance at that time. Eligibility of client members must be determined by the recipient or, if the recipient so chooses, by the nominating organization(s) or group(s) in accordance with written policies adopted by the recipient.

* * * * *

■ 3. Revise paragraph (c) of § 1607.3 to read as follows:

§ 1607.3 Composition.

* * * * *

(c) At least one-third of the members of a recipient's governing body must be eligible client members when initially appointed by the recipient. The recipient must solicit recommendations for eligible client members from a variety of appropriate groups designated by the recipient that may include, but are not limited to, client and neighborhood associations and community-based organizations that advocate for or deliver services or resources to the client community served by the recipient. Recipients should solicit recommendations from groups in a manner that reflects, to the extent possible, the variety of interests

within the client community, and eligible client members should be selected so that they reasonably reflect the diversity of the eligible client population served by the recipient, including race, gender, ethnicity and other similar factors.

* * * * *

Dated: August 1, 2018.

Stefanie Davis,

Assistant General Counsel.

[FR Doc. 2018–16765 Filed 8–3–18; 8:45 am]

BILLING CODE 7050–01–P

Notices

Federal Register
Vol. 83, No. 151
Monday, August 6, 2018

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS–LP–18–0050]

United States Classes, Standards, and Grades for Poultry

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) is revising the United States Classes, Standards, and Grades for Poultry, (the poultry standards) to lower the age requirement for the ''roaster and roasting chickens'' class of poultry and identify a ready-to-cook weight of 5.5 pounds or more. This change is consistent with how the USDA Food Safety and Inspection Service (FSIS) defines ''roaster or roasting chickens'' for labeling compliance.

DATES: The revised poultry standards are *effective* August 6, 2018.

FOR FURTHER INFORMATION CONTACT: Richard Lawson, National Poultry Supervisor, Livestock and Poultry Program, AMS, USDA; 1400 Independence Ave. SW; Room 3932–S, STOP 0258; Washington, DC 20250–0258; phone (202) 690–3166; *Richard.Lawson@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*), directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade, and packaging and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'' AMS is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities. While the poultry standards do not appear in the Code of Federal Regulations, they—along with other official standards—are maintained by USDA and can be found at *https://www.ams.usda.gov/grades-standards.* Copies of official standards are also available upon request. To revise the poultry standards, AMS utilizes the procedures it published in the August 13, 1997, **Federal Register** (62 FR 43439) and in 7 CFR part 36. Because this change to the poultry standards is to ensure consistency with FSIS's definition, public comments are not being sought.

Background

FSIS maintains regulatory authority over the labeling of poultry products under the Poultry Products Inspection Act (PPIA) which prohibits the distribution of poultry products that are adulterated or misbranded (12 U.S.C. 458). In November 2013, the National Chicken Council petitioned FSIS to amend the ''roaster chicken class to remove the 8-week minimum age criteria and increase the Ready-to-Cook (RTC) carcass weight to 5.5 pounds.'' According to the petition, the existing ''roaster'' standard—defined at 9 CFR 381.170(a)(1)(iii) as a ''young chicken (between 8 and 12 weeks of age), of either sex, with a ready-to-cook carcass weight of 5 pounds or more, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that is somewhat less flexible than that of a broiler or fryer''—detracted from the orderly and efficient marketing of classes. Specifically, companies were unable to label and market chickens as ''roasters'' that met all the physical attributes apart from the minimum age requirement. FSIS and AMS completed a review of the petition in July 2014 and concluded that continuous improvements in breeding and poultry management techniques had enabled producers to raise chickens with the characteristics of roasters in under 8 weeks.

On April 13, 2016, FSIS published a final rule in the **Federal Register** (81 FR 21706) amending the definition and standard of identity for the ''roaster or roasting chicken'' poultry class, with an effective date of January 1, 2018. AMS is revising its poultry standards definition of roaster from usually 3 to 5 months of age to 5.5 pounds or more and less than 12 weeks of age to maintain consistency with the FSIS regulation.

Dated: July 23, 2018.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2018–16249 Filed 8–3–18; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Announcement of Loan Application Procedures, and Deadlines for the Rural Energy Savings Program (RESP)

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of Funding Availability (NOFA); the RESP application process and deadlines.

SUMMARY: The Rural Utilities Service (RUS), an agency of the United States Department of Agriculture (USDA), is announcing funding availability and is soliciting letters of intent for loan applications under the Rural Energy Savings Program (RESP), announcing the application process for those loans and deadlines for applications from eligible entities. These loans are made available under the authority of Section 6407 of the Farm Security and Rural Investment Act of 2002, as amended, (Section 6407) and Title VII, Section 741 of the Consolidated Appropriations Act, 2018. This notice describes the eligibility requirements, the application process and deadlines, the criteria that will be used by RUS to assess Applicants' creditworthiness, and how to obtain application materials. The Consolidated Appropriations Act of 2018 appropriated a budget authority of $8,000,000 and authorized that the Secretary may use this funding to allow eligible entities to offer energy efficiency loans to customers in any part of their service territory and may also use this funding for projects replacing manufactured housing units with another manufactured housing unit if the replacement would be more cost effective in saving energy. The Administrator may approve loans proposing to include these new eligible activities for entities currently in the queue provided they still meet the all application requirements, pursuant to this NOFA.

The Agency encourages applications that will support recommendations made in the Rural Prosperity Task Force report to help improve life in rural America, *See, www.usda.gov/ruralprosperity.* Applicants are encouraged to consider projects that provide measurable results in helping rural communities build robust and sustainable economies through strategic investments in infrastructure, partnerships and innovation. Key strategies include: Achieving e-Connectivity for rural America, developing the rural economy, harnessing technological innovation, supporting a rural workforce, and improving quality of life.

DATES: The application process consists of two steps. To be considered for this funding, Applicants must submit their documentation no later than the mandatory dates set forth herein.

Step 1: To be considered for financing pursuant to this notice, an Applicant seeking financing must submit a Letter of intent to apply, as provided herein, in an electronic Portable Document Format (PDF), not to exceed 10 MB in size, by electronic mail (email) to *RESP@wdc.usda.gov.* This Notice will remain open until September 30, 2019; or until all funds available for this year have been obligated; or changed by a subsequent notice. If funds are exhausted prior to the end of the open period, applicants that qualify based on their Letter of Intent will be placed in a queue, and will be notified when funds become available. Late or incomplete Letters of Intent will not be considered by RUS.

Step 2: An RESP Applicant that has been invited in writing by RUS to proceed with the loan application, as provided in this NOFA, will have up to sixty (60) days to complete the documentation for a complete application. The sixty (60) day timeframe will begin from the date the RESP Applicant receives an email with RUS' Invitation to proceed. If the deadline to submit the completed application falls on Saturday, Sunday, or a Federal holiday, the application is due the next business day. Instructions on how to submit the loan application package will be included in the RUS Invitation to proceed to the RESP Applicant.

ADDRESSES: Copies of this NOFA and other information on the Rural Energy Savings Program may be obtained by:

(1) Contacting Robert Coates at (202) 260–5415 to request a copy of this Notice.

(2) Sending an electronic mail (Email) to *Robert.Coates@wdc.usda.gov.* The email must be identified as RESP Notice of Funding Availability in the subject field.

(3) The Letter of intent must be submitted by the Applicant in an electronic PDF (PDF) format not to exceed 10 Megabytes (10 MB) by electronic mail (email) to *RESP@WDC.USDA.GOV* on or before the deadline set forth herein. No paper letters of intent will be accepted.

(4) The completed loan application package must be submitted following the instructions that will be outlined in the RUS Invitation to proceed to the RESP Applicant. The loan application package must be marked with the subject line ''Attention: Christopher McLean, Assistant Administrator for the Electric Program; RESP Loan Application.''

FOR FURTHER INFORMATION CONTACT: Robert Coates, Rural Utilities Service-Electric Program, Rural Development, United States Department of Agriculture, 1400 Independence Avenue SW, STOP 1568, Room 0257–S, Washington DC 20250–1560; Telephone: (202) 260–5415; Email *Robert.Coates@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Utilities Service (RUS), USDA.

Funding Opportunity Title: Rural Energy Savings Program (RESP).

Announcement Type: Requests for Letter of intent and Applications.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.751.

Dates: Submit the Letter of intent before September 30, 2019, and the completed loan application package on or before sixty (60) days from the receipt date of a written RUS Invitation to proceed.

Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), OMB approved this information collection under OMB Control Number 0572–0151. The current expiration date for the information collection is December 31, 2019.

Definitions and Rules of Grammatical Construction

For the purpose of RESP, the following terms must have the following meanings:

Administrator means the Administrator of the Rural Utilities Service, an agency under the Rural Development mission area of the United States Department of Agriculture.

Applicant means an Eligible entity interested in applying for a RESP that is planning to submit a Letter of intent.

Commercially available technology means equipment, devices, applications, or systems that have a proven, reliable performance and replicable operating history specific to the proposed application. The equipment, device, application or system is based on established patented design or has been certified by an industry-recognized organization and subject to installation, operating, and maintenance procedures generally accepted by industry practices and standards. Service and replacement parts for the equipment, device, application or system must be readily available in the marketplace with established warranty applicable to parts, labor and performance.

Completed loan application means an application containing all information required by RUS to approve a loan and that is materially complete in form and substance satisfactory to RUS within the specified time.

Conditional commitment letter means the notification issued by the Administrator to a RESP Applicant advising it of the total loan amount approved for it as a RESP borrower, the acceptable security arrangement, and such controls and conditions on the RESP borrower's financial, investment, operational and managerial activities deemed necessary by the Administrator to adequately secure the Government's interest. This notification will also describe the accounting standards and audit requirements applicable to the transaction.

Conflict of interest means a situation or situations, event or series of events, that jointly or severely undermines an individual's judgement, ability, or commitment to providing an accurate, unbiased, fair and reliable assessment or determination about the cost-effectiveness of the Energy efficiency measures due to self-interest or cannot be justified by the prevailing and sound application of the generally accepted standards and principles of the industry.

Eligible entity means an entity described in section C.1. of this NOFA.

Energy audit means an analysis or inspection of the energy flows in a building, process, or system with the goal of identifying opportunities to enhance energy efficiency. The activity should result in an objective standard-based technical report containing recommendations on the Energy efficiency measures to reduce energy costs or consumption of the Qualified consumer and an analysis of the estimated benefits and costs of pursuing

each recommendation in a payback period not to exceed 10 years. The report will include a payback analysis of the aggregated energy efficiency measures.

Energy efficiency measures means for or at a property served by an Eligible entity, structural improvements or investments in cost-effective, commercially available technologies that result in a decrease in a Qualified consumer's energy usage or costs.

Energy efficiency program (EE Program) means a program set up by an Eligible entity to provide financing to Qualified consumers so that they can reduce their energy use or costs by implementing energy efficiency measures.

Financial feasibility means an Eligible entity's ability to generate sufficient revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the financial ratios set forth in the applicable loan documents.

Invitation to proceed means the written notification issued by RUS to the Eligible entity acknowledging that the Letter of intent was received and reviewed, describing the next steps in the application process and inviting the Eligible entity to submit a complete application.

Key performance indicators means the set of measures that help an entity to determine if it is reaching its performance and operational goals. These indicators can be both financial and non-financial.

Letter of intent means a signed letter issued by an Applicant notifying RUS of its intent to apply for a RESP loan and addressing all the elements identified in section D.1.a. of this NOFA.

Qualified consumer means a consumer served by an Eligible entity that has the ability to repay a loan made by an RESP borrower under the RESP program, as determined by the Eligible entity.

RESP applicant means an Eligible entity that has received a written Invitation to proceed from RUS to apply for a RESP loan.

RESP borrower means an Eligible entity with an approved RESP loan.

Small business means an entity that is in accordance with the Small Business Administration's (SBA) small business size standards found in 13 CFR part 121.

Special advance means an advance, not to exceed 4 percent of the total approved loan amount, that a RESP borrower may request to defray the start-up costs of establishing a new EE Program.

Start-up costs mean amounts paid or incurred for: (a) Creating or implementing an active Energy efficiency (EE) program; or (b) investing in the integration of an active Energy efficiency program. Start-up costs may include, but are not limited to, amounts paid or incurred in the analysis or survey of potential markets, products such as software and hardware, labor supply, consultants, salaries and other working capital directly related to creation or enhancement of an Energy efficiency program consistent with RESP.

With regard to the rules of grammatical construction, unless the context otherwise indicates, ''includes'' and ''including'' are not limiting, and ''or'' is not exclusive.

Additional Items in Supplementary Information

A. Program Description

The USDA through the Rural Utilities Service (RUS) provides RESP loans to Eligible entities that agree to, in turn, make loans to Qualified consumers for the purpose of implementing Energy efficiency measures. These loans are made available under the authority of Section 6407. Eligible Energy efficiency measures funded under this NOFA must be for or at a property or properties served by a RESP borrower, using commercially available technologies that would allow Qualified consumers to decrease their energy use or costs through cost-effective measures including structural improvements to the structure. Loans made by RESP borrowers under this program may be repaid through charges added to the Qualified consumer's bill for the property or properties for, or at which, energy efficiencies are or will be implemented. The purpose of the program is to help rural families and small businesses achieve cost savings by providing loans to Qualified consumers to implement durable cost-effective Energy efficiency measures.

B. Federal Award Information

Type of Award: Loan.

Fiscal Year 2018 Funds: $8,000,000 in budget authority to remain available until expended, plus any available prior year funding, to remain available until September 30, 2019. Based on projected subsidy rates and estimated carry over funds, RUS expects to have approximately $100 Million available to lend this fiscal year.

Authority: RESP is a program to be carried out by the Rural Utilities Service pursuant to Section 6407 of the Farm Security and Rural Investment Act of 2002, 7 U.S.C. 8107a, as amended; and Section 769, Title VII, Division A of the Consolidated Appropriations Act, 2017, Public Law 115–31, May 5, 2017.

C. Eligibility Information

1. Eligible Entities Include

a. Any public power district, public utility district, or similar entity, or any electric cooperative described in section 501(c)(12) or 1381(a)(2) of the Internal Revenue Code of 1986, that borrowed and repaid, prepaid, or is paying an electric loan made or guaranteed by the Rural Utilities Service (or any predecessor agency);

b. Any entity primarily owned or controlled by one (1) or more entities described in section C.1.a. of this NOFA; and

c. Any other entity that is an eligible borrower of the Rural Utilities Service, as determined under 7 CFR 1710.101.

2. Equity Contributions

a. To be eligible for a RESP loan, a newly created Eligible entity or an entity primarily owned or controlled by one (1) or more entities described in section C.1.a. of this NOFA must have a minimum equity position in the Energy efficiency program proposed to be funded with RESP at the time of the loan closing and the Eligible entity will be required to continue to maintain the minimum equity position for the period of time determined by the Administrator and as set forth in the loan documents. The required equity position and terms will be determined by the Administrator on a case-by-case basis based upon review of the risk profile of the Eligible entity and other security arrangements.

b. If the Administrator determines that the RESP Applicant under this section does not have acceptable equity, in the Energy efficiency (EE) Program at the time of application, the Administrator may consider the following to meet such shortfall regarding equity:

i. The infusion of additional capital into the EE program by an Investor to meet any shortfall. RUS may require that the additional capital be deposited into a RESP Applicant's special account subject to a deposit account control agreement with RUS prior to loan closing.

ii. An unconditional, irrevocable letter of credit satisfactory to the Administrator in the amount of the shortfall. RUS must be an unconditional payee under the letter of credit and the letter of credit must be in place prior to loan closing and remain in place until the loan is repaid.

iii. General obligation bonds issued by tribal, state or local governments in the amount of the shortfall. If the equity requirement is satisfied with general obligation bonds, any lien securing the bonds must be subordinate to the lien of the government securing the RESP loan.

iv. Any other equity requirements determined necessary by the Administrator to meet the shortfall.

D. Application and Submission Information

Complete applications for loans to Eligible entities under this NOFA will be processed on a first-come-first served basis (queue) until funds appropriated to carry out RESP are available pursuant to Public Law 115–31, as amended by Public Law 115–141, and pursuant to Public Law 115–141. An Eligible entity that applied pursuant to the Notice of Solicitation of Application issued on June 21, 2016, or pursuant to the NOFA issued on November 20, 2017, and that is in the queue but has not yet been invited to proceed to closing, may notify the Administrator of its intent to participate in RESP pursuant to the new authorities granted by Public Law 115–141 regarding manufactured housing replacement and service territory. The Administrator may approve loans for the queued entities provided they still meet the all application requirements, pursuant to this NOFA. To be considered for this funding, Applicants must submit documentation no later than the dates set forth in this NOFA. The application process consists of two steps:

1. *Step 1: Letter of Intent*—To be considered for financing pursuant to this notice, an Applicant seeking financing must submit a mandatory Letter of intent with the following information. Applicants must submit all the information identified in the Letter of intent ''Evaluation Criteria Checklist'' available online at the following web address: *http://www.rd.usda.gov/resp/.* A sample Letter of intent is available online at the following web address: *www.rd.usda.gov/files/RD-RUS-SampleLetterofIntent.pdf.*

By submitting the Letter of intent, the Applicant certifies to RUS that it has the intent of submitting a complete RESP loan application on or before the date set forth as the application deadline in the event that RUS provides an Invitation to proceed. RUS will not consider Letters of intent where the project description exceeds five (5) pages. An Invitation to proceed with the loan application sent by the RUS is not to be deemed as an offer by the Agency. The Letter of intent must contain the following:

a. Applicant's Profile and Point of Contact—

i. Name and legal status of the Eligible entity and its address and principal place of business.

ii. The Eligible entity's tax identification number, DUNS and Bradstreet (D&B) number.

iii. Specify if the Eligible entity is a current or a former RUS borrower.

iv. Identify the service territory.

v. Identify the net assets value and specify if the Eligible entity has been placed in receivership liquidation, or under a workout agreement or declared bankruptcy or has had a decree or order issued for relief in any bankruptcy, insolvency or other similar action over the last 10 years. The Applicant must submit a copy of its balance sheet and income statements for the last 3 years. If applicable, the Applicant must provide the balance sheet and income statements for the last 3 years of the entity or entities providing equity or security for the RESP loan together with an explanation of the legal relationship among the legal entities.

vi. Identify a point of contact and provide contact information.

b. The description of the project must not exceed five (5) pages (size 8.5 X 11) and must include the following:

i. A description of the service to be provided to Qualified consumers.

ii. Identity of the staff or contractors that will be implementing the EE Program and their credentials.

iii. Implementation plan that briefly addresses:

A. The marketing strategy.

B. How the Applicant will operate the relending process.

C. A schedule showing sources and uses of funds to implement the EE Program.

D. A brief description of the processes, procedures, and capabilities to quantify and verify the reduction in energy consumption or decrease in the energy costs of the Qualified consumers.

iv. A list of eligible Energy efficiency measures that will be implemented. An Applicant with an existing Energy efficiency Program in place by April 8, 2014, may describe the Energy efficiency measures, its implementation plan, and its measurement and verification system for the existing program in its Letter of intent to expedite the application process.

c. The Applicant must provide evidence of its key performance indicators for the 5 complete years prior to the submission of the loan application if the total loan amount exceeds 5 million dollars.

2. *Step 2: Loan Application*—A RESP Applicant that has been invited in writing by RUS to proceed with the loan application, as provided in this NOFA, will have up to sixty (60) days to complete the documentation for a complete application. The sixty (60) day timeframe will begin from the date the RESP Applicant receives an email with RUS' Invitation to proceed. If the deadline to submit the completed application falls on Saturday, Sunday, or a Federal holiday, the application is due the next business day. The Administrator may grant an extension of time to complete the documentation required for an application if, in the Administrator's sole judgment, extraordinary circumstances prevented the RESP Applicant from completing the application within the timeframe herein stipulated (60 days). An Applicant may not submit more than one application in this funding cycle for the same EE Program. However, one or more Eligible entities may submit their applications using the same EE Program model. In extending an Invitation to proceed to an Applicant in the queue, RUS reserves the right to meet overall RUS Program objectives and therefore, may notify the Applicant that the amount of financing to be awarded is below the level sought by the Applicant.

Instructions on how to submit the loan application package will be included in the RUS Invitation to proceed to the RESP Applicant. An initial conference call will be scheduled within 10 days from the date of the written invitation to proceed with the RESP loan application and a General Field Representative (GFR) will be assigned to assist the RESP Applicant during this part of the application process.

a. Loan Application Package—The RESP Applicant's application package must include the following documents:

i. Cover Letter. A signed cover letter from the RESP Applicant's General Manager or highest-ranking officer requesting a RESP loan under this NOFA.

ii. Board Resolution. A signed copy of the board resolution or applicable authorizing document approving and establishing the EE Program.

iii. Environmental Compliance Agreement. A copy of the duly executed Multi-tier Action Environmental Compliance Agreement (Multi-tier Agreement). A template of a Multi-tier

Agreement can be found in Exhibit H of RD Instruction 1970–A, Environmental Policies and Procedures (*http://www.rd.usda.gov/files/1970a.pdf*). A copy of the Multi-tier Agreement will be provided to the RESP Applicant with the Invitation to proceed and discussed with the RESP Applicant in the initial conference call.

iv. Financial Forecast. A financial forecast approved by the applicable governing body of the RESP Applicant in support of its loan application. RUS encourages RESP Applicants to follow the format set forth in RUS Form 325, which may be obtained from a GFR. The financial forecast must cover a period of at least 10 years and must demonstrate that the RESP Applicant's operation is economically viable and that the proposed loan is financially feasible. RUS may request projections for a longer period of time, or additional information, if RUS deems it necessary based on the financial structure of the RESP Applicant and necessary to make a determination regarding loan feasibility. The financial forecast and related projections submitted in support of a loan application must include:

A. Current and projected cash flows.

B. A pro forma balance sheet, statement of operations, and general funds summary projected for each year during the forecast period. The requested RESP loan must be included in the financial forecast.

C. The financial goals established for margins, debt service coverage, equity, and levels of general funds to be invested in the EE Program. The financial forecast must use the accrual method of accounting for analyzing costs and revenues and, as applicable, compare the economic results of the various alternatives on a present value basis.

D. A full explanation of the assumptions, supporting data, and analysis used in the forecast, including the methodology used to project revenues, operating expenses, power costs, and any other factors having a material effect on the balance sheet and the financial ratios such as equity and debt service coverage. RUS may require additional data and analysis on a case-by-case basis to assess the probable future competitiveness of the RESP Applicant.

E. Current and projected non-operating income and expense.

F. An itemized budget and schedule for the activities to be implemented with the RESP funds and a discussion on how the loan loss reserve will be set up, the expected delinquency and default rates. The RESP applicant is expected to forecast the amount of loans to be made to Qualified consumers over a 10-year timeframe. If the RESP Applicant determines to charge interest, the RESP Applicant must describe how it is going to use the funds generated from the interest to be received from the loans to the Qualified consumers.

G. A sensitivity analysis may be required by RUS on a case-by-case basis.

v. EE Program Implementation Work Plan (IWP). The RESP Applicant must produce, to the satisfaction of the Administrator, an IWP, duly approved by the applicable governing body of the Eligible entity. The IWP must address all the following core elements:

A. Marketing. In this section the RESP Applicant will identify the qualified customers by market segment that will benefit from the funding available under this NOFA and explains the marketing and outreach efforts to be executed in implementing the relending program. In the identification of the marketing effort to the qualified customers, the RESP Applicant should provide racial and ethnic demographics for the service area or individuals.

B. Operations. In this section the RESP Applicant will describe its Energy efficiency program and how it will operate the relending process. The RESP Applicant must also identify the staff that will be implementing the program, including the tasks that each one will be carrying out, and whether or not it will be outsourcing some or all of the execution of the program.

The RESP Applicant must describe its expertise and the credentials of any third party implementing outsourced tasks to effectively implement the Energy efficiency measures at the scale contemplated by the EE Program for which RESP funding is requested. The statement of qualifications must show the party's experience carrying out the financial and technical expertise components of an EE program at the desired scale. The RESP Applicant will be held accountable to RUS for actions or omissions departing from the required standards by those partners or contractors, arising from or in connection with an EE Program funded under this NOFA.

In this section the RESP Applicant will identify the anticipated amount of special advance for start-up costs and purposes over the expected schedule to draw down the funds attributable to such purposes. In addition, the RESP Applicant will describe the expected schedule to implement the EE Program with an itemized allocation of expected resources including anticipated costs assigned to each task. *The IWP must only include those activities and investments identified in the Multi-tier Agreement executed between RUS and the RESP Applicant. If any additional activities or investments are to be pursued, additional environmental review would be required.*

The RESP Applicant must describe the processes and procedures that will be put in place to avoid a Conflict of interest in the implementation of the energy efficiency loan program for Qualified consumers.

C. Financials. The RESP Applicant must address the items identified in the Financial Forecast section of this NOFA, Section D.2.a.iv.

D. Measurement and Verification. The RESP Applicant must describe the processes, procedures, and capabilities to quantify and verify the reduction in energy consumption or decrease in energy costs of the Qualified consumers. An RESP Applicant may provide a measurement and verification plan approved by a state or local regulatory body or sponsored by a governmental entity. A measurement and verification plan developed and certified by an industry recognized professional or entity will also be acceptable. Other measurement and verification plans may be acceptable if the Eligible entity can support, to the satisfaction of the Administrator, that the protocols and methodology used to verify the Energy efficiency measures are cost-effective and follow generally accepted industry principles and standards. An RESP Applicant with an existing EE Program as of April 8, 2014, may submit the measurement and verification plan previously established to fulfill this requirement.

vi. Articles of incorporation and bylaws or other applicable governing and organizational documents. The RESP Applicant must provide the Applicant's articles of incorporation or other applicable organizational documents currently in effect, as filed with the appropriate state office, setting forth the RESP applicant's corporate purpose; and the bylaws or other applicable governing documents currently in effect, as adopted by the RESP Applicant's applicable governing body. RESP Applicants that are active RUS borrowers may comply with this requirement by notifying in writing to RUS that there are no material changes to the documents already on file with RUS.

vii. Statement of Compliance with other federal statutes. The RESP Applicant must provide statement of compliance with other federal statutes, including but not limited to the following:

A. Nondiscrimination in Federally Assisted Programs. 7 CFR part 15,

subpart A, Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture-Effectuation on Title VI of the Civil Rights Act of 1964, RUS Bulletin 1790–1, ''Nondiscrimination Among Beneficiaries of RUS Program.'' Eligible entities must complete and submit RUS Form 266, Assurance Agreement.

• Signing Form RD 400–4 (Assurance Agreement). Each prospective recipient must sign Form 400–4, Assurance Agreement, which assures USDA that the recipient is in compliance with Title VI of the Civil Rights Act of 1964, 7 CFR part 15 and other Agency regulations. That no person will be discriminated against based on race, color or national origin, in regard to any program or activity for which the recipient receives Federal financial assistance. That nondiscrimination statements are in advertisements and brochures.

• Collect and maintain data provided by ultimate beneficiaries on race, sex, and national origin. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, ''Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, ''(62 FR 58782), October 30, 1997. These items should not be submitted with the application but should be available upon request by the Agency.

• The applicant and the ultimate recipient must comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, Age Discrimination Act of 1975, Equal Credit Opportunity Act, Executive Order 12250, Executive Order 13166 Limited English Proficiency (LEP), and 7 CFR part 1901, subpart E.

• Civil rights compliance reviews will be conducted by the Agency at pre-award and post award. The results of the review should be documented on Form 9, Compliance Review, and appropriate documentation attached to substantiate findings of compliance or noncompliance. The original Form 9 should be maintained in the case file with copies forwarded to the Rural Development Program Compliance Branch. If the recipient is not in compliance, copies must be immediately forwarded to the Director, Civil Rights Staff, with a recommendation for action to be taken.

• RD Instruction 2006–P requires that a Civil Rights Impact Analysis be conducted prior to approving or implementing a wide range of Agency activities. The Agency will prepare Form RD 2006–38, Civil Rights Impact Analysis, on the recipient.

• Signing Form 400–1 Equal Opportunity Agreement in accordance with Executive Order 11246. The requirement of the Equal Opportunity Clause within a construction contract where federal financial assistance exceeds $10,000.

B. Standard Form 100—Equal Employment Opportunity Employer Report EEO–1. This form, required by the Department of Labor, sets forth employment data for Eligible entities with 100 or more employees. A copy of this form, as submitted to the Department of Labor, is to be included in the application for an insured loan if the Eligible entity has more than 100 employees.

C. Form AD–1049—Certificate Regarding Drug Free Workplace Requirements. This form is required as prescribed in 2 CFR parts 182 and 421, Requirements for Drug Free Workplace (Financial Assistance). Information on all of your organization's known workplaces by including the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Workplace identification is required under the drug-free workplace requirements in Subpart B of 2 CFR part 421, which adopts the Government-wide implementation (2 CFR part 182) of the Drug-Free Workplace Act.

D. Form AD–1047—Certification Regarding Debarment, Suspension, and Other Responsibility Matters. This form is required in accordance with 2 CFR part 417 (Nonprocurement Debarment and Suspension) supplemented by 2 CFR part 180, if it applies. See the section heading is ''What information must I provide before entering into a covered transaction with the Federal Government?'' located at 2 CFR 180.335.

E. Executive Order 13166, ''Improving Access to Services for Persons with Limited English Proficiency.'' For information on limited English proficiency and agency-specific guidance, go to *http://www.LEP.gov.*

F. Lobbying for Grants, Loans, Contracts and Cooperative Agreements. The information on lobbying is required pursuant to 2 CFR part 418. The RESP Applicant should consult RUS before submitting this information.

G. Report on Federal debt delinquency. This report indicates whether or not the RESP Applicant is delinquent on any Federal debt.

H. Certify Accounting, Auditing, and Reporting Requirements. The RESP Applicant must certify to RUS that it is aware of and will abide by the accounting, auditing, and reporting requirements as described within the Federal Award Administration Information section of this NOFA.

I. Dun and Bradstreet Universal Numbering System (DUNS). The Dun and Bradstreet Universal Numbering System (DUNS Unique entity identifier and System for Award Management (SAM). Applicants must supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number with their Letters of Intent and RESP Applicants with their loan application. Please see *http://fedgov.dnb.com/webform.* RESP Applicants are required to be registered in SAM before submitting an application, provide a valid unique entity identifier in the application, and continue to maintain an active SAM registration with current information at all times during which the entity has an active Federal award or an application or plan under consideration by a Federal awarding agency. The agency may not make a Federal award to a RESP Applicant until the RESP Applicant has complied with all applicable unique entity identifier and SAM requirements. If a RESP Applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the RESP Applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another RESP Applicant. Applicants may register for the SAM at *http://www.sam.gov/portal/public/SAM.* To remain registered in SAM, the Applicant must review and update the information in the SAM database annually from the date of initial registration or last update. Applicants must ensure that the information in the database is current, accurate, and complete.

E. Agency Review: Letter of Intent and Loan Application

1. General—Loans made to RESP Applicants for eligible purposes under this program will be made only when the Administrator, in his judgment, finds that there is reasonably adequate security and the loan will be repaid within the time agreed.

The Administrator, on case-by-case basis, may set financial coverage ratios based on the risk profile of the RESP Applicant and specific loan terms. Those financial ratios will be included in the RESP borrower's loan documents with RUS. Existing RUS borrowers will be subject to their current debt service coverage ratios in their current loan documents, unless notified otherwise. A RESP Applicant must, after submitting a loan application, promptly notify RUS

of any changes in its circumstances that materially affect the information contained in the loan application.

2. Letter of Intent Review—RUS will consider complete Letters of intent as they are received. Upon review of the Letters of Intent, RUS will issue a notification to the Applicant indicating the result of the initial screening. Letters of intent will be reviewed by RUS for the following:

a. Eligibility to participate in RESP in accordance with section C. of this NOFA.

b. Eligibility and feasibility of the project. Compliance with the purpose of Section 6407 to help rural families and small businesses achieve cost savings by providing loans to Qualified consumers to implement durable cost-effective Energy efficiency measures, provided that the Administrator may allow eligible entities to offer loans to customers in any part of their service territory.

c. The financial status of the Applicant to determine the Applicant's likelihood to complete the full application.

3. Loan Application Review

a. Loan Feasibility. Based on the complete application, RUS must have reasonable assurance that the loan, together with all other outstanding loans and other obligations of the RESP Applicant, will be repaid in full as scheduled, in accordance with the loan documents. In making a finding of loan feasibility, RUS will consider, among others: (i) That expected amount of loans and loan amounts are based on reasonable assumptions and adequate supporting data and analysis; (ii) the interest rate, application fees, servicing fees and any other fees expected to be charged to the Qualified consumer per customer class; (iii) the projected revenues, expenses, and any other reliable financial information that could enable RUS to assess its ability to repay the loan within a term not to exceed 20 years; (iv) the ability of the RESP Applicant to meet the required coverage ratios; (v) such risk factors that may substantially impair the RESP Applicant's ability to operate a sustainable business; (vi) supplemental sources of funding to carry out the EE Program; (vii) management's experience implementing EE Programs at the expected scale; and (viii) the financial and management controls in place.

b. Loan Security. Loans will ordinarily be secured by a first and prior lien on substantially all the RESP borrower's property, and in any event will be secured by the best security position practicable in a manner which will adequately protect the interest of the Government during the repayment period of the loan. Collateral that is used to secure a loan must ordinarily be free from liens or security interests other than those permitted by RUS or existing security documents. RUS may in certain circumstances agree to share its first lien position with another lender provided the RESP loan is adequately secured and the security arrangements are acceptable to RUS. In such circumstances, RUS will consider entering into joint security arrangements with other lenders on a pari passu basis.

c. Loan Term. Amortization schedule must be based on a loan term that does not exceed 20 years from the date on which the loan is closed.

d. EE Program Compliance. Proceeds from a RESP loan may only be used for loans to Qualified consumers for the purpose of implementing Energy efficiency measures that decrease energy (not just electricity) usage or costs of the Qualified consumer by an amount that ensures, to the maximum extent practicable, that a loan term of not more than 10 years will not pose an undue financial burden on the Qualified consumer.

Proceeds from the interest charged to the Qualified consumers may be used to establish a loan loss reserve, and to offset personnel and program costs necessary to carry out the program. Nonetheless, under no circumstances will the RESP borrower be able to charge more than 3 percent interest rate to its customers. Loans made by the RESP borrower to Qualified consumers may not exceed 10 years.

Qualified consumers must ordinarily repay their loans to the RESP borrower through charges added by the RESP borrower to the electric bill associated with the property where the Energy efficiency measures are or will be implemented. The repayment mechanism adopted to implement an EE Program under RESP must not prevent the voluntary prepayment of the loan by the owner of the property. A RESP borrower may adopt any other repayment mechanism to carry out its EE Program with RESP proceeds as long as it can demonstrate that the proposed repayment mechanism has appropriate risk mitigation features and ensures repayment to the RESP borrower if the Qualified consumer will no longer be a customer of the RESP borrower.

Loans made by a RESP borrower to a Qualified consumer using RESP loan funds must require an Energy audit by the RESP borrower to determine the impact of the proposed Energy efficiency measures on the energy costs and consumption of the Qualified consumer. The RESP borrower may engage contractors to carry out the Energy audits necessary to fulfill this requirement. In so doing, the RESP borrower must engage contractors with adequate expertise to perform the Energy audits according to the applicable standards of the industry. The credentials of the energy auditors used or proposed to be used by the RESP Applicant will be subject to RUS review. RUS may reject a loan application or refuse to disburse loan proceeds to the RESP borrower that fails to demonstrate that the Energy audits will be or have been performed by qualified individuals.

4. Ancillary Provisions

a. Contractor's Expertise—Contractor's adequate expertise may be determined by using the following criteria:

i. Contractor's staff possesses a current residential or commercial Energy auditor or building analyst certification from a national, industry-recognized organization.

ii. Contractor's staff possesses proficiency in the knowledge, skills and abilities needed to conduct whole house assessments, building performance diagnostics and reasoning, and estimates of energy savings from improvement installations (via calculations or a modeling software tool) accredited by training and credentialing. The credentialing process must be at least as robust as those employed by nationally recognized certification bodies or suitable to meet or exceed the rigor of the standards of federal, state or local government entities.

iii. The contractor must demonstrate adequate capacity and resources to engage customers, conduct whole house assessments, building performance testing and diagnostic reasoning, and fulfillment of all program data collection and reporting requirements. This includes having access to satisfactory diagnostic equipment, tools, qualified staff, data systems and software, and administrative support.

iv. The contractor must be current and in good standing with all local registration and licensing requirements for their specific region and trade.

v. The contractor must employ or sub-contract to companies with workers who are qualified to install or physically oversee the installation of home performance improvements in compliance with local building codes and industry-accepted protocols.

vi. In the absence of fulfilling the first criterion under this subsection, the contractor for commercial Energy audits, must meet one of the following criteria:

A. Be a licensed professional engineer in the state in which the audit is conducted with at least one (1) year experience and who has completed at least two similar type Energy audits;

B. Be an individual with a four-year engineering or architectural degree with at least three years of experience and who has completed at least five similar type Energy audits; or

C. Be an individual with an energy auditor certification recognized by the U.S. Department of Energy through its Better Buildings Workforce Guidelines project. For related information please visit: *http://betterbuildingssolutioncenter.energy.gov/workforce/better-buildings-workforce-guidelines.*

b. Collateral. RUS generally requires that borrowers provide it with a first priority lien on all of the borrower's real and personal property, including intangible personal property and any property acquired after the date of the loan. For existing RUS borrowers, the agency may, at its sole discretion, rely on existing security arrangements with RUS. When a RESP borrower is unable by reason of preexisting encumbrances, or otherwise, to furnish a first priority lien on its entire system, the Administrator may accept other forms of security, such as a parent guarantee, state guarantee, an irrevocable letter of credit, or a pledge of revenues if the Administrator determines such credit support is reasonably adequate and otherwise acceptable in form and substance.

c. Appeal Rights. Applicants and RESP Applicants have appeal or review rights for Agency decisions made under this NOFA. Programmatic decisions based on clear and objective statutory or regulatory requirements are not appealable; however, such decisions are reviewable for appealability by the National Appeals Division (NAD). An Applicant and a RESP Applicant can appeal any Agency decision that directly and adversely impacts it. Appeals will be conducted by USDA NAD and will be handled in accordance with 7 CFR part 11.

d. Eligible Activities and Investments. A RESP borrower may provide financing to Qualified consumers to implement or invest in one or more set of Energy efficiency measures listed in this section. However, a RESP borrower may be able to fund other Energy efficiency measures if it can justify, to the satisfaction of the Administrator that the proposed Energy efficiency measure is cost effective and the technology is commercially available. Eligible activities and investments include, but are not limited, to:

i. Lighting:

A. Lighting fixture upgrades to improve efficiency.

B. Re-lamping to more energy efficient bulbs.

C. Lighting controls.

ii. Heating, Ventilation, and Air Conditioning (HVAC):

A. Central Air Systems—Energy Star qualified equipment.

B. Economizers.

C. Heat pumps.

D. Furnaces—Energy Star qualified equipment.

E. Air Handlers.

F. Programmable controls.

G. Duct sealing.

iii. Building Envelope Improvements:

A. Improved insulation—added insulation beyond existing levels, or above existing building codes.

B. Caulking and weather stripping of doors and windows.

C. Window upgrades—Energy Star qualifying windows.

D. Door upgrades—door upgrades could include man-doors, and overhead doors with integrated insulation and energy efficient windows.

E. Materials listed in Appendix A to Part 440 of the U.S. Department of Energy's Weatherization Assistance Program, 10 CFR part 440, Appendix A—Standards for Weatherization Materials.

iv. Water Heaters.

v. Compressed Air Systems.

vi. Motors:

A. High efficiency motors—motors with a rated efficiency beyond the Energy Policy Act standards.

B. Variable frequency drive.

vii. Boilers, dryers, heaters and process-related equipment or equipment not otherwise specified, *e.g.* commercial coolers and freezers.

viii. Energy audits.

ix. On or Off Grid Renewable energy systems if consistent with the statutory purpose of RESP.

x. Energy storage devices if permanently installed to reduce the energy cost or usage of small businesses and families within a rural area.

xi. Energy efficient appliance upgrades if attached to real property as fixtures.

xii. Irrigation or water and waste disposal system efficiency improvements.

xiii. Replacement of a manufactured housing unit with another manufactured housing unit, if replacement would be more cost effective in saving energy.

xiv. Necessary and incidental activities and investments directly related to implementation of an Energy efficiency measure.

e. Funding Disbursements and Restriction

i. General. RUS will disburse RESP funds to the RESP borrower in accordance with the terms of the executed loan documents. Excluding the special advance for start-up activities, all loan funds will be disbursed either as an advance in anticipation of consumer loans to be made by the RESP borrower; or as a reimbursement for eligible program costs, including consumer loans already made, upon the RESP borrower having complied with the loan conditions set forth in the loan documents. Within a 12-month consecutive period, any disbursements of loan funds to an RESP borrower must not exceed 50 percent of the approved loan amount.

ii. Loan Advances. The RESP borrower must provide to the Qualified consumers all RESP loan funds that the RESP borrower receives within one year of receiving them from RUS. If the RESP borrower does not re-lend the RESP loan funds within one year, the unused RESP loan funds, and any interest earned on those RESP loan funds, must be returned to the Federal Government and will be applied to the RESP borrower's debt. The RESP borrower will not be eligible to receive additional RESP loan funds from RUS until providing evidence, satisfactory to RUS, that RESP loan funds from a previous advance have been fully relent to Qualified consumers or returned to the Federal Government. RUS will disburse the RESP loan funds in advance only if the RESP borrower has established written procedures that will minimize the time elapsing between the transfer of RESP loan funds from RUS and their disbursement to the Qualified consumer, and the requests for advances made by the RESP borrower are limited to the minimum amounts needed and timed to be in accordance with the actual immediate cash needs to carry out the Energy efficiency program.

iii. Loan term for loans to Qualified consumers. Each loan made by the RESP borrower to a Qualified consumer may not exceed a term of 10 years.

iv. Unauthorized uses of funds. The RESP borrower must not finance the purchase or modification of personal property with proceeds from the RESP loan unless the personal property is or becomes attached to real property (including a manufactured home) as a fixture. The RESP borrower must keep adequate processes, procedures and records and must not commingle RESP funds with other sources of funding in the implementation of an EE Program.

F. Federal Award Administration Information

1. General. A successful loan RESP Applicant will receive a Conditional commitment letter from the Administrator notifying the Applicant of the total loan amount approved by RUS; any additional controls on the its financial, investment, operational and managerial activities; acceptable security arrangements; and such other conditions deemed necessary by the Administrator to adequately secure the Government's interest and ensure repayment. Upon receipt of the acceptance of the loan offer from the RUS Borrower, RUS will begin to prepare the loan documents with the assistance of the Eligible entity. Upon completion of the loan documents, RUS will forward the loan documents to the RESP borrower.

Receipt of a Conditional commitment letter from the Administrator does not authorize the RESP borrower to commence performance under the award. All RUS requirements and loan conditions specified in the Conditional commitment letter must be met before the loan will be advanced. RUS will notify the RESP borrower when it is authorized to commence performance using RESP funds.

2. Loan Term. RUS will make loans to RESP Applicant under RESP for a term not to exceed 20 years from the date on which the loan is closed.

3. Interest rate. Loans made under RESP will not bear interest (0 percent) although indebtedness not paid when due will be subject to interest, penalties, administrative costs and late fees as provided in the loan documents.

4. Repayment. The repayment of each advance to the RESP borrower must be amortized for a period not to exceed 10 years. However, any special advances under a loan must be made during the first 10-year period of the term of the underlying loan and repayment of such special advance shall be required during the 10-year period with such period beginning on the date on which such special advance is made. A RESP borrower may elect to defer the repayment of the special advance to the end of the 10-year period. However, all amounts advanced on the loan by RUS to the RESP borrower must be paid prior to the final maturity which must not exceed 20 years. The RESP borrower is responsible for fully repaying the RESP loan to RUS according to the loan documents regardless of repayment by its Qualified consumers.

5. Financial Ratios. The requirements for coverage ratios will be set forth in the Conditional commitment letter and RESP borrower's loan documents with RUS. The minimum coverage ratios required of RESP borrowers, whether applied on an annual or average basis will be determined by the Administrator on case-by-case basis based on the risk profile of the RESP Applicant and specific loan features. Existing RUS borrowers will be subject to their current debt service coverage ratios. When new loan documents are executed, the Administrator may, on a case-by-case basis, increase the coverage ratio of the RESP borrower if the Administrator determines that higher ratios are required to ensure the repayment made by RUS. Also, the Administrator may, on a case-by-case basis, reduce the coverage ratios if the Administrator determines that the lower ratios are required to ensure the repayment of the loan made by RUS.

6. Equity Requirements. The required equity position would be determined by the Administrator on a case-by-case basis and will be set forth in the Conditional commitment letter and the loan documents as a condition to the RESP loan.

7. Opinion of counsel. An opinion of counsel is required at closing and must be acceptable to the Administrator, opining that the RESP Applicant is properly organized and has the required corporate authority to enter into the proposed transaction. It must also identify the proposed collateral to secure the RESP loan and certify that such collateral is free of liens or identify any issues that may arise for the Government regarding the securing and perfecting of a first and prior lien on such property comprising the collateral.

8. Loan Term and Conditions. The Administrator reserves the right to modify or waive certain requirements if the Administrator believes such modifications or waiver are in the best interest of the government and the Administrator has determined that the loan will be repaid in the designated time period and the security is adequate. Also, the Administrator, at his sole discretion, may add such terms and conditions in a loan under this NOFA to ensure the RESP loan is timely repaid and is adequately secured.

9. Administrative and National Policy Requirements. The items listed in this notice implement the appropriate administrative and national policy requirements, which include but are not limited to:

a. Execution of a RESP loan agreement and related loan documents;

b. Compliance with policies, guidance, and requirements as described in Section D.2.a.vii. (Statement of Compliance with other federal statutes) of this notice, and any successor regulations.

10. Reporting.

a. Performance Reporting. RUS will establish periodic reporting requirements. These will be enumerated in the loan documents.

b. Accounting Requirements. RESP borrowers must follow RUS' accounting requirements. These requirements, which will be specified in the loan agreement, include, but are not limited to, the following:

i. RUS accounting requirements include compliance with Generally Accepted Accounting Principles, as well as compliance with the requirements of the applicable regulations: 7 CFR part 200 (for RESP borrowers, under this CFR Part, the term ''grant recipient'' will also mean loan recipient) or the system of accounting prescribed by RUS Bulletin 1767. The Administrator may modify the accounting requirements if, in his judgement, it is necessary to satisfy the purpose of Section 6407.

ii. RESP borrowers must comply with all reasonable RUS requests to support ongoing monitoring efforts. The RESP borrowers must afford RUS, through their representatives, a reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in possession of the RESP borrowers or in any way pertaining to its property or business, including its parents, affiliates, and subsidiaries, if any, and to make copies or extracts therefrom.

c. Audit Requirements. RESP borrowers will be required to prepare and furnish to RUS, at least once during each 12-month period, a full and complete report of its financial condition, operations, and cash flows, in form and substance satisfactory to RUS, audited and certified by an independent certified public accountant, satisfactory to RUS, and accompanied by a report of such audit, in form and substance satisfactory to RUS. RESP borrowers must follow the 7 CRF 1773, Policy on Audits for RUS borrowers or 2 CFR part 200, subpart F audit requirements. The Administrator may modify the audit requirements if, in his judgement, it is necessary to satisfy the purpose of Section 6407.

G. Federal Awarding Agency Contact

Robert Coates, Electric Program, Rural Utilities Service, Rural Development, United States Department of Agriculture, 1400 Independence Avenue

SW, STOP 1568, Room 0257–S, Washington, DC 20250–1510; Telephone: (202) 260–5415; Email: *Robert.Coates@wdc.usda.gov.*

H. Other Information

1. Other Funding Opportunities

Applicants may also consider the funding opportunities under the Energy Efficiency and Conservation Loan Program, 7 CFR 1710, Subpart H.

2. USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, religion, sex, age, national origin, marital status, gender identity (including gender expression), sexual orientation, familial status, disability, limited English proficiency, or because all or a part of an individual's income is derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English. To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.ascr.usda.gov/ad-3027-usda-program-discrimination-complaint-form* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form.

To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

a. *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

b. *Facsimile:* (202) 690–7442; or

c. *Email: program.intake@usda.gov.*

d. USDA is an equal opportunity provider, employer, and lender.

Kenneth L. Johnson,

Administrator, Rural Utilities Service.

[FR Doc. 2018–16743 Filed 8–3–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

Agency: U.S. Census Bureau.

Title: Public Employment & Payroll Forms.

OMB Control Number: 0607–0452.

Form Number(s): E–1, E–2, E–3, E–4, E–5, E–6, E–7, E–8, E–9, E–10.

Type of Request: Extension of a currently approved collection.

Number of Respondents: 16,357.

Average Hours per Response: 50 minutes.

Burden Hours: 13,614.

Needs and Uses: The Census Bureau's Public Employment & Payroll Program, consisting of a Census of Governments: Employment Phase (conducted every 5 years in years ending in 2 and 7) and the related Annual Survey of Public Employment & Payroll (conducted in the intervening years), provides a rich source of data on state and local government employment and payroll in the United States. The survey provides state and local government data on full-time and part-time employment, part-time hours worked, full-time equivalent employment, and payroll statistics by governmental function (*e.g.,* elementary and secondary education, higher education, police protection, fire protection, financial administration, central staff services, judicial and legal, highways, public welfare, etc.).

This request is for clearance of the forms and procedures to be used in conducting the 2019, 2020 and 2021 Annual Survey of Public Employment & Payroll.

The users of the Public Employment and Payroll Program data include Federal agencies, state and local governments and related organizations, public interest groups, and many business, market, and private research organizations. The Census Bureau provides these employment data to the Bureau of Economic Analysis for constructing the functional payrolls in the public sector of the Gross Domestic Product; payroll being the single largest component of current operations. The public employment and payroll data are also used in reimbursable programs conducted by the Census Bureau for other Federal agencies such as: (1) The government portion of the Medical Expenditure Panel Survey commissioned by the Agency for Healthcare Research and Quality to provide timely, comprehensive information about health care use and costs in the United States, and (2) the Criminal Justice Expenditure and Employment Survey, sponsored by the Bureau of Justice Statistics (BJS), which provides criminal justice expenditure and employment data on spending and personnel levels.

Affected Public: State, local or tribal governments.

Frequency: Annually.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, U.S.C., Sections 161 and 182.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202)395–5806.

Sheleen Dumas,

Departmental PRA Lead Officer, Office of the Chief Information Officer.

[FR Doc. 2018–16769 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

District Export Council Nomination Opportunity

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of Opportunity for Appointment to serve as a District Export Council Member on the Central California District Export Council.

SUMMARY: The Department of Commerce is currently seeking nominations of individuals for consideration for up to 35 appointments by the Secretary of Commerce to serve as members of a new Central California District Export Council (CenCal DEC). The CenCal DEC is closely affiliated with the Fresno and Bakersfield U.S. Export Assistance Centers (USEACs) of the U.S. and Foreign Commercial Service (US&FCS),

and will play a key role in the planning and coordination of export activities in Central California communities. As representatives of the local exporting community, DEC Members must reside in, or conduct the majority of their work in, the territory that the DEC covers which includes the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Mono, San Luis Obispo, Stanislaus, Tulare, Tuolumne, and surrounding areas.

DATES: Nominations must be submitted by 5:00 p.m. PDT on August 17, 2018.

ADDRESSES: Contact Glen Roberts, the Director of the Fresno USEAC at (559) 348–9859 or *Glen.Roberts@Trade.gov* for information on how to submit your nomination on-line.

FOR FURTHER INFORMATION CONTACT: Please contact Glen Roberts, the Director of the Fresno USEAC at (559) 348–9859 or *Glen.Roberts@Trade.gov* for more information on the CenCal DEC and the nomination process. For general program information, contact Laura Barmby, National DEC Liaison, U.S. & Foreign Commercial Service, at (202) 482–2675.

SUPPLEMENTARY INFORMATION: District Export Councils support the mission of US&FCS by facilitating the development of an effective local export assistance network, supporting the expansion of export opportunities for local U.S. companies, serving as a communication link between the business community and US&FCS, and assisting in coordinating the activities of trade assistance partners to leverage available resources. Individuals appointed to a DEC become part of a select corps of trade experts dedicated to providing international trade leadership and guidance to the local business community and assistance to the Department of Commerce on export development issues.

Nomination Process: Each DEC has a maximum membership of 35 appointed to staggered four-year terms. Because the CenCal DEC will be a new DEC, up to 17 members will be appointed from the date of appointment until December 31, 2019, and up to 18 individuals will be appointed from the date of appointment until December 31, 2021. All potential nominees must complete an online nomination form and consent, if appointed, to sharing of their contact information with the National Association of District Export Councils; trade and industry associations; and with Federal, State, and local government agencies with an interest in trade.

Eligibility and Appointment Criteria: Appointment is based upon an individual's international trade leadership in the local community, ability to influence the local environment for exporting, knowledge of day-to-day international operations, interest in export development, and willingness and ability to devote time to DEC activities. Members must be employed as exporters or export service providers or in a profession which supports U.S. export promotion efforts. Members include exporters, export service providers and others whose profession supports U.S. export promotion efforts. DEC member appointments are made without regard to political affiliation. DEC membership is open to U.S. citizens and permanent residents of the United States. As representatives of the local exporting community, DEC Members must reside in, or conduct the majority of their work in, the territory that the DEC covers. DEC membership is not open to federal government employees, or individuals representing foreign governments, including individuals registered with the Department of Justice under the Foreign Agents Registration Act.

Selection Process: Nominations of individuals who have applied for DEC membership will be forwarded to the Fresno USEAC Director for consideration. The Fresno USEAC Director ensures that all nominees meet the membership criteria outlined below. The Fresno USEAC Director then evaluates all nominations to determine their interest, commitment, and qualifications. In reviewing nominations, the Fresno USEAC Director strives to ensure a balance among exporters from a manufacturing or service industry and export service providers. A fair representation should be considered from companies and organizations that support exporters, representatives of local and state government, and trade organizations and associations. Membership should reflect the diversity of the local business community, encompass a broad range of businesses and industry sectors, and be distributed geographically across the DEC service area.

The Executive Secretary determines which nominees to forward to the US&FCS Office of U.S. Operations for further consideration for recommendation to the Secretary of Commerce. A candidate's background and character are pertinent to determining suitability and eligibility for DEC membership. Since DEC appointments are made by the Secretary, the Department must make a suitability determination for all DEC nominees. After completion of a vetting process, the Secretary selects nominees for appointment to local DECs. DEC members are appointed by and serve at the pleasure of the Secretary of Commerce.

Authority: 15 U.S.C. 1512, 15 U.S.C. 4721.

Anthony Diaz,

Program Analyst, Global Markets, International Trade Administration.

[FR Doc. 2018–16741 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–042]

Stainless Steel Sheet and Strip From the People's Republic of China: Rescission of Antidumping Duty Administrative Review; 2016–2018

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

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty (AD) order on stainless steel sheet and strip (SSSS) from the People's Republic of China (China) for the period September 19, 2016, through March 31, 2018.

DATES: *Applicable Date:* August 6, 2018.

FOR FURTHER INFORMATION CONTACT: Chloee Sagmoe and Kathryn Wallace, Enforcement and Compliance, AD/CVD Operations, Office VII, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2273 and (202) 482–6251.

Background

On April 2, 2018, Commerce published a notice of opportunity to request an administrative review of the antidumping order on SSSS from China for the period September 19, 2016 through March 31, 2018.[1] On April 30, 2018, Hans-Mill Corporation and C.Y. Housewares (Dongguan) Co., Ltd. (C.Y. Housewares), requested an administrative review of its exports of subject merchandise to the United States.[2] Additionally, on April 30, 2018, the petitioners [3] requested an

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 83 FR 13949 (April 2, 2018).

[2] *See* C.Y. Houseware's letter, ''Stainless Steel Sheet and Strip from the People's Republic of China: Request for Administrative Review,'' dated April 30, 2018.

[3] The petitioners are AK Steel Corporation; Allegheny Ludlum, LLC d/b/a ATI Flat Rolled

Continued

administrative review with respect to the U.S. entries of subject merchandise that were produced in or exported from China by the companies listed in the Appendix.[4] On June 6, 2018, in accordance with section 751(a) the Act and 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the order on SSSS from China with respect to the requested companies.[5] On June 20, 2018, the petitioners timely withdrew their requests for an administrative review of all 152 companies listed in Appendix I.[6] On July 3, 2018, C.Y. Housewares also timely withdrew its request for an administrative review.[7]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, ''in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review.'' The petitioners and C.Y. Housewares both withdrew their requests within the 90-day time limit. Because we received no other requests for review of the order on SSSS from China, we are rescinding the administrative review of the order in full, in accordance with 19 CFR 351.213(d)(1).

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping on all appropriate entries of SSSS from China during the POR at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate instructions to CBP 15 days after publication of this notice in the **Federal Register**.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: July 31, 2018.

James Maeder,

Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix

1. Ahonest Changjiang Stainless Co., Ltd.
2. Angang Guangzhou Stainless Steel Corporation (LISCO).
3. Angang Hanyang Stainless Steel Corp. (LISCO).
4. Anping Yuanjing Metal Products Co., Ltd.
5. Apex Industries Corporation.
6. Baofeng Xianglong Stainless Steel (Baofeng Steel Group Co.)
7. Baojing Steel Ltd.
8. Baosteel Desheng Stainless Steel Co., Ltd.
9. Baosteel Huayong Stainless Steel Co., Ltd.
10. Baosteel Stainless Steel Co., Ltd.
11. Beihai Chengde Ferronickel Stainless Steel.
12. Beijing Dayang Metal Industry Co.
13. Beijing Hengsheng Tongda Stainless Steel.
14. Beijing Jingnanfang Decoration Engineering Co., Ltd.
15. Benxi Iron and Steel.
16. Chain Chon Metal (Foshan).
17. Chain Chon Metal (Kunshan).
18. Changhai Stainless Steel.
19. Changzhou General Import and Export.
20. Changzhou Taiye Sensing Technology Co., Ltd.
21. Compart Precision Co.
22. Dalian Yirui Import and Export Agent Co., Ltd.
23. Daming International Import and Export Co., Ltd.
24. Dongbei Special Steel Group Co., Ltd
25. Double Stone Steel.
26. Etco (China) International Trading Co., Ltd.
27. FHY Corporation.
28. Foshan Foreign Economic Enterprise.
29. Foshan Hermes Steel Co., Ltd.
30. Foshan Jinfeifan Stainless Steel Co.
31. Foshan Topson Stainless Steel Co.
32. Fugang Group.
33. Fujian Fuxin Special Steel Co., Ltd.
34. Fujian Kaixi Stainless Steel.
35. Fujian Wuhang STS Products Co., Ltd.
36. Gangzhan Steel Developing Co., Ltd.
37. Globe Express Services Co., Ltd.
38. Golden Fund International Trading Co.
39. Guangdong Forward Metal Supply Chain Co., Ltd.
40. Guangdong Guangxin Suntec Metal Holdings Co., Ltd.
41. Guanghan Tiancheng Stainless Steel Products Co. Ltd.
42. Guangxi Beihai Chengde Group
43. Guangxi Wuzhou Jinhai Stainless Steel Co.
44. Guangzhou Eversunny Trading Co., Ltd.
45. Haimen Senda Decoration Material Co.
46. Hanyang Stainless Steel Co. (LISCO)
47. Hebei Iron & Steel.
48. Henan Tianhong Metal.
49. Henan Xinjinhui Stainless Steel Co., Ltd.
50. Henan Xuyuan Stainless Steel Co. Ltd.
51. Huadi Steel Group Co., Ltd.
52. Ideal Products of Dongguan Ltd.
53. Irestal Shanghai Stainless Pipe (ISSP).
54. Jaway Metal Co., Ltd.
55. Jiangdu Ao Jian Sports Apparatus Factory.
56. Jiangsu Daming Metal Products Co., Ltd.
57. Jiangsu Jihongxin Stainless Steel Co., Ltd.
58. Jiaxing Winner Import and Export Co., Ltd.
59. Jiaxing Zhongda Import and Export Co., Ltd.
60. Jieyang Baowei Stainless Steel Co., Ltd.
61. Jinyun Xinyongmao.
62. Jiuquan Iron & Steel (JISCO).
63. Kuehne & Nagel, Ltd. (Ningbo).
64. Lianzhoung Stainless Steel Corp. (LISCO).
65. Lu Qin (Hong Kong) Co., Ltd.
66. Maanshan Sungood Machinery Equipment Co., Ltd.
67. Minmetals Steel Co., Ltd.
68. Nanhi Tengshao Metal Manufacturing Co.
69. NB (Ningbo) Rilson Export & Import Corp.
70. Ningbo Baoxin Stainless Steel Co., Ltd.
71. Ningbo Bestco Import & Export Co., Ltd.
72. Ningbo Bingcheng Import & Export Co., Ltd.
73. Ningbo Chinaworld Grand Import & Export Co., Ltd.
74. Ningbo Dawon Resources Co., Ltd.
75. Ningbo Economic and Technological Development Zone (Beilun Xiapu).
76. Ningbo Hog Slat Trading Co., Ltd.
77. Ningbo New Hailong Import & Export Co.
78. Ningbo Polaris Metal Products Co.
79. Ningbo Portec Sealing Component.
80. Ningbo Qiyi Precision Metals Co., Ltd.
81. Ningbo Seduno Import & Export Co., Ltd.
82. Ningbo Sunico International Ltd.
83. Ningbo Swoop Import & Export.
84. Ningbo Yaoyi International Trading Co.,

Products; North American Stainless; and Outokumpu Stainless USA, LLC.

[4] *See* Petitioners' Letter, ''Stainless Steel Sheet and Strip from the People's Republic of China-Petitioner's Request for Initiation of First Administrative Review'' (April 30, 2018); *see also* Appendix for the list of companies.

[5] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83, FR 26258 (June 6, 2018) (*Initiation Notice).*

[6] *See* Petitioners' letter, ''Stainless Steel Sheet and Strip from the People's Republic of China-Petitioner's Withdrawal of Requests for First Administrative Review,'' dated June 20, 2018.

[7] *See* C.Y. Houseware's letter, ''Stainless Steel Sheet and Strip from the People's Republic of China: Withdrawal of Request for Administrative Review,'' dated July 3, 2018.

Ltd.
85. Onetouch Business Service, Ltd.
86. Qianyuan Stainless Steel.
87. Qingdao-Pohang Stainless Steel (QPSS).
88. Qingdao Rising Sun International Trading Co., Ltd.
89. Qingdao Sincerely Steel.
90. Rihong Stainless Co., Ltd.
91. Ruitian Steel.
92. Samsung Precision Stainless Steel (Pinghu) Co., Ltd.
93. Sejung Sea & Air Co., Ltd.
94. Shandong Huaye Stainless Steel Group Co., Ltd.
95. Shandong Mengyin Huarun Imp and Exp Co., Ltd.
96. Shandong Mingwei Stainless Steel Products Co., Ltd.
97. Shanghai Dongjing Import & Export Co.
98. Shanghai Fengye Industry Co., Ltd.
99. Shanghai Ganglian E-commerce Holdings Co. Ltd.
100. Shanghai Krupp Stainless (SKS).
101. Shanghai Metal Corporation.
102. Shanghai Tankii Alloy Material Co, Ltd.
103. Shanxi Taigang Stainless Steel Co., Ltd. (TISCO).
104. Shaoxing Andrew Metal Manufactured Co., Ltd.
105. Shaoxing Yuzhihang Import & Export Trade Co, Ltd.
106. Shenzhen Brilliant Sign Co., Ltd.
107. Shenzhen Wide International Trade Co., Ltd.
108. Sichuan Southwest Stainless Steel.
109. Sichuan Tianhong Stainless Steel.
110. Sino Base Metal Co., Ltd.
111. Suzhou Xinchen Precision Industrial Materials Co., Ltd.
112. Taishan Steel.
113. Taiyuan Accu Point Technology, Co. Ltd.
114. Taiyuan Iron & Steel (TISCO).
115. Taiyuan Ridetaixing Precision Stainless Steel Incorporated Co., Ltd.
116. Taizhou Durable Hardware Co., Ltd.
117. Tiancheng Stainless Steel Products.
118. Tianjin Fulida Supply Co., Ltd.
119. Tianjin Hongji Stainless Steel Products Co. Ltd.
120. Tianjin Jiuyu Trade Co., Ltd.
121. Tianjin Taigang Daming Metal Product Co., Ltd.
122. Tianjin Teda Ganghua Trade Co., Ltd.
123. Tianjin Tianchengjida Import & Export Trade Co., Ltd.
124. Tianjin Tianguan Yuantong Stainless Steel.
125. TISCO Stainless Steel (HK), Ltd.
126. Top Honest Stainless Steel Co., Ltd.
127. TPCO Yuantong Stainless Steel Ware.
128. Tsingshan Qingyuan.
129. World Express Freight Co., Ltd.
130. Wuxi Baochang Metal Products Co., Ltd.
131. Wuxi Fangzhu Precision Materials Co.
132. Wuxi Grand Tang Metal Co., Ltd.
133. Wuxi Jinyate Steel Co., Ltd.
134. Wuxi Joyray International Corp.
135. Wuxi Shuoyang Stainless Steel Co., Ltd.
136. Xiamen Lizhou Hardware Spring Co., Ltd.
137. Xinwen Mining
138. Yieh Corp. Ltd.
139. Yongjin Metal Technology.
140. Yuyao Purenovo Stainless Steel Co., Ltd.
141. Zhangjiagang Pohang Stainless Steel Co., Ltd. (ZPSS)
142. Zhejiang Baohong Stainless Steel Co., Ltd.
143. Zhejiang Huashun Metals Co., Ltd.
144. Zhejiang Jaguar Import & Export Co., Ltd.
145. Zhejiang New Vision Import & Export
146. Zhejiang Yongjin Metal Technology Co., Ltd.
147. Zhengzhou Mingtai Industry Co., Ltd.
148. Zhenjiang Huaxin Import & Export
149. Zhenjiang Yongyin Metal Tech Co.
150. Zhenshi Group Eastern Special Steel Co., Ltd.
151. Zun Hua City Transcend Ti-Gold

[FR Doc. 2018–16695 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904, Binational Panel Reviews: Notice of Completion of Panel Review

AGENCY: United States Section, NAFTA Secretariat, International Trade Administration, Department of Commerce.

ACTION: Notice of completion of panel review in the matter of Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination (Secretariat File Number: USA–CDA–2015–1904–01).

SUMMARY: The NAFTA Secretariat has received motions filed on behalf of the U.S. Department of Commerce; the government of Canada; the governments of British Columbia, Ontario, Nova Scotia, New Brunswick, and Quebec; Resolute FP Canada Inc. and Resolute FP US Inc.; Catalyst Paper Corporation, Catalyst Pulp and Paper Sales Inc. and Catalyst Paper (USA) Inc.; Port Hawkesbury Paper LP; Irving Paper Limited; and Verso Corporation requesting the termination of panel review in the Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination (Supercalendered Paper CVD) dispute.

Given all the participants have filed motions requesting termination and pursuant to Rule 71(2) of the *NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews (Rules),* the NAFTA Supercalendered Paper CVD dispute has been terminated.

As a result, and in accordance with Rule 78(a), notice is hereby given that the panel review of the NAFTA Supercalendered Paper CVD dispute has been completed and the panelists were discharged from their duties effective July 24, 2018.

FOR FURTHER INFORMATION CONTACT: Paul E. Morris, United States Secretary, NAFTA Secretariat, Room 2061, 1401 Constitution Avenue NW, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of Article 1904 of NAFTA provides a dispute settlement mechanism involving trade remedy determinations issued by the government of the United States, the government of Canada, and the government of Mexico. There are established *Rules,* which were adopted by the three governments and require Notices of Completion of Panel Review to be published in accordance with Rule 78. For the complete *Rules,* please see *https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/Rules-of-Procedure/Article-1904.*

Dated: July 31, 2018.

Paul E. Morris,

U.S. Secretary, NAFTA Secretariat.

[FR Doc. 2018–16688 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG387

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 58 Data Scoping Webinar.

SUMMARY: The SEDAR 58 assessment of the Atlantic stock of Cobia will consist of a series of workshops and webinars: Data Workshop; Assessment Webinars; and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 58 Data Scoping Webinar will be held on Wednesday, August 29, 2018, from 9 a.m. to 1 p.m.

ADDRESSES: The meetings will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the Data Scoping webinar are as follows:

1. Participants will review SEDAR 58 stock identification recommendations.

2. Participants will identify potential data sources and discuss data needs and treatments in order to prepare for the Data Workshop.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: July 31, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–16699 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG385

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Acting Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS, has made a preliminary determination that an Exempted Fishing Permit application contains all of the required information and warrants further consideration. This Exempted Fishing Permit would allow four commercial fishing vessels, directed by Coonamessett Farm Foundation, to be exempt from Atlantic sea scallop regulations for the purpose of bycatch reduction research.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed Exempted Fishing Permits.

DATES: Comments must be received on or before August 21, 2018.

ADDRESSES: You may submit written comments by any of the following methods:

- *Email: NMFS.GAR.EFP@noaa.gov.* Include in the subject line ''Comments on CFF Extended Link Apron EFP.''
- *Mail:* Michael Pentony, Regional Administrator, NMFS, NE Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on CFF Extended Link Apron EFP.''

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Management Specialist, 978–282–8456.

SUPPLEMENTARY INFORMATION: Coonamessett Farm Foundation (CFF) submitted a complete application for an Exempted Fishing Permit (EFP) on July 10, 2018, to conduct commercial fishing activities that the regulations would otherwise restrict. The EFP would authorize vessels to test the efficacy of an extended link scallop dredge apron at reducing the capture of yellowtail and windowpane flounder and small scallops over the duration of four directed research cruises. The EFP would support research associated with a project titled ''Development of an Extended Link Apron: A Broad Range Tool for Bycatch Reduction,'' that has been funded under the 2017 Atlantic Sea Scallop Research Set-Aside (RSA) Program.

CFF is requesting exemptions that would exempt four commercial fishing vessels from the following regulations:

- Atlantic sea scallop days-at-sea (DAS) allocations at 50 CFR 648.53(b);
- Crew size restrictions at § 648.51(c);
- Dredge gear restrictions for minimum mesh size at § 648.51(b)(2) and gear obstructions at § 648.51(b)(4)(iii);
- Atlantic sea scallop observer program requirements at § 648.11(g);
- Access area program requirements at § 648.59(a)(1)–(3), (b)(2), (b)(4);
- Rotational closed area exemptions for Closed Area I Access Area at § 648.60(c), Closed Area II Access Area at § 648.60(d), and all four of the Nantucket Lightship areas at § 648.60(e)–(h); and
- Possession limits and minimum size requirements specified in 50 CFR part 648, subpart B and subparts D through O, to allow temporary possession for biological sampling.

Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

The project would consist of conduct four, 7-day research trips for a total of 28 days-at-sea on limited access (LA) vessels fishing on Georges Bank. All trips will take place from September

2018 through June 2019. Vessels would complete approximately 55 paired, 30-minute tows per trip at a standard vessel speed of 4.8 knots. In addition to open areas, tows could occur in Closed Area I, Closed Area II, or the four Nantucket Lightship Scallop Rotational Areas. The four research trips would be centralized around areas with high yellowtail and winter flounder bycatch and in areas with a high abundance of harvestable size scallops mixed with pre-recruit scallops.

Vessels would fish two, 15-foot (4.57-m) Turtle Deflector Dredges; one dredge would be rigged with a standard apron while the other would be rigged with an extended vertical link apron. The project will alternate tows with and without the dredge over net over both dredges. Standard linking is defined as a single link between ring spaces, and the extended link is defined as two links linked together between rings. Both dredges would use 4-inch (10.16-cm) rings and a 10-inch (25.40-cm) twine top.

For all tows, the sea scallop catch would be counted into baskets and weighed. One basket from each dredge would be randomly selected and the scallops would be measured in 5 mm increments to determine size selectivity. Finfish catch would be sorted by species and then counted, weighed, and measured in 1 mm increments. Depending on the volume of scallops and finfish captured, the catch would be subsampled as necessary. No catch would be retained for longer than needed to conduct sampling and no finfish or scallop catch would be landed for sale. Table 1 contains an estimate of the finfish catch anticipated for the project.

TABLE 1—CFF EXTENDED LINK APRON PROJECT CATCH ESTIMATES

Species	Weight (lbs)	Weight (kg)
Sea Scallop	16,552	7,508
Yellowtail Flounder	549	249
Winter Flounder	803	364
Windowpane Flounder	2,828	1,283
Summer Flounder	943	428
Fourspot Flounder	74	34
American Plaice Flounder	90	41
Witch Flounder	12	5
Haddock	58	26
Atlantic Cod	100	45
Monkfish	8,420	3,819
Spiny Dogfish	87	39
Barndoor Skate	1,109	503
NE Skate Complex (excluding barndoor skate)	63,528	28,816

CFF needs these exemptions to allow them to conduct experimental dredge towing without being charged DAS, and to deploy gear in closed access areas where concentrations of primary bycatch species are sufficiently high to provide statistically robust results. Researchers also need mesh size and gear obstruction exemptions in order to use the dredge net cover. Utilizing the dredge net cover will allow researchers to quantify fish that would normally escape through the gear during normal fishing operations. Participating vessels need crew size waivers to accommodate science personnel, and possession waivers will enable researchers to conduct finfish sampling activities. The project would be exempt from the sea scallop observer program requirements because activities conducted on the trip are not consistent with normal fishing operations.

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: August 1, 2018.

Margo B. Schulze-Haugen,

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

[FR Doc. 2018–16770 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF696

Marine Mammals; File No. 21217

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

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that Aaron Roberts, Ph.D., University of North Texas, Biological Sciences, 1155 Union Circle, #310559, Denton, TX 76203, has applied for an amendment to Scientific Research Permit No. 21217.

DATES: Written, telefaxed, or email comments must be received on or before September 5, 2018.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 21217 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. 21217 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific

reasons why a hearing on the application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Sara Young (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 21217 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Permit No. 21217, issued on November 6, 2017 (82 FR 60968; December 26, 2017), authorizes the permit holder to import biological samples from up to 30 harp seals (*Pagophilus groenlandicus*) and 30 hooded seals (*Cystophora cristata*) from Canada to study the effects of polybrominated diphenyl ethers (PBDEs) on the fitness and immune function in two species of phocid seals. The permit holder is requesting the permit be amended to increase the number of samples imported from each species from 30 to 60 individuals and to include the import of samples collected during the 2019 field season in Canada. All other aspects of the permitted activities would not change.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the proposed activities are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of these applications to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: July 31, 2018.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–16719 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG365

Pacific Fishery Management Council; Public Meeting

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) Salmon Technical Team (STT), Salmon Advisory Subpanel (SAS), and Model Evaluation Workgroup (MEW) will hold a joint meeting to discuss and make recommendations on issues on the Pacific Council's September 2018 agenda. This meeting will be held via webinar and is open to the public.

DATES: The webinar will be held Wednesday, August 22, 2018, at 2 p.m. and will end when 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, use this link: *https://www.gotomeeting.com/webinar* (click ''Join a Webinar'' in top right corner of page). (1) Enter the Webinar ID: 493–298–571. (2) Enter your name and email address (required). You must use your telephone for the audio portion of the meeting by dialing this TOLL number 1–415–930–5321. (3) Enter the Attendee phone audio access code 706–308–295. (4) 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/webinar/ipad-iphone-android-webinar-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.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Robin Ehlke, Pacific Council; telephone: (503) 820–2410.

SUPPLEMENTARY INFORMATION: Major topics include, but are not limited to, Salmon Methodology Review, Salmon Rebuilding Plan update, and preliminary Pacific halibut management for 2019. The groups may also address one or more of the Council's scheduled Administrative Matters and Ecosystem topics. Public comments during the webinar will be received from attendees at the discretion of the STT, SAS, and MEW Chairs.

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

The public listening station is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2411) at least 10 days prior to the meeting date.

Dated: July 31, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–16698 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG374

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Caribbean Fishery Management Council will hold its 163rd meeting in August to discuss the items contained in the agenda in the **SUPPLEMENTARY INFORMATION**.

DATES: The meetings will be held on August 28–30, 2018, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meetings will be held at The Buccaneer Hotel located at 5007 Estate Shoys, Christiansted, St. Croix, USVI.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION:

August 28, 2018, 8:30 a.m.–5 p.m.

- New Council Members Oath
- Election of New Officers
- Call to Order
- Adoption of Agenda
- Consideration of 162nd Council Meeting Verbatim Transcriptions
- Executive Director's Report
- Scientific and Statistical Committee (SSC)) Meeting Report—Richard Appeldoorn
- Island-based Fishery Management Plans
  —Review of Draft Environmental Impact Statements:
  —Puerto Rico
  —St. Thomas/St. John
  —St. Croix
  —Council selection of preferred alternatives
  —Council decision as to whether to take DEIS to public hearings
- Spiny Lobster Control Rule

Public Comment Period (5-minute presentations)

August 28, 2018, 5:30 p.m.–6:30 p.m.

- Administrative Issues
- Closed Session

August 29, 2018, 8:30 a.m.–12 p.m.

- Outreach and Education Report—Alida Ortiz
- Lionfish Project Report—Dr. J. Tookes
- Puerto Rico Fisheries Socio-Economic Project Update—Dr. T. Seara
- Western Central Atlantic Fishery Commission (WECAFC)
  —Overview and Status of Working Groups
  —Proposal for a Regional Fishery Management (RFMO)—DOS
- 2018 Okeanos Expedition to PR and the USVI—Daniel Wagner

August 29, 2018, 1 p.m.–6 p.m.

- Field Trip to Visit St. Croix Fishing Communities

August 30, 2018, 8:30 a.m.–12 p.m.

- Exempted Fishing Permits (EFPs) Summary of Applications and Status
- Emergency Location and Removal of Lost Fishing Gear in Puerto Rico: Avoiding Long Term Impacts of Ghost Gear—Raimundo Espinoza.
- Enforcement Issues:
  —Puerto Rico-DNER
  —U.S. Virgin Islands-DPNR
  —U.S. Coast Guard
  —NMFS/NOAA
- Meetings Attended by Council Members and Staff
- Other Business

Public Comment Period (5-minute presentations)

- Next Meeting

The order of business may be adjusted as necessary to accommodate the completion of agenda items. The meeting will begin on August 28, 2018 at 8:30 a.m. Other than the start time, interested parties should be aware that discussions may start earlier or later than indicated. In addition, the meeting may be extended from, or completed prior to the date established in this notice.

Special Accommodations

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and other auxiliary aids, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: July 31, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–16710 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF370

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Sand Point City Dock Replacement Project in Sand Point, Alaska

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: NMFS has received a request from the Alaska Department of Transportation and Public Facilities (ADOT&PF) to issue an incidental harassment authorization (IHA) previously issued to ADOT&PF to incidentally take nine species of marine mammal, by Level A and Level B harassment, during construction activities associated with the Sand Point City Dock Replacement Project in Sand Point, Alaska. ADOT&PF reported that the project has been delayed. The IHA issued on October 13, 2017 has effective dates of August 1, 2018 through July 31, 2019. ADOT&PF requested that a new IHA be issued to conduct their work between May 31, 2019 and May 30, 2020. NMFS is, therefore, issuing a second IHA to cover the incidental take analyzed and authorized in the first IHA. The authorized take numbers would be the same as authorized previously, and the required mitigation, monitoring, and reporting would remain the same as authorized for the 2018 IHA referenced above. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is notifying the public about the issuance of an IHA to ADOT&PF to incidentally take marine mammals, by Level A and Level B harassment only, during the specified activity.

DATES: The IHA is valid May 31, 2019, through May 30, 2020.

ADDRESSES: An electronic copy of the final Authorization previously issued for 2018–2019, ADOT&PF's application, and related documents may be obtained by visiting *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Rob Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS had determined that the issuance of the 2018–2019 IHA qualified to be categorically excluded from further NEPA review and signed a Categorical Exclusion memo in October 2017. Since the new 2019–2020 IHA covers the same work covered in the former 2018–2019 IHA, NMFS is relying on this same Categorical Exclusion memo for the issuance of this IHA.

History of Request

On September 16, 2016, NMFS received an application from ADOT&PF for the taking of marine mammals incidental to replacing the city dock in Sand Point, Alaska. On April 11, 2017, ADOT&PF submitted a revised application that NMFS determined was adequate and complete. ADOT&PF proposed to conduct in-water activities that may incidentally take, by Level A and Level B harassment, nine species of marine mammals. Proposed activities included as part of the Sand Point City Dock Replacement Project with potential to affect marine mammals include impact hammer pile driving and vibratory pile driving and removal. We published a notice of a proposed IHA and request for comments on July 6, 2017 (82 FR 31400). We subsequently published the final notice of our issuance of the IHA on October 23, 2017 (82 FR 48987), making the IHA valid for August 1, 2018–July 31, 2019. The specified activities are expected to result in the take of nine species of marine mammals including harbor seal (*Phoca vitulina*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), killer whale (*Orcinus orca*), humpback whale (*Megaptera novaeangliae*), Fin whale (*Balaenoptera physalus*), gray whale (*Eschrichtius robustus*), and minke whale (*Balaenoptera acutorostrata*).

On April 24, 2018, ADOT&PF informed NMFS that work would be postponed relevant to the specified activity considered in the MMPA analysis and construction will not start until spring of 2019. Therefore, ADOT&PF requested the IHA be re-issued to be valid from May 31, 2019 through May 30, 2020.

Description of the Proposed Activity and Anticipated Impacts

The 2018–2019 IHA covered the construction of a new dock in Sand Point, Alaska. Impact and vibratory driving of piles and vibratory pile removal were expected to take place over a total of approximately 32 working days within a 5-month window from August 1, 2019 through December 31, 2019. However, due to the potential for unexpected delays, up to 40 working days may be required. The new dock would be supported by approximately 52 round, 30-inch-diameter, 100-foot-long permanent steel pipe piles. Fender piles installed at the dock face would consist of 8 round, 24-inch-diameter, 80-foot-long permanent steel pipe piles. The single mooring dolphin would consist of 3 round, 24-inch-diameter, 120-foot-long permanent battered steel pipe piles. This equates to a total of 63 permanent piles. Up to 90 temporary piles would be installed and removed during construction of the dock and would be either H-piles or pipe piles with a diameter of less than 24 inches.

NMFS refers the reader to the documents related to the previously issued IHA for more detailed description of the project activities. These previous documents include the **Federal Register** notice of the issuance of the 2018–2019 IHA for ADOT&PF's Sand Point City Dock Replacement Project (82 FR 48987; October 23, 2017), ADOT&PF's application, the **Federal Register** notice of the proposed IHA (82 FR 31400; July 6, 2017) and all associated references and documents.

Detailed Description of the Action—A detailed description of the proposed vibratory and impact pile driving activities at Sand Point City Dock is found in these previous documents. The location, timing (including the August 1, 2019—December 31 2019 work window), and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical to those described in the previous notices.

Description of Marine Mammals—A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to this IHA as well. In addition, NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the current IHA.

Potential Effects on Marine Mammals—A description of the potential effects of the specified activities on marine mammals and their habitat is found in these previous documents, which remains applicable to this IHA. There is no new information on potential effects.

Estimated Take—A description of the methods and inputs used to estimate take anticipated to occur and, ultimately, the take that was authorized is found in these previous documents. The methods of estimating take are identical to those used in the previous IHA, as is the density of marine mammals. The source levels, were also unchanged from the previously issued IHA, and NMFS' 2016 acoustic technical guidance was used to address new acoustic thresholds in the notice of issuance of the 2018 IHA.

Description of Proposed Mitigation, Monitoring and Reporting Measures—A description of proposed mitigation, monitoring, and reporting measures is found in the previous documents, which are identical in this issued IHA. The following measures would apply to ADOT&PFs mitigation requirements:

Establishment of Shutdown Zone—For all pile driving activities, ADOT&PF will establish a shutdown zone. The purpose of a shutdown zone is generally to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). In this case, shutdown zones are intended to contain areas in which SPLs equal or exceed acoustic injury criteria for some authorized species, based on NMFS' acoustic

technical guidance published in the **Federal Register** on August 4, 2016 (81 FR 51693).

Establishment of Monitoring Zones—ADOT&PF will identify Level A take zones which are areas beyond the shutdown zones where animals may be exposed to sound levels that could result in permanent threshold shift (PTS). During impact installation of 30-inch and 24-inch piles, a 100-meter shutdown zone would not be sufficient to prevent Level A take of low-frequency cetaceans (*i.e.,* humpback whales), high-frequency cetaceans (*i.e.,* harbor porpoises), or phocid pinnipeds (*i.e.,* harbor seals). For this reason, Level A take for small numbers of humpback whales, harbor porpoises, and harbor seals is authorized. To account for potential variations in daily productivity during impact installation, isopleths were calculated for different numbers of piles that could be installed each day. ADOT&PF will identify Level B disturbance zones which are areas where SPLs equal or exceed 160 dB rms for impact driving and 120 dB rms during vibratory driving. Observation of monitoring zones enables observers to be aware of and communicate the presence of marine mammals in the project area and outside the shutdown zone and thus prepare for potential shutdowns of activity. NMFS has established monitoring protocols described in the **Federal Register** notice of the issuance (82 FR 48987; October 23, 2017) which are based on the distance and size of the monitoring and shutdown zones. The same protocols are contained in this 2019–2020 IHA.

Soft Start—The use of a soft-start procedure is believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to implement soft start procedures. Soft Start is not required during vibratory pile driving and removal activities.

Pre-Activity Monitoring—Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 minutes or longer occurs, the observer will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be cleared when a marine mammal has not been observed within zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 30 minutes for medium and large-sized odontocetes and mysticetes and 15 minutes for small cetaceans and pinnipeds.

Visual Marine Mammal Observation—Monitoring will be conducted by qualified marine mammal observers (MMOs), who are trained biologists, with minimum qualifications described in the **Federal Register** notice of the issuance of the 2018–2019 IHA (82 FR 48987; October 23, 2017). In order to effectively monitor the pile driving monitoring zones, two MMOs will be positioned at the best practical vantage point(s). If waters exceed a sea-state which restricts the observers' ability to make observations within 100 m of the pile driving activity (*e.g.,* excessive wind or fog), pile installation and removal will cease. Pile driving will not be initiated until the entire shutdown zone is visible. MMOs shall record specific information on the sighting forms as described in the **Federal Register** notice of the issuance of the 2018–2019 IHA (82 FR 48987; October 23, 2017). At the conclusion of the in-water construction work, ADOT&PF will provide NMSF with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

Determinations

ADOT&PF proposes to conduct activities identical to those covered in the previous 2018 IHA. As described above, the number of estimated takes of the same stocks of marine mammals is the same as those authorized in the 2018 IHA that were found to meet the negligible impact and small numbers standards. The authorized take of marine mammal species is shown in Table 1. Our analysis shows that between <0.01 percent and 2.89 percent of the populations of affected stocks could be taken by harassment. Therefore, the numbers of animals authorized to be taken for all species would be considered small relative to the relevant stocks or populations.

TABLE 11—SUMMARY OF THE ESTIMATED NUMBERS OF MARINE MAMMALS POTENTIALLY EXPOSED TO LEVEL A AND LEVEL B HARASSMENT NOISE LEVELS

Species (DPS/stock)	Estimated number of individuals potentially exposed to the level A harassment threshold	Estimated number of individuals potentially exposed to the level B harassment threshold	DPS/stock bundance (DPS/stock)	Percent of population exposed to level A or level B thresholds
Steller sea lion (wDPS)	0	960	50,983	1.88
Harbor seal (Cook Inlet/Shelikof Strait)	27	53	27,386	0.29
Harbor porpoise (Gulf of Alaska)	16	33	31,046	0.16
Dall's porpoise (Alaska)	0	4	83,400	<0.01
Killer whale (Gulf of Alaska, Aleutian Islands, and Bering Sea transient or Alaska resident).	0	14	587 (transient)	2.38 (transient)
			2,347 (resident)	0.6 (resident)
Humpback whale [1] (Central North Pacific/Western North Pacific).	2	30	10,103 (Central NP)	0.32
			1,107 (Western NP)	2.89
Fin whale (Northeast Pacific)	0	6	[2] 1,368	0.44
Gray whale (Eastern North Pacific)	0	2	20,990	<0.01
Minke whale (Alaska)	0	3	[3] 2,020	<0.01
Total	45	1,105	N/A	N/A.

[1] The Hawaii DPS is estimated to account for approximately 89 percent of all humpback whales in the Gulf of Alaska, whereas the Mexico and Western North Pacific DPSs account for approximately 10.5% and 0.5%, respectively (Wade *et al.,* 2016; NMFS 2016). Therefore, an estimated 28 animals from Hawaii DPS; 3 from Mexico DPS; and 1 from Western North Pacific DPS.

[2] Based on 2010 survey of animals north and west of Kenai Peninsula in U.S. waters and is likely an underestimate (Muto *et al.,* 2016b).

[3] Based on 2010 survey on Eastern Bering Sea shelf. Considered provisional and not representative of abundance of entire stock (Muto *et al.,* 2016a).

N/A: Not Applicable.

This final IHA includes identical required mitigation, monitoring, and reporting measures as the 2018 IHA, and there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) ADOT&PF's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

In order to comply with the ESA, NMFS Alaska Regional Office (AKR) Protected Resources Division issued a Biological Opinion in September 2017 under section 7 of the ESA, on the issuance of an IHA to ADOT&PF under section 101(a)(5)(D) of the MMPA. There are four distinct population segments (DPSs) of three marine mammal species that are listed under the ESA with confirmed or possible occurrence in the study area: The Western North Pacific DPS and Mexico DPS of humpback whale; the Western DPS of Steller sea lion; and fin whale. The Biological Opinion concluded that while the issuance of the authorization may adversely affect members of some listed species it is not likely to jeopardize the continued existence of any listed marine mammal species or destroy or modify any critical habitat. Note that the only modification to the IHA is a change in effective dates. No additional take has been requested or is being authorized and all mitigation measures described in the Biological Opinion will continue to be implemented to limit Level A and Level B exposures. For these reasons, we anticipate no new or changed effects of the action beyond what was considered in the 2017 Biological Opinion.

Authorization

NMFS has issued an IHA to ADOT&PF for the Sand Point City Dock Replacement Project for 2019–2020, provided the previously described mitigation, monitoring, and reporting requirements from the 2018–2019 IHA are incorporated.

Dated: August 1, 2018.

Elaine T. Saiz,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–16767 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG358

Meeting of the Columbia Basin Partnership Task Force of the Marine Fisheries Advisory Committee

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

ACTION: Notice of open public meeting.

SUMMARY: This notice sets forth the proposed schedule and agenda of a forthcoming meeting of the Marine Fisheries Advisory Committee's (MAFAC's) Columbia Basin Partnership Task Force (CBP Task Force). The CBP Task Force will discuss the issues outlined in the **SUPPLEMENTARY INFORMATION** below.

DATES: The meeting will be held August 22, 2018, 1–4 p.m., Pacific Time.

ADDRESSES: There is no public access. Meeting is by conference call.

FOR FURTHER INFORMATION CONTACT: Katherine Cheney; NFMS West Coast Region; 503–231–6730; email: *Katherine.Cheney@noaa.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given of a meeting of MAFAC's CBP Task Force. The MAFAC was established by the Secretary of Commerce (Secretary), and, since 1971, advises the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. The MAFAC charter and summaries of prior MAFAC meetings are located online at *https://www.fisheries.noaa.gov/topic/partners#marine-fisheries-advisory-committee.* The CBP Task Force reports to MAFAC and is being convened to develop recommendations for long-term goals to meet Columbia Basin salmon recovery, conservation needs, and harvest opportunities, in the context of habitat capacity and other factors that affect salmon mortality. More information is available at the CBP Task Force web page: *http://www.westcoast.fisheries.noaa.gov/columbia_river/index.html.*

Matters To Be Considered

The Committee is convening to discuss feedback from CBP Task Force members as they shared provisional goals with their constituents and communities; drafting of their recommendations and report; and next steps for the CBP Task Force.

Time and Date

The meeting is scheduled for August 22, 2018, 1–4 p.m., Pacific Time by conference call and webinar. Access information for the public will be posted at *http://www.westcoast.fisheries.noaa.gov/columbia_river/index.html* by August 8, 2018.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to Katherine Cheney, 503–231–6730 by August 8, 2018.

Dated: August 1, 2018.

Jennifer L. Lukens,

Federal Program Officer, Marine Fisheries Advisory Committee, National Marine Fisheries Service.

[FR Doc. 2018–16731 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG311

Determination of Overfishing or an Overfished Condition

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

ACTION: Notice.

SUMMARY: This action serves as a notice that NMFS, on behalf of the Secretary of Commerce (Secretary), has found that the following stocks are overfished or subject to overfishing. Klamath River fall-run Chinook salmon, Queets coho salmon, Juan de Fuca coho salmon, Snohomish coho salmon, and

Sacramento River fall-run Chinook salmon are now overfished. Upper Columbia River summer-run Chinook salmon is now subject to overfishing. Thorny skate and the Atlantic and Gulf of Mexico stock of sandbar shark are still overfished. The Gulf of Maine/Cape Hatteras Atlantic mackerel stock is now both overfished and subject to overfishing. NMFS, on behalf of the Secretary, notifies the appropriate fishery management council (Council) whenever it determines that overfishing is occurring, a stock is in an overfished condition or a stock is approaching an overfished condition.

FOR FURTHER INFORMATION CONTACT: Regina Spallone, (301) 427–8568.

SUPPLEMENTARY INFORMATION: Pursuant to section 304(e)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1854(e)(2), NMFS, on behalf of the Secretary, must notify Councils, and publish in the **Federal Register**, whenever it determines that a stock or stock complex is subject to overfishing, overfished, or approaching an overfished condition.

NMFS has determined that Klamath River fall-run Chinook salmon, Queets coho salmon, Juan de Fuca coho salmon, Snohomish coho salmon, and Sacramento River fall-run Chinook salmon are now overfished. Pacific salmon stocks are overfished when the 3-year geometric mean of annual spawning escapement falls below the stock's minimum stock size threshold (MSST). MSST for Pacific salmon is generally defined as $0.5*S_{MSY}$ or $0.75*S_{MSY}$, although there are some exceptions including Juan de Fuca and Snohomish coho, where MSST is $0.636*S_{MSY}$ and $0.62\ S_{MSY}$, respectively. S_{MSY} is the number of spawners corresponding to maximum sustainable yield (MSY). The determinations for the two Chinook stocks are based on 2018 assessments—using data from 2017—produced by the Pacific Fishery Management Council's (Pacific Council) Salmon Technical Team (STT) using methodologies that have been reviewed by the Pacific Council's Science and Statistical Committee (SSC). The determinations for the three coho stocks are based on 2018 assessments—using data from 2016—produced by the Pacific Council's STT, using methodologies that have been reviewed by the Pacific Council's SSC.

NMFS has further determined that Upper Columbia River summer-run Chinook salmon is now subject to overfishing. This stock is subject to overfishing when the F_{year} exceeds the maximum fishing mortality threshold (MFMT), where the MFMT is generally defined as less than or equal to F_{MSY}. This determination is based on a 2018 assessment—using data from 2015—produced by the Pacific Salmon Commission's Chinook Technical Committee. Consistent with the requirements in the Salmon FMP, the Pacific Council has directed the STT to develop rebuilding plans for each overfished stock for the Council's consideration. Of the six salmon stocks, only the two Chinook stocks are not internationally managed stocks. For all other stocks, the Council has limited ability to control ocean fisheries in waters outside its jurisdiction.

Thorny skate and the Atlantic and Gulf of Mexico stock of sandbar shark are still overfished. Thorny skate is overfished if the three-year moving average of the autumn survey mean weight per tow (B) is less than $B_{THRESHOLD}$, which is one-half of the 75th percentile of the mean weight per tow observed in the autumn trawl survey from the selected reference time series. A stock assessment was completed in 2017—using data through 2016—which supported the determination that thorny skate remains overfished. NMFS is working with the New England Fishery Management Council (New England Council) to implement conservation and management measures to rebuild thorny skate. The sandbar shark stock is overfished when current biomass (B) proxy is less than the minimum stock size threshold (MSST) ($B < B_{MSST}$). The B proxy for sandbar shark is spawning stock fecundity. The sandbar shark determination is based on a stock assessment completed in 2018—using data through 2015—following the Southeast Data Assessment and Review process. NMFS manages sandbar shark under the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan and its amendments.

The Gulf of Maine/Cape Hatteras Atlantic mackerel stock is now both overfished and subject to overfishing. Atlantic mackerel is subject to overfishing if the fishing mortality rate (F) exceeds $F_{40\%}$. The stock is overfished if spawning stock biomass (SSB) is less than ½ SSB_{MSY}, the SSB associated with fishing at F_{MSY}. This determination is based on a benchmark assessment, finalized in 2018 and using data through 2016. The Mid-Atlantic Fishery Management Council has been notified of its requirement to adopt measures to end overfishing and approve a rebuilding plan for Atlantic mackerel.

Dated: August 1, 2018.

Margo Schulze-Haugen,

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

[FR Doc. 2018–16764 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG368

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Whiting Advisory Panel and Committee on Wednesday, August 29, 2018 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Wednesday, August 29, 2018 at 9:30 a.m.

ADDRESSES: *Meeting address:* The meeting will be held at the Hotel Providence, 139 Mathewson Street, Providence, RI 02903; telephone: (401) 861–8000.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Whiting Advisory Panel and Committee will evaluate Amendment 22 (limited access alternatives) public hearing comments and impact analyses to recommend final action to the Council at its September meeting. The will also receive the Annual Monitoring Report for Fishing Year 2017 from the Whiting Plan Development Team. The Advisory Panel and Committee will review recommendations to streamline small-mesh multispecies fishery regulations and make final recommendations to the Council. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: July 31, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–16704 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG389

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) Trawl Electronic Monitoring Committee will hold a public meeting on August 23, 2018 through August 24, 2018.

DATES: The meeting will be held on Thursday, August 23, 2018, from 9 a.m. to 5:30 p.m. and on Friday, August 24, 2018, from 9 a.m. to 5:30 p.m. (or as necessary).

ADDRESSES: The meeting will be held in the Husky Room, Purple and Gold at the Silver Cloud Hotel, 5036 25th Ave. NE, Seattle, WA 98105. Teleconference number: (907) 271–2896.

Council address: North Pacific Fishery Management Council, 605 W 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone: (907) 271–2809.

FOR FURTHER INFORMATION CONTACT: Elizabeth Figus, Council staff; telephone: (907) 271–2801.

SUPPLEMENTARY INFORMATION:

Thursday, August 23, 2018 through Friday, August 24, 2018

This two-day meeting is expected to focus on: (a) A presentation on uses of EM for recording interactions with seabirds; (b) an update about the Alaska Region Electronic Technologies Implementation Plan; (c) updates for ongoing research, funding, and regulatory comparisons relevant to trawl EM; (d) a review of the EM Workgroup cooperative approach; (e) drafting of a cooperative workplan for trawl EM; and, (f) a discussion of scheduling and other issues. The Agenda is subject to change, and the latest version will be posted at *http://www.npfmc.org/observer-program/*.

Public Comment

Public comment letters will be accepted and should be submitted either electronically to Elizabeth Figus, Council staff: *Elizabeth.figus@noaa.gov* or through the mail: North Pacific Fishery Management Council, 605 W 4th Ave., Suite 306, Anchorage, AK 99501–2252. In-person oral public testimony will be accepted at the discretion of the chair.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shannon Gleason at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: July 31, 2018.

Tracey L. Thompson,

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

[FR Doc. 2018–16703 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG384

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Acting Assistant Regional Administrator for Sustainable Fisheries, Greater Atlantic Region, NMFS, has made a preliminary determination that an Exempted Fishing Permit application contains all of the required information and warrants further consideration. The Exempted Fishing Permit would allow commercial fishing vessels to fish outside of scallop regulations in support of research conducted by the Coonamessett Farm Foundation. These exemptions would support research conducted on trips to test gear modifications for bycatch reduction in the scallop dredge fishery.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed Exempted Fishing Permits.

DATES: Comments must be received on or before August 21, 2018.

ADDRESSES: You may submit written comments by any of the following methods:

- *Email: nmfs.gar.efp@noaa.gov.* Include in the subject line ''CFF Compensation Fishing Gear Research EFP.''
- *Mail:* Michael Pentony, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on CFF Compensation Fishing Gear Research EFP.''

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fisheries Management Specialist, 978–282–8456.

SUPPLEMENTARY INFORMATION: Coonamessett Farm Foundation (CFF) submitted a complete application for an Exempted Fishing Permit (EFP) on July 6, 2018, that would allow gear research to be conducted by vessels on compensation fishing trips associated with projects funded by the 2018 Scallop Research Set-Aside (RSA) program. The exemptions would allow commercial fishing vessels to exceed the crew size regulations at 50 CFR 648.51(c) to place a researcher on the vessel and temporarily exempt the participating vessels from possession limits and minimum size requirements specified in 50 CFR part 648, subpart B and subparts D through O, for biological sampling purposes. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited, including landing fish in excess of a possession limit or below the minimum size.

Experimental fishing activity would test a one-way extended link gear

modification in an attempt to reduce finfish bycatch and habitat impact in the scallop dredge fishery. Any modification would comply with existing scallop gear regulations. All trips would take place in scallop fishing areas open to scallop RSA compensation fishing.

Exemption from crew size limits is needed because a research technician would accompany vessels on the compensation fishing trips to collect catch data associated with the dredge modifications. The crew size exemption would be for approximately 120 days-at-sea and would be used in conjunction with a valid compensation fishing letter of authorization. The technician would only engage in data collection activities, and would not process catch to be landed for sale. Exemption from possession limit and minimum sizes would support catch sampling activities, and ensure the vessel is not in conflict with possession regulations while collecting catch data. All catch above a possession limit or below a minimum size would be discarded as soon as possible following data collection. Estimated catch totals for the experimental permit activities are listed below in Table 1. The proposed gear modifications are not expected to increase catch above typical commercial fishing practices and gears. All research trips would otherwise be consistent with normal commercial fishing activity and catch would be retained for sale.

TABLE 1—ESTIMATED BYCATCH FOR CFF EFP COMPENSATION TRIPS

Species	Number	Weight (lb)	Weight (kg)
NE Skate Complex	19,326	10,051	4,559
Barndoor Skate	1,231	14	6
Summer Flounder	747	2,951	1,339
Winter Flounder	14	2	1
Yellowtail Flounder	36	10	5
Windowpane Flounder	106	39	18
Monkfish	2,973	4,689	2,127

If approved, the applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: August 1, 2018.

Margo B. Schulze-Haugen,

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

[FR Doc. 2018–16771 Filed 8–3–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2018–ICCD–0059]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Graduate Assistance in Areas of National Need (GAANN) Performance Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before September 5, 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–2018–ICCD–0059. 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, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Rebecca Ell, 202–453–6348.

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: Graduate Assistance in Areas of National Need (GAANN) Performance Report.

OMB Control Number: 1840–0748.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 291.

Total Estimated Number of Annual Burden Hours: 3,274.

Abstract: GAANN grantees must submit a performance report annually. In addition, grantees are required to submit a supplement to the final performance report two years after submission of their final report. The reports are used to evaluate grantee performance. Further, the data from the reports will be aggregated to evaluate the accomplishments and impact of the GAANN Program as a whole. Results will be reported to the Secretary in order to respond to GPRA requirements.

Minor changes have been made to the collection to clarify the intent of the questions and update the areas of national need. These changes did not alter the anticipated burden hours associated with this collection. There was a small increase in total burden hours based on the recalculation of the burden on public respondents.

Dated: August 1, 2018.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–16737 Filed 8–3–18; 8:45 am]

BILLING CODE 4000–01–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: EC18–76–000.
Applicants: Entergy Arkansas, Inc., Entergy Mississippi, Inc.
Description: Supplement to March 27, 2018 Joint Application of Entergy Arkansas, Inc., et al. for Approval under Section 203 of the Federal Power Act.
Filed Date: 7/27/18.
Accession Number: 20180727–5212.
Comments Due: 5 p.m. ET 8/10/18.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG18–116–000.
Applicants: Live Oak Wind Project, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Live Oak Wind Project, LLC.
Filed Date: 7/31/18.
Accession Number: 20180731–5034.
Comments Due: 5 p.m. ET 8/21/18.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3279–002; ER10–3275–002; ER10–3274–002; ER18–213–001; ER10–3278–002.
Applicants: Basin Creek Equity Partners L.L.C., Capitol District Energy Center Cogeneration Associates, Pawtucket Power Associates Limited Partnership, Pittsfield Generating Company, L.P., Forked River Power LLC.
Description: Notice of Non-Material Change in Status of Basin Creek Equity Partners L.L.C., et. al.
Filed Date: 7/30/18.
Accession Number: 20180730–5275.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER15–794–008.
Applicants: Catalyst Paper Operations, Inc.
Description: Notification of Change in Status of Catalyst Paper Operations, Inc.
Filed Date: 7/30/18.
Accession Number: 20180730–5250.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2049–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2018–07–30_Amendment to Attachment X Revisions to Expedite Phase I of the DPP to be effective 9/19/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5233.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2104–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Rate Schedule No. 217, Exhibit A and Exhibit B Revisions to be effective 10/1/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5227.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2105–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Revisions to Service Agreement Nos. 218 and 335 to be effective 7/1/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5229.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2106–000.
Applicants: Duke Energy Ohio, Inc.
Description: § 205(d) Rate Filing: Duke-DP&L IA 205 Filing (PJM SA No. TBD) to be effective 6/30/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5238.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2107–000.
Applicants: Duke Energy Ohio, Inc.
Description: § 205(d) Rate Filing: Duke-AEP IA 205 Filing (PJM SA No. 1491) to be effective 6/30/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5239.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2108–000.
Applicants: Duke Energy Ohio, Inc.
Description: § 205(d) Rate Filing: Duke-EKPC IA 205 Filing (PJM SA No. 3141) to be effective 6/30/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5240.
Comments Due: 5 p.m. ET 8/20/18.
Docket Numbers: ER18–2109–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: 2nd Quarter 2018 Revisions to OA, Sch. 12 and RAA, Sch. 17 Member Lists to be effective 6/30/2018.
Filed Date: 7/31/18.
Accession Number: 20180731–5059.
Comments Due: 5 p.m. ET 8/21/18.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16746 Filed 8–3–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2628–065]

Alabama Power Company; Notice of Intent To File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.
b. *Project No.:* 2628–065.
c. *Dated Filed:* June 1, 2018.
d. *Submitted By:* Alabama Power Company (Alabama Power).
e. *Name of Project:* R.L. Harris Hydroelectric Project (Harris Project).
f. *Location:* The project is located on the Tallapoosa River the City of Lineville in Randolph, Clay, and Cleburne Counties, Alabama. The project occupies 4.90 acres of federal land administered by the Bureau of Land Management.
g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.
h. *Potential Applicant Contact:* Angie Anderegg, Harris Relicensing Project Manager, Alabama Power Company, 600 18th Street, Birmingham, AL 35203; (205) 257–2251 or *ARSEGARS@southernco.com.*
i. *FERC Contact:* Sarah Salazar at (202) 502–6863 or email at *sarah.salazar@ferc.gov.*
j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item o below. Cooperating agencies should note the Commission's

policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Alabama Power as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. Alabama Power filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Commission staff's Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission.

The Commission strongly encourages electronic filing. Please file all documents 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.* In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P–2628–065.

All filings with the Commission must bear the appropriate heading: ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document 1,'' ''Request for Cooperating Agency Status,'' or ''Communications to and from Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by September 29, 2018.

p. We intend to prepare either an environmental assessment (EA) or Environmental Impact Statement (EIS). The meetings listed below will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the times and places noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Evening Scoping Meeting—Lineville, Alabama

Date & Time: Tuesday, August 28, 2018 at 6:30 p.m.

Location: Wedowee Marine South, 9681 Highway 48, Lineville, Alabama 36266, (770) 843–3054.

Daytime Scoping Meeting—Lineville, Alabama

Date & Time: Wednesday, August 29, 2018 at 9 a.m.

Location: Wedowee Marine South, 9681 Highway 48, Lineville, Alabama 36266, (770) 843–3054.

Please RSVP to *harrisrelicensing@southernco.com,* or call Cecile Jones at 205–257–1701, on or before August 15, 2018, if you plan to attend one of the scoping meetings in Lineville. Directions to Wedowee Marine South are available at *www.harrisrelicensing.com* and in Appendix C of the Commission's Scoping Document 1, described below.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at *http://www.ferc.gov,* using the ''eLibrary'' link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Environmental Site Review

The potential applicant and Commission staff will conduct an Environmental Site Review (site visit) of the project on Tuesday, August 28, 2018, starting at 9:00 a.m., and ending at or about 4:30 p.m. All participants should meet at the R.L. Harris Dam located at 2761 County Road 100, Lineville, AL 36266. Directions to the R.L. Harris Dam are available at *www.harrisrelicensing.com* and in Appendix C of the Commission's SD1. Participants must notify Cecile Jones at (205) 257–1701 or *www.harrisrelicensing.com,* on or before August 15, 2018, if they plan to attend the environmental site review.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for

development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public records of the project.

Dated: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16752 Filed 8–3–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER18–1978–000]

Casa Mesa Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Casa Mesa Wind, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 20, 2018.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the 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: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16749 Filed 8–3–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2042–028; ER10–1945–008; ER10–1944–006; ER10–2051–008; ER10–1942–020; ER17–696–008; ER14–2931–006; ER10–1941–010; ER10–2043–008; ER10–2029–010; ER10–2041–008; ER18–1321–001; ER10–2040–008; ER10–1938–023; ER10–2036–009; ER13–1407–007; ER10–1934–022; ER10–1893–022; ER10–3051–027; ER10–2985–026; ER10–3049–027; ER10–1889–006; ER10–1888–010; ER10–1885–010; ER15–748–004; ER10–1884–010; ER10–1883–010; ER10–1878–010; ER10–3260–008; ER10–1877–005; ER10–1895–006; ER10–1876–010; ER10–1875–010; ER10–1873–010; ER10–1871–007; ER10–1870–006; ER11–4369–007; ER16–2218–007; ER12–1987–008; ER10–1947–010; ER12–2645–003; ER10–1863–006; ER10–1862–022; ER10–1933–005; ER12–2261–009; ER10–1865–009; ER10–1858–006; ER13–1401–006; ER10–2044–008.

Applicants: Calpine Energy Services, L.P., Auburndale Peaker Energy Center, LLC, Bethpage Energy Center 3, LLC, Calpine Bethlehem, LLC, Calpine Construction Finance Company, L.P., Calpine Energy Solutions, LLC, Calpine Fore River Energy Center, LLC, Calpine Gilroy Cogen, L.P., Calpine Mid-Atlantic Generation, LLC, Calpine Mid-Atlantic Marketing, LLC, Calpine Mid Merit, LLC, Calpine Mid-Merit II, LLC, Calpine New Jersey Generation, LLC, Calpine Power America—CA, LLC, Calpine Vineland Solar, LLC, CCFC Sutter Energy, LLC, CES Marketing IX, LLC, CES Marketing X, LLC, Champion Energy, LLC, Champion Energy Marketing LLC, Champion Energy Services, LLC, CPN Bethpage 3rd Turbine, Inc., Creed Energy Center, LLC, Delta Energy Center, LLC, Geysers Power Company, LLC, Gilroy Energy Center, LLC, Goose Haven Energy Center, LLC, Granite Ridge Energy, LLC, Hermiston Power, LLC, KIAC Partners, Los Esteros Critical Energy Facility LLC, Los Medanos Energy Center, LLC, Metcalf Energy Center, LLC, Morgan Energy Center, LLC, Nissequogue Cogen Partners, North American Power and Gas, LLC, North American Power Business, LLC, O.L.S. Energy-Agnews, Inc., Otay Mesa Energy Center, LLC, Pastoria Energy Facility L.L.C., Pine Bluff Energy, LLC, RockGen Energy, LLC, Power Contract Financing, L.L.C., Russell City Energy Company, LLC, South Point Energy Center, LLC, Westbrook Energy Center, LLC, Zion Energy LLC, TBG Cogen Partners, Garrison Energy Center LLC.

Description: Notification of Change in Status of the Calpine MBR Sellers.

Filed Date: 7/31/18.

Accession Number: 20180731–5112.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–614–003.

Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: Compliance Filing—OATT, Sch. 12—Appendix A re: RTEP to be effective 4/5/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5110.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–1737–001.

Applicants: Northern Indiana Public Service Company.

Description: Tariff Amendment: Amendment to Reactive Power Rate Filing of NIPSCO to be effective 10/1/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5107.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–2110–000.

Applicants: Buckeye Power, Inc., PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Revised SA No. 4753—NITSA among

PJM and Buckeye Power, Inc. to be effective 10/1/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5088.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–2111–000.

Applicants: Midcontinent Independent System Operator, Inc., ITC Midwest LLC.

Description: § 205(d) Rate Filing: 2018–07–31_SA 3142 ITC Midwest-EDF Renewables E&P Agreement (J495) to be effective 9/30/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5111.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–2112–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2018–07–31_SA 3137 Entergy Arkansas-Cooperative Energy TSR CPA (F116) to be effective 6/28/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5141.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–2113–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2018–07–31_Revisions to Attachment O–MRES interest rate calculation language to be effective 8/1/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5153.

Comments Due: 5 p.m. ET 8/21/18.

Docket Numbers: ER18–2114–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3215R4 People's Electric Cooperative NITSA NOA to be effective 7/1/2018.

Filed Date: 7/31/18.

Accession Number: 20180731–5176.

Comments Due: 5 p.m. ET 8/21/18.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16747 Filed 8–3–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR18–30–000]

Targa NGL Pipeline Company LLC; Notice of Petition for Declaratory Order

Take notice that on July 27, 2018, pursuant to Rule 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207(a)(2) (2017), Targa NGL Pipeline Company LLC (Targa or Petitioner) filed a declaratory order petition seeking approval of the overall tariff rate structure and terms and conditions of service, including the proposed prorationing methodology for a new pipeline system that Targa is developing through a combination of newly constructed and leased capacity to transport mixed natural gas liquids from processing facilities in Coal and Hughes Counties, Oklahoma to Targa's affiliate's storage facilities in Mont Belvieu, Texas, all as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the 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.

Comment Date: 5:00 p.m. Eastern time on August 27, 2018.

Dated: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16751 Filed 8–3–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER18–2091–000]

Titan Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Titan Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 20, 2018.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies

of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the 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: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16750 Filed 8–3–18; 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: RP18–1000–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: Compliance filing Refund Report—Texas Eastern OFO Penalty Sharing (Rate Schedule S–2).
Filed Date: 7/30/18.
Accession Number: 20180730–5065.
Comments Due: 5 p.m. ET 8/13/18.

Docket Numbers: RP18–1001–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Rate Schedule S–2 Tracker Filing—EPC eff 8/1/2018 to be effective 8/1/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5068.
Comments Due: 5 p.m. ET 8/13/18.

Docket Numbers: RP18–1002–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Non-Conforming—Philadelphia Gas Works—FT, PSFT to be effective 9/1/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5088.
Comments Due: 5 p.m. ET 8/13/18.

Docket Numbers: RP18–1003–000.
Applicants: Dominion Energy Transmission, Inc.
Description: § 4(d) Rate Filing: DETI—July 30, 2018 Nonconforming Service Agreement to be effective 8/30/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5131.
Comments Due: 5 p.m. ET 8/13/18.

Docket Numbers: RP18–1004–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Non-Conforming—Rivervale—Tennessee, PSEG to be effective 9/1/2018.
Filed Date: 7/30/18.
Accession Number: 20180730–5196.
Comments Due: 5 p.m. ET 8/13/18.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 31, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–16748 Filed 8–3–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0273; FRL–9980–85]

Pesticide Product Registration; Receipt of Applications for New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received an application to register a new use for a pesticide product containing a currently registered active ingredient. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on this application.

DATES: Comments must be received on or before September 5, 2018.

ADDRESSES: Submit your comments, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (RD) (7505P), main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.* The mailing address is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that

includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Registration Applications

EPA has received an application to register a new use for a pesticide product containing a currently registered active ingredient. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on this application. Notice of receipt does not imply a decision by the Agency on this application.

New Uses

EPA registration numbers: 59639–107, 59639–138, 59639–202. *Docket ID number:* EPA–HQ–OPP–2017–0273. *Applicant:* The Interregional Research Project No. 4 (IR–4), Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540. *Active ingredient:* etoxazole. *Product type:* insecticide. *Proposed use:* sweet corn. Contact: RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: July 24, 2018.

Michael Goodis,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2018–16768 Filed 8–3–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R03–OAR–2018–0215; FRL–9981–71—Region 3]

Adequacy Status of Motor Vehicle Emission Budgets in Submitted State Implementation Plan for Transportation Conformity Purposes; District of Columbia, Maryland, and Virginia; Washington, DC-MD-VA 2008 8-Hour Ozone National Ambient Air Quality Standard Nonattainment Area Maintenance Plan 2014, 2025, and 2030 Motor Vehicle Emissions Budgets for Nitrogen Oxides and Volatile Organic Compounds

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this document, the Environmental Protection Agency (EPA or Agency) is notifying the public that the Agency has found that the 2014, 2025, and 2030 motor vehicle emissions budgets (MVEBs) for the ozone precursors nitrogen oxides (NO_X) and volatile organic compounds (VOC) contained in the maintenance plan for the Washington, DC–MD–VA 2008 ozone national ambient air quality standards (NAAQS) nonattainment area (hereafter ''the Washington Area'' or ''the Area'') are adequate for conformity purposes. As a result of EPA's finding, the Washington Area must use the NO_X and VOC MVEBs from the submitted maintenance plan for the Washington Area in future conformity determinations.

DATES: This finding is effective August 21, 2018.

FOR FURTHER INFORMATION CONTACT: Sara Calcinore, (215) 814–2043, or by email at *calcinore.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

On March 12, 2018, January 29, 2018, and January 3, 2018, the District of Columbia (the District), State of Maryland (Maryland), and Commonwealth of Virginia (Virginia), respectively, formally submitted, as revisions to their SIPs, a maintenance plan for the Washington Area. The maintenance plan includes NO_X and VOC MVEBs for the Washington Area for the years 2014 (the attainment year), 2025, and 2030. Under 40 CFR part 93, a MVEB for an area seeking redesignation to attainment must be established, at minimum, for the last year of the maintenance plan. A state may adopt MVEBs for other years as well. The MVEBs are the amount of emissions allowed in the SIP for on-road motor vehicles and establishes an emissions ceiling for the regional transportation network. The most recently approved MVEBs for the Washington Area originate from the attainment plan for the 1997 ozone NAAQS, which EPA found adequate on February 7, 2013 (78 FR 9044). The maintenance plan includes two sets of NO_X and VOC MVEBs, shown in Table 1 and Table 2. The MVEBs shown in Table 1 will be the applicable motor vehicle emissions budgets after the adequacy findings are effective. The MVEBs shown in Table 2 add a twenty percent (20%) transportation buffer to the mobile emissions inventory projections for NO_X and VOC in 2025 and 2030. The MVEBs shown in Table 2 that include a transportation buffer will be used only as needed in situations where the conformity analysis must be based on different data, models, or planning assumptions, including, but not limited to, updates to demographic, land use, or project-related assumptions, than were used to create the first set of MVEBs in the maintenance plan (Table 1). The technical analyses used to demonstrate compliance with the MVEBs and the need, if any, to use transportation buffers will be fully documented in the conformity analysis and follow the Transportation Planning Board's (TPB) interagency consultation procedures.

TABLE 1—WASHINGTON, DC-MD-VA MAINTENANCE PLAN ON-ROAD MVEBS

Year	MVEBs for NO_X on-road emissions (tons per day)	MVEBs for VOC on-road emissions (tons per day)
2014 (Attainment Year)	136.8	61.3
2025	40.7	33.2
2030	27.4	24.1

TABLE 2—WASHINGTON, DC-MD-VA MAINTENANCE PLAN ON-ROAD MVEBS WITH TRANSPORTATION BUFFERS

Year	MVEBs for NO_X on-road emissions (tons per day)	MVEBs for VOC on-road emissions (tons per day)
2014 (Attainment Year)	136.8	61.3
2025	48.8	39.8
2030	32.9	28.9

On May 21, 2018, EPA posted the availability of the 2014, 2025, and 2030 NO_X and VOC MVEBs for the Washington Area on EPA's website for the purpose of soliciting public comments as part of the adequacy process. The comment period closed on June 20, 2018 and EPA received no comments.

This document is simply an announcement of a finding that we have already made. EPA Region III sent letters to the District of Columbia Department of Energy and Environment (DOEE), Maryland Department of the Environment (DOE), and the Virginia Department of Environmental Quality (DEQ) on July 24, 2018 finding that the 2014, 2025, and 2030 NO_X and VOC MVEBs in the maintenance plan for the Washington Area submitted by the District, Maryland, and Virginia on March 12, 2018, January 29, 2018, and January 3, 2018, respectively, are adequate and must be used for transportation conformity determinations in the Washington Area.[1] The finding and associated letters are available at EPA's conformity website: *https://www.epa.gov/state-and-local-transportation.*

Transportation conformity is required by Clean Air Act (CAA) section 176(c). EPA's conformity rule requires that transportation plans, transportation improvement programs, and projects conform to state air quality implementation plans (SIPs) and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS.

The criteria by which we determine whether a SIP's MVEBs are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). We've described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004 preamble starting at 69 FR 40038, and we used the information in these resources in making our adequacy determination. Please note that an adequacy review is separate from EPA's completeness review and should not be used to prejudge EPA's ultimate approval action for the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

The finding for the 2014, 2025, and 2030 NO_X and VOC MVEBs contained in the maintenance plan for the Washington Area and the response to comments are available at EPA's conformity website: *https://www.epa.gov/state-and-local-transportation.*

Authority: 42 U.S.C. 7401–7671q.

Dated: July 24, 2018.

Cosmo Servidio,

Regional Administrator, Region III.

[FR Doc. 2018–16777 Filed 8–3–18; 8:45 am]

BILLING CODE 6560–50–P

[1] EPA originally informed the District, Maryland, and Virginia that the 2014, 2025, and 2030 MVEBs were adequate for use in transportation conformity analyses in letters dated July 18, 2018. EPA revised language in these letters and sent the revised letters to the District, Maryland, and Virginia on July 24, 2018. The original and revised letters are available online at *http://www.regulations.gov* as well as EPA's conformity website: *https://www.epa.gov/state-and-local-transportation.*

ENVIRONMENTAL PROTECTION AGENCY

[EPA–OW–2018–0270; FRL–9981–86–OW]

Announcement of the Per- and Polyfluoroalkyl Substances (PFAS) North Carolina Community Engagement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of an event.

SUMMARY: The Environmental Protection Agency (EPA) will host a Per- and Polyfluoroalkyl Substances (PFAS) community engagement in Fayetteville, North Carolina. The goal of the event is to allow the EPA to hear directly from North Carolina communities to understand ways the Agency can best support the work that is being done at the state, local, and tribal level. For more information on the event, visit the EPA's PFAS website: *https://www.epa.gov/pfas/pfas-community-engagement.* During the recent PFAS National Leadership Summit, the EPA announced plans to visit communities to hear directly from those impacted by PFAS. These engagements are the next step in the EPA's commitment to address challenges with PFAS. The EPA anticipates that the community engagements will provide valuable insight for the Agency's efforts moving forward. For more information, go to the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The event will be held on August 14, 2018, from 10 a.m. to 8 p.m., eastern time. The public listening session will begin at 3 p.m., eastern time.

ADDRESSES: The event will be held at the Crown Ballroom, 1960 Coliseum Drive, Fayetteville, North Carolina 28306. If you are unable to attend the North Carolina Community Engagement event, you will be able to submit comments at *http://www.regulations.gov:* Enter Docket ID No. EPA–OW–2018–0270. Citizens, including those that attend and provide oral statements, are encouraged to send written statements to the public docket. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Davina Marraccini, USEPA Region 4, 61 Forsyth Street SW (Mail Code 9T24), Atlanta, Georgia 30303–8960; telephone

number: 404–562–8293; email address: *marraccini.davina@epa.gov.*

SUPPLEMENTARY INFORMATION:

Details about Participating in the Event: The public is invited to speak during the August 14 listening session. Those interested in speaking can sign up for a 3-minute speaking slot on the EPA's website at *https://www.epa.gov/pfas/pfas-community-engagement.* Please check this website for event materials as they become available, including a full agenda, leading up to the event.

The PFAS National Leadership Summit: On May 22–23, 2018, the EPA hosted the PFAS National Leadership Summit. During the summit, participants worked together to share information on ongoing efforts to characterize risks from PFAS, develop monitoring and treatment/cleanup techniques, identify specific near-term actions (beyond those already underway) that are needed to address challenges currently facing states and local communities, and develop risk communication strategies that will help communities to address public concerns regarding PFAS.

The EPA wants to assure the public that their input is valuable and meaningful. Using information from the National Leadership Summit, public docket, and community engagements, the EPA plans to develop a PFAS Management Plan for release later this year. A summary of the North Carolina Community Engagement will be made available to the public following the event on the EPA's PFAS Community Engagement website at: *https://www.epa.gov/pfas/pfas-community-engagement.*

Dated: July 27, 2018.

Jennifer McLain,

Acting Director, Office of Ground Water and Drinking Water.

[FR Doc. 2018–16805 Filed 8–3–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to implement a new information collection, the Single-Counterparty Credit Limits (SCCL) (FR 2590; OMB No. 7100–NEW) and associated notice requirements in connection with the final SCCL rule published elsewhere in this issue of the **Federal Register**.

DATES: Comments must be submitted on or before October 5, 2018.

ADDRESSES: You may submit comments, identified by *FR 2590,* by any of the following methods:

- *Agency website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include OMB 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 *http://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personal identifying information at the commenter's request. Public comments may also be viewed electronically or in paper form in Room 3515, 1801 K Street NW (between 18th and 19th Streets NW), Washington, DC 20006 between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments. Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public website at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below. Federal Reserve Board Clearance Officer—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.

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. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal To Approve Under OMB Delegated Authority the Implementation of a New Information Collection

Report title: Single-Counterparty Credit Limits.

Agency form number: FR 2590.

OMB control number: 7100–NEW.

Frequency: Quarterly; event-generated for requests for temporary relief.

Respondents: U.S. bank holding companies (BHCs) with total consolidated assets that equal or exceed $250 billion, foreign banking organizations (FBOs) with U.S. banking operations and total consolidated assets that equal or exceed $250 billion, and the U.S. intermediate holding companies (IHCs) of such FBOs with total consolidated assets of at least $50 billion. Based on data as of December 31, 2017, this respondent panel would include 10 U.S. BHCs, 12 U.S. IHCs, and 82 FBOs.

Estimated number of respondents: 104; 3 for requests for temporary relief.

Estimated average hours per response: 254 for ongoing and 1,273 for one-time implementation and 10 for requests for temporary relief.

Estimated annual burden hours: 237,982 (which includes 132,392 for one-time implementation and 30 for requests for temporary relief).

General description of report: The proposed reporting form would provide the Federal Reserve with information to monitor a covered company's or a covered foreign entity's compliance with the SCCL set forth in the final SCCL rule published elsewhere in this issue of the **Federal Register**. The report would comprehensively capture the credit exposures of a respondent organization to its counterparties in accordance with the SCCL rule. A covered company is any U.S. BHC identified as a global systemically important BHC (GSIB) under the Board's Regulation Q and any other U.S. BHC with total consolidated assets that equal or exceed $250 billion. A covered foreign entity is any entity that is part of the combined U.S. operations of an FBO with total global consolidated assets that equal or exceed $250 billion, and any U.S. IHC of such an FBO with total consolidated assets that equal or exceed $50 billion.

The reporting form first asks for general information about the respondent organization (*e.g.,* the respondent organization's full legal name; the amount of its capital stock and surplus; whether the respondent would be considered a major covered company, major foreign banking organization, or major U.S. intermediate holding company under the final SCCL rule).[1] The reporting form also permits any respondent that is an FBO to certify that it is subject to and complies with large exposure standards on a consolidated basis established by its home-country supervisor that are consistent with the large exposures framework published by the Basel Committee on Banking Supervision. The reporting form then requests data required to calculate the respondent organization's credit exposures and requires identification of counterparties by name and by entity type (*e.g.,* sovereign entities, securitization funds). The form would require each respondent organization to report its top 50 counterparties.[2]

The FR 2590 includes nine schedules. Five of these schedules (Schedules G–1 through G–5) collect information related to the gross exposures of the respondent organization to various counterparties, as calculated pursuant to the methods in § 252.73 and 252.173, respectively, of the SCCL rule. A respondent organization must add the exposure amounts in the five G schedules to calculate its aggregate gross credit exposure.

A respondent organization would then calculate its net credit exposure by adjusting its gross credit exposures using Schedules M–1 and M–2, which collect information related to eligible collateral and other eligible risk mitigants (*e.g.,* eligible guarantees), respectively, pursuant to § 252.74 and 252.174 of the SCCL rule.

The respondent organization must take into account special provisions in the SCCL rule that require aggregation of certain connected counterparties due to economic interdependence—meaning the underlying risk of one counterparty's financial distress or failure would cause the financial distress or failure of another counterparty, as indicated by the presence of certain enumerated factors in the SCCL rule—or due to the presence of certain control relationships described in the SCCL rule.[3] Data relevant to understanding the presence of any relationships that require such aggregation are reported in Schedules A–1 and A–2.

In filling out the schedules described above, the respondent organization must report exposures by counterparty, with a single counterparty in each row. The reporting form requires each respondent organization to report its top 50 counterparties.

Detailed Discussion of Proposed Information Collection Activity

Schedule G–1: General Exposures

This schedule contains seven general gross credit exposure categories that are described in § 252.73, 252.75, 252.173, and 252.175 of the SCCL rule: (i) Deposits; (ii) loans and leases; (iii) debt securities or investments; (iv) equity securities or investments; (v) committed credit lines; (vi) guarantees and letters of credit; and (vii) securitization arising from the look-through approach.[4] These gross exposures are summed together, by counterparty, in the final column of Schedule G–1.

Schedule G–2: Repurchase Agreement Exposures

This schedule collects gross credit exposures arising from repurchase agreements and reverse repurchase agreements as provided in § 252.73 and 252.173 of the SCCL rule. It requires the respondent organization to identify the assets transferred and received in the transaction. Examples include sovereign entity debt, non-sovereign entity debt, main index equities,[5] and cash. The penultimate column asks for the total gross credit exposure under bilateral netting agreements. The final column tallies the total gross credit exposure resulting from these transactions by counterparty.

Schedule G–3: Securities Lending Exposures

This schedule collects similar information to that collected in Schedule G–2 with respect to securities lending and securities borrowing transactions. Again, the final column tallies the total gross credit exposure resulting from these transactions by counterparty.

Schedule G–4: Derivatives Exposures

Schedule G–4 requires the respondent organization to report the gross notional amount of its derivatives transactions—interest rate, foreign exchange rate, credit, equity, commodity, or other—by counterparty, consistent with § 252.73 and 252.173 of the SCCL rule. If the respondent organization has been authorized by the Board to use internal models to value such transactions, then

[1] ''Major covered company,'' ''major foreign banking organization,'' and ''major U.S. intermediate holding company'' are defined terms in the final SCCL rule. *See* § 252.71(y), 252.171(z), 252.171(aa).

[2] ''Counterparty'' is a defined term in the final SCCL rule. *See* § 252.71(e), 252.171(f).

[3] The requirement to aggregate counterparties based on these relationships can be found in § 252.76 and 252.176 of the SCCL rule.

[4] Calculation of gross credit exposure as a result of item (vii) (securitization arising from the look-through approach) is described in § 252.75 and 252.175 of the SCCL rule. Gross credit exposure to a securitization that does not require application of the look-through approach would be reported as either item (iii) (debt securities or investments) or item (iv) (equity securities or investments), as applicable.

[5] ''Main index'' is defined in the Board's capital rules, 12 CFR part 217.

it can report its exposures using the ''Internal Model Method'' columns.[6] Another column in Schedule G–4 is available for a respondent organization to report gross credit exposures resulting from qualifying master netting agreements.[7] All respondent organizations are required to complete the total gross credit exposure column.

Schedule G–5: Risk-Shifting Exposures

Schedule G–5 collects information related to gross credit exposures that have been impacted by the risk shifting requirements of § 252.74 and 252.174 of the SCCL rule. Risk-shifting is required when a respondent organization employs five types of credit risk mitigants: (i) Eligible collateral; (ii) eligible guarantees; (iii) eligible credit derivatives; (iv) other eligible hedges; or (v) unused portion of certain extensions of credit. Risk-shifting may also be required in connection with credit transactions involving exempt counterparties.[8] The final column aggregates the total gross exposure, by counterparty, due to risk-shifting.

Schedule M–1: Eligible Collateral

Sections 252.74 and 252.174 of the SCCL rule permit a respondent organization to subtract the value of any ''eligible collateral'' provided by a counterparty in connection with a particular transaction from its gross credit exposure for that transaction.[9] The value of all such eligible collateral is reported in Schedule M–1. Eligible collateral include, but are not limited to, sovereign debt, non-sovereign debt, main index equities, other publicly traded equities, and cash. The final column sums the total credit risk mitigation impact due to eligible collateral, by counterparty.

Schedule M–2: General Risk Mitigants

Schedule M–2 collects information related to credit risk mitigation techniques other than the receipt of eligible collateral used by the firm to reduce its gross credit exposure in a given transaction. Permitted credit risk mitigation methods, described in § 252.74 and 252.174 of the SCCL rule, are (i) eligible guarantees; (ii) eligible credit derivatives; (iii) other eligible hedges; (iv) unused portion of certain extensions of credit; and (v) credit transactions involving exempt entities. The final column sums the total credit risk mitigation effected by use of these techniques, by counterparty.

Summary Sheet

The reporting form contains a summary sheet that sums the respondent organization's aggregate gross credit exposure (as reported in the final columns of each of the five G schedules); calculates the respondent organization's aggregate net credit exposures by reducing its aggregate gross credit exposure by its aggregate credit risk mitigants (calculated by taking the sum of the final columns of the two M schedules); and divides the respondent organization's aggregate net credit exposure by its eligible capital base.[10] The resulting ratio shows whether the respondent organization's aggregate net credit exposures comply with the limits of the SCCL rule.

Schedule A–1: Economic Interdependence

Sections 252.76(b) and 252.176(b) of the SCCL rule require a covered company, a covered foreign entity, or U.S. IHC with total consolidated assets that equal or exceed $250 billion to aggregate its net credit exposures to counterparties that are economically interdependent—meaning that the underlying risk of one counterparty's financial distress or failure would cause the financial distress or failure of another counterparty.[11] Those sections enumerate specific factors that those covered companies or covered foreign entities must consider in order to assess whether counterparties are economically interdependent. Such factors include whether 50 percent or more of one counterparty's gross revenue is derived from the other counterparty, or whether two or more counterparties rely on the same source for the majority of their funding.[12] The SCCL rule requires that counterparties that must be aggregated be treated as a single counterparty (reported in Schedule A–1 as an ''interconnected counterparty group'') for purposes of the aggregate net credit exposure limits of the SCCL rule. Schedule A–1 requires the respondent organization to provide its aggregate net credit exposure to each member of the interconnected counterparty group (one per column). The final column of Schedule A–1 sums the total net credit exposure of the respondent organization to each connected counterparty group.

Schedule A–2: Control Relationships

Sections 252.76(c) and 252.176(c) of the SCCL rule require a covered company, a covered foreign entity, or U.S. IHC with total consolidated assets that equal or exceed $250 billion to aggregate exposures to counterparties due to the presence of certain control relationships.[13] These sections require that counterparties that are connected by certain specified control relationships must be treated as a single counterparty (reported in Schedule A–2 as a ''control counterparty group'') for purposes of the aggregate net credit exposure limits of the SCCL rule. Schedule A–2 requires the respondent organization to provide its aggregate net credit exposure to each member of the control counterparty group (one per column). The final column of Schedule A–2 sums the total net credit exposure of the respondent organization to each control counterparty group.

In addition, certain provisions in the SCCL rule permit a covered company or covered foreign entity to request temporary relief from specific requirements of the rule. Specifically, the SCCL rule permits a covered company or covered foreign entity to request temporary relief from

[6] If the respondent organization has not been authorized by the Board to use internal models, these columns would remain blank.

[7] ''Qualifying master netting agreement'' is defined in § 252.71(cc) and 252.171(ee) of the SCCL rule.

[8] *See* § 252.74(g) and 252.174(g) of the SCCL rule. ''Exempt counterparty'' is defined in the SCCL rule to mean an entity that is expressly exempted from or otherwise excluded from the requirements of the SCCL rule. *See* §§ 252.71(q) and 252.171(r) of the SCCL rule.

[9] ''Eligible collateral'' is defined in sections 252.71(k) and 252.171(*l*).

[10] As noted above, a respondent organization's aggregate net credit exposure limits under the SCCL rule are based on a percentage of either its capital stock and surplus or its tier 1 capital, depending on the size of the respondent organization. ''Eligible capital base,'' as reported on this form, refers to either the respondent organization's capital stock and surplus or its tier 1 capital, as applicable.

[11] This requirement does not apply to U.S. IHCs with total consolidated assets of less than $250 billion, unless the Board determines in writing after notice and opportunity for hearing that the covered foreign entity must aggregate its exposures to two or more counterparties to prevent evasions of the purposes of subpart Q of Regulation YY (12 CFR part 252, subpart Q). *See* § 252.176 of the SCCL rule.

[12] A covered company, foreign banking organization that is a covered foreign entity, or U.S. IHC with total consolidated assets that equal or exceed $250 billion is required to conduct an assessment for economic interdependence only if its aggregate net credit exposure to a counterparty exceeds 5 percent of its tier 1 capital. *See* §§ 252.76(b) and 252.176(b) of the SCCL rule. If none of the enumerated factors are met, then the covered company or covered foreign entity need not aggregate exposures to those counterparties unless the Board determines that one or more other counterparties of the covered company or covered foreign entity are economically interdependent. *Id.*

[13] This requirement does not apply to U.S. IHCs with total consolidated assets of less than $250 billion, unless the Board determines in writing after notice and opportunity for hearing that a covered company must aggregate its exposures to two or more counterparties to prevent evasions of the purposes of subpart Q of Regulation YY (12 CFR part 252, subpart Q). *See* § 252.176 of the SCCL rule.

requirements to aggregate one or more counterparties even if one or more factors indicating economic interdependence or control relationships are met, subject to certain conditions, including that such relief be in the public interest and consistent with the purpose of the rule.[14] The SCCL rule also permits a covered company or covered foreign entity that is not in compliance with the requirements of the rule to request a special temporary credit exposure limit exemption from the Board to permit continued credit transactions with that counterparty, based upon a finding that those transactions are necessary or appropriate to preserve the safety and soundness of the covered company or U.S. financial stability.[15]

Legal authorization and confidentiality: Section 165(e) of the Dodd-Frank Act (12 U.S.C. 5365(e)) and section 5(c)(1) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(c)(1)) authorize the Board to require these BHCs, FBOs, and U.S. IHCs to file a reporting form such as the proposed FR 2590 with the Board. The proposed FR 2590 would be mandatory for U.S. BHCs with total consolidated assets that equal or exceed $250 billion, FBOs with U.S. banking operations and total consolidated assets that equal or exceed $250 billion, and U.S. IHCs of such FBOs with at least $50 billion in total consolidated assets.

The data collected on this proposed form includes financial information that is not normally disclosed by the respondent organizations, the release of which would likely cause substantial harm to the competitive position of the respondent organization if made publicly available. Therefore, the data collected on this form would be kept confidential under exemption 4 of the Freedom of Information Act, which protects from disclosure trade secrets and commercial or financial information (5 U.S.C. 552(b)(4)).

Regarding notices associated with requests for temporary relief from specific requirements of the SCCL rule, a firm that wishes information in these notices to be kept confidential in accordance with exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)) may request confidential treatment under the Board's rules regarding confidential treatment of information at 12 CFR 261.15. The Board's Legal Division will be asked to review the confidentiality status of such notices.

By order of the Board of Governors of the Federal Reserve System, July 24, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–16132 Filed 8–3–18; 8:45 am]

BILLING CODE 6210–01–P

[14] *See* §§ 252.76(b)(3), 252.76(c)(2), 252.176(b)(3), and 252.176(c)(2) of the SCCL rule.

[15] *See* § 252.78(c)(2) and 252.178(c)(2) of the SCCL rule.

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 20, 2018.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Ernest E. (Gene) Dillard, Sheila A. Dillard, and Aaron D. Dillard, all of Tulsa Oklahoma, and Sarah E. Dillard, Dallas, Texas;* to acquire voting shares of First Pryor Bancorp, Inc., Pryor, Oklahoma, and thereby be approved as members of the Dillard family group, which owns voting shares of First Pryor Bancorp, Inc. and thereby indirectly owns First Pryority Bank, Pryor, Oklahoma, and Locust Grove Banshares, Inc., Locust Grove, Oklahoma, which owns Lakeside Bank of Salina, Salina, Oklahoma, and Bank of Locust Grove, Locust Grove, Oklahoma.

Board of Governors of the Federal Reserve System, July 31, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–16701 Filed 8–3–18; 8:45 am]

BILLING CODE 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 August 31, 2018.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Steele Holdings, Inc., Tyler, Texas;* to merge with Joaquin Bankshares, Inc., Huntington, Texas, and thereby indirectly acquire Texas State Bank, Joaquin, Texas.

Board of Governors of the Federal Reserve System, August 1, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–16753 Filed 8–3–18; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act

(12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan 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 application also will 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 HOLA (12 U.S.C. 1467a(e)). 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 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). 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 August 28, 2018.

A. Federal Reserve Bank of Minneapolis (Mark A. Rauzi, Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *MidCountry Acquisition Corp., Minneapolis, Minnesota;* to become a savings and loan holding company by acquiring 100 percent of the voting shares of MidCountry Bank, Bloomington, Minnesota.

Board of Governors of the Federal Reserve System, July 31, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2018–16702 Filed 8–3–18; 8:45 am]

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FEDERAL TRADE COMMISSION

Hearings on Competition and Consumer Protection in the 21st Century

AGENCY: Federal Trade Commission.

ACTION: Notice of hearings and request for comments.

SUMMARY: The Federal Trade Commission seeks comment in connection with a forthcoming series of public hearings in the fall and winter 2018 to examine whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. These hearings will cover a range of issues listed in the **SUPPLEMENTARY INFORMATION** section below. The Commission seeks the views of consumers, business representatives, economists, lawyers, academics, information technology professionals, and other interested parties. Commenters are invited to address one or more of the following topics generally, or with respect to a specific industry.

DATES: The hearings will begin in September 2018 and are expected to continue through January 2019, and will consist of 15 to 20 public sessions. The sessions will be held in various locations throughout Washington, DC and in other parts of the country. For this stage of the public comment process, comments will be accepted on or before August 20, 2018.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Public Comments portion of the **SUPPLEMENTARY INFORMATION** section below. Comments should refer to ''Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.'' If an interested party wishes to comment on multiple topics, we encourage filing a separate comment for each topic. If an interested party wishes to make general comments about the hearings, we encourage filing a comment in response to Topic 1, using this link: *https://www.regulations.gov/docket?D=FTC-2018-0048.* For this stage of the public comment process, comments will be accepted until August 20, 2018. If you prefer to file a comment in hard copy, write ''Competition and Consumer Protection in the 21st Century Hearing, Project Number P181201,'' on your comment and on the envelope and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex C), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex C), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Derek Moore, *Office of Policy Planning,* 202–326–3367, or John Dubiansky, *Office of Policy Planning,* 202–326–2182 or email us at *CCPhearings@ftc.gov.*

SUPPLEMENTARY INFORMATION: The mission of the Federal Trade Commission (''FTC'' or ''Commission'') is to promote competition and to protect consumers from unfair and deceptive practices. In support of pursuing a vigorous law enforcement agenda, the FTC engages in substantial research to stay informed of market developments, shape its policy agenda, and identify opportunities to develop the law consistent with its enforcement authority. Beginning in September 2018, the FTC will hold a series of multi-day, multi-part public hearings (''hearings'') to consider whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. The hearings pay tribute to, and are modeled after, the FTC's 1995 Global Competition and Innovation Hearings under the leadership of then-Chairman Robert Pitofsky. Chairman Pitofsky's hearings ''were the first major step in establishing the FTC as a key modern center for . . . 'competition policy research and development' '' and ''sought to 'articulate recommendations that would effectively ensure the competitiveness of U.S. markets without imposing unnecessary costs on private parties or governmental processes.' '' [1] They ''re-energized one of the FTC's most valuable functions—to gather leaders in business, economics, law, and related disciplines to discuss tough, emerging problems and prepare public reports on the facts, issues, governing law, and the need, as appropriate, for change.'' [2] Subsequent to the hearings, the Commission released two staff reports ''*Anticipating the 21st Century*'' on competition and consumer protection policy, respectively.[3] This new series of hearings honors Chairman Pitofsky's legacy, and complements and enhances the agency's robust enforcement program.

''The progress of the Federal Trade Commission in its modern era has built

[1] Timothy J. Muris, *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky,* 72 Antitrust L.J. 772, 773 (2005).

[2] *Id.* at 774.

[3] Fed. Trade Comm'n Staff, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (1996), *https://www.ftc.gov/system/files/documents/reports/anticipating-21st-century-competition-policy-new-high-tech-global-marketplace/gc_v1.pdf;* Fed. Trade Comm'n Staff, Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace (1996), *https://www.ftc.gov/system/files/documents/reports/anticipating-21st-century-competition-policy-new-high-tech-global-marketplace/gc_v2.pdf.*

heavily upon the willingness of its people to assess their work critically and explore possibilities for improvement.''[4] The hearings and associated public comment process will provide opportunities for FTC staff and leadership to obtain input from a broad and diverse range of interested stakeholders and experts, and will stimulate thoughtful internal and external evaluation of the FTC's near- and long-term law enforcement and policy agenda. The hearings may identify areas for additional study, enforcement, advocacy, and policy guidance, including improvements to the agency's investigation and law enforcement processes.

The Commission will invite public comment in stages throughout the term of the hearings.

- Through August 20, 2018, the Commission will accept public comment on the topics identified in this announcement. Each topic description includes issues of particular interest to the Commission, but comments need not be restricted to these subjects.
- Additionally, the Commission will invite comments on the topic of each hearing session. The FTC will issue a news release before each session to inform the public of the agenda, the date and location, and instructions on submitting comment.
- The Commission will also invite public comment upon completion of the entire series of hearings.

The Commission is especially interested in new empirical research that indicates (or contraindicates) a causal relationship with respect to any of the topics identified for comment. Upon review and consideration of a public comment highlighting such research, the Commission may request the voluntary sharing of the data and models underlying the comment, in accordance with general principles of peer review of social scientific inquiry, and consistent with confidentiality or other limitations on the sharing of such data.

Commenters are invited to address one or more of the following topics generally, or with respect to a specific industry, such as the health care,[5] high-tech,[6] or energy[7] industries. (1) The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings. Of particular interest to the Commission: (a) The continued viability of the consumer welfare standard for antitrust law enforcement and policy; (b) economic analysis and evidence on market competitiveness, enforcement policy, and the effects of past FTC enforcement decisions; (c) the identification of new developments in markets and in business-to-business or business-to-consumer relationships; (d) the benefits and costs associated with the growth of international competition and consumer protection enforcement regimes; and (e) the advisory and advocacy role of the FTC regarding enforcement efforts by competition and consumer protection agencies outside the United States, when such efforts have a direct effect on important U.S. interests. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0048.*

(2) Competition and consumer protection issues in communication, information, and media technology networks. FTC staff's 1996 *Competition Policy in the New High-Tech Global Marketplace* report[8] discussed the competitive analysis of both unilateral and joint conduct in industries subject to network effects; and FTC staff's 2007 *Broadband Connectivity and Competition Policy* report[9] addressed similar issues in the broadband internet access service market. Of particular interest to the Commission: (a) Whether contemporary industry practices in networked industries continue to present competition and consumer protection concerns like those discussed in the prior reports; (b) the welfare effects of regulatory intervention to promote standardization and interoperability; (c) the application of the FTC's Section 5 authority to the broadband internet access service business; and (d) unique competition and consumer protection issues associated with internet and online commerce. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0049.*

(3) The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring ''platform'' businesses.[10] Of particular interest to the Commission: (a) Whether the platform business model has unique implications for antitrust and consumer protection law enforcement and policy; and (b) whether and how the presence of ''network effects'' should affect the Commission's analysis of competition and consumer protection issues in these markets. Comments filed in electronic form should be submitted using this

[4] The Federal Trade Commission at 100: Into Our 2nd Century: The Continuing Pursuit of Better Practices, A Report by Federal Trade Commission Chairman William E. Kovacic (2009), *https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf* at (i).

[5] *See, e.g.,* Fed. Trade Comm'n, Emerging Health Care Issues: Follow-On Biologic Drug Competition (2009), *https://www.ftc.gov/sites/default/files/documents/reports/emerging-health-care-issues-follow-biologic-drug-competition-federal-trade-commission-report/p083901biologicsreport.pdf;* Fed Trade Comm'n & Dep't of Justice, Improving Health Care: A Dose of Competition (2004), *https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf.*

[6] *See, e.g.,* Fed. Trade Comm'n Staff, Protecting Consumers in the Next Tech-Ade (2008), *https://www.ftc.gov/sites/default/files/documents/reports/protecting-consumers-next-tech-ade-report-staff-federal-trade-commission/p064101tech.pdf;* Fed. Trade Comm'n Staff, Mobile Privacy Disclosures: Building Trust Through Transparency (2013), *https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf.*

[7] *See, e.g.,* Fed. Trade Comm'n, The Federal Trade Commission Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases: A Commission Report to Congress (2006), *https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf;* Fed. Trade Comm'n, Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition (2005), *https://www.ftc.gov/sites/default/files/documents/reports/gasoline-price-changes-dynamic-supply-demand-and-competition-federal-trade-commission-report-2005/050705gaspricesrpt.pdf;* Fed Trade Comm'n Staff, The Petroleum Industry: Mergers, Structural Change, And Antitrust Enforcement (2004), *https://www.ftc.gov/sites/default/files/documents/reports/petroleum-industry-mergers-structural-change-and-antitrust-enforcement-report-staff-federal-trade/040813mergersinpetrolberpt.pdf;* Fed. Trade Comm'n Staff, Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition (2001), *https://www.ftc.gov/sites/default/files/documents/reports/competition-and-consumer-protection-perspectives-electric-power-regulatory-reform-focus-retail/electricityreport.pdf;* Fed. Trade Comm'n Staff, Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform (2000), *https://www.ftc.gov/reports/competition-consumer-protection-perspectives-electric-power-regulatory-reform.*

[8] Fed. Trade Comm'n Staff, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (1996), *https://www.ftc.gov/system/files/documents/reports/anticipating-21st-century-;competition-policy-new-high-tech-global-marketplace/gc_v1.pdf* at Ch. 9.

[9] Fed. Trade Comm'n Staff, Broadband Connectivity Competition Policy (2007), *https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.*

[10] The Commission's workshop and report on the Sharing Economy addressed many issues related to ''platform'' businesses. Fed. Trade Comm'n Staff, The Sharing Economy: Issues Facing Platforms, Participants & Regulators (2016), *https://www.ftc.gov/system/files/documents/reports/sharing-✖ftc_staff_report_on_the_sharing_economy.pdf.*

link: *https://www.regulations.gov/docket?D=FTC-2018-0050.*

(4) The intersection between privacy, big data, and competition.[11] Of particular interest to the Commission: (a) Data as a dimension of competition, and/or as an impediment to entry into or expansion within a relevant market; (b) competition on privacy and data security attributes (between, for example, social media companies or app developers), and the importance of this competition to consumers and users; (c) whether consumers prefer free/ad-supported products to products offering similar services or capabilities but that are neither free nor ad-supported; (d) the benefits and costs of privacy laws and regulations, including the effect of such regulations on innovation, product offerings, and other dimensions of competition and consumer protection; (e) the benefits and costs of varying state, federal and international privacy laws and regulations, including the conflicts associated with those standards; and (f) competition and consumer protection implications of use and location tracking mechanisms. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0051.*

(5) The Commission's remedial authority to deter unfair and deceptive conduct in privacy and data security matters. Of particular interest to the Commission: (a) The efficacy of the Commission's use of its current remedial authority; and (b) the identification of any additional tools or authorities the Commission may need to adequately deter unfair and deceptive conduct related to privacy and data security. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0052.*

(6) Evaluating the competitive effects of corporate acquisitions and mergers. Of particular interest to the Commission: (a) The economic and legal analysis of vertical and conglomerate mergers; (b) whether the doctrine of potential competition is sufficient to identify and analyze the competitive effects (if any) associated with the acquisition of a firm that may be a nascent competitive threat; (c) the analysis of acquisitions and holding of a non-controlling ownership interest in competing companies; (d) the identification and evaluation of the exercise of monopsony power and buyer-power as arising from consolidation; (e) the identification and evaluation of differentiated but potentially competing technologies, and of disruptive or generational changes in technology, and how such technologies affect competitive effects analysis; and (f) empirical validation of the analytical tools used to evaluate acquisitions and mergers (*e.g.,* models of upward pricing pressure, gross upward pricing pressure, net innovation pressure, critical loss analysis, compensating marginal cost reduction, merger simulation, natural experiments, and empirical estimation of demand systems). Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0053.*

(7) The evidence and analysis of monopsony power, including but not limited to, in labor markets. Of particular interest to the Commission: (a) The analytic framework applied to conduct and transactions that negatively or positively affect competition between employers as buyers in labor markets; (b) evidence regarding the existence and exercise of buyer monopsony or market power in properly defined markets, including by employers in labor markets; (c) the exercise of monopsony power through collusion, including in labor markets through employer collusion; and (d) the use of non-competition agreements and the conditions under which their use may be inconsistent with the antitrust laws. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0054.*

(8) The role of intellectual property and competition policy in promoting innovation. The Commission has taken a dual-pronged approach to issues arising at the intersection of intellectual property and antitrust law: (1) Antitrust enforcement against harmful business conduct involving intellectual property; and (2) competition advocacy regarding the development of intellectual property law. The Commission has articulated its enforcement positions in a number of public documents, including the joint Commission and Department of Justice 2017 *Antitrust Guidelines for the Licensing of Intellectual Property*[12] and 2007 *Antitrust Enforcement and Intellectual Property Rights* report.[13] The Commission has engaged in substantial competition advocacy with respect to the legal and policy regime related to intellectual property rights, including its three ''IP'' reports: The 2003 *To Promote Innovation*[14] report, the 2011 *Evolving IP Marketplace*[15] report, and the 2016 *Patent Assertion Entity Activity*[16] report. Of particular interest to the Commission: (a) The adoption and utilization of novel business practices (beyond those addressed in the Commission's prior guidance and actions)[17] with respect to obtaining or enforcing intellectual property rights, where such practices may be inconsistent with the antitrust laws; (b) identification of contemporary patent doctrine that substantially affects innovation and raises the greatest challenges for competition policy; (c) evaluation of intellectual property litigation in competitive effects analysis; and (d) evaluation of efficiencies and entry considerations in technology markets in merger analysis. Comments filed in electronic form should be submitted using this link: *https://*

[11] The Commission has previously issued reports related to this area of inquiry, including *id.;* Fed. Trade Comm'n Staff, Internet of Things: Privacy and Security in a Connected World (2015), *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf;* and Fed. Trade Comm'n, Big Data: A Tool for Inclusion or Exclusion? (2016), *https://www.ftc.gov/system/files/;documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.*

[12] Fed. Trade Comm'n & U.S. Dep. Justice, Guidelines for the Licensing of Intellectual Property (2017), *https://www.justice.gov/atr/IPguidelines/download.*

[13] Fed. Trade Comm'n & U.S. Dep. Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), *https://www.justice.gov/atr/public/hearings/ip/222655.pdf.*

[14] Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition Law and Policy (2003), *https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf.*

[15] Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011), *https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.*

[16] Fed. Trade Comm'n, Patent Assertion Entity Activity: An FTC Study (2016), *https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.*

[17] Enforcement and policy issues with respect to standard essential patents are discussed in Fed. Trade Comm'n & U.S. Dep. Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), *https://www.justice.gov/atr/public/hearings/ip/222655.pdf* and have been the subject of seven FTC enforcement matters. Licensing conduct, such as tying and grantbacks, is discussed in the revised Fed. Trade Comm'n & U.S. Dep. Justice, Guidelines for the Licensing of Intellectual Property (2017), *https://www.justice.gov/atr/IPguidelines/download.* The behavior of Patent Assertion Entities is discussed in Fed. Trade Comm'n, Patent Assertion Entity Activity: An FTC Study (2016), *https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.*

www.regulations.gov/docket?D=FTC-2018-0055.

(9) The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics. Of particular interest to the Commission: (a) The welfare effects and privacy implications associated with the application of these technologies to consumer advertising and marketing campaigns; (b) the welfare implications associated with use of these technologies in the determination of a firm's pricing and output decisions; and (c) whether restrictions on the use of computer and machine learning and data analytics affect innovation or consumer rights and opportunities in existing or future markets, or in the development of new business models. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0056.*

(10) The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices. Of particular interest to the Commission: (a) Whether and to what extent other enforcement entities authorized to prosecute unfair or deceptive acts and practices apply FTC precedent in their enforcement efforts; and (b) whether the Commission can, and to what extent it should, take steps to promote harmonization between the FTC Act and similar statutes. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0057.*

(11) The agency's investigation, enforcement and remedial processes. Of particular interest to the Commission: (a) Whether the agency's investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct; (b) the extent to which the Commission's Part 3 process facilitates timely and efficient administrative litigation; (c) the efficacy of the Commission's current use of its remedial authority; and (d) willingness of affected parties to cooperate with the Commission in conducting post-investigation and enforcement retrospectives. Comments filed in electronic form should be submitted using this link: *https://www.regulations.gov/docket?D=FTC-2018-0058.*

Public Comments: Interested parties may submit written comments on the topics listed above to the FTC. Electronic submission is preferred; comments in paper form are also accepted. FTC staff may use these comments in any subsequent reports or policy papers. Comments should refer to ''Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201.'' If an interested party wishes to comment on multiple topics, we encourage filing a separate comment for each topic. If an interested party wishes to make general comments about the hearings, we encourage filing a comment in response to Topic 1, using this link: *https://www.regulations.gov/docket?D=FTC-2018-0048.* For this stage of the public comment process, comments will be accepted until August 20, 2018.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. If you prefer to file your comment on paper, write ''Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex C), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex C), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment may be placed on the publicly accessible FTC website at *https://www.ftc.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

If any entity has provided funding for research, analysis, or commentary that is included in a submitted public comment, such funding and its source should be identified on the first page of any submitted comment.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. For this stage of the comment process, the Commission will consider all timely and responsive public comments that it receives on or before August 20, 2018.

The FTC Act and other laws that the Commission administers permit the collection of public comments. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, available at *https://www.ftc.gov/site-information/privacy-policy.*

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2018–16608 Filed 8–3–18; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension

Correction

In notice document 2018–15979, appearing on pages 35477 through 35485 in the issue of Thursday, July 26, 2018, make the following correction:

On page 35481, the heading of the first table should read ''Regulation E: Recordkeeping and Disclosures—Cost''.

[FR Doc. C1–2018–15979 Filed 8–3–18; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0007: Docket No. 2018–0003; Sequence No. 6]

Information Collection; Subcontracting Plans

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the FAR Council invites the public to comment upon a renewal concerning small business subcontracting plans.

DATES: Submit comments on or before October 5, 2018.

ADDRESSES: The FAR Council invites interested persons to submit comments on this collection by either of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. Go to *http://www.regulations.gov* and follow the instructions on the site.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405. ATTN: Ms. Mandell/IC 9000–0007, Subcontracting Plans.

Instructions: All items submitted must cite Information Collection 9000–0007, Subcontracting Plans. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, at *http://www.regulations.gov.* Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail). This information collection is pending at the FAR Council. The Council will submit it to OMB within 60 days from the date of this notice.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or email *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Overview of Information Collection

Description of the Information Collection

1. *Type of Information Collection:* Revision/Renewal of a currently approved collection.
2. *Title of the Collection*— Subcontracting Plans.
3. *Agency form number, if any:* —— SF 294.

Solicitation of Public Comment

Written comments and suggestions from the public should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

B. Purpose

This information collection requirement, OMB Control No. 9000–0007, currently titled ''Summary Subcontract Report,'' is proposed to be retitled ''Subcontracting Plans,'' due to consolidation with currently approved information collection requirement OMB Control No. 9000–0006, Subcontracting Plans/Individual Subcontract Report (SF 294) and ISRS, and 9000–0192, Utilization of Small Business Subcontractors.

This clearance covers the information that offerors and contractors must submit to comply with the requirements in Federal Acquisition Regulation (FAR) 52.219–9, Small Business Subcontracting Plans, regarding subcontracting plans as follows:

1. Subcontracting plan. In accordance with Section 8(d) of the Small Business Act (15 U.S.C. 637(d)), any contractor receiving a contract for more than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance. Further, 15 U.S.C. 637(d) imposes the requirement that contractors receiving a contract that is expected to exceed, or a contract modification that causes a contract to exceed, $700,000 ($1.5 million for construction) and has subcontracting possibilities, shall submit an acceptable subcontracting plan that provides maximum practicable opportunities for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Specific elements required to be included in the plan are specified in section 8(d) of the Small Business Act and implemented in FAR subpart 19.7 and the clause at 52.219–9.

2. Summary Subcontract Report (SSR). In conjunction with the subcontracting plan requirements, contractors with subcontracting plans must submit an annual summary of subcontracts awarded as prime and subcontractors for each specific Federal Government agency. Contractors submit the information in a SSR through the Electronic Subcontracting Reporting System (eSRS). This is required for all contractors with subcontracting plans regardless of the type of plan (*i.e.,* commercial or individual).

3. Individual Subcontract Report (ISR). In conjunction with the subcontracting plan requirements, contractors with individual subcontracting plans must submit semi-annual reports of their small business subcontracting progress. Contractors submit the information through eSRS in

an ISR, the electronic equivalent of the Standard Form (SF) 294, Subcontracting Report for Individual Contracts. Contracts that are not reported in the Federal Procurement Data System (FPDS) in accordance with FAR 4.606(c)(5) do not submit ISRs in eSRS; they will continue to use the SF 294 to submit the information to the agency.

4. Written explanation for not using a small business subcontractor as specified in the proposal or subcontracting plan. Section 1322 of the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240, amends the Small Business Act (15 U.S.C. 637(d)(6)) to require as part of a subcontracting plan that a prime contractor make good faith effort to utilize a small business subcontractor during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. If a prime contractor does not utilize a small business subcontractor as described above, the prime contractor is required to explain, in writing, to the contracting officer the reasons why it is unable to do so.

C. Annual Reporting Burden

1. Subcontracting plan. Subcontracting plans are provided on a contract-by-contract basis for individual subcontracting plans. Individual subcontracting plans cover the entire contract period, including options. Commercial plans are provided on an entity basis and cover the fiscal year of the contractor. The time required for development of the plan (including commercial and individual plans) is estimated as follows:

Respondents: 4,350.
Responses per Respondent: 1.
Total Annual Responses: 4,350.
Hours per Response: 5.
Total Burden Hours: 21,750.

2. Summary Subcontract Report (SSR). SSRs are submitted annually for all types of subcontracting plans. One SSR is submitted for each commercial subcontracting plan. For individual subcontracting plans, an SSR is required for every agency that funds work under the contract that the plan covers. Time required for reading, preparing information, and data entry into eSRS is estimated as follows:

Commercial plan
Respondents: 1,653.
Responses per Respondent: 1.
Total Annual Responses: 1,653.
Hours per Response: 2.
Total Burden Hours: 3,306.

Individual plan without order level reporting
Respondents: 10,885.
Responses per Respondent: 1.
Total Annual Responses: 10,885.
Hours per Response: 1.5.
Total Burden Hours: 16,327.5.

Individual plan with order level reporting
Respondents: 197.
Responses per Respondent: 3.
Total Annual Responses: 591.
Hours per Response: 1.5.
Total Burden Hours: 886.5.

3. Individual Subcontract Report (ISR). ISRs are submitted semi-annually for each contract with an individual subcontracting plan. The ISR consists of data for subcontracting under a given contract. ISRs are not required for commercial plans. Time required for reading, preparing information, and data entry into eSRS is estimated as follows:

Individual plan without order-level reporting requirement
Respondents: 10,855.
Responses per Respondent: 2.
Total Annual Responses: 21,710.
Hours per Response: 2.
Total Burden Hours: 43,420.

Individual plan—with order-level reporting requirement
Respondents: 197.
Responses per Respondent: 2.
Total Annual Responses: 394.
Hours per Response: 5.
Total Burden Hours: 1,970.

4. Written explanation for not using a small business subcontractor as specified in the proposal or subcontracting plan. This explanation is submitted on a contract-by-contract basis. FPDS for FY 2017 identified 3,808 contracts with individual subcontracting plans and 542 entities awarded contracts with commercial plans, for a total of 4,350 plans for FY 2017. We estimate that at most 50%, or 2,175, of these contracts with subcontracting plans may have instances of the prime contractor not using a small business subcontractor to the same extent used in preparing the bid or proposal. We estimate two hours as the average time required to read and prepare information for this collection.

Respondents: 2,175.
Responses per Respondent: 1.
Total Annual Responses: 2,175.
Hours per Response: 2.
Total Burden Hours: 4,350.

5. Summary.
Respondents: 30,312.
Total Annual Responses: 41,758.
Total Burden Hours: 92,010.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 9000–0007, Subcontracting Plans, in all correspondence.

William Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2018–16744 Filed 8–3–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0079; Docket No. 2018–0003; Sequence No. 14]

Information Collection; Travel Costs

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the FAR Council invites the public to comment upon a renewal concerning travel costs.

DATES: Submit comments on or before October 5, 2018.

ADDRESSES: The FAR Council invites interested persons to submit comments on this collection by either of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. Go to *http://www.regulations.gov* and follow the instructions on the site.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405. ATTN: Ms. Mandell/IC 9000–0079, Travel Costs.

Instructions: All items submitted must cite Information Collection 9000–0079, Travel Costs. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, at *http://www.regulations.gov.*

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please

check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail). This information collection is pending at the FAR Council. The Council will submit it to OMB within 60 days from the date of this notice.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or email *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Overview of Information Collection

Description of the Information Collection

1. *Type of Information Collection:* Revision/Renewal of a currently approved collection.
2. *Title of the Collection:* Travel Costs.
3. *Agency form number, if any:* N/A.

Solicitation of Public Comment

Written comments and suggestions from the public should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

B. Purpose

This information collection requirement, OMB Control No. 9000–0079, currently titled ''Corporate Aircraft Costs,'' is proposed to be retitled ''Travel Costs,'' due to consolidation with currently approved information collection requirement OMB Control No. 9000–0088, Travel Costs.

This information collection requirement pertains to information that a contractor must submit in response to the requirements in FAR 31.205–46:

1. FAR 31.205–46(a)(3)—In special or unusual situations, costs incurred by a contractor for lodging, meals, and incidental expenses, may exceed on a daily basis the per diem rates in effect as set forth in the Federal Travel Regulation (FTR) for travel in the conterminous 48 United States. The actual costs may be allowed only if the contractor provides the following:

a. FAR 31.205–46(a)(3)(ii)—A written justification for use of the higher amounts approved by an officer of the contractor's organization or designee to ensure that the authority is properly administered and controlled to prevent abuse.

b. FAR 31.205–46(a)(3)(iii)—Advance approval from the contracting officer if it becomes necessary to exercise the authority to use the higher actual expense method repetitively or on a continuing basis in a particular area.

c. FAR 31.205–46(a)(3)(iv)—Documentation to support actual costs incurred including a receipt for each expenditure of $75.00 or more.

2. FAR 31.205–46(c) requires firms to maintain and make available manifest/logs for all flights on company aircraft. As a minimum, the manifest/log must indicate:

a. Date, time, and points of departure;

b. Destination, date, and time of arrival;

c. Name of each passenger and relationship to the contractor

d. Authorization for trip; and

e. Purpose of trip.

The information required by (a) and (b) and the name of each passenger (required by (c)) are recordkeeping requirements already established by Federal Aviation Administration regulations. This information, plus the additional required information, is needed to ensure that costs of owned, chartered, or leased aircraft are properly charged against Government contracts and that directly associated costs of unallowable activities are not charged to Government contracts.

C. Annual Reporting Burden

DoD, GSA and NASA analyzed the FY 2017 data from the Federal Procurement Data System (FPDS) to develop the estimated burden hours for this information collection.

1. FAR 31.205–46(a)(3)—Actual travel costs.

Respondents: 3,247.
Responses Per Respondent: 10.
Total Annual Responses: 32,470.
Hours Per Response: 0.25.
Total Burden Hours: 8,118.

2. FAR 31.205–46(c)—Manifest/logs for flights on company aircraft.

Number of recordkeepers: 797.
Records per recordkeeper per year: 3.
Total annual records: 2,391.
Estimated hours per record: 2.0.
Total recordkeeping burden hours: 4,782.

3. Total (counting recordkeepers with respondents).

Recordkeepers and respondents: 4,044.
Responses: 34,861.
Hours (reporting and recordkeeping): 12,900.
Affected Public: Businesses or other for-profit and not-for-profit institutions.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755.

Please cite OMB Control No. 9000–0079, Travel Costs, in all correspondence.

William Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2018–16745 Filed 8–3–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0154; Docket No. 2018–0053; Sequence No. 2]

Submission for OMB Review; Construction Wage Rate Requirements—Price Adjustment (Actual Method)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding the price adjustment (Actual Method) for Construction Wage Rate Requirements.

DATES: Submit comments on or before September 5, 2018.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Office of Information and Regulatory Affairs of OMB, Attention:

Desk Officer for GSA, Room 10236, NEOB, Washington, DC 20503. Additionally submit a copy to GSA by any of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. Go to *http://www.regulations.gov* and follow the instructions on the site.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405. ATTN: Ms. Mandell/IC 9000–0154, Construction Wage Rate Requirements—Price Adjustment (Actual Method).

Instructions: Please submit comments only and cite Information Collection 9000–0154, Construction Wage Rate Requirements—Price Adjustment (Actual Method), in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or email *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Government contracting officers may include Federal Acquisition Regulation (FAR) clause 52.222–32, Construction Wage Rate Requirements—Price Adjustment (Actual Method), in fixed-price solicitations and contracts subject to the Construction Wage Rate Requirements statute under certain conditions. The conditions are that the solicitation or contract contains option provisions to extend the term of the contract and the contracting officer determines that the most appropriate method to adjust the contract price at option exercise is to use a computation method based on the actual increase or decrease from a new or revised Department of Labor Construction Wage Rate Requirements statute wage determination.

The clause requires that a contractor submit at the exercise of each option to extend the term of the contract, a statement of the amount claimed for incorporation of the most current wage determination by the Department of Labor, and any relevant supporting data, including payroll records, that the contracting officer may reasonably require. The information is used by Government contracting officers to establish the contract price adjustment for the construction requirements of a contract, generally if the contract requirements are predominantly services subject to the Service Contract Labor Standards statute.

B. Public Comment

A 60 day notice was published in the **Federal Register** at 83 FR 23278, on May 18, 2018. No comments were received.

C. Annual Reporting Burden

The Federal Procurement Data System (FPDS) indicates that 5,309 construction contractors in FY 2017 could potentially have had contracts with recurring options. However, we believe there are only approximately 10% of these that would contain the subject clause, since most would not have a price adjustment clause, and there are other FAR prescribed price adjustment clauses.

The estimated total burden is as follows:

Respondents: 531.

Responses per Respondent: 1.

Total Annual Responses: 531.

Hours per Response: 40.

Total Burden Hours: 21,240.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Frequency: Annually.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 9000–0154, Construction Wage Rate Requirements—Price Adjustment (Actual Method), in all correspondence.

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2018–16763 Filed 8–3–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Decision To Evaluate a Petition To Designate a Class of Employees From the Superior Steel Company in Carnegie, Pennsylvania, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: NIOSH gives notice of a decision to evaluate a petition to designate a class of employees from the Superior Steel Company in Carnegie, Pennsylvania, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 1090 Tusculum Avenue, MS C–46, Cincinnati, OH 45226–1938, Telephone 877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION:

Authority: 42 CFR 83.9–83.12.

Pursuant to 42 CFR 83.12, the initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Superior Steel Company.

Location: Carnegie, Pennsylvania.

Job Titles and/or Job Duties: All workers who worked at all locations at the Superior Steel Co. in Carnegie, PA from January 1, 1952 through December 31, 1957.

Period of Employment: January 1, 1952 through December 31, 1957.

John J. Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2018–16761 Filed 8–3–18; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–2583]

Nonclinical Testing of Orally Inhaled Nicotine-Containing Drug Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Nonclinical Testing of Orally Inhaled Nicotine-Containing Drug Products.'' The document provides guidance regarding the nonclinical information FDA recommends to support development and approval of orally inhaled nicotine-containing drug products, including electronic nicotine delivery systems intended for smoking cessation and other chronic uses.

DATES: Submit either electronic or written comments on the draft guidance by October 5, 2018 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

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–2018–D–2583 for ''Nonclinical Testing of Orally Inhaled Nicotine-Containing Drug Products; Draft Guidance for Industry; Availability.'' Received comments 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

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

FOR FURTHER INFORMATION CONTACT: Alina Salvatore, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5418, Silver Spring, MD 20903–0002, 240–402–0379.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Nonclinical Testing of Orally Inhaled Nicotine-Containing Drug Products.'' This document provides guidance on the nonclinical information FDA recommends to support development and approval of orally inhaled nicotine-containing drug products for smoking cessation and other chronic uses.

The recommended nonclinical assessment as outlined in the guidance addresses safety of novel components of the drug product formulation, novel chemicals generated from any component of the drug product formulation by the delivery system, and novel impurities. As used in the guidance, the phrase *novel component of the formulation* refers to active and inactive ingredients intentionally added to the drug product that have not been approved in drugs at an equal or greater dose, for an equal or greater duration of use, or by a relevant route of administration sufficient to characterize toxicity via local and systemic exposure. FDA expects that in many cases use of the delivery system will generate novel chemicals (*e.g.,* heat-generated products).

Orally inhaled nicotine-containing drug products developed for smoking cessation and other chronic uses are expected to involve continuous use or chronic intermittent use resulting in 6

months or more exposure over a lifetime. Because of the duration of use, the nonclinical assessment for marketing approval should include general toxicity studies, developmental and reproductive toxicity studies, an assessment of carcinogenic potential, and supporting toxicokinetic and pharmacokinetic studies.

FDA is aware of the serious risk associated with smoking and is committed to facilitating the development of therapies to support smoking cessation efforts. This guidance focuses on novel components of the drug product formulation, heat-generated products, and impurities that are generally not well characterized. Orally inhaled nicotine-containing tobacco products, including electronic nicotine delivery systems currently marketed in the United States, have already been associated with toxicity concerns (Refs 1–4). An adequate nonclinical assessment, as described in this guidance, can address the potential toxicity of chemicals from orally inhaled nicotine-containing drug products. As noted in the guidance, sponsors can use an alternative approach if that approach provides adequate safety information.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on nonclinical testing of orally inhaled nicotine-containing drug products. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014. The collections of information resulting from special protocol assessments have been approved under OMB control number 0910–0470.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

IV. References

The following reference marked with an asterisk (*) is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it also is available electronically at *https://www.regulations.gov.* References without asterisks are not on display because they have copyright restriction, or they are available as published articles and books. Please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section to schedule a date to inspect references without asterisks.

1. Madsen, L.R., N.H. Vinther Krarup, T.K. Bergmann, et al., 2016, ''A Cancer That Went Up in Smoke: Pulmonary Reaction to E-Cigarettes Imitating Metastatic Cancer,'' *Chest,* 149(3):e65–67.
2. Ghosh, A., R.C. Coakley, T. Mascenik, et al., 2018, ''Chronic E-Cigarette Exposure Alters the Human Bronchial Epithelial Proteome,'' *American Journal of Respiratory and Critical Care Medicine,* epub ahead of print February 26, 2018, doi: 10.1164/rccm.201710–2033OC.
* 3. Olmedo, P., W. Goessler, S. Tanda, et al., 2018, ''Metal Concentrations in E-Cigarette Liquid and Aerosol Samples: The Contribution of Metallic Coils,'' *Environmental Health Perspectives,* 126(2): doi: 10.1289/EHP2175.
4. Rubinstein, M.L., K. Delucchi, N.L. Benowitz, and D.E. Ramo, 2018, ''Adolescent Exposure to Toxic Volatile Organic Chemicals From E-Cigarettes,'' *Pediatrics,* epub ahead of print March 5, 2018, doi: 10.1542/peds.2017–3557.

Dated: July 31, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–16726 Filed 8–3–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that on July 13, 2018, the U.S. Department of Health and Human Services (HHS) Debarring Official, on behalf of the Secretary of HHS, issued a final notice of debarment based on an Administrative Law Judge's findings of research misconduct against Christian Kreipke, Ph.D., former Research Associate Professor, Wayne State University. Dr. Kreipke engaged in research misconduct in research supported by National Institute of Neurological Disorders and Stroke (NINDS), National Institutes of Health (NIH), grants R01 NS039860 and R01 NS064976–01A2. The administrative actions, including five (5) years of debarment, were implemented beginning on July 13, 2018, and are detailed below.

FOR FURTHER INFORMATION CONTACT:

Wanda K. Jones, Dr.P.H., Interim Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION:

Christian Kreipke, Ph.D., Wayne State University: ORI issued a charge letter enumerating findings of research misconduct and proposing HHS administrative actions. Dr. Kreipke (''Respondent'') subsequently requested a hearing before an Administrative Law Judge (ALJ) of the Departmental Appeals Board to dispute these findings. A hearing before the ALJ was held on July 10–12, 2017. On May 31, 2018, the ALJ issued his recommended decision, finding that Respondent recklessly caused or permitted twenty-three (23) instances of research misconduct in his three (3) grant applications, two (2) articles on which he was the first listed author, and two (2) posters on which he was the first listed author. The ALJ held that appropriate administrative actions included a five-year debarment from any contracting or subcontracting with any agency of the United States and from eligibility for or involvement in nonprocurement programs of the United States referred to as ''covered transactions.'' 2 CFR parts 180 and 376. The ALJ held it was an appropriate administrative action to also impose a five-year prohibition from serving in any capacity to the U.S. Public Health Service (PHS), including but not limited to, service on any PHS advisory committee, board, or peer review committee, or as a consultant. The ALJ noted that ORI also had proposed that the publisher of certain articles be notified of the need to retract those articles and that retraction had already occurred by the time of his recommended decision.

Under the regulation, the ALJ's recommended decision went to the Assistant Secretary for Health, who did not modify it and forwarded it to the HHS Debarring Official, who is the deciding official for the debarment. The ALJ decision constituted the findings of fact to the HHS Debarring Official in accordance with 2 CFR 180.845(c). On July 13, 2018, the HHS Debarring Official issued a final notice of debarment to begin on July 13, 2018, and end on July 12, 2023.

Respondent's grant applications, articles, and posters in question examined the differential effects of endothelin receptor antagonists on traumatic brain injury-induced hypoperfusion of cerebral blood flow, neuronal cell injury, and cognition in rat animal models.

Respondent recklessly included falsely described images in the following grant applications:

- R01 NS064976–01A1 submitted to NINDS, NIH (unfunded)
- R01 NS064976–01A2 submitted to NINDS, NIH (funded)
- R01 NS065824–01 submitted to NINDS, NIH (unfunded)

Respondent recklessly included falsely described images in the following publications and posters:

- ''Differential effects of endothelin receptor A and B antagonism on cerebral hypoperfusion following traumatic brain injury.'' *Neurological Research* 32(2):209–14, 2010 Mar (''NR2010''). Retracted in *Neurological Research* 39(5):472, 2017 May.
- ''Clazosentan, a novel endothelin A antagonist, improves cerebral blood flow and behavior after traumatic brain injury.'' *Neurological Research* 33(2):208–13, 2011 Mar (''NR2011–1''). Retracted in *Neurological Research* 39(5):472, 2017 May.
- 2009 poster for a Department of Veterans Affairs (VA) presentation: ''Using endothelin-A antagonists to ameliorate hypoperfusion and cognitive deficits following brain trauma: towards a clinical trial'' (''VA2009'').
- 2010 poster for a VA presentation: ''Endothelin-1 receptor A antagonists improve neurologic and cognitive outcome following TBI'' (''VA2010'').

The following findings of research misconduct were proven by a preponderance of the evidence. Respondent recklessly included:

- falsely described Fluoro-Jade stained images of rat brain cells in:
  - —Figure 8 (left panel) in R01 NS064976–01A1
  - —Figure 8B (left panel) in R01 NS064976–01A2
  - —Figures 4A–F in R01 NS065824–01
  - —Figure 3 (right and left panels) in NR2011–1
  - —Figure 5C in NR2010
  - —Figure 3 (panel 3) and Figure 6 (right and left panels) in VA2009
  - —Figure 3 (panel 3) and Figure 6 (right and left panels) in VA2010
- falsely described systolic blood pressure curves in Figures 4A and 4B in NR2010
- falsely described cerebral blood flow graphs in:
  - —Figure 5 (left panel) in R01 NS064976–01A1
  - —Figure 5 (left panel) in R01 NS064976–01A2
  - —Figure 3A in NR2010
  - —Figure 5 in VA2009
  - —Figure 5 in VA2010
- falsely described Western blot images in one of the following three grant applications (because at least one of the three must be false): Figure 1 (me+TBI panel for VEGF) in R01 NS065824–01, Figure 2B in R01 NS064976–01A1, and Figure 2B in R01 NS064976–01A2
- falsely described Western blot images in:
  - —Figure 2A in R01 NS064976–01A1
  - —Figure 2A in R01 NS064976–01A2
- a falsely described image of lectin labeled rat brain section in Figure 2C in R01 NS065824–01

Thus, the research misconduct findings set forth above became effective, and the following administrative actions have been implemented for a period of five (5) years, beginning on July 13, 2018:

(1) Dr. Kreipke is debarred from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS' Implementation (2 CFR part 376) of Office of Management and Budget (OMB) Guidelines to Agencies on Governmentwide Debarment and Suspension (2 CFR part 180); and

(2) Dr. Kreipke is prohibited from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

Wanda K. Jones,

Interim Director, Office of Research Integrity.

[FR Doc. 2018–16693 Filed 8–3–18; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket Number USCG–2018–0193]

Polar Icebreaker Program; Preparation of Environmental Impact Statement

AGENCY: Coast Guard, DHS.

ACTION: Notice of Availability and request for comments.

SUMMARY: The U.S. Coast Guard, as lead agency, announces the availability of a draft Programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) for the Polar Icebreaker Program's design and build of up to six polar icebreakers. The U.S. Coast Guard requests public comments on the draft EIS.

DATES: Comments must be submitted to the online docket via *http://www.regulations.gov* on or before September 20, 2018.

ADDRESSES: You may submit comments identified by docket number USCG–2018–0193 using the Federal 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 notice of intent, email Mr. Ahmed Majumder, Deputy Program Manager, Polar Icebreaker Program, U.S. Coast Guard; email *PIBEnvironment@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
CGC Coast Guard Cutter
EIS Environmental Impact Statement
FR Federal Register
NEPA National Environmental Policy Act
PIBs Polar Icebreakers
U.S.C. United States Code

II. Background and Purpose

The U.S. Coast Guard's current fleet of polar icebreakers (PIBs) consists of two heavy icebreakers, Coast Guard Cutter (CGC) POLAR STAR and CGC POLAR SEA, and one medium icebreaker, CGC HEALY. The U.S. Coast Guard's heavy icebreakers have both exceeded their designed 30 year service life. CGC POLAR STAR was commissioned in 1976 and CGC POLAR SEA in 1978. CGC POLAR STAR began reactivation in 2010 and completed a service life extension in 2013 to allow CGC POLAR STAR to operate for an additional seven to ten years. CGC POLAR SEA has remained out of service since 2010 and is not expected to be reactivated. The current PIB program acquisition strategy is approved to construct up to three heavy PIBs and may (at a future date) potentially expand to include up to three medium icebreakers, with planned service design lives of 30 years each. The first of these new PIBs is expected to delivered in 2023. Because the first new PIB would not be operational in the Polar Regions until at least 2023, new information may become available after the completion of this EIS. In that case, supplemental NEPA documentation may, as appropriate, be prepared in

support of individual proposed actions. Examples of new information may include, but are not limited to, changes to a species listing status or any other applicable laws and directives, and information regarding mission, training, homeporting, maintenance, and eventual decommissioning of the new PIBs.

A new PIB would be designed to carry out the U.S. Coast Guard's primary missions supported by the current polar icebreaker fleet. Expected missions include Ice Operations, Defense Readiness, Aids to Navigation, Living Marine Resources, Marine Safety, Marine Environmental Protection, Other Law Enforcement, Ports, Waterways, and Coastal Security, and Search and Rescue.

In executing its various missions, the U.S. Coast Guard protects the public, the environment, and U.S. economic and security interests in any maritime region, including international waters and the Nation's coasts, ports, and inland waterways, as required to support national security. Legislation and executive orders assign the U.S. Coast Guard a wide range of responsibilities applicable to Polar Regions. The U.S. Coast Guard derives its authority for the use of icebreaking from several statutes governing execution of its missions. These include 14 U.S.C. 81 (Coast Guard establishment, maintenance, and operation of aids to navigation), 14 U.S.C. 88 (Coast Guard saving of life and property), 14 U.S.C. 89 (Coast Guard law enforcement), 14 U.S.C. 90 (Arctic maritime transportation), 14 U.S.C. 91 (controlling anchorage and movement of vessels), 14 U.S.C. 94 (conduct oceanographic research), and 14 U.S.C. 141 (cooperation with agencies, States, territories, and others). In addition, Executive Order 7521 (Use of Vessels for Icebreaking in Channels and Harbors), 1 FR 2184, Dec. 24, 1936, directs the U.S. Coast Guard to assist in keeping channels and harbors open to navigation by means of icebreaking operations.

The U.S. Coast Guard proposes to conduct polar icebreaker operations and training exercises to meet Coast Guard mission responsibilities in the U.S. Arctic and Antarctic Regions of operation, in addition to vessel performance testing post-dry dock in the Pacific Northwest near the current polar icebreaker homeport of Seattle, Washington. The exact location for future homeporting has not been determined, but the current fleet of polar icebreakers is homeported in Seattle, Washington.

Polar Regions are becoming increasingly important to U.S. national interests. The changing environment in these regions could lead to a rise in human activity and increased commercial ship, cruise ship, and naval surface ship operations, as well as increased exploration for oil and other resources, particularly in the Arctic. One of the U.S. Coast Guard's highest priorities is safety of life at sea. This entails the Artic responsibilities described above as well as assisting with Antarctica logistics at McMurdo Station. Long-term projected increases in U.S. Coast Guard mission demand in the Polar Regions would require additional support from PIBs. A lack of infrastructure, polar environmental conditions, and long distances between operating areas and support bases all influence the U.S. Coast Guard's ability to provide comparable service and presence in Polar Regions as compared to that provided in other non-polar areas of operation with existing Coast Guard assets.

This EIS will analyze the potential impacts of up to six new PIBs, as this is the maximum number anticipated to be operational in the Polar Regions under the current PIB program acquisition strategy; A lesser number of icebreakers is expected to result in a similar or reduced impact than what will be discussed and evaluated in this EIS. Potential environmental stressors include acoustic (underwater acoustic transmissions, vessel noise, icebreaking noise, aircraft noise, and gunnery noise), and physical (vessel movement, aircraft or in-air device movement, in-water device movement, icebreaking, and marine expended materials).

III. Scoping Process

The U.S. Coast Guard conducted scoping in accordance with Council on Environmental Quality (CEQ) regulations implementing the NEPA (40 CFR 1500 et seq.) through public comment and public meetings. A summary of the scoping process can be found in the draft EIS.

IV. Public Participation and Request for Comments

We encourage you to submit comments (or related material) on the draft Programmatic Environmental Impact Statement. We will consider all submissions and may adjust our final action based on your comments. If you submit a comment, please include the docket number for this notice, 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. 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 or a final EIS is published.

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).

This notice is issued under authority of 5 U.S.C. 552(a).

Dated: June 31, 2018.

Ahmed Majumder,

U.S. Coast Guard, Program Manager, Polar Icebreaker Program.

[FR Doc. 2018–16760 Filed 8–3–18; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2008–0010]

Board of Visitors for the National Fire Academy

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee management; notice of open federal advisory committee meeting.

SUMMARY: The Board of Visitors for the National Fire Academy (Board) will meet on August 27–28, 2018, in Emmitsburg, Maryland. The meeting will be open to the public.

DATES: The meeting will take place on Monday, August 27, 8:00 a.m. to 5:00 p.m. Eastern Daylight Time and on Tuesday, August 28, 8:00 a.m. to 5:00 p.m. Eastern Daylight Time. Please note that the meeting may close early if the Board has completed its business.

ADDRESSES: The meeting will be held at the National Emergency Training Center, 16825 South Seton Avenue,

Building H, Room 300, Emmitsburg, Maryland. Members of the public who wish to obtain details on how to gain access to the facility and directions may contact Deborah Gartrell-Kemp as listed in the **FOR FURTHER INFORMATION CONTACT** section by close of business August 17, 2018. Photo identification that meets *REAL ID ACT* standards (*https://www.usfa.fema.gov/training/nfa/admissions/campus_access.html*) is required for access. Members of the public may also participate by teleconference and may contact Deborah Gartrell-Kemp to obtain the call-in number and access code. For information on services for individuals with disabilities or to request special assistance, contact Deborah Gartrell-Kemp as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the Board as listed in the **SUPPLEMENTARY INFORMATION** section. Comments must be submitted in writing no later than August 17, 2018, must be identified by Docket ID FEMA–2008–0010 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: FEMA–RULES@fema.dhs.gov.* Include the docket number in the subject line of the message.
- *Mail/Hand Delivery:* Deborah Gartrell-Kemp, 16825 South Seton Avenue, Emmitsburg, Maryland 21727, post-marked no later than August 17, 2018.

Instructions: All submissions received must include the words ''Federal Emergency Management Agency'' and the Docket ID for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the National Fire Academy Board of Visitors, go to *http://www.regulations.gov,* click on ''Advanced Search,'' then enter ''FEMA–2008–0010'' in the ''By Docket ID'' box, then select ''FEMA'' under ''By Agency,'' and then click ''Search.''

FOR FURTHER INFORMATION CONTACT:

Alternate Designated Federal Officer: Kirby E. Kiefer, telephone (301) 447–1117, email *Kirby.Kiefer@fema.dhs.gov.*

Logistical Information: Deborah Gartrell-Kemp, telephone (301) 447–7230 and email *Deborah.GartrellKemp@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Board will meet on Monday, August 27, and Tuesday, August 28, 2018. The meeting will be open to the public. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App.

Purpose of the Board

The purpose of the Board is to review annually the programs of the National Fire Academy (Academy) and advise the Administrator of the Federal Emergency Management Agency (FEMA), through the United States Fire Administrator, on the operation of the Academy and any improvements therein that the Board deems appropriate. In carrying out its responsibilities, the Board examines Academy programs to determine whether these programs further the basic missions that are approved by the Administrator of FEMA, examines the physical plant of the Academy to determine the adequacy of the Academy's facilities, and examines the funding levels for Academy programs. The Board submits a written annual report through the United States Fire Administrator to the Administrator of FEMA. The report provides detailed comments and recommendations regarding the operation of the Academy.

Agenda

On Monday, August 27, 2018, there will be five sessions, with deliberations and voting at the end of each session as necessary:

1. The Board will conduct a swearing in of new Board members and will then select a Chairperson and Vice Chairperson for Fiscal Year 2019.

2. The Board will receive annual ethics training and will tour the campus facility.

3. The Board will discuss deferred maintenance and capital improvements on the National Emergency Training Center campus and Fiscal Year 2018 Budget Request/Budget Planning.

4. The Board will deliberate and vote on recommendations on Academy program activities, including:

- Fire and Emergency Services Higher Education (FESHE) Recognition Program update, a certification program acknowledging that a collegiate emergency services degree meets the minimum standards of excellence established by FESHE development committees and the Academy;
- The National Professional Development Summit Report held on June 13–16, 2018, which brought national training and education audiences together for their annual conference and support initiatives;
- The Managing Officer Program progress report, a multiyear curriculum that introduces emerging emergency services leaders to personal and professional skills in change management, risk reduction, and adaptive leadership;
- Program application selection results;
- The Executive Fire Officer (EFO) Program Symposium held April 6–8, 2018, an annual event for alumni which recognizes outstanding applied research completed by present EFO Program participants, recognizes recent EFO Program graduates, provides high-quality presentations offered by private and public sector representatives, facilitates networking between EFO Program graduates, promotes further dialog between EFO Program graduates and U.S. Fire Administrator and National Fire Academy faculty and staff;
- The EFO Program review initiative;
- Curriculum development and revision updates for Academy courses;
- Discussion on the approval process for state-specific courses;
- Online mediated instruction program update;
- Distance learning program update;
- Staffing update.

5. The Board will receive activity reports on the National Fire Incident Reporting System Subcommittee, the Professional Development Initiative Subcommittee, and four EFO Program Subcommittees: Admissions, Curriculum, Delivery and Design, and Evaluations and Outcomes.

On Tuesday, August 28, 2018, the Board will receive updates on U.S. Fire Administration data, research, and response support initiatives and will conduct classroom visits. The Board will also engage in an annual report writing session. Deliberations or voting may occur as needed during the report writing session.

There will be a 10-minute comment period after each agenda item and each speaker will be given no more than 2 minutes to speak. Please note that the public comment period may end before the time indicated, following the last call for comments. Contact Deborah Gartrell-Kemp to register as a speaker. Meeting materials will be posted at *https://www.usfa.fema.gov/training/nfa/about/bov.html* by August 17, 2018.

Dated: July 27, 2018.

Tonya L. Hoover,

Superintendent, National Fire Academy, United States Fire Administration, Federal Emergency Management Agency.

[FR Doc. 2018–16697 Filed 8–3–18; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2018–N057; FXES11130900000C2–189–FF09E32000]

Endangered and Threatened Wildlife and Plants; 5-Year Status Reviews for 42 Southeastern Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are initiating 5-year status reviews of 42 species under the Endangered Species Act of 1973, as amended. A 5-year review is an assessment of the best scientific and commercial data available at the time of the review. We are requesting submission of information that has become available since the last reviews of these species.

DATES: To allow us adequate time to conduct these reviews, we must receive your comments or information on or before October 5, 2018. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For instructions on how to submit information and review information that we receive on these species, see Request for New Information under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: For species-specific information, see Request for New Information under **SUPPLEMENTARY INFORMATION**.

SUPPLEMENTARY INFORMATION:

Why do we conduct 5-year reviews?

Under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we maintain lists of endangered and threatened wildlife and plant species (referred to as the Lists) in title 50 of the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for wildlife) and 17.12 (for plants). Section 4(c)(2)(A) of the ESA requires us to review each listed species' status at least once every 5 years. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, go to *http://www.fws.gov/endangered/what-we-do/recovery-overview.html.*

Which species are under review?

This notice announces our active 5-year reviews of the species in the following table.

Common name/scientific name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (**Federal Register** citation and publication date)	Contact's mailing address
ANIMALS					
Mammals					
Bat, Florida bonneted (*Eumops floridanus*).	Roxanna Hinzman, *florida bonnetedbat_5-yearreview@fws.gov*, 772–468–4341.	Endangered	Florida	78 FR 61003; 10/2/2013.	USFWS, 1339 20th St., Vero Beach, FL 32960.
Mouse, St. Andrew beach (*Peromyscus polionotus peninsularis*).	Kristi Yanchis, *panamacity@fws.gov*, 850–769–0552.	Endangered	Florida	63 FR 70053; 12/18/1998.	USFWS, 1601 Balboa Ave., Panama City, FL 32405.
Rabbit, Lower Keys (*Sylvilagus palustris hefneri*).	Roxanna Hinzman, *lowerkeys marshrabbit_5-yearreview@fws.gov*, 772–469–4342.	Endangered	Florida	55 FR 25588; 6/21/1990.	USFWS, 1339 20th St., Vero Beach, FL 32960.
Rice rat, (=silver rice rat) (*Oryzomys palustris natator*).	Roxanna Hinzman, *silverricerat_5-yearreview@fws.gov*, 772–469–4343.	Endangered	Florida	56 FR 19809; 4/30/1991.	USFWS, 1339 20th St., Vero Beach, FL 32960.
Birds					
Woodpecker, red-cockaded (*Picoides borealis*).	Will McDearman, *mississippi_field_office@fws.gov*, 601–321–1124.	Endangered	Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Virginia.	35 FR 16047: 10/13/1970.	USFWS, 6578 Dogwood View Pkwy., Jackson, MS 39213.
Reptiles					
Crocodile, American (*Crocodylus acutus*).	Roxanna Hinzman, *american crocodile_5-yearreview@fws.gov.*, 772–469–4355.	Threatened	Florida	71 FR 13027; 3/20/2007.	USFWS, 1339 20th St., Vero Beach, FL 32960
Lizard, St. Croix ground (*Ameiva polops*).	Jan Zegarra, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	U.S. Virgin Islands	42 FR 28543; 6/3/1977.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Fishes					
Darter, bayou (*Etheostoma rubrum*).	Daniel Drennen, *mississippi_field_office@fws.gov.*, 601–321–1127.	Threatened	Mississippi	40 FR 44149; 9/25/1975.	USFWS, 6578 Dogwood View Pkwy., Jackson, MS 39213
Darter, Okaloosa (*Etheostoma okaloosae*).	Bill Tate, *panamacity@fws.gov.*, 850–769–0552.	Threatened	Florida	76 FR 18087; 4/1/2011.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Darter, Relict (*Etheostoma chienense*).	Mike Floyd, *kentuckyes@fws.gov.*, 502–695–0468.	Endangered	Kentucky	58 FR 68480; 12/27/1993.	USFWS, 330 W. Broadway, Ste 265, Frankfort, KY 40601
Logperch, Conasauga (*Percina jenkinsi*).	Robin Goodloe, *georgiaes@fws.gov.*, 706–613–9493.	Endangered	Georgia/Tennessee	56 FR 31597; 8/5/1985.	USFWS, 355 East Hancock Ave Room 320, Athens, GA 30601

Common name/scientific name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (**Federal Register** citation and publication date)	Contact's mailing address
		Clams			
Bankclimber, purple (*Elliptoideus sloatianus*).	Maureen Walsh, *panamacity@fws.gov.*, 850–769–0552.	Threatened	Florida	63 FR 12664; 3/16/1998.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Moccasinshell, Gulf (*Medionidus penicillatus*).	Maureen Walsh, *panamacity@fws.gov.*, 850–769–0552.	Endangered	Florida	63 FR 12664; 3/16/1998.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Moccasinshell, Ochlockonee (*Medionidus simpsonianus*).	Maureen Walsh., *panamacity@fws.gov.*, 850–769–0552.	Endangered	Florida	63 FR 12664; 3/16/1998.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Pearlymussel, littlewing (*Pegias fabula*).	Leroy Koch, *kentuckyes@fws.gov.*, 502–695–0468.	Endangered	Alabama, Kentucky, North Carolina, Tennessee, Virginia.	53 FR 45861; 11/14/1988.	USFWS, 330 West Broadway, Suite 265, Frankfort, KY 40601
Pigtoe, oval (*Pleurobema pyriforme*).	Maureen Walsh, *panamacity@fws.gov.*, 850–769–0552.	Threatened	Florida	63 FR 12664; 3/16/1998.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Pocketbook, shinyrayed (*Lampsilis subangulata*).	Maureen Walsh, *panamacity@fws.gov.*, 850–769–0552.	Endangered	Florida	63 FR 12664; 3/16/1998.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Slabshell, Chipola (*Elliptio chipolaensis*).	Maureen Walsh, *panamacity@fws.gov.*, 850–769–0552.	Threatened	Florida	63 FR 12664; 3/16/1998.	USFWS., 1601 Balboa Ave., Panama City, FL 32405
Spinymussel, Altamaha (*Elliptio spinosa*).	Anthony Sowers, *georgiaes@fws.gov.*, 706–613–9493.	Endangered	Georgia	76 FR 62928; 10/11/2011.	USFWS, 355 East Hancock Ave Room 320, Athens, GA 30601
Threeridge, fat (*Amblema neislerii*).	Maureen Walsh, *panamacity@fws.gov.*, 850–769–0552.	Endangered	Florida/Georgia	63 FR 12664; 3/16/1998.	USFWS, 1601 Balboa Ave, Panama City, FL 32405
		Snails			
Snail, Stock Island tree (*Orthalicus reses*).	Roxanna Hinzman, *stockislandtreesnail_5-yearreview@fws.gov.*, 772–469–4347.	Threatened	Florida	43 FR 28932; 7/3/1978.	USFWS, 1339 20th St., Vero Beach, FL 32960
		Insects			
Swallowtail, Schaus (*Heraclides aristodemus ponceanus*).	Roxanna Hinzman, *schausswallowtailbutterfly_5-yearreview@fws.gov.*, 772–469–4345.	Endangered	Florida	49 FR 34501; 8/31/1984.	USFWS, 1339 20th St., Vero Beach, FL 32960
		Crustaceans			
Crayfish, Benton County Cave (*Cambarus aculabrum*).	Tommy Inebnit, *arkansas-es_recovery@fws.gov.*, 501–513–4483.	Endangered	Florida	58 FR 25742; 4/27/1993.	USFWS, 110 South Amity Rd., Suite 300, Conway, AR 72032
		PLANTS			
		Flowering Plants			
Buxus vahlii (Vahl's boxwood)	Omar Monsegur, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	Puerto Rico	50 FR 32572; 8/13/1985.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Calyptranthes thomasiana (Thomas lidflower).	Jaime Yrigoyen, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	Puerto Rico; U.S. Virgin Islands.	59 FR 8138; 2/18/1994.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Cladonia perforata (Florida perforate cladonia).	Roxanna Hinzman, *floridaperforatecladonia_5-yearreview@fws.gov.*, 772–469–4349.	Endangered	Florida	58 FR 25746; 4/27/1993.	USFWS, 1339 20th St., Vero Beach, FL 32960
Clitoria fragrans (Pigeon wings)	Roxanna Hinzman, *pigeonwings_5-yearreview@fws.gov.*, 772–469–4353.	Threatened	Florida	58 FR 25746; 4/27/1993.	USFWS, 1339 20th St., Vero Beach, FL 32960
Crotalaria avonensis (Avon Park harebells).	Roxanna Hinzman, *avonparkharebells_5-yearreview@fws.gov.*, 772–469–4350.	Endangered	Florida	58 FR 25746; 4/27/1993.	USFWS, 1339 20th St., Vero Beach, FL 32960
Daphnopsis hellerana (no common name).	Jennifer Valentin, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	Puerto Rico	53 FR 23740; 6/23/1988.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Dicerandra immaculata (Lakela's mint).	Roxanna Hinzman, *lakelasmint_5-yearreview@fws.gov.*, 772–469–4350.	Endangered	Florida	50 FR 20212; 5/15/1985.	USFWS., 1339 20th St., Vero Beach, FL 32960
Gesneria pauciflora (no common name).	Omar Monsegur, *caribbean_es@fws.gov.*, 787–851–7297.	Threatened	Puerto Rico	60 FR 12483; 3/7/1995.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Goetzea elegans (Beautiful goetzea).	Martiza Vargas, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	Puerto Rico	50 FR 15564; 4/19/1985.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Helianthus schweinitzii (Schweinitz's sunflower).	Rebekkah Reid, *fw4esasheville@fws.gov.*, 828–258–3939.	Endangered	North Carolina; South Carolina.	56 FR 21087; 5/7/1991.	USFWS, 160 Zillicoa St., Asheville, NC 28801

Common name/scientific name	Contact person, email, phone	Status (endangered or threatened)	States where the species is known to occur	Final listing rule (**Federal Register** citation and publication date)	Contact's mailing address
Hudsonia montana (Mountain golden heather).	Rebekkah Reid, *fw4esasheville@fws.gov.*, 828–258–3939.	Threatened	North Carolina	45 FR 69360; 10/20/1980.	USFWS, 160 Zillicoa St., Asheville, NC 28801
Ilex cookii (Cook's holly)	Angel Colon, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	Puerto Rico	52 FR 22936; 6/16/1987.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Jacquemontia reclinata (Beach jacquemontia).	Roxanna Hinzman, *beach_jacquemontia_5-yearreview@fws.gov.*, 772–469–4348.	Endangered	Florida	58 FR 62046; 11/24/1993.	USFWS, 1339 20th St., Vero Beach, FL 32960
Juglans jamaicensis (West Indian walnut (nogal)).	Angel Colon, *caribbean_es@fws.gov.*, 787–851–7297.	Endangered	Puerto Rico	62 FR 1691; 1/13/1997.	USFWS, Road 301, Km 5.1, P.O. Box 491, Boquerón, PR 00622
Paronychia chartacea (Papery whitlow-wort).	Roxanna Hinzman, *paperywhitlow-wort_5-yearreview@fws.gov.*, 772–469–4352.	Threatened	Florida	52 FR 2227; 1/21/1987.	USFWS, 1339 20th St., Vero Beach, FL 32960
Rhododendron chapmanii (Chapman's rhododendron).	Vivian Negron-Ortiz, *panamacity@fws.gov.*, 850–769–0552.	Endangered	Florida	44 FR 24248; 4/24/1979.	USFWS, 1601 Balboa Ave., Panama City, FL 32405
Sisyrinchium dichotomum (White irisette).	Rebekkah Reid, *fw4esasheville@fws.gov.*, 828–258–3939.	Endangered	North Carolina; South Carolina.	56 FR 48752; 9/26/1991.	USFWS., 160 Zillicoa St., Asheville, NC 28801
Solidago spithamaea, (Blue Ridge goldenrod).	Rebekkah Reid, *fw4esasheville@fws.gov.*, 828–258–3939.	Threatened	North Carolina, Tennessee.	50 FR 12306; 3/28/1985.	USFWS, 160 Zillicoa St., Asheville, NC 28801
		Conifers			
Torreya taxifolia (Florida torreya)	Vivian Negron-Ortiz, *panamacity@fws.gov.*, 850–769–0552.	Endangered	Florida, Georgia	49 FR 2783; 1/23/1984.	USFWS, 1601 Balboa Ave., Panama City, FL 32405

What information do we consider in our review?

A 5-year review considers the best scientific and commercial data that have become available since the current listing determination or most recent status review of each species, such as:

A. Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

B. Habitat conditions, including but not limited to amount, distribution, and suitability;

C. Conservation measures that have been implemented to benefit the species;

D. Threat status and trends (see the five factors under How Do We Determine Whether A Species Is Endangered or Threatened?); and

E. Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

We request any new information concerning the status of any of these 42 species. Information submitted should be supported by documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

We expect we could conduct a species status assessment (SSA) for some of these species under review. An SSA is a biological risk assessment to aid decision makers who must use the best available scientific information to make policy decisions under the ESA. The SSA provides decisionmakers with a scientifically rigorous characterization of a species' status, and of the likelihood that the species will sustain populations, along with key uncertainties in that characterization.

It presents a compilation of the best available information on a species, as well as its ecological needs, based on environmental factors. An SSA also describes the current condition of the species' habitat and demographics, and probable explanations for past and ongoing changes in abundance and distribution within the species' range. Finally, it forecasts the species' response to probable future scenarios of environmental conditions and conservation efforts. Overall, an SSA uses the conservation biology principles of resiliency, redundancy, and representation (collectively known as the ''3 Rs'') to evaluate the current and future condition of the species. As a result, the SSA characterizes a species' ability to sustain populations in the wild over time based on the best scientific understanding of current and future abundance and distribution within the species' ecological settings.

Definitions

A. *Species* means any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any species of vertebrate which interbreeds when mature.

B. *Endangered* means any species that is in danger of extinction throughout all or a significant portion of its range.

C. *Threatened* means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

How do we determine whether a species is endangered or threatened?

Section 4(a)(1) of the ESA requires that we determine whether a species is endangered or threatened based on one or more of the following five factors:

A. The present or threatened destruction, modification, or curtailment of its habitat or range;

B. Overutilization for commercial, recreational, scientific, or educational purposes;

C. Disease or predation;

D. The inadequacy of existing regulatory mechanisms; or

E. Other natural or manmade factors affecting its continued existence.

Request for New Information

To do any of the following, contact the person associated with the species you are interested in under the table in **SUPPLEMENTARY INFORMATION**:

A. To get more information on a species;

B. To submit information on a species; or

C. To review information we receive, which will be available for public inspection by appointment, during normal business hours, at the listed addresses.

Public Availability of Comments

Comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Availability of Status Reviews

All completed status reviews under the ESA are available via the Service website, at *https://www.fws.gov/endangered/species/us-species.html.*

Authority

We publish this document under the authority of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: May 1, 2018.

Mike Oetker,

Acting Regional Director, Southeast Region.

[FR Doc. 2018–16734 Filed 8–3–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Armaments Consortium

Notice is hereby given that, on April 20, 2018, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Armaments Consortium (''NAC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Base Design LLC, Wake Forest, NC; Agile Defense, Inc., Reston, VA; Arizona State University Research Enterprise (ASURE), Scottsdale, AZ; ARRS Technologies, LLC, San Diego, CA; Ascent Vision Technologies, LLC, Belgrade, MT; Bachstein Consulting LLC, Raymond, NH; Barden Brook Solutions, Bloomfield Hills, MI; Binergy Scientific Inc., Atlanta, GA; BlankSafe LLC, San Juan Bautista, CA; Calculagraph Co DBA Control Products, Inc., East Hanover, NJ; Chemimage Biothreat, LLC d/b/a Chemimage Sensor Systems, Pittsburgh, PA; CMI Defence America, Sterling Heights, MI; CTC Enterprise Ventures Corporation (EVC), Johnstown, PA; Dynamic Matter LLC, Englewood, CO; Fiber Materials, Inc., Biddeford, ME; FLIR Systems, Inc., North Billerica, MA; Harbour Mechanical Corporation, Hoboken, NJ; Harris Corporation, Roanoke, VA; Hill Technical Solutions, Inc., Huntsville, AL; Intellisense Systems, Inc., Torrance, CA; Knobley Technical Associates LLC, Rocket Center, WV; Lithium Battery Engineering, LLC, Randolph, NJ; Lynntech, Inc., College Station, TX; Mainstream Engineering Corporation, Rockledge, FL; MAJR Mechatronics Corp, Sebring, FL; MegaWave Corporation, Devens, MA; Mustang Vacuum Systems, Inc., Sarasota, FL; NAVSYS Corporation, Colorado Springs, CO; NBS Enterprises, LLC, Leesburg, VA; North Star Systems, Inc., Birmingham, AL; Novateur Research Solutions LLC, Leesburg, VA; Novetta, Inc., McLean, VA; nP Technology LLC, Colorado Springs, CO; Nutronics, Inc., Longmont, CO; nVision Technology, Inc, Norton, OH; OASYS, INC., Huntsville, AL; Olin Corporation—Winchester Division, East Alton, IL; Optek Global Solutions, Inc., Los Angeles, CA; Ordnance Technology Service, Inc., Mentor, OH; Ormond, LLC, Auburn, WA; Peak Nano Optics, LLC, Coppel, TX; Piasecki Aircraft Corporation, Essington, PA; Polaris Contract Manufacturing, Inc., Marion, MA; PolyK Technologies, LLC, State College, PA; PPI-Time Zero, Inc., Fairfield, NJ; Princeton Infrared Technologies, Inc., Monmouth, NJ; Qynergy Corporation, Albuquerque, NM; RADA Technologies LLC, Silver Spring, MD; Redfish Trading, LLC, San Antonio, TX; Riptide Autonomous Solutions, Plymouth, MA; Robert Doto Associates, LLC, Sun City Center, FL; Senvol LLC, New York, NY; Sierra Nevada Corporation, Sparks, NV; SiliconScapes, LLC, State College, PA; Solid Innovations, LLC, East Stroudsburg, PA; Space Vector Corporation, Chatsworth, CA; SPIRE Manufacturing Solutions, LLC, Colorado Springs, CO; Stockdale & Associates, Indianapolis, IN; Strategic Marketing Innovations, Inc., Washington, DC; Technology and Communications Systems Inc., Clearwater, FL; Teledyne Brown Engineering, Inc., Huntsville, AL; Telephonies Corporation, Farmingdale, NY; TERMA North America Inc., Warner Robins, GA; Total Reliant Consulting, Boerne, TX; T-Worx Holdings, LLC, Ashburn, VA; UDC USA Inc., Tampa, FL; United Protective Technologies LLC, Locus, NC; University of Delaware, Newark, DE; VK Integrated Systems, Fullerton, CA; Volans-I, INC., San Francisco, CA; VT Miltope Corporation, Hope Hull, AL; WMD Guns, LLC, Stuart, FL; and ZedaSoft, Inc., Fort Worth, TX have been added as parties to this venture.

Also, 3D Systems, Inc., Rock Hill, SC; Advanced Ceramics Manufacturing, Tucson, AZ; Alaire Technologies Inc., Lorton, VA; Arco Global Services Corp., Corpus Christi, TX; Aria Microwave Systems, Inc., Teaneck, NJ; KYNTEC Corporation, Cheektowaga, NY; Metamagnetics Inc., Westborough, MA; Mission Critical Solutions, LLC, Alum Bank, PA; Riptide Software, Inc., Oviedo, FL; and Vista Outdoor Sales LLC, Anoka, MN, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NAC intends to file additional written notifications disclosing all changes in membership.

On May 2, 2000, NAC filed its original notification Pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 30, 2000 (65 FR 40693).

The last notification was filed with the Department on April 19, 2018. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 21, 2018 (83 FR 23486).

Suzanne Morris

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–16705 Filed 8–3–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on ROS-Industrial Consortium Americas

Notice is hereby given that, on July 12, 2018, Pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium-Americas (''RIC-Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Microsoft Corp., Redmond, WA, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership.

On April 30, 2014, RIC-Americas filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on June 11, 2018. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 9, 2018 (83 FR 31775).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–16713 Filed 8–3–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Integrated Photonics Institute for Manufacturing Innovation Operating Under the Name of The American Institute for Manufacturing Integrated Photonics

Notice is hereby given that, on July 23, 2018, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Integrated Photonics Institute for Manufacturing Innovation operating under the name of the American Institute for Manufacturing Integrated Photonics (''AIM Photonics'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Applied Materials, Inc., Santa Clara, CA; The Board of Governors of the Colorado State University System acting by and through Colorado State University, Fort Collins, CO; Stonehill College, Inc., Easton, MA; University of Chicago Argonne LLC, as operator of Argonne National Laboratory, Lemont, IL; The George Washington University, Washington, DC; Marktech International Corporation dba Marktech Optoelectronics, Latham, NY; and Israeli Hi-Tech Association at the Manufacturer's Association of Israel, TelAviv, ISRAEL, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AIM Photonics intends to file additional written notifications disclosing all changes in membership.

On June 16, 2016, AIM Photonics filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 2016 (81 FR 48450).

The last notification was filed with the Department on January 26, 2018. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 12, 2018 (83 FR 10750).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–16706 Filed 8–3–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0034]

Agency Information Collection Activities; Proposed eCollection, eComments Requested; Revision of a Currently Approved Collection; the National Forensic Laboratory Information System Collection of Drug Analysis Data

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 30-day Notice.

SUMMARY: The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on June 11, 2018, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until September 5, 2018.

FOR FURTHER INFORMATION CONTACT: If you have comments 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 Thomas D. Sonnen, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812 or sent to *OIRA_submission@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information proposed to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of

appropriate automated, electronic, mechanical, or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection.

2. *Title of the Form/Collection:* The National Forensic Laboratory Information System Collection of Drug Analysis Data.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Medical Examiner/Coroner Office Survey; National Forensic Laboratory Information System Drug Survey of Drug Laboratories; and Toxicology Laboratory Survey for the component within the Department of Justice is the Drug Enforcement Administration, Diversion Control Division.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Affected public (Primary): Forensic Science Laboratory Management.

Abstract: The National Forensic Laboratory Information System (NFLIS) collections provide the DEA with national databases on analyzed drug samples from law enforcement activities, antemortem toxicology samples (toxiciology laboratories), and post-mortem toxicology samples (medical examiner/coroner offices (MECs) from federal, state, and local laboratories. Specifically, NFLIS-Drug data provide DEA current, precise, and representative estimates of drugs seized by law enforcement and analyzed by forensic laboratories. Since 2001, DEA has had case and drug report estimates for all drugs reported in NFLIS that are statistically representative of the nation and of census regions. The estimates, which are made possible by updating the laboratory profiles through the survey effort (see draft survey in Appendix), have given DEA the ability to track national and regional drug trends; a clearer national picture of illicit or diverted drug availability; additional information about the temporal changes in drug availability by geographic region; and the ability to detect new or emerging drugs. Information from NFLIS is combined with other existing databases to develop more accurate, up-to-date information on abused drugs. This database represents a voluntary, cooperative effort on the part of participating laboratories and MECs to provide a centralized source of analyzed drug data. Existing federal drug abuse databases do not provide the type, scope, timeliness, or quality of information necessary to effectively estimate the actual or relative abuse potential of drugs as required under the Controlled Substances Act (21 U.S.C. 811(b)) and international treaties in a timely and efficient manner. For example, much of the trafficking data for federal drug scheduling actions is presently obtained on a case-by-case basis from state and local laboratories. Occasionally scientific personnel from the DEA's Diversion Control Division, Drug and Chemical Evaluation Section, have contacted specific laboratories and requested files. In addition, some DEA field offices routinely subpoena MEC records for use in case work. The development of the National Forensic Laboratory Information System (NFLIS) greatly enhances the collection of such data. Submission of information for this collection is voluntary. DEA is not mandating this information collection.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The DEA estimates that 140 persons annually for this collection at 1.6 hour per respondent, for an annual burden of 218 hours.

6. *An estimate of the total public burden (in hours) associated with the proposed collection:* The DEA estimates that this collection takes 218 annual burden hours.

If additional information is required please 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: August 1, 2018.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2018–16740 Filed 8–3–18; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Survey of State Attorneys General Offices (SSAGO): Human Trafficking

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics (BJS), 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.

DATES: Comments are encouraged and will be accepted for 60 days until October 5, 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 Suzanne Strong, Statistician, Prosecution and Judicial Statistics Unit, Bureau of Justice Statistics, 810 Seventh Street NW, Washington, DC 20531 (email: *Suzanne.M.Strong@usdoj.gov;* telephone: 202–616–3666).

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 Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *The Title of the Form/Collection:* Survey of State Attorneys General Offices (SSAGO)—Human Trafficking.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* SSAGO–2. The applicable component

within the Department of Justice is the Bureau of Justice Statistics, in the Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Respondents will be state attorneys general or deputy attorneys within the state and territory attorneys general offices who work on human trafficking matters. *Abstract:* Among other responsibilities, the Bureau of Justice Statistics is charged with collecting data regarding the prosecution of crimes by state and federal offices. This survey will be directed towards state and territory attorneys general offices regarding their jurisdiction over civil and criminal human trafficking matters. This is BJS's second survey of state attorney general offices, but the first survey from the Survey of State Attorneys General Offices (SSAGO) program. The survey collects data on the staffing of state attorneys general offices, including the total number of deputy attorneys general and access to support staff. The survey also collects information on the types and numbers of human trafficking matters referred to the state attorneys general offices, the sources of the referrals of human trafficking matters, the estimates of labor and sex trafficking cases, the types of victims in labor and sex trafficking cases, the types of offenders of labor and sex trafficking cases, the manner in which criminal and civil human trafficking cases were closed in court, and state attorneys general offices' participation in state and federal human trafficking task forces.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An agency-level survey will be sent to approximately 56 state and territory attorneys general offices. The expected burden placed on these respondents is about 25 minutes per respondent, with an additional 5 minutes to locate any additional persons within the office necessary to complete the survey.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total respondent burden is approximately 28 burden hours for the 56 respondents.

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, 3E.405A, Washington, DC 20530.

Dated: July 30, 2018.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2018–16581 Filed 8–3–18; 8:45 am]

BILLING CODE 4410–18–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket 14–CRB–0010–CD/SD (2010–13)]

Distribution of Cable Royalty Funds; Distribution of Satellite Royalty Funds

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final Distribution Determination.

SUMMARY: The Copyright Royalty Judges (Judges) announce final distribution of a portion of cable and satellite royalty funds for the years 2010, 2011, 2012, and 2013. The determination results from agreement among the participants that claim shares of the funds to be allocated to the Devotional Claimant category. The Judges issued their initial determination to the participants on July 19, 2018.

DATES: *Applicable:* August 6, 2018.

ADDRESSES: The final distribution order is also published in eCRB at *https://app.crb.gov/* and on the Federal eRulemaking Portal at *www.regulations.gov.*

Docket: For access to the docket to read submitted background documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/* and search for docket number 14–CRB–0010–CD/SD (2010–13).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707–7658 or email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: This matter is before the Copyright Royalty Judges (Judges) on motion of Multigroup Claimants (MGC) for entry of a consent order adopting the distribution shares proposed by the Settling Devotional Claimants (SDC) and ordering a final distribution of cable and satellite television royalty funds to be allocated to the Devotional Claimants category in conformity with those agreed shares.[1] The SDC do not oppose the final percentage distribution.

The Judges find that the parties' agreement regarding the final percentage distribution ends any remaining controversy with regard to the subject funds over which the Judges have jurisdiction and that neither party retains a significant interest related to this proceeding. Accordingly, good cause exists for entry of a final distribution determination relating to the subject funds.

The Judges therefore *order* that the royalty shares proposed in the SDC's Written Direct Statement (Dec. 29, 2017) are adopted, and that final distribution of the cable and satellite royalty funds allocated to the Devotional category shall be in accordance with the following relative shares.

CABLE FUNDS ALLOCATED TO DEVOTIONAL PROGRAMMING

Cable royalty year	SDC share (percent)	MGC share (percent)
2010	77.1	22.9
2011	82.6	17.4
2012	84.8	15.2
2013	89.1	10.9

SATELLITE FUNDS ALLOCATED TO DEVOTIONAL PROGRAMMING

Satellite royalty year	SDC share (percent)	MGC share (percent)
2010	75.3	24.7
2011	88.3	11.7
2012	90.7	9.3
2013	97.7	2.3

The Judges *further order* that, as the parties have presented this as an agreed determination, they have waived their rights to seek rehearing.

The Judges *further order* that this final distribution determination is without prejudice to the parties' right to appeal the Judges' interlocutory ruling in this consolidated proceeding with regard to both cable and satellite claims issues.

Upon issuance of this final determination, the Register of Copyrights (Register) shall have 60 days to conduct a statutory review. The Librarian of Congress shall review and cause this final determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

July 18, 2018.

So ordered.

Suzanne M. Barnett,

Chief United States Copyright Royalty Judge.

[1] Allocation of cable royalty funds to the Devotional Claimants category remains the subject of the allocation proceeding, Docket No. 14–CRB–0010 CD (2010–13). The schedule in the proceeding to determine allocation of satellite royalty funds among claimant categories, Docket No. 14–CRB–0011 SD (2010–13) is suspended pending completion of the cable allocation proceeding.

David R. Strickler
United States Copyright Royalty Judge.

Jesse M. Feder
United States Copyright Royalty Judge.

Dated: July 27, 2018.

Suzanne M. Barnett,

Chief United States Copyright Royalty Judge.

Dr. Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2018–16780 Filed 8–3–18; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. These meetings will primarily take place at NSF's headquarters, 2415 Eisenhower Avenue, Alexandria, VA 22314.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF website: *https://www.nsf.gov/events/advisory.jsp.* This information may also be requested by telephoning, 703/292–8687.

Dated: August 1, 2018.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2018–16729 Filed 8–3–18; 8:45 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83750; File No. SR–CboeBZX–2018–010]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Adopt BZX Rule 14.11(k) To Permit the Listing and Trading of Managed Portfolio Shares and To List and Trade Shares of the ClearBridge Appreciation ETF, ClearBridge Large Cap ETF, ClearBridge Mid Cap Growth ETF, ClearBridge Select ETF, and ClearBridge All Cap Value ETF

July 31, 2018.

On February 5, 2018, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt BZX Rule 14.11(k) to permit the listing and trading of Managed Portfolio Shares, and to list and trade shares of the ClearBridge Appreciation ETF, ClearBridge Large Cap ETF, ClearBridge Mid Cap Growth ETF, ClearBridge Select ETF, and ClearBridge All Cap Value ETF under proposed BZX Rule 14.11(k). The proposed rule change was published for comment in the **Federal Register** on February 20, 2018.[3] On April 3, 2018, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On May 21, 2018, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change.[7] The Commission has received four comment letters on the proposed rule change.[8]

On July 27, 2018, the Exchange withdrew the proposed rule change (SR–CboeBZX–2018–010).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16722 Filed 8–3–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83752; File No. SR–FINRA–2018–019]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change Creating Fee and Honorarium for Late Cancellation of a Prehearing Conference

July 31, 2018.

I. Introduction

On May 4, 2018, 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 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rules 12500 and 12501 of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and FINRA Rules 13500 and 13501 of the Code of Arbitration Procedure for Industry Disputes (''Industry Code'' and together, ''Codes''), to charge a $100 per-arbitrator fee to parties who request cancellation of a prehearing conference within three business days before a scheduled prehearing conference. The proposed rule change would also amend FINRA Rules 12214(a) and 13214(a) of the Codes to create a $100 honorarium to pay each arbitrator scheduled to attend a prehearing conference that was cancelled within three business days of the prehearing conference.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 82705 (February 13, 2018), 83 FR 7256.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 82984, 83 FR 15181 (April 9, 2018).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 83293, 83 FR 24367 (May 25, 2018).

[8] *See* letters to Brent J. Fields, Secretary, Commission, from: (1) Todd J. Broms, Chief Executive Officer, Broms & Company LLC, dated March 13, 2018; (2) Simon P. Goulet, Co-Founder, Blue Tractor Group, LLC, dated March 19, 2018; (3) Terence W. Norman, Founder, Blue Tractor Group, LLC, dated March 20, 2018; and (4) Terence W. Norman, Founder, Blue Tractor Group, LLC, dated May 8, 2018. The comment letters are available at *https://www.sec.gov/comments/sr-cboebzx-2018-010/cboebzx2018010.htm.*

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The proposed rule change was published for comment in the **Federal Register** on May 14, 2018.[3] The public comment period closed on June 8, 2018. The Commission received one comment letter in response to the Notice, supporting the proposed rule change.[4] This order approves the proposed rule change.

II. Description of the Proposed Rule Change [5]

Cancellation Fee

Parties to an arbitration typically schedule prehearing conferences with the arbitrator(s) before the hearing on the merits of the claim.[6] During these conferences, the participants set discovery, briefing and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters.[7] A prehearing conference may also address other outstanding matters, such as discovery disputes or substantive motions (*e.g.,* motions to dismiss or motions to amend).[8]

FINRA stated that its arbitrators devote considerable time preparing for prehearing conferences and forgo other opportunities by reserving time on their schedules.[9] Currently, however, parties can cancel prehearing conferences up to, and including, the day of the conference without penalty.[10] Consequently, FINRA has found that late cancellations (in particular, those that occur within three or fewer business days of a scheduled prehearing conference) have negatively impacted its roster of arbitrators by creating scheduling inconveniences for, and uncompensated work by, arbitrators.[11]

To help alleviate these burdens, FINRA is proposing to amend FINRA Rules 12500 and 12501 of the Customer Code and FINRA Rules 13500 and 13501 of the Industry Code,[12] which govern prehearing conferences, to provide that if a cancellation [13] request is agreed to by the parties or requested by one or more parties within three business days before a scheduled prehearing conference and granted, the party or parties shall be charged a fee of $100 per arbitrator scheduled to attend the prehearing conference (''late cancellation fee'').[14] The date of the party's or parties' cancellation request would control whether the fee is assessed, not the date of the arbitrator or arbitrators' decision on such a request, if a decision is required.[15] If the arbitrator(s) cancel a prehearing conference on their own, the parties would not be charged.[16]

Under the proposal, if more than one party requests the cancellation of a prehearing conference, the arbitrator(s) would have the authority to allocate the fee in the award between or among the requesting parties.[17] However, depending on the facts and circumstances of the request, the arbitrator(s) could assess the fee to one party or to a non-requesting party or parties if the arbitrator(s) determine that these parties caused or contributed to the need for the cancellation.[18]

Under the proposal, however, if an extraordinary circumstance prevents a party from making a timely cancellation request, the arbitrator(s) would have the discretion to waive the late cancellation fee, provided they receive a written explanation of the circumstance.[19] FINRA would notify parties and arbitrator(s) that the prehearing conference was cancelled and remind parties to provide an explanation, if applicable, before the close of the arbitration case.[20] If the fee is waived, the party's or parties' obligation to pay the fee would be eliminated. FINRA, however, would pay the $100 per-arbitrator honorarium (discussed below) to the arbitrator(s) scheduled to attend the prehearing conference.[21]

Honorarium

In addition, FINRA is proposing to amend FINRA Rules 12214(a) and 13214(a) to provide that FINRA would pay an honorarium of $100 to each arbitrator scheduled to attend a prehearing conference that was cancelled within three business days of the prehearing conference by agreement of the parties or was requested by one or more parties within three business days of the prehearing conference and granted. As discussed above, if the arbitrator(s) waive the fee, the obligation to pay the fee would be eliminated, but FINRA would still pay the $100 per-arbitrator honorarium to the arbitrator(s) scheduled to attend the prehearing conference.

III. Comment Summary

As noted above, the Commission received one comment letter on the proposed rule change, supporting the proposal.[22] The commenter states that late cancellations often result in scheduling inconvenience for, and uncompensated work by, arbitrators. The commenter believes that the proposal represents a ''fair, equitable and reasonable'' solution to these concerns because the fee and honorarium recognize the ''considerable preparation by arbitrators . . . that is required prior to a prehearing conference.'' [23] Accordingly, the commenter believes that the proposal would ''lead to an improved and expanded roster of arbitrators.'' [24]

IV. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letter, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[25] Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,[26] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Exchange Act Section 15A(b)(5) of

[3] *See* Exchange Act Release No. 83227 (May 4, 2018), 83 FR 23306 (May 14, 2018) (File No. SR–FINRA–2018–019 (''Notice'').

[4] *See* Letter from Steven B. Caruso, Maddox Hargett Caruso, P.C., dated May 15, 2018 (''Caruso Letter''), available at *https://www.sec.gov.*

[5] The subsequent description of the proposed rule change is substantially excerpted from FINRA's description in the Notice. *See* Notice, 83 FR at 23306–23308.

[6] *See* FINRA Rules 12100(w) and 13100(w).

[7] *See* FINRA Rules 12500(c) and 13500(c).

[8] *See* FINRA Rules 12501(b) and 13501(b).

[9] *See* Notice, 83 FR at 23309.

[10] *Id.*

[11] In the past, arbitrators have resigned from the roster because FINRA's dispute resolution forum does not provide a payment to arbitrators for cancellations of prehearing conferences. FINRA notes that one reason former arbitrators have given for their resignation is the lack of compensation for prehearing conferences that are cancelled on short notice. FINRA has identified 17 separate complaints relating to 22 arbitrators with respect to the late cancellations of prehearing conferences. *See* Notice, 83 FR at 23307, note 12.

[12] To simplify this explanation, FINRA's discussion of the proposed changes focuses on changes to the Customer Code. However, the proposed changes also apply to the Industry Code. *See* Notice, 83 FR at 23307, note 13.

[13] References to cancellations of prehearing conferences include postponements of such conferences. *See* Notice, 83 FR at 23309, note 29.

[14] *See* Notice, 83 FR at 23307.

[15] A decision would be required if only one party requests that the prehearing conference be cancelled. *See* Notice, 83 FR at 23307, note 14.

[16] *See* Notice, 83 FR at 23307.

[17] *See* Notice, 83 FR at 23307.

[18] *See* Notice, 83 FR at 23307. *See also* FINRA Rules 12904(e)(8) and 13904(e)(8); *see generally* FINRA Rules 12601(b) and 13601(b).

[19] *See* Notice, 83 FR at 23307.

[20] *Id.*

[21] *Id.*

[22] *See supra* note 4.

[23] Caruso Letter.

[24] *Id.*

[25] In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 15 U.S.C. 78o–3(b)(6).

the Exchange Act,[27] 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.

Public Interest

The Commission agrees with FINRA and the commenter that the proposed rule change would protect investors and the public interest by improving FINRA's ability to recruit and retain qualified arbitrators willing to devote the time and effort necessary to consider prehearing issues, which FINRA asserts is an essential element for it to operate an effective arbitration forum.[28] Currently, parties can cancel prehearing conferences up to, and including, the same day of the conference without penalty. Late cancellations of prehearing conferences do, however, penalize the arbitrators who would not receive compensation for the time and effort devoted to preparing for the conference, as well as the potential for lost personal or professional opportunities caused by reserving the scheduled meeting time. These burdens could negatively impact an arbitrator's decision to remain on the FINRA arbitrator roster or an individual's decision to join the roster. The proposed rule change would eliminate these disincentives by compensating arbitrators in the event of a late cancellation. For these reasons, the Commission believes the proposed rule change is consistent with the Section 15A(b)(6) requirement that FINRA rules be designed to protect the public interest.

Equitable Allocation of Fees

The Commission also agrees that the proposed rule change represents an equitable allocation of the fees associated with using the FINRA arbitration forum.[29] In particular, the Commission notes the proposed late cancellation fee would be allocated among those parties responsible for canceling the meeting within three days of the prehearing conferences. Even if a party or parties did not request the cancellation, the proposed rule change would permit arbitrators to allocate all, or a portion of the fee, to those parties if the arbitrators determine that they caused or contributed to the late cancellation.[30]

The Commission recognizes that the proposed rule change could increase the cost to parties of using the arbitration forum.[31] However, the Commission also recognizes that the late cancellation fee would compensate arbitrators directly inconvenienced by the late cancellation of a prehearing conference and address a practice that negatively impacts the roster of arbitrators. In particular, the Commission notes that FINRA would compensate arbitrators for their preparation time and opportunity cost associated with reserving a meeting date when a prehearing conference is cancelled on short notice.[32] The Commission believes that it is reasonable to compensate the inconvenienced arbitrators for the time and opportunity cost. Furthermore, the Commission notes that parties to an arbitration could avoid the proposed late termination fee by, among other ways, providing notice of cancellation more than three business days prior to a scheduled prehearing conference.[33] Furthermore, the Commission notes that the arbitrator(s) could assess the fee to one party or to a non-requesting party or parties if the arbitrator(s) determine that these parties caused or contributed to the need for the cancellation. Finally, if an extraordinary circumstance prevents a party from making a timely cancellation request, the arbitrator(s) would have the discretion to waive the late cancellation fee, provided they receive a written explanation of the circumstance

For these reasons, the Commission believes the proposed rule change is also consistent with the Section 15A(b)(5) requirement that FINRA rules provide for the equitable allocation of reasonable fees among persons using any facility or system that FINRA operates or controls.

V. Conclusion

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act[34] that the proposal (SR–FINRA–2018–019), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16721 Filed 8–3–18; 8:45 am]

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[27] 15 U.S.C. 78*o*–3(b)(5).

[28] *See* Notice, 83 FR at 23308.

[29] *Id. See also* Caruso Letter.

[30] *See* Notice, 83 FR at 23308.

[31] *Id.*

[32] *Id.*

[33] *See* Notice, 83 FR at 23308.

[34] 15 U.S.C. 78s(b)(2).

[35] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83745; File No. SR–NSCC–2017–805]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Amendment No. 1 to an Advance Notice To Adopt a Recovery & Wind-Down Plan and Related Rules

July 31, 2018.

On December 18, 2017, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–NSCC–2017–805 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act'').[1] The notice of filing and extension of the review period of the Advance Notice was published for comment in the **Federal Register** on January 30, 2018.[2]

[1] 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b–4(n)(1)(i), respectively. On December 18, 2017, NSCC filed the Advance Notice as a proposed rule change (SR–NSCC–2017–017) with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder (''Proposed Rule Change''). (17 CFR 240.19b–4 and 17 CFR 240.19b–4, respectively.) The Proposed Rule Change was published in the **Federal Register** on January 8, 2018. *See* Securities Exchange Act Release No. 82430 (January 2, 2018), 83 FR 841 (January 8, 2018) (SR–NSCC–2017–017). On February 8, 2018, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017). On March 20, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82908 (March 20, 2018), 83 FR 12986 (March 26, 2018) (SR–NSCC–2017–017). On June 25, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change. Therefore, September 5, 2018 is the date by which the Commission should either approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 83509 (June 25, 2018), 83 FR 30785 (June 29, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017). On June 28, 2018, NSCC filed Amendment No. 1 to the Proposed Rule Change. *See* Securities Exchange Act Release No. 83632 (July 13, 2018), 83 FR 34166 (July 19, 2018) (SR–NSCC–2017–017). As of the date of this release, the Commission has not received any comments on the Proposed Rule Change.

[2] Securities Exchange Act Release No. 82581 (January 24, 2018), 83 FR 4327 (January 30, 2018) (SR–NSCC–2017–805). Pursuant to Section

Continued

On April 10, 2018, the Commission required additional information from NSCC pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice.[3] On June 28, 2018, NSCC filed Amendment No. 1 to the Advance Notice to amend and replace in its entirety the Advance Notice as originally submitted on December 18, 2017.[4] On July 6, 2018, the Commission received a response to its request for additional information in consideration of the Advance Notice, which added a further 60-days to the review period pursuant to Section 806(e)(1)(E) and (G) of the Clearing Supervision Act.[5]

The Advance Notice, as amended by Amendment No. 1, is described in Items I and II below, which Items have been prepared by NSCC. The Commission is publishing this notice to solicit comments on the Advance Notice, as amended by Amendment No. 1, from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The Advance Notice of NSCC proposes to (1) adopt the Recovery & Wind-down Plan of NSCC (''R&W Plan'' or ''Plan''); and (2) amend NSCC's Rules & Procedures (''Rules'')[6] in order to adopt Rule 41 (Corporation Default), Rule 42 (Wind-down of the Corporation), and Rule 60 (Market Disruption and Force Majeure) (each a ''Proposed Rule'' and, collectively, the ''Proposed Rules''). The Advance Notice would also propose to re-number the current Rule 42 (Wind-down of a Member, Fund Member or Insurance Carrier/Retirement Services Member) to Rule 40, which is currently reserved for future use.

The R&W Plan would be maintained by NSCC in compliance with Rule 17Ad–22(e)(3)(ii) under the Act by providing plans for the recovery and orderly wind-down of NSCC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, as described below.[7] The Proposed Rules are designed to (1) facilitate the implementation of the R&W Plan when necessary and, in particular, allow NSCC to effectuate its strategy for winding down and transferring its business; (2) provide Members and Limited Members with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities and obligations; and (3) provide NSCC with the legal basis to implement those provisions of the R&W Plan when necessary, as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency 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. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

While NSCC has not solicited or received any written comments relating to this proposal, NSCC has conducted outreach to Members in order to provide them with notice of the proposal. NSCC will notify the Commission of any written comments received by NSCC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Amendment No. 1

This filing constitutes Amendment No. 1 (''Amendment'') to the Advance Notice (also referred to below as the ''Original Filing'') previously filed by NSCC.[8] NSCC is amending the proposed R&W Plan and the Original Filing in order to clarify certain matters and make minor technical and conforming changes to the R&W Plan, as described below and as marked on Exhibit 4 hereto. To the extent such changes to the Plan require changes to the Original Filing, the information provided under ''*Description of Proposed Changes*'' in the Original Filing has been amended and is restated in its entirety below. Other sections of the Original Filing are unchanged and are restated in their entity for convenience.

First, this Amendment would clarify the meaning of the terms ''cease to act,'' ''Member default,'' ''Defaulting Member,'' and ''Member Default Losses'' as such terms are used in the Plan. This Amendment would also make conforming changes as necessary to reflect the use of these terms.

Second, this Amendment would clarify that actions and tools described in the Plan that are available in one phase of the Crisis Continuum may be used in subsequent phases of the Crisis Continuum when appropriate to address the applicable situation. This Amendment would also clarify that the allocation of losses resulting from a Member default would be applied when provided for, and in accordance with, Rule 4 of the Rules.

Third, this Amendment would clarify that the Recovery Corridor (as defined therein) is not a ''sub-phase'' of the recovery phase. Rather, the Recovery Corridor is a period of time that would occur toward the end of the Member default phase, when indicators are that NSCC may transition into the recovery phase. Thus, the Recovery Corridor precedes the recovery phase within the Crisis Continuum.

Fourth, this Amendment would make revisions to address the allocation of losses resulting from a Member default in order to more closely conform such statements to the changes proposed by the Loss Allocation Filing, as defined below.

Fifth, this Amendment would clarify the notifications that NSCC would be required to make under the Proposed Rule 60 (Market Disruption and Force Majeure).

Finally, this Amendment would make minor, technical and conforming revisions to correct typographical errors and to simplify descriptions. For example, such revisions would use lower case for terms that are not defined

806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. 12 U.S.C. 5465(e)(1)(H). The Commission found that the Advance Notice raised novel and complex issues and, accordingly, extended the review period of the Advance Notice for an additional 60 days until April 17, 2018, pursuant to Section 806(e)(1)(H). *Id.*

[3] 12 U.S.C. 5465(e)(1)(D); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Commission's Request for Additional Information,'' *available at https://www.sec.gov/rules/sro/nscc-an.htm.*

[4] To promote the public availability and transparency of its post-notice amendment, NSCC submitted a copy of Amendment No. 1 through the Commission's electronic public comment letter mechanism. Accordingly, Amendment No. 1 has been posted on the Commission's website at *https://www.sec.gov/rules/sro/nscc-an.htm* and thus been publicly available since June 29, 2018.

[5] 12 U.S.C. 5465(e)(1)(E) and (G); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Response to the Commission's Request for Additional Information,'' *available at https://www.sec.gov/rules/sro/nscc-an.htm.*

[6] Capitalized terms used herein and not otherwise defined herein are defined in the Rules, *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[7] 17 CFR 240.17Ad–22(e)(3)(ii).

[8] *See* Securities Exchange Act Release No. 82581 (January 24, 2018), 83 FR 4327 (January 30, 2018) (SR–NSCC–2017–805).

therein, and would use upper case for terms that are defined. The Amendment would also simplify certain descriptions by removing extraneous words and statements that are repetitive. These minor, technical revisions would not alter the substance of the proposal.

Description of Proposed Changes

NSCC is proposing to adopt the R&W Plan to be used by the Board and management of NSCC in the event NSCC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would identify (i) the recovery tools available to NSCC to address the risks of (a) uncovered losses or liquidity shortfalls resulting from the default of one or more Members, and (b) losses arising from non-default events, such as damage to its physical assets, a cyber-attack, or custody and investment losses, and (ii) the strategy for implementation of such tools. The R&W Plan would also establish the strategy and framework for the orderly wind-down of NSCC and the transfer of its business in the remote event the implementation of the available recovery tools does not successfully return NSCC to financial viability.

As discussed in greater detail below, the R&W Plan would provide, among other matters, (i) an overview of the business of NSCC and its parent, The Depository Trust & Clearing Corporation (''DTCC''); (ii) an analysis of NSCC's intercompany arrangements and critical links to other financial market infrastructures (''FMIs''); (iii) a description of NSCC's services, and the criteria used to determine which services are considered critical; (iv) a description of the NSCC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to NSCC to mitigate credit/market and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a ''Crisis Continuum'' timeline; (vii) a discussion of potential non-default losses and the resources available to NSCC to address such losses, including recovery triggers and tools to mitigate such losses; (viii) an analysis of the recovery tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Members to, among other things, control and monitor the risks they may present to NSCC, and how NSCC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of NSCC's business, including an estimate of the time and costs to effect a recovery or orderly wind-down of NSCC.

The R&W Plan would be structured as a roadmap, and would identify and describe the tools that NSCC may use to effect a recovery from the events and scenarios described therein. Certain recovery tools that would be identified in the R&W Plan are based in the Rules (including the Proposed Rules) and, as such, descriptions of those tools would include descriptions of, and reference to, the applicable Rules and any related internal policies and procedures. Other recovery tools that would be identified in the R&W Plan are based in contractual arrangements to which NSCC is a party, including, for example, existing committed or pre-arranged liquidity arrangements. Further, the R&W Plan would state that NSCC may develop further supporting internal guidelines and materials that may provide operationally for matters described in the Plan, and that such documents would be supplemental and subordinate to the Plan.

Key factors considered in developing the R&W Plan and the types of tools available to NSCC were its governance structure and the nature of the markets within which NSCC operates. As a result of these considerations, many of the tools available to NSCC that would be described in the R&W Plan are NSCC's existing, business-as-usual risk management and Member default management tools, which would continue to be applied in scenarios of increasing stress. In addition to these existing, business-as-usual tools, the R&W Plan would describe NSCC's other principal recovery tools, which include, for example, (i) identifying, monitoring and managing general business risk and holding sufficient liquid net assets funded by equity (''LNA'') to cover potential general business losses pursuant to the Clearing Agency Policy on Capital Requirements (''Capital Policy''),[9] (ii) maintaining the Clearing Agency Capital Replenishment Plan (''Replenishment Plan'') as a viable plan for the replenishment of capital should NSCC's equity fall close to or below the amount being held pursuant to the Capital Policy,[10] and (iii) the process for the allocation of losses among Members, as provided in Rule 4.[11] The R&W Plan would provide governance around the selection and implementation of the recovery tool or tools most relevant to mitigate a stress scenario and any applicable loss or liquidity shortfall.

The development of the R&W Plan is facilitated by the Office of Recovery & Resolution Planning (''R&R Team'') of DTCC.[12] The R&R Team reports to the DTCC Management Committee (''Management Committee'') and is responsible for maintaining the R&W Plan and for the development and ongoing maintenance of the overall recovery and wind-down planning process. The Board, or such committees as may be delegated authority by the Board from time to time pursuant to its charter, would review and approve the R&W Plan biennially, and would also review and approve any changes that are proposed to the R&W Plan outside of the biennial review.

As discussed in greater detail below, the Proposed Rules would define the procedures that may be employed in the event of NSCC's default and its wind-down, and would provide for NSCC's authority to take certain actions on the occurrence of a ''Market Disruption Event,'' as defined therein. Significantly, the Proposed Rules would provide Members and Limited Members with transparency and certainty with respect to these matters. The Proposed Rules would facilitate the implementation of the R&W Plan, particularly NSCC's strategy for winding down and transferring its business, and would provide NSCC with the legal basis to implement those aspects of the R&W Plan.

NSCC R&W Plan

The R&W Plan is intended to be used by the Board and NSCC's management in the event NSCC encounters scenarios that could potentially prevent it from being able to provide its critical services

[9] *See* Securities Exchange Act Release No. 81105 (July 7, 2017), 82 FR 32399 (July 13, 2017) (SR–DTC–2017–003, SR–FICC–2017–007, SR–NSCC–2017–004).

[10] *See id.*

[11] *See* Rule 4 (Clearing Fund), *supra* note 6. NSCC is proposing changes to Rule 4 and other related rules regarding allocation of losses in a separate filing submitted simultaneously with the Original Filing. *See* Securities Exchange Act Release Nos. 82430 (January 2, 2018), 83 FR 841 (January 8, 2018) (SR–NSCC–2017–017) and 82581 (January 24, 2018), 83 FR 4327 (January 30, 2018) (SR–NSCC–2017–805) (collectively referred to herein as the ''Loss Allocation Filing''). NSCC has submitted an amendment to the Loss Allocation Filing. A copy of the amendment to the Loss Allocation Filing is available at *http://www.dtcc.com/legal/sec-rule-filings.aspx*. NSCC expects the Commission to review both proposals, as amended, together, and, as such, the proposal described in this filing anticipates the approval and implementation of those proposed changes to the Rules.

[12] DTCC operates on a shared services model with respect to NSCC and its other subsidiaries. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a subsidiary, including NSCC.

as a going concern. The R&W Plan would be structured to provide a roadmap, define the strategy, and identify the tools available to NSCC to either (i) recover in the event it experiences losses that exceed its prefunded resources (such strategies and tools referred to herein as the ''Recovery Plan'') or (ii) wind-down its business in a manner designed to permit the continuation of its critical services in the event that such recovery efforts are not successful (such strategies and tools referred to herein as the ''Wind-down Plan''). The description of the R&W Plan below is intended to highlight the purpose and expected effects of the material aspects of the R&W Plan, and to provide Members and Limited Members with appropriate transparency into these features.

Business Overview, Critical Services, and Governance

The introduction to the R&W Plan would identify the document's purpose and its regulatory background, and would outline a summary of the Plan. The stated purpose of the R&W Plan is that it is to be used by the Board and NSCC management in the event NSCC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would be maintained by NSCC in compliance with Rule 17Ad–22(e)(3)(ii) under the Act [13] by providing plans for the recovery and orderly wind-down of NSCC.

The R&W Plan would describe DTCC's business profile, provide a summary of NSCC's services, and identify the intercompany arrangements and links between NSCC and other entities, including other FMIs. This overview section would provide a context for the R&W Plan by describing NSCC's business, organizational structure and critical links to other entities. By providing this context, this section would facilitate the analysis of the potential impact of utilizing the recovery tools set forth in later sections of the Recovery Plan, and the analysis of the factors that would be addressed in implementing the Wind-down Plan.

DTCC is a user-owned and user-governed holding company and is the parent company of NSCC and its affiliates, The Depository Trust Company (''DTC'') and Fixed Income Clearing Corporation (''FICC'', and, together with NSCC and DTC, the ''Clearing Agencies''). The Plan would describe how corporate support services are provided to NSCC from DTCC and DTCC's other subsidiaries through intercompany agreements under a shared services model.

The Plan would provide a description of established links between NSCC and other FMIs, including The Options Clearing Corporation (''OCC''), CDS Clearing and Depository Services Inc. (''CDS''), and DTC. For example, the arrangement between NSCC and OCC governs the process by which OCC submits transactions to NSCC for settlement, and sets the time when the settlement obligations and the central counterparty trade guaranty shifts from OCC to NSCC with respect to these transactions.[14] The arrangement with CDS enables participants of CDS to clear and settle OTC trades with U.S. broker-dealers through subaccounts maintained by CDS through its own membership with NSCC.[15] The interface between DTC and NSCC permits transactions to flow between DTC's system and NSCC's Continuous Net Settlement (''CNS'') system in a collateralized environment.[16] NSCC's CNS relies on this interface with DTC for the book-entry movement of securities to settle transactions. This section of the Plan, identifying and briefly describing NSCC's established links, would provide a mapping of critical connections and dependencies that may need to be relied on or otherwise addressed in connection with the implementation of either the Recovery Plan or the Wind-down Plan.

The Plan would define the criteria for classifying certain of NSCC's services as ''critical,'' and would identify those critical services and the rationale for their classification. This section would provide an analysis of the potential systemic impact from a service disruption, and is important for evaluating how the recovery tools and the wind-down strategy would facilitate and provide for the continuation of NSCC's critical services to the markets it serves. The criteria that would be used to identify an NSCC service or function as critical would include consideration as to (1) whether there is a lack of alternative providers or products; (2) whether failure of the service could impact NSCC's ability to perform its central counterparty services; (3) whether failure of the service could impact NSCC's ability to perform its netting services, and, as such, the availability of market liquidity; and (4) the service is interconnected with other participants and processes within the U.S. financial system, for example, with other FMIs, settlement banks, broker-dealers, and exchanges. The Plan would then list each of those services, functions or activities that NSCC has identified as ''critical'' based on the applicability of these four criteria. Such critical services would include, for example, trade capture and recording through the Universal Trade Capture system,[17] services supporting Correspondent Clearing relationships,[18] the CNS system,[19] the Balance Order Netting system,[20] Mutual Funds Services,[21] and the settlement of money payments with respect to transactions processed by NSCC.[22] The R&W Plan would also include a non-exhaustive list of NSCC services that are not deemed critical.

The evaluation of which services provided by NSCC are deemed critical is important for purposes of determining how the R&W Plan would facilitate the continuity of those services. As discussed further below, while NSCC's Wind-down Plan would provide for the transfer of all critical services to a transferee in the event NSCC's wind-down is implemented, it would anticipate that any non-critical services that are ancillary and beneficial to a critical service, or that otherwise have substantial user demand from the continuing membership, would also be transferred.

The Plan would describe the governance structure of both DTCC and NSCC. This section of the Plan would identify the ownership and governance model of these entities at both the Board of Directors and management levels. The Plan would state that the stages of escalation required to manage recovery under the Recovery Plan or to invoke NSCC's wind-down under the Wind-down Plan would range from relevant business line managers up to the Board through NSCC's governance structure. The Plan would then identify the parties responsible for certain activities under

[13] 17 CFR 240.17Ad–22(e)(3)(ii).

[14] *See* Securities Exchange Act Release Nos. 81266 (July 31, 2017), 82 FR 36484 (August 4, 2017) (SR–NSCC–2017–007, SR–OCC–2017–013); 81260 (July 31, 2017), 82 FR 36476 (August 4, 2017) (SR–NSCC–2017–803, SR–OCC–2017–804); Procedure III (Trade Recording Service (Interface with Qualified Clearing Agencies)), *supra* note 6.

[15] *See* Rule 61 (International Links), *supra* note 6.

[16] *See* Rule 11 (CNS System) and Procedure VII (CNS Accounting Operation), *supra* note 6.

[17] *See* Rule 7 (Comparison and Trade Recording Operation) and Procedure II (Trade Comparison and Recording Service), *supra* note 6.

[18] *See* Procedure IV (Special Representative Service), *supra* note 6.

[19] *See* Rule 11 (CNS System) and Procedure VII (CNS Accounting Operation), *supra* note 6.

[20] *See* Rule 8 (Balance Order and Foreign Security Systems) and Procedure V (Balance Order Accounting Operation), *supra* note 6.

[21] *See* Rule 52 (Mutual Funds Services), *supra* note 6.

[22] *See* Rule 12 (Settlement) and Procedure VIII (Money Settlement Service), *supra* note 6.

both the Recovery Plan and the Wind-down Plan, and would describe their respective roles. The Plan would identify the Risk Committee of the Board (''Board Risk Committee'') as being responsible for oversight of risk management activities at NSCC, which include focusing on both oversight of risk management systems and processes designed to identify and manage various risks faced by NSCC, and, due to NSCC's critical role in the markets in which it operates, oversight of NSCC's efforts to mitigate systemic risks that could impact those markets and the broader financial system.[23] The Plan would identify the DTCC Management Risk Committee (''Management Risk Committee'') as primarily responsible for general, day-to-day risk management through delegated authority from the Board Risk Committee. The Plan would state that the Management Risk Committee has delegated specific day-to-day risk management, including management of risks addressed through margining systems and related activities, to the DTCC Group Chief Risk Office (''GCRO''), which works with staff within the DTCC Financial Risk Management group. Finally, the Plan would describe the role of the Management Committee, which provides overall direction for all aspects of NSCC's business, technology, and operations and the functional areas that support these activities.

The Plan would describe the governance of recovery efforts in response to both default losses and non-default losses under the Recovery Plan, identifying the groups responsible for those recovery efforts. Specifically, the Plan would state that the Management Risk Committee provides oversight of actions relating to the default of a Member, which would be reported and escalated to it through the GCRO, and the Management Committee provides oversight of actions relating to non-default events that could result in a loss, which would be reported and escalated to it from the DTCC Chief Financial Officer (''CFO'') and the DTCC Treasury group that reports to the CFO, and from other relevant subject matter experts based on the nature and circumstances of the non-default event.[24] More generally, the Plan would state that the type of loss and the nature and circumstances of the events that lead to the loss would dictate the components of governance to address that loss, including the escalation path to authorize those actions. As described further below, both the Recovery Plan and the Wind-down Plan would describe the governance of escalations, decisions, and actions under each of those plans.

Finally, the Plan would describe the role of the R&R Team in managing the overall recovery and wind-down program and plans for each of the Clearing Agencies.

NSCC Recovery Plan

The Recovery Plan is intended to be a roadmap of those actions that NSCC may employ to monitor and, as needed, stabilize its financial condition. As each event that could lead to a financial loss could be unique in its circumstances, the Recovery Plan would not be prescriptive and would permit NSCC to maintain flexibility in its use of identified tools and in the sequence in which such tools are used, subject to any conditions in the Rules or the contractual arrangement on which such tool is based. NSCC's Recovery Plan would consist of (1) a description of the risk management surveillance, tools, and governance that NSCC would employ across evolving stress scenarios that it may face as it transitions through a ''Crisis Continuum,'' described below; (2) a description of NSCC's risk of losses that may result from non-default events, and the financial resources and recovery tools available to NSCC to manage those risks and any resulting losses; and (3) an evaluation of the characteristics of the recovery tools that may be used in response to either default losses or non-default losses, as described in greater detail below. In all cases, NSCC would act in accordance with the Rules, within the governance structure described in the R&W Plan, and in accordance with applicable regulatory oversight to address each situation in order to best protect NSCC, Members, and the markets in which it operates.

Managing Member Default Losses and Liquidity Needs Through the Crisis Continuum. The Recovery Plan would describe the risk management surveillance, tools, and governance that NSCC may employ across an increasing stress environment, which is referred to as the ''Crisis Continuum.'' This description would identify those tools that can be employed to mitigate losses, and mitigate or minimize liquidity needs, as the market environment becomes increasingly stressed. The phases of the Crisis Continuum would include (1) a stable market phase, (2) a stress market phase, (3) a phase commencing with NSCC's decision to cease to act for a Member or Affiliated Family of Members (referred to in the Plan as the '' Member default phase''),[25] and (4) a recovery phase. This section of the Recovery Plan would address conditions and circumstances relating to NSCC's decision to cease to act for a Member pursuant to the Rules.[26] In the Plan, ''cease to act'' and the events that may lead to such decision, are used within the context of Rule 46 of the Rules.[27] Further, for ease of reference, the R&W Plan would, for purposes of the Plan, use the term ''Member default'' to refer to the event or events that precipitate NSCC ceasing to act for a Member or an Affiliated Family, would use the term ''Defaulting Member'' to refer to a Member for which NSCC has ceased to act, and would use the term ''Member Default Losses'' to refer to losses that arise out of or relate to the Member default (including any losses that arise from liquidation of that Member's portfolio), and to distinguish such losses from those that arise out of the business or other events not related to a Member default, which are separately addressed in the Plan.

The Recovery Plan would provide context to its roadmap through this Crisis Continuum by describing NSCC's ongoing management of credit, market and liquidity risk, and its existing process for measuring and reporting its risks as they align with established thresholds for its tolerance of those risks. The Recovery Plan would discuss the management of credit/market risk and liquidity exposures together, because the tools that address these risks can be deployed either separately or in a coordinated approach in order to address both exposures. NSCC manages these risk exposures collectively to limit their overall impact on NSCC and its membership. As part of its market risk management strategy, NSCC manages its credit exposure to Members by determining the appropriate Required Deposits to the Clearing Fund and monitoring its sufficiency, as provided

[23] *The charter of the Board Risk Committee is available at http://www.dtcc.com/~/media/Files/Downloads/legal/policy-and-compliance/DTCC-BOD-Risk-Committee-Charter.pdf.*

[24] The Plan would state that these groups would be involved to address how to mitigate the financial impact of non-default losses, and in recommending mitigating actions, the Management Committee would consider information and recommendations from relevant subject matter experts based on the nature and circumstances of the non-default event. Any necessary operational response to these events, however, would be managed in accordance with applicable incident response/business continuity process; for example, processes established by the DTCC Technology Risk Management group would be followed in response to a cyber event.

[25] The Plan would define an ''Affiliated Family'' of Members as a number of affiliated entities that are all Members of NSCC.

[26] *See* Rule 46 (Restrictions on Access to Services), *supra* note 6.

[27] *Id.*

for in the Rules.[28] NSCC manages its liquidity risks with an objective of maintaining sufficient resources to be able to fulfill obligations that have been guaranteed by NSCC in the event of a Member default that presents the largest aggregate liquidity exposure to NSCC over the settlement cycle.[29]

The Recovery Plan would outline the metrics and indicators that NSCC has developed to evaluate a stress situation against established risk tolerance thresholds. Each risk mitigation tool identified in the Recovery Plan would include a description of the escalation thresholds that allow for effective and timely reporting to the appropriate internal management staff and committees, or to the Board. The Recovery Plan would make clear that these tools and escalation protocols would be calibrated across each phase of the Crisis Continuum. The Recovery Plan would also establish that NSCC would retain the flexibility to deploy such tools either separately or in a coordinated approach, and to use other alternatives to these actions and tools as necessitated by the circumstances of a particular Member default, in accordance with the Rules. Therefore, the Recovery Plan would both provide NSCC with a roadmap to follow within each phase of the Crisis Continuum, and would permit it to adjust its risk management measures to address the unique circumstances of each event.

The Recovery Plan would describe the conditions that mark each phase of the Crisis Continuum, and would identify actions that NSCC could take as it transitions through each phase in order to both prevent losses from materializing through active risk management, and to restore the financial health of NSCC during a period of stress.

The stable market phase of the Crisis Continuum would describe active risk management activities in the normal course of business. These activities would include (1) routine monitoring of margin adequacy through daily review of back testing and stress testing results that review the adequacy of NSCC's margin calculations, and escalation of those results to internal and Board committees; [30] and (2) routine monitoring of liquidity adequacy through review of daily liquidity studies that measure sufficiency of available liquidity resources to meet cash settlement obligations of the Member that would generate the largest aggregate payment obligation.[31]

The Recovery Plan would describe some of the indicators of the stress market phase of the Crisis Continuum, which would include, for example, volatility in market prices of certain assets where there is increased uncertainty among market participants about the fundamental value of those assets. This phase would involve general market stresses, when no Member default would be imminent. Within the description of this phase, the Recovery Plan would provide that NSCC may take targeted, routine risk management measures as necessary and as permitted by the Rules.

Within the Member default phase of the Crisis Continuum, the Recovery Plan would provide a roadmap for the existing procedures that NSCC would follow in the event of a Member default and any decision by NSCC to cease to act for that Member.[32] The Recovery Plan would provide that the objectives of NSCC's actions upon a Member or Affiliated Family default are to (1) minimize losses and market exposure of the affected Members and NSCC's non-Defaulting Members; and (2), to the extent practicable, minimize disturbances to the affected markets. The Recovery Plan would describe tools, actions, and related governance for both market risk monitoring and liquidity risk monitoring through this phase. For example, in connection with managing its market risk during this phase, NSCC would, pursuant to the Rules, (1) monitor and assess the adequacy of Clearing Fund resources; (2), when necessary and appropriate pursuant to the Rules, assess and collect additional margin requirements; and (3) follow its operational procedures to liquidate the Defaulting Member's portfolio. Management of liquidity risk through this phase would involve ongoing monitoring of the adequacy of NSCC's liquidity resources, and the Recovery Plan would identify certain actions NSCC may deploy as it deems necessary to mitigate a potential liquidity shortfall, which would include, for example, adjusting its strategy for closing out the Defaulting Member's portfolio or seeking additional liquidity resources. The Recovery Plan would state that, throughout this phase, relevant information would be escalated and reported to both internal management committees and the Board Risk Committee.

The Recovery Plan would also identify financial resources available to NSCC, pursuant to the Rules, to address losses arising out of a Member default. Specifically, Rule 4, as proposed to be amended by the Loss Allocation Filing, would provide that losses remaining after application of the Defaulting Member's resources be satisfied first by applying a ''Corporate Contribution,'' and then, if necessary, by allocating remaining losses among the membership in accordance with such Rule 4.[33]

In order to provide for an effective and timely recovery, the Recovery Plan would describe the period of time that would occur near the end of the Member default phase, during which NSCC may experience stress events or observe early warning indicators that allow it to evaluate its options and prepare for the recovery phase (referred to in the Plan as the ''Recovery Corridor''). The Recovery Plan would then describe the recovery phase of the Crisis Continuum, which would begin on the date that NSCC issues the first Loss Allocation Notice of the second loss allocation round with respect to a given ''Event Period.'' [34] The recovery

[28] *See* Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters), *supra* note 6. Because NSCC does not maintain a guaranty fund separate and apart from the Clearing Fund it collects from Members, NSCC monitors its credit exposure to its Members by managing the market risks of each Member's unsettled portfolio through the collection of the Clearing Fund. The aggregate of all Members' Required Fund Deposits comprises the Clearing Fund that represents NSCC's prefunded resources to address uncovered loss exposures, as provided for in proposed Rule 4. Therefore, NSCC's market risk management strategy is designed to comply with Rule 17Ad–22(e)(4) under the Act, where these risks are referred to as ''credit risks.'' *See also* 17 CFR 240.17Ad–22(e)(4).

[29] NSCC's liquidity risk management strategy, including the manner in which NSCC utilizes its liquidity tools, is described in the Clearing Agency Liquidity Risk Management Framework. *See* Securities Exchange Act Release Nos. 80489 (April 19, 2017), 82 FR 19120 (April 25, 2017) (SR–DTC–2017–004, SR–NSCC–2017–005, SR–FICC–2017–008); 81194 (July 24, 2017), 82 FR 35241 (July 28, 2017) (SR–DTC–2017–004, SR–NSCC–2017–005, SR–FICC–2017–008).

[30] NSCC's stress testing practices are described in the Clearing Agency Stress Testing Framework (Market Risk). *See* Securities Exchange Act Release Nos. 80485 (April 19, 2017), 82 FR 19131 (April 25, 2017) (SR–DTC–2017–005, SR–FICC–2017–009, SR–NSCC–2017–006); 81192 (July 24, 2017), 82 FR 35245 (July 28, 2017) (SR–DTC–2017–005, SR–FICC–2017–009, SR–NSCC–2017–006).

[31] *See supra* note 29.

[32] *See* Rule 18 (Procedures for When the Corporation Declines or Ceases to Act) and Rule 46 (Restrictions on Access to Services), *supra* note 6.

[33] *See supra* note 11. The Loss Allocation Filing proposes to amend Rule 4 to define the amount NSCC would contribute to address a loss resulting from either a Member default or a non-default event as the ''Corporate Contribution.'' This amount would be 50 percent (50%) of the ''General Business Risk Capital Requirement,'' which is calculated pursuant to the Capital Policy and is an amount sufficient to cover potential general business losses so that NSCC can continue operations and services as a going concern if those losses materialize, in compliance with Rule 17Ad–22(e)(15) under the Act. *See also supra* note 9; 17 CFR 240.17Ad–22(e)(15).

[34] The Loss Allocation Filing proposes to amend Rule 4 to introduce the concept of an ''Event Period'' as the ten (10) Business Days beginning on

phase would describe actions that NSCC may take to avoid entering into a wind down of its business.

NSCC expects that significant deterioration of liquidity resources would cause it to enter the Recovery Corridor. As such, the Plan would describe the actions NSCC may take aimed at replenishing those resources. Recovery Corridor indicators may include, for example, a rapid and material change in market prices or substantial intraday activity volume by the Member that subsequently defaults, neither of which are mitigated by intraday margin calls, or subsequent defaults by other Members or Affiliated Families during a compressed time period. Throughout the Recovery Corridor, NSCC would monitor the adequacy of its resources and the expected timing of replenishment of those resources, and would do so through the monitoring of certain corridor indicator metrics.

The majority of the corridor indicators, as identified in the Recovery Plan, relate directly to conditions that may require NSCC to adjust its strategy for hedging and liquidating a Defaulting Member's portfolio, and any such changes would include an assessment of the status of the corridor indicators. Corridor indicators would include, for example, effectiveness and speed of NSCC's efforts to close out the portfolio of the Defaulting Member, and an impediment to the availability of its financial resources. For each corridor indicator, the Recovery Plan would identify (1) measures of the indicator, (2) evaluations of the status of the indicator, (3) metrics for determining the status of the deterioration or improvement of the indicator, and (4) ''Corridor Actions,'' which are steps that may be taken to improve the status of the indicator,[35] as well as management escalations required to authorize those steps. Because NSCC has never experienced the default of multiple Members, it has not, historically, measured the deterioration or improvements metrics of the corridor indicators. As such, these metrics were chosen based on the business judgment of NSCC management.

The Recovery Plan would also describe the reporting and escalation of the status of the corridor indicators throughout the Recovery Corridor. Significant deterioration of a corridor indicator, as measured by the metrics set out in the Recovery Plan, would be escalated to the Board. NSCC management would review the corridor indicators and the related metrics at least annually, and would modify these metrics as necessary in light of observations from simulations of Member defaults and other analyses. Any proposed modifications would be reviewed by the Management Risk Committee and the Board Risk Committee. The Recovery Plan would estimate that NSCC may remain in the Recovery Corridor between one day and two weeks. This estimate is based on historical data observed in past Member defaults, the results of simulations of Member defaults, and periodic liquidity analyses conducted by NSCC. The actual length of a Recovery Corridor would vary based on actual market conditions observed at the time, and NSCC would expect the Recovery Corridor to be shorter in market conditions of increased stress.

The Recovery Plan would outline steps by which NSCC may allocate its losses, which would occur when and in the order provided in Rule 4, as amended.[36] The Recovery Plan would also identify tools that may be used to address foreseeable shortfalls of NSCC's liquidity resources following a Member default, and would provide that these tools may be used as appropriate during the Crisis Continuum to address liquidity shortfalls if they arise. The goal in managing NSCC's qualified liquidity resources is to maximize resource availability in an evolving stress situation, to maintain flexibility in the order and use of sources of liquidity, and to repay any third party lenders of liquidity in a timely manner. These liquidity tools include, for example, NSCC's committed 364-day credit facility,[37] and the issuance and private placement of additional short-term promissory notes (''commercial paper'') and extendible notes, the cash proceeds of which provide NSCC with prefunded liquidity.[38] Additional voluntary or uncommitted tools to address potential liquidity shortfalls, for example uncommitted bank loans, which may supplement NSCC's other liquid resources described herein, would also be identified in the Recovery Plan. The Recovery Plan would state that, due to the extreme nature of a stress event that would cause NSCC to consider the use of these liquidity tools, the availability and capacity of these liquidity tools, and the willingness of counterparties to lend, cannot be accurately predicted and are dependent on the circumstances of the applicable stress period, including market price volatility, actual or perceived disruptions in financial markets, the costs to NSCC of utilizing these tools, and any potential impact on NSCC's credit rating.

As stated above, the Recovery Plan would state that NSCC will have entered the recovery phase on the date that it issues the first Loss Allocation Notice of the second loss allocation round with respect to a given Event Period. The Recovery Plan would provide that, during the recovery phase, NSCC would continue and, as needed, enhance, the monitoring and remedial actions already described in connection with previous phases of the Crisis Continuum, and would remain in the recovery phase until its financial resources are expected to be or are fully replenished, or until the Wind-down Plan is triggered, as described below.

The Recovery Plan would describe governance for the actions and tools that may be employed within each phase of the Crisis Continuum, which would be dictated by the facts and circumstances applicable to the situation being addressed. Such facts and circumstances would be measured by the various indicators and metrics applicable to that phase of the Crisis Continuum, and would follow the relevant escalation protocols that would be described in the Recovery Plan. The Recovery Plan would also describe the governance procedures around a decision to cease to act for a Member, pursuant to the Rules, and around the management and oversight of the subsequent liquidation of the Defaulting

(i) with respect to a Member default, the day on which NSCC notifies Members that it has ceased to act for a Member under the Rules, or (ii) with respect to a non-default loss, the day that NSCC notifies Members of the determination by the Board that there is a non-default loss event, as described in greater detail in that filing. The proposed Rule 4 would define a ''round'' as a series of loss allocations relating to an Event Period, and would provide that the first Loss Allocation Notice in a first, second, or subsequent round shall expressly state that such notice reflects the beginning of a first, second, or subsequent round. The maximum allocable loss amount of a round is equal to the sum of the ''Loss Allocation Caps'' (as defined in the proposed Rule 4) of those Members included in the round. *See supra* note 11.

[35] The Corridor Actions that would be identified in the Plan are indicative, but not prescriptive; therefore, if NSCC needs to consider alternative actions due to the applicable facts and circumstances, the escalation of those alternative actions would follow the same escalation protocol identified in the Plan for the Corridor Indicator to which the action relates.

[36] As these matters are described in greater detail in the Loss Allocation Filing and in the proposed amendments to Rule 4, described therein, reference is made to that filing and the details are not repeated here. *See supra* note 11.

[37] *See* Securities Exchange Act Release No. 80605 (May 5, 2017), 82 FR 21850 (May 10, 2017) (SR–DTC–2017–802, SR–NSCC–2017–802).

[38] *See* Securities Exchange Act Release No. 75730 (August 19, 2015), 80 FR 51638 (August 25, 2015) (SR–NSCC–2015–802).

Member's portfolio. The Recovery Plan would state that, overall, NSCC would retain flexibility in accordance with the Rules, its governance structure, and its regulatory oversight, to address a particular situation in order to best protect NSCC and the Members, and to meet the primary objectives, throughout the Crisis Continuum, of minimizing losses and, where consistent and practicable, minimizing disturbance to affected markets.

Non-Default Losses. The Recovery Plan would outline how NSCC may address losses that result from events other than a Member default. While these matters are addressed in greater detail in other documents, this section of the Plan would provide a roadmap to those documents and an outline for NSCC's approach to monitoring and managing losses that could result from a non-default event. The Plan would first identify some of the risks NSCC faces that could lead to these losses, which include, for example, the business and profit/loss risks of unexpected declines in revenue or growth of expenses; the operational risks of disruptions to systems or processes that could lead to large losses, including those resulting from, for example, a cyber-attack; and custody or investment risks that could lead to financial losses. The Recovery Plan would describe NSCC's overall strategy for the management of these risks, which includes a ''three lines of defense'' approach to risk management that allows for comprehensive management of risk across the organization.[39] The Recovery Plan would also describe NSCC's approach to financial risk and capital management. The Plan would identify key aspects of this approach, including, for example, an annual budget process, business line performance reviews with management, and regular review of capital requirements against LNA. These risk management strategies are collectively intended to allow NSCC to effectively identify, monitor, and manage risks of non-default losses.

The Plan would identify the two categories of financial resources NSCC maintains to cover losses and expenses arising from non-default risks or events as (1) LNA, maintained, monitored, and managed pursuant to the Capital Policy, which include (a) amounts held in satisfaction of the General Business Risk Capital Requirement,[40] (b) the Corporate Contribution,[41] and (c) other amounts held in excess of NSCC's capital requirements pursuant to the Capital Policy; and (2) resources available pursuant to the loss allocation provisions of Rule 4.[42]

The Plan would address the process by which the CFO and the DTCC Treasury group would determine which available LNA resources are most appropriate to cover a loss that is caused by a non-default event. This determination involves an evaluation of a number of factors, including the current and expected size of the loss, the expected time horizon over when the loss or additional expenses would materialize, the current and projected available LNA, and the likelihood LNA could be successfully replenished pursuant to the Replenishment Plan, if triggered.[43] Finally the Plan would discuss how NSCC would apply its resources to address losses resulting from a non-default event, including the order of resources it would apply if the loss or liability exceeds NSCC's excess LNA amounts, or is large relative thereto, and the Board has declared the event a ''Declared Non-Default Loss Event'' pursuant to Rule 4.[44]

The Plan would also describe proposed Rule 60 (Market Disruption and Force Majeure), which NSCC is proposing to adopt in the Rules. This Proposed Rule would provide transparency around how NSCC would address extraordinary events that may occur outside its control. Specifically, the Proposed Rule would define a ''Market Disruption Event'' and the governance around a determination that such an event has occurred. The Proposed Rule would also describe NSCC's authority to take actions during the pendency of a Market Disruption Event that it deems appropriate to address such an event and facilitate the continuation of its services, if practicable, as described in greater detail below.

The Plan would describe the interaction between the Proposed Rule and NSCC's existing processes and procedures addressing business continuity management and disaster recovery (generally, the ''BCM/DR procedures''), making clear that the Proposed Rule is designed to support those BCM/DR procedures and to address circumstances that may be exogenous to NSCC and not necessarily addressed by the BCM/DR procedures. Finally, the Plan would describe that, because the operation of the Proposed Rule is specific to each applicable Market Disruption Event, the Proposed Rule does not define a time limit on its application. However, the Plan would note that actions authorized by the Proposed Rule would be limited to the pendency of the applicable Market Disruption Event, as made clear in the Proposed Rule. Overall, the Proposed Rule is designed to mitigate risks caused by Market Disruption Events and, thereby, minimize the risk of financial loss that may result from such events.

Recovery Tool Characteristics. The Recovery Plan would describe NSCC's evaluation of the tools identified within the Recovery Plan, and its rationale for concluding that such tools are comprehensive, effective, and transparent, and that such tools provide appropriate incentives to Members and minimize negative impact on Members and the financial system, in compliance with guidance published by the Commission in connection with the adoption of Rule 17Ad–22(e)(3)(ii) under the Act.[45] NSCC's analysis and the conclusions set forth in this section of the Recovery Plan are described in greater detail in Item 3(b) of this filing, below.

NSCC Wind-Down Plan

The Wind-down Plan would provide the framework and strategy for the orderly Wind-down of NSCC if the use of the recovery tools described in the Recovery Plan do not successfully return NSCC to financial viability. While NSCC believes that, given the comprehensive nature of the recovery tools, such event is extremely unlikely, as described in greater detail below, NSCC is proposing a Wind-down strategy that provides for (1) the transfer of NSCC's business, assets and

[39] This ''three lines of defense'' approach to risk management includes (1) a first line of defense comprised of the various business lines and functional units that support the products and services offered by NSCC; (2) a second line of defense comprised of control functions that support NSCC, including the risk management, legal and compliance areas; and (3) a third line of defense, which is performed by an internal audit group. The Clearing Agency Risk Management Framework includes a description of this ''three lines of defense'' approach to risk management, and addresses how NSCC comprehensively manages various risks, including operational, general business, investment, custody, and other risks that arise in or are borne by it. *See* Securities Exchange Act Release No. 81635 (September 15, 2017), 82 FR 44224 (September 21, 2017) (SR–DTC–2017–013, SR–FICC–2017–016, SR–NSCC–2017–012). The Clearing Agency Operational Risk Management Framework describes the manner in which NSCC manages operational risks, as defined therein. *See* Securities Exchange Act Release No. 81745 (September 28, 2017), 82 FR 46332 (October 4, 2017) (SR–DTC–2017–014, SR–FICC–2017–017, SR–NSCC–2017–013).

[40] *See supra* note 33.

[41] *See supra* note 33.

[42] *See supra* note 11.

[43] *See supra* note 9.

[44] *See supra* note 11.

[45] Standards for Covered Clearing Agencies, Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14).

membership to another legal entity, (2) such transfer being effected in connection with proceedings under Chapter 11 of the U.S. Federal Bankruptcy Code,[46] and (3) after effectuating this transfer, NSCC liquidating any remaining assets in an orderly manner in bankruptcy proceedings. NSCC believes that the proposed transfer approach to a wind-down would meet its objectives of (1) assuring that NSCC's critical services will be available to the market as long as there are Members in good standing, and (2) minimizing disruption to the operations of Members and financial markets generally that might be caused by NSCC's failure.

In describing the transfer approach to NSCC's Wind-down Plan, the Plan would identify the factors that NSCC considered in developing this approach, including the fact that NSCC does not own material assets that are unrelated to its clearance and settlement activities. As such, a business reorganization or ''bail-in'' of debt approach would be unlikely to mitigate significant losses. Additionally, NSCC's approach was developed in consideration of its critical and unique position in the U.S. markets, which precludes any approach that would cause NSCC's critical services to no longer be available.

First, the Wind-down Plan would describe the potential scenarios that could lead to the wind-down of NSCC, and the likelihood of such scenarios. The Wind-down Plan would identify the time period leading up to a decision to wind-down NSCC as the ''Runway Period.'' This period would follow the implementation of any recovery tools, as it may take a period of time, depending on the severity of the market stress at that time, for these tools to be effective or for NSCC to realize a loss sufficient to cause it to be unable to effectuate settlements and repay its obligations.[47] The Wind-down Plan would identify some of the indicators that it has entered this Runway Period, which would include, for example, successive Member defaults, significant Member retirements thereafter, and NSCC's inability to replenish its financial resources following the liquidation of the portfolio of the Defaulting Member(s).

The trigger for implementing the Wind-down Plan would be a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning NSCC to viability as a going concern. As described in the Plan, NSCC believes this is an appropriate trigger because it is both broad and flexible enough to cover a variety of scenarios, and would align incentives of NSCC and the Members to avoid actions that might undermine NSCC's recovery efforts. Additionally, this approach takes into account the characteristics of NSCC's recovery tools and enables the Board to consider (1) the presence of indicators of a successful or unsuccessful recovery, and (2) potential for knock-on effects of continued iterative application of NSCC's recovery tools.

The Wind-down Plan would describe the general objectives of the transfer strategy, and would address assumptions regarding the transfer of NSCC's critical services, business, assets and membership, and the assignment of NSCC's links with other FMIs, to another legal entity that is legally, financially, and operationally able to provide NSCC's critical services to entities that wish to continue their membership following the transfer (''Transferee''). The Wind-down Plan would provide that the Transferee would be either (1) a third party legal entity, which may be an existing or newly established legal entity or a bridge entity formed to operate the business on an interim basis to enable the business to be transferred subsequently (''Third Party Transferee''); or (2) an existing, debt-free failover legal entity established ex-ante by DTCC (''Failover Transferee'') to be used as an alternative Transferee in the event that no viable or preferable Third Party Transferee timely commits to acquire NSCC's business. NSCC would seek to identify the proposed Transferee, and negotiate and enter into transfer arrangements during the Runway Period and prior to making any filings under Chapter 11 of the U.S. Federal Bankruptcy Code.[48] As stated above, the Wind-down Plan would anticipate that the transfer to the Transferee be effected in connection with proceedings under Chapter 11 of the U.S. Federal Bankruptcy Code, and pursuant to a bankruptcy court order under Section 363 of the Bankruptcy Code, such that the transfer would be free and clear of claims against, and interests in, NSCC, except to the extent expressly provided in the court's order.[49]

In order to effect a timely transfer of its services and minimize the market and operational disruption of such transfer, NSCC would expect to transfer all of its critical services and any non-critical services that are ancillary and beneficial to a critical service, or that otherwise have substantial user demand from the continuing membership. Following the transfer, the Wind-down Plan would anticipate that the Transferee and its continuing membership would determine whether to continue to provide any transferred non-critical service on an ongoing basis, or terminate the non-critical service following some transition period. NSCC's Wind-down Plan would anticipate that the Transferee would enter into a transition services agreement with DTCC so that DTCC would continue to provide the shared services it currently provides to NSCC, including staffing, infrastructure and operational support. The Wind-down Plan would also anticipate the assignment of NSCC's link arrangements, including those with DTC, CDS and OCC, described above, to the Transferee.[50] The Wind-down Plan would provide that Members' open positions existing prior to the effective time of the transfer would be addressed by the provisions of the proposed Wind-down Rule and Corporation Default Rule, as defined and described below, and that the Transferee would not acquire any pending or open transactions with the transfer of the business. The Wind-down Plan would anticipate that the Transferee would accept transactions for processing with a trade date from and after the effective time of the transfer.

The Wind-down Plan would provide that, following the effectiveness of the transfer to the Transferee, the wind-down of NSCC would involve addressing any residual claims against NSCC through the bankruptcy process and liquidating the legal entity. As such, and as stated above, the Wind-down Plan does not contemplate NSCC continuing to provide services in any

[46] 11 U.S.C. 1101 *et seq.*

[47] The Wind-down Plan would state that, given NSCC's position as a user-governed financial market utility, it is possible that Members might voluntarily elect to provide additional support during the recovery phase leading up to a potential trigger of the Wind-down Plan, but would also make clear that NSCC cannot predict the willingness of Members to do so.

[48] *See* 11 U.S.C. 1101 *et seq.*

[49] *See id.* at 363.

[50] The proposed transfer arrangements outlined in the Wind-down Plan do not contemplate the transfer of any credit or funding agreements, which are generally not assignable by NSCC. However, to the extent the Transferee adopts rules substantially identical to those NSCC has in effect prior to the transfer, it would have the benefit of any rules-based liquidity funding. The Wind-down Plan contemplates that no Clearing Fund would be transferred to the Transferee, as it is not held in a bankruptcy remote manner and it is the primary prefunded liquidity resource to be accessed in the recovery phase.

capacity following the transfer time, and any services not transferred would be terminated.

The Wind-down Plan would also identify the key dependencies for the effectiveness of the transfer, which include regulatory approvals that would permit the Transferee to be legally qualified to provide the transferred services from and after the transfer, and approval by the applicable bankruptcy court of, among other things, the proposed sale, assignments, and transfers to the Transferee.

The Wind-down Plan would address governance matters related to the execution of the transfer of NSCC's business and its wind-down. The Wind-down Plan would address the duties of the Board to execute the wind-down of NSCC in conformity with (1) the Rules, (2) the Board's fiduciary duties, which mandate that it exercise reasonable business judgment in performing these duties, and (3) NSCC's regulatory obligations under the Act as a registered clearing agency. The Wind-down Plan would also identify certain factors the Board may consider in making these decisions, which would include, for example, whether NSCC could safely stabilize the business and protect its value without seeking bankruptcy protection, and NSCC's ability to continue to meet its regulatory requirements.

The Wind-down Plan would describe (1) actions NSCC or DTCC may take to prepare for wind-down in the period before NSCC experiences any financial distress, (2) actions NSCC would take both during the recovery phase and the Runway Period to prepare for the execution of the Wind-down Plan, and (3) actions NSCC would take upon commencement of bankruptcy proceedings to effectuate the Wind-down Plan.

Finally, the Wind-down Plan would include an analysis of the estimated time and costs to effectuate the plan, and would provide that this estimate be reviewed and approved by the Board annually. In order to estimate the length of time it might take to achieve a recovery or orderly wind-down of NSCC's critical operations, as contemplated by the R&W Plan, the Wind-down Plan would include an analysis of the possible sequencing and length of time it might take to complete an orderly wind-down and transfer of critical operations, as described in earlier sections of the R&W Plan. The Wind-down Plan would also include in this analysis consideration of other factors, including the time it might take to complete any further attempts at recovery under the Recovery Plan. The Wind-down Plan would then multiply this estimated length of time by NSCC's average monthly operating expenses, including adjustments to account for changes to NSCC's profit and expense profile during these circumstances, over the previous twelve months to determine the amount of LNA that it should hold to achieve a recovery or orderly wind-down of NSCC's critical operations. The estimated wind-down costs would constitute the ''Recovery/Wind-down Capital Requirement'' under the Capital Policy.[51] Under that policy, the General Business Risk Capital Requirement is calculated as the greatest of three estimated amounts, one of which is this Recovery/Wind-down Capital Requirement.[52]

The R&W Plan is designed as a roadmap, and the types of actions that may be taken both leading up to and in connection with implementation of the Wind-down Plan would be primarily addressed in other supporting documentation referred to therein.

The Wind-down Plan would address proposed Rule 41 (Corporation Default) and proposed Rule 42 (Wind-down of the Corporation), which would be adopted to facilitate the implementation of the Wind-down Plan, and are discussed below.

Proposed Rules

In connection with the adoption of the R&W Plan, NSCC is proposing to adopt the Proposed Rules, each described below. The Proposed Rules would facilitate the execution of the R&W Plan and would provide Members and Limited Members with transparency as to critical aspects of the Plan, particularly as they relate to the rights and responsibilities of both NSCC and Members. The Proposed Rules also provide a legal basis to these aspects of the Plan.

Rule 41 (Corporation Default)

The proposed Rule 41 (''Corporation Default Rule'') would provide a mechanism for the termination, valuation and netting of unsettled, guaranteed CNS transactions in the event NSCC is unable to perform its obligations or otherwise suffers a defined event of default, such as entering insolvency proceedings. The proposed Corporation Default Rule would provide Members with transparency and certainty regarding what would happen if NSCC were to fail (defined in the proposed Rule as a ''Corporation Default'').

The proposed rule would define the events that would constitute a Corporation Default, which would generally include (1) the failure of NSCC to make any undisputed payment or delivery to a Member if such failure is not remedied within seven days after notice of such failure is given to NSCC; (2) NSCC is dissolved; (3) NSCC institutes a proceeding seeking a judgment of insolvency or bankruptcy, or a proceeding is instituted against it seeking a judgment of bankruptcy or insolvency and such judgment is entered; or (4) NSCC seeks or becomes subject to the appointment of a receiver, trustee or similar official pursuant to the federal securities laws or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act [53] for it or for all or substantially all of its assets.

Upon a Corporation Default, the proposed Corporation Default Rule would provide that all unsettled, guaranteed CNS transactions would be terminated and, no later than forty-five days from the date on which the event that constitutes a Corporation Default occurred (or ''Default Date''), the Board would determine a single net amount owed by or to each Member with respect to such transactions pursuant to the valuation procedures set forth in the Proposed Rule. Essentially, for each affected position in a CNS Security, the ''CNS Market Value'' would be determined by using the Current Market Price for that security as determined in the CNS System as of the close of business on the next Business Day following the Default Date. NSCC would determine a ''Net Contract Value'' for each Member's net unsettled long or short position in a CNS Security by netting the Member's (i) contract price for such net position that, as of the Default Date, has not yet passed the Settlement Date, and (ii) the Current Market Price in the CNS System on the Default Date for its fail positions. To determine each Member's ''CNS Close-out Value,'' (i) the Net Contract Value for each CUSIP would be subtracted from the CNS Market Value for such CUSIP, and (ii) the resulting difference for all CUSIPS in which the Member had a net long or short position would be summed, and would be netted and offset against any other amounts that may be due to or owing from the Member under the Rules. The proposed Corporation Default Rule would provide for notification to each Member of its CNS Close-out Value, and would also address interpretation of the Rules in relation to certain terms that are defined in the Federal Deposit Insurance

[51] *See supra* note 9.

[52] *See supra* note 9.

[53] 12 U.S.C. 5381–5394.

Corporation Improvement Act of 1991 (''FDICIA'').[54]

NSCC believes this valuation approach, which is comparable to the approach adopted by other central counterparties, is appropriate for NSCC given the market in which NSCC operates and the volumes of transactions it processes in CNS, because it would provide for a common, clear and transparent valuation methodology and price per CUSIP applicable to all affected Members.

Rule 42 (Wind-Down of the Corporation)

The proposed Rule 42 (''Wind-down Rule'') would be adopted to facilitate the execution of the Wind-down Plan. The Wind-down Rule would include a proposed set of defined terms that would be applicable only to the provisions of this Proposed Rule. The Wind-down Rule would make clear that a wind-down of NSCC's business would occur (1) after a decision is made by the Board, and (2) in connection with the transfer of NSCC's services to a Transferee, as described therein. Generally, the proposed Wind-down Rule is designed to create clear mechanisms for the transfer of Eligible Members, Eligible Limited Members, and Settling Banks (as these terms would be defined in the Wind-down Rule), and NSCC's business, in order to provide for continued access to critical services and to minimize disruption to the markets in the event the Wind-down Plan is initiated.

Wind-down Trigger. First, the Proposed Rule would make clear that the Board is responsible for initiating the Wind-down Plan, and would identify the criteria the Board would consider when making this determination. As provided for in the Wind-down Plan and in the proposed Wind-down Rule, the Board would initiate the Plan if, in the exercise of its business judgment and subject to its fiduciary duties, it has determined that the execution of the Recovery Plan has not or is not likely to restore NSCC to viability as a going concern, and the implementation of the Wind-down Plan, including the transfer of NSCC's business, is in the best interests of NSCC, Members and Limited Members, its shareholders and creditors, and the U.S. financial markets.

Identification of Critical Services; Designation of Dates and Times for Specific Actions. The Proposed Rule would provide that, upon making a determination to initiate the Wind-down Plan, the Board would identify the critical and non-critical services that would be transferred to the Transferee at the Transfer Time (as defined below and in the Proposed Rule), as well as any non-critical services that would not be transferred to the Transferee. The proposed Wind-down Rule would establish that any services transferred to the Transferee will only be provided by the Transferee as of the Transfer Time, and that any non-critical services that are not transferred to the Transferee would be terminated at the Transfer Time. The Proposed Rule would also provide that the Board would establish (1) an effective time for the transfer of NSCC's business to a Transferee (''Transfer Time''), (2) the last day that transactions may be submitted to NSCC for processing (''Last Transaction Acceptance Date''), and (3) the last day that transactions submitted to NSCC will be settled (''Last Settlement Date'').

Treatment of Pending Transactions. The Wind-down Rule would also authorize the Board to provide for the settlement of pending transactions prior to the Transfer Time, so long as the Corporation Default Rule has not been triggered. For example, the Proposed Rule would provide the Board with the ability to, if it deems practicable, based on NSCC's resources at that time, allow pending transactions to complete prior to the transfer of NSCC's business to a Transferee. The Board would also have the ability to allow Members to only submit trades that would effectively offset pending positions or provide that transactions will be processed in accordance with special or exception processing procedures. The Proposed Rule is designed to enable these actions in order to facilitate settlement of pending transactions and reduce claims against NSCC that would have to be satisfied after the transfer has been effected. If none of these actions are deemed practicable (or if the Corporation Default Rule has been triggered), then the provisions of the proposed Corporation Default Rule would apply to the treatment of open, pending transactions.

The Proposed Rule would make clear, however, that NSCC would not accept any transactions for processing after the Last Transaction Acceptance Date or which are designated to settle after the Last Settlement Date. Any transactions to be processed and/or settled after the Transfer Time would be required to be submitted to the Transferee, and would not be NSCC's responsibility.

Notice Provisions. The proposed Wind-down Rule would provide that, upon a decision to implement the Wind-down Plan, NSCC would provide Members and Limited Members and its regulators with a notice that includes material information relating to the Wind-down Plan and the anticipated transfer of NSCC's membership and business, including, for example, (1) a brief statement of the reasons for the decision to implement the Wind-down Plan; (2) identification of the Transferee and information regarding the transaction by which the transfer of NSCC's business would be effected; (3) the Transfer Time, Last Transaction Acceptance Date, and Last Settlement Date; and (4) identification of Eligible Members and Eligible Limited Members, and the critical and non-critical services that would be transferred to the Transferee at the Transfer Time, as well as those Non-Eligible Members and Non-Eligible Limited Members (as defined in the Proposed Rule), and any non-critical services that would not be included in the transfer. NSCC would also make available the rules and procedures and membership agreements of the Transferee.

Transfer of Membership. The proposed Wind-down Rule would address the expected transfer of NSCC's membership to the Transferee, which NSCC would seek to effectuate by entering into an arrangement with a Failover Transferee, or by using commercially reasonable efforts to enter into such an arrangement with a Third Party Transferee. Therefore, the Wind-down Rule would provide Members, Limited Members and Settling Banks with notice that, in connection with the implementation of the Wind-down Plan and with no further action required by any party, (1) their membership with NSCC would transfer to the Transferee, (2) they would become party to a membership agreement with such Transferee, and (3) they would have all of the rights and be subject to all of the obligations applicable to their membership status under the rules of the Transferee. These provisions would not apply to any Member or Limited Member that is either in default of an obligation to NSCC or has provided notice of its election to withdraw from membership. Further, the proposed Wind-down Rule would make clear that it would not prohibit (1) Members and Limited Members that are not transferred by operation of the Wind-down Rule from applying for membership with the Transferee, or (2) Members, Limited Members, and Settling Banks that would be transferred to the Transferee from withdrawing from membership with the Transferee.[55]

[54] 12 U.S.C. 1811 *et seq.*

[55] The Members and Limited Members whose membership is transferred to the Transferee

Continued

Comparability Period. The proposed automatic mechanism for the transfer of NSCC's membership is intended to provide NSCC's membership with continuous access to critical services in the event of NSCC's wind-down, and to facilitate the continued prompt and accurate clearance and settlement of securities transactions. Further to this goal, the proposed Wind-down Rule would provide that NSCC would enter into arrangements with a Failover Transferee, or would use commercially reasonable efforts to enter into arrangements with a Third Party Transferee, providing that, in either case, with respect to the critical services and any non-critical services that are transferred from NSCC to the Transferee, for at least a period of time to be agreed upon (''Comparability Period''), the business transferred from NSCC to the Transferee would be operated in a manner that is comparable to the manner in which the business was previously operated by NSCC. Specifically, the proposed Wind-down Rule would provide that: (1) the rules of the Transferee and terms of membership agreements would be comparable in substance and effect to the analogous Rules and membership agreements of NSCC; (2) the rights and obligations of any Members, Limited Members and Settling Banks that are transferred to the Transferee would be comparable in substance and effect to their rights and obligations as to NSCC; and (3) the Transferee would operate the transferred business and provide any services that are transferred in a comparable manner to which such services were provided by NSCC. The purpose of these provisions and the intended effect of the proposed Wind-down Rule is to facilitate a smooth transition of NSCC's business to a Transferee and to provide that, for at least the Comparability Period, the Transferee (1) would operate the transferred business in a manner that is comparable in substance and effect to the manner in which the business was operated by NSCC, and (2) would not require sudden and disruptive changes in the systems, operations and business practices of the new members of the Transferee.

Subordination of Claims Provisions and Miscellaneous Matters. The proposed Wind-down Rule would also include a provision addressing the subordination of unsecured claims against NSCC of Members and Limited Members who fail to participate in NSCC's recovery efforts (*i.e.,* such firms are delinquent in their obligations to NSCC or elect to retire from NSCC in order to minimize their obligations with respect to the allocation of losses, pursuant to the Rules). This provision is designed to incentivize Members to participate in NSCC's recovery efforts.[56]

The proposed Wind-down Rule would address other ex-ante matters including provisions providing that Members, Limited Members and Settling Banks (1) will assist and cooperate with NSCC to effectuate the transfer of NSCC's business to a Transferee, (2) consent to the provisions of the rule, and (3) grant NSCC power of attorney to execute and deliver on their behalf documents and instruments that may be requested by the Transferee. Finally, the Proposed Rule would include a limitation of liability for any actions taken or omitted to be taken by NSCC pursuant to the Proposed Rule. The purpose of the limitation of liability is to facilitate and protect NSCC's ability to act expeditiously in response to extraordinary events. As noted, such limitation of liability would be available only following triggering of the Wind-down Plan. In addition, and as a separate matter, the limitation of liability provides Members with transparency for the unlikely situation when those extraordinary events could occur, as well supporting the legal framework within which NSCC would take such actions. These provisions, collectively, are designed to enable NSCC to take such acts as the Board determines necessary to effectuate an orderly transfer and wind-down of its business should recovery efforts prove unsuccessful.

Rule 60 (Market Disruption and Force Majeure)

The proposed Rule 60 (''Force Majeure Rule'') would address NSCC's authority to take certain actions upon the occurrence, and during the pendency, of a ''Market Disruption Event,'' as defined therein. The Proposed Rule is designed to clarify NSCC's ability to take actions to address extraordinary events outside of the control of NSCC and of its membership, and to mitigate the effect of such events by facilitating the continuity of services (or, if deemed necessary, the temporary suspension of services). To that end, under the proposed Force Majeure Rule, NSCC would be entitled, during the pendency of a Market Disruption Event, to (1) suspend the provision of any or all services, and (2) take, or refrain from taking, or require Members and Limited Members to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of NSCC's services as may be practicable.

The proposed Force Majeure Rule would identify the events or circumstances that would be considered a ''Market Disruption Event,'' including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which NSCC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. The proposed Force Majeure Rule would define the governance procedures for how NSCC would determine whether, and how, to implement the provisions of the rule. A determination that a Market Disruption Event has occurred would generally be made by the Board, but the Proposed Rule would provide for limited, interim delegation of authority to a specified officer or management committee if the Board would not be able to take timely action. In the event such delegated authority is exercised, the proposed Force Majeure Rule would require that the Board be convened as promptly as practicable, no later than five Business Days after such determination has been made, to ratify, modify, or rescind the action. The proposed Force Majeure Rule would also provide for prompt notification to the Commission, and advance consultation with Commission staff, when practicable, including notification when an event is no longer continuing and the relevant actions are terminated. The Proposed Rule would require Members and Limited Members to notify NSCC immediately upon becoming aware of a Market Disruption Event, and, likewise, would require NSCC to notify Members and Limited Members if it has triggered the Proposed Rule and of actions taken or intended to be taken thereunder.

Finally, the Proposed Rule would address other related matters, including a limitation of liability for any failure or delay in performance, in whole or in part, arising out of the Market Disruption Event. The purpose of the limitation of liability would be similar to the purpose of the analogous provision in the proposed Wind-down

pursuant to the proposed Wind-down Rule would submit transactions to be processed and settled subject to the rules and procedures of the Transferee, including any applicable margin charges or other financial obligations.

[56] Nothing in the proposed Wind-down Rule would seek to prevent a Member, Limited Member or Settling Bank that retired its membership at NSCC from applying for membership with the Transferee. Once its NSCC membership is terminated, however, such firm would not be able to benefit from the membership assignment that would be effected by this proposed Wind-down Rule, and it would have to apply for membership directly with the Transferee, subject to its membership application and review process.

Rule, which is to facilitate and protect NSCC's ability to act expeditiously in response to extraordinary events.

Proposed Change to the Rule Numbers

In order to align the order of the Proposed Rules with the order of comparable rules in the rulebooks of the other Clearing Agencies, NSCC is also proposing to re-number the current Rule 42 (Wind-down of a Member, Fund Member or Insurance Carrier/Retirement Services Member) to Rule 40, which is currently reserved for future user, as shown on Exhibit 5b, hereto.

Expected Effect on and Management of Risk

NSCC believes the proposal to adopt the R&W Plan and the Proposed Rules would enable it to better manage its risks. As described above, the Recovery Plan would identify the recovery tools and the risk management activities that NSCC may use to address risks of uncovered losses or shortfalls resulting from a Member default and losses arising from non-default events. By creating a framework for its management of risks across an evolving stress scenario and providing a roadmap for actions it may employ to monitor and, as needed, stabilize its financial condition, the Recovery Plan would strengthen NSCC's ability to manage risk. The Wind-down Plan would also enable NSCC to better manage its risks by establishing the strategy and framework for its orderly wind-down and the transfer of NSCC's business when the Wind-down Plan is triggered. By creating clear mechanisms for the transfer of NSCC's membership and business, the Wind-down Plan would facilitate continued access to NSCC's critical services and minimize market impact of the transfer and enable NSCC to better manage risks related to its wind-down.

NSCC believes the Proposed Rules would enable it to better manage its risks by facilitating, and providing a legal basis for, the implementation of critical aspects of the R&W Plan. The Proposed Rules would provide Members and Limited Members with transparency around those provisions of the R&W Plan that relate to their and NSCC's rights, responsibilities and obligations. Therefore, NSCC believes the Proposed Rules would enable it to better manage its risks by providing this transparency and creating certainty, to the extent practicable, around the occurrence of a Market Disruption Event or a Corporation Default (as such terms are defined in the respective Proposed Rules), and around the implementation of the Wind-down Plan.

Consistency With the Clearing Supervision Act

The stated purpose of Title VIII 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.[57] Section 805(a)(2) of the Clearing Supervision Act[58] also authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities, like NSCC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act[59] 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.

NSCC believes that the proposal is consistent with Section 805(b) of the Clearing Supervision Act because it is designed to address each of these objectives. The Recovery Plan and the proposed Force Majeure Rule would promote robust risk management and would reduce systemic risks by providing NSCC with a roadmap for actions it may employ to monitor and manage its risks, and, as needed, to stabilize its financial condition in the event those risks materialize. Further, the Recovery Plan would identify the triggers of recovery tools, but would not provide that those triggers necessitate the use of those tools. Instead, the Recovery Plan would provide that the triggers of these tools lead to escalation to an appropriate management body, which would have the authority and flexibility to respond appropriately to the situation. Essentially, the Recovery Plan and the proposed Force Majeure Rule are designed to minimize losses to both NSCC and Members by giving NSCC the ability to determine the most appropriate way to address each stress situation. This approach would allow for proper evaluation of the situation and the possible impacts of the use of the available recovery tools in order to minimize the negative effects of the stress situation, and would reduce systemic risks related to the implementation of the Recovery Plan and the underlying recovery tools.

The Wind-down Plan and the proposed Corporation Default Rule and Wind-down Rule, which would facilitate the implementation of the Wind-down Plan, would promote safety and soundness and would support the stability of the broader financial system, because they would establish a framework for the orderly wind-down of NSCC's business and would set forth clear mechanics for the transfer of its critical services and membership, as well as clear provisions concerning the treatment of open, guaranteed CNS transactions in the event of NSCC's default. By designing the Wind-down Plan and these Proposed Rules to enable the continuity of NSCC's critical services and membership, NSCC believes they would promote safety and soundness and would support stability in the broader financial system in the event the Wind-down Plan is implemented.

By assisting NSCC to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system, as described above, NSCC believes the proposal is consistent with Section 805(b) of the Clearing Supervision Act.[60]

NSCC also believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, NSCC believes that the R&W Plan, each of the Proposed Rules, and the proposed change to Rule numbers are consistent with Section 17A(b)(3)(F) of the Act,[61] the R&W Plan and each of the Proposed Rules are consistent with Rule 17Ad–22(e)(3)(ii) under the Act,[62] and the R&W Plan is consistent with Rule 17Ad-22(e)(15)(ii) under the Act,[63] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of NSCC be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible.[64] The Recovery Plan and the proposed Force Majeure Rule would promote the prompt and accurate clearance and settlement of securities transactions by providing NSCC with a roadmap for actions it may employ to mitigate losses, and monitor and, as needed, stabilize, its financial condition, which would

[57] 12 U.S.C. 5461(b).

[58] *Id.* at 5464(a)(2).

[59] *Id.* at 5464(b).

[60] *Id.*

[61] 15 U.S.C. 78q–1(b)(3)(F).

[62] 17 CFR 240.17Ad–22(e)(3)(ii).

[63] *Id.* at 240.17Ad–22(e)(15)(ii).

[64] 15 U.S.C. 78q–1(b)(3)(F).

allow it to continue its critical clearance and settlement services in stress situations. Further, as described above, the Recovery Plan is designed to identify the actions and tools NSCC may use to address and minimize losses to both NSCC and Members. The Recovery Plan and the proposed Force Majeure Rule would provide NSCC's management and the Board with guidance in this regard by identifying the indicators and governance around the use and application of such tools to enable them to address stress situations in a manner most appropriate for the circumstances. Therefore, the Recovery Plan and the proposed Force Majeure Rule would also contribute to the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible by enabling actions that would address and minimize losses.

The Wind-down Plan and the proposed Corporation Default Rule and Wind-down Rule, which would both facilitate the implementation of the Wind-down Plan, would also promote the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible. The Wind-down Plan and the proposed Corporation Default Rule and Wind-down Rule would collectively establish a framework for the transfer and orderly wind-down of NSCC's business. These proposals would establish clear mechanisms for the transfer of NSCC's critical services and membership, and for the treatment of open, guaranteed CNS transactions in the event of NSCC's default. By doing so, the Wind-down Plan and these Proposed Rules are designed to facilitate the continuity of NSCC's critical services and enable Members and Limited Members to maintain access to NSCC's services through the transfer of its membership in the event NSCC defaults or the Wind-down Plan is triggered by the Board. Therefore, by facilitating the continuity of NSCC's critical clearance and settlement services, NSCC believes the proposals would promote the prompt and accurate clearance and settlement of securities transactions. Further, by creating a framework for the transfer and orderly wind-down of NSCC's business, NSCC believes the proposals would enhance the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible.

Finally, the proposed change to the Rule numbers would align the order of the Proposed Rules with the order of comparable rules in the rulebooks of the other Clearing Agencies. Therefore, NSCC believes the proposed change would create ease of reference, particularly for Members that are also participants of the other Clearing Agencies, and, as such, would assist in promoting the prompt and accurate clearance and settlement of securities transactions.

Therefore, NSCC believes the R&W Plan, each of the Proposed Rules, and the proposed change to Rule numbers are consistent with the requirements of Section 17A(b)(3)(F) of the Act.[65]

Rule 17Ad–22(e)(3)(ii) under the Act requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[66] The R&W Plan and the Proposed Rules are designed to meet the requirements of Rule 17Ad–22(e)(3)(ii).[67]

The R&W Plan would be maintained by NSCC in compliance with Rule 17Ad–22(e)(3)(ii) in that it provides plans for the recovery and orderly wind-down of NSCC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, as described above.[68] Specifically, the Recovery Plan would define the risk management activities, stress conditions and indicators, and tools that NSCC may use to address stress scenarios that could eventually prevent it from being able to provide its critical services as a going concern. Through the framework of the Crisis Continuum, the Recovery Plan would address measures that NSCC may take to address risks of credit losses and liquidity shortfalls, and other losses that could arise from a Member default. The Recovery Plan would also address the management of general business risks and other non-default risks that could lead to losses.

The Wind-down Plan would be triggered by a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning NSCC to viability as a going concern. Once triggered, the Wind-down Plan would set forth clear mechanisms for the transfer of NSCC's membership and business, and would be designed to facilitate continued access to NSCC's critical services and to minimize market impact of the transfer. By establishing the framework and strategy for the execution of the transfer and wind-down of NSCC in order to facilitate continuous access to NSCC's critical services, the Wind-down Plan establishes a plan for the orderly wind-down of NSCC. Therefore, NSCC believes the R&W Plan would provide plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, and, as such, meets the requirements of Rule 17Ad–22(e)(3)(ii).[69]

As described in greater detail above, the Proposed Rules are designed to facilitate the execution of the R&W Plan, provide Members and Limited Members with transparency regarding the material provisions of the Plan, and provide NSCC with a legal basis for implementation of those provisions. As such, NSCC also believes the Proposed Rules meet the requirements of Rule 17Ad–22(e)(3)(ii).[70]

NSCC has evaluated the recovery tools that would be identified in the Recovery Plan and has determined that these tools are comprehensive, effective, and transparent, and that such tools provide appropriate incentives to NSCC's Members to manage the risks they present. The recovery tools, as outlined in the Recovery Plan and in the proposed Force Majeure Rule, provide NSCC with a comprehensive set of options to address its material risks and support the resiliency of its critical services under a range of stress scenarios. NSCC also believes the recovery tools are effective, as NSCC has both legal basis and operational capability to execute these tools in a timely and reliable manner. Many of the recovery tools are provided for in the Rules; Members are bound by the Rules through their membership agreements with NSCC, and the Rules are adopted pursuant to a framework established by Rule 19b–4 under the Act,[71] providing a legal basis for the recovery tools found therein. Other recovery tools have legal basis in contractual arrangements to which NSCC is a party, as described above. Further, as many of the tools are embedded in NSCC's ongoing risk management practices or are embedded into its predefined default-management

[65] *Id.*

[66] 17 CFR 240.17Ad–22(e)(3)(ii).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 240.19b–4.

procedures, NSCC is able to execute these tools, in most cases, when needed and without material operational or organizational delay.

The majority of the recovery tools are also transparent, as they are, or are proposed to be, included in the Rules, which are publicly available. NSCC believes the recovery tools also provide appropriate incentives to the Members, as they are designed to control the amount of risk they present to NSCC's clearance and settlement system. Members' financial obligations to NSCC, particularly their Required Deposits to the Clearing Fund, are measured by the risk posed by the Members' activity in NSCC's systems, which incentivizes them to manage that risk which would correspond to lower financial obligations. Finally, NSCC's Recovery Plan provides for a continuous evaluation of the systemic consequences of executing its recovery tools, with the goal of minimizing their negative impact. The Recovery Plan would outline various indicators over a timeline of increasing stress, the Crisis Continuum, with escalation triggers to NSCC management or the Board, as appropriate. This approach would allow for timely evaluation of the situation and the possible impacts of the use of a recovery tool in order to minimize the negative effects of the stress scenario. Therefore, NSCC believes that the recovery tools that would be identified and described in its Recovery Plan, including the authority provided to it in the proposed Force Majeure Rule, would meet the criteria identified within guidance published by the Commission in connection with the adoption of Rule 17Ad–22(e)(3)(ii).[72]

Therefore, NSCC believes the R&W Plan and each of the Proposed Rules are consistent with Rule 17Ad–22(e)(3)(ii).[73]

Rule 17Ad–22(e)(15)(ii) under the Act requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient LNA to cover potential general business losses so that NSCC can continue operations and services as a going concern if those losses materialize, including by holding LNA equal to the greater of either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency.[74] While the Capital Policy addresses how NSCC holds LNA in compliance with these requirements, the Wind-down Plan would include an analysis that would estimate the amount of time and the costs to achieve a recovery or orderly wind-down of NSCC's critical operations and services, and would provide that the Board review and approve this analysis and estimation annually. The Wind-down Plan would also provide that the estimate would be the ''Recovery/Wind-down Capital Requirement'' under the Capital Policy. Under that policy, the General Business Risk Capital Requirement, which is the sufficient amount of LNA that NSCC should hold to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize, is calculated as the greatest of three estimated amounts, one of which is this Recovery/Wind-down Capital Requirement. Therefore, NSCC believes the R&W Plan, as it interrelates with the Capital Policy, is consistent with Rule 17Ad–22(e)(15)(ii).[75]

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 that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

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.

The clearing agency 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. 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–NSCC–2017–805 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–NSCC–2017–805. 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 NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–NSCC–2017–805 and should be submitted on or before August 21, 2018.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16711 Filed 8–3–18; 8:45 am]

BILLING CODE 8011–01–P

[72] *Supra* note 45.

[73] 17 CFR 240.17Ad–22(e)(3)(ii).

[74] *Id.* at 240.17Ad–22(e)(15)(ii).

[75] *Id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83743; File No. SR–DTC–2017–803]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Amendment No. 1 to an Advance Notice To Adopt a Recovery & Wind-Down Plan and Related Rules

July 31, 2018.

On December 18, 2017, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–DTC–2017–803 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act'').[1] The notice of filing and extension of the review period of the Advance Notice was published for comment in the **Federal Register** on January 30, 2018.[2]

On April 10, 2018, the Commission required additional information from DTC pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice.[3] On June 28, 2018, DTC filed Amendment No. 1 to the Advance Notice to amend and replace in its entirety the Advance Notice as originally submitted on December 18, 2017.[4] On July 6, 2018, the Commission received a response to its request for additional information in consideration of the Advance Notice, which added a further 60-days to the review period pursuant to Section 806(e)(1)(E) and (G) of the Clearing Supervision Act.[5]

The Advance Notice, as amended by Amendment No. 1, is described in Items I and II below, which Items have been prepared by DTC. The Commission is publishing this notice to solicit comments on the Advance Notice, as amended by Amendment No. 1, from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The Advance Notice of DTC proposes to (1) adopt the Recovery & Wind-down Plan of DTC (''R&W Plan'' or ''Plan''); and (2) amend the Rules, By-Laws and Organization Certificate of DTC (''Rules'')[6] in order to adopt Rule 32(A) (Wind-down of the Corporation) and Rule 38 (Market Disruption and Force Majeure) (each proposed Rule 32(A) and proposed Rule 38, a ''Proposed Rule'' and, collectively, the ''Proposed Rules'').

The R&W Plan would be maintained by DTC in compliance with Rule 17Ad–22(e)(3)(ii) under the Act by providing plans for the recovery and orderly wind-down of DTC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, as described below.[7] The Proposed Rules are designed to (1) facilitate the implementation of the R&W Plan when necessary and, in particular, allow DTC to effectuate its strategy for winding down and transferring its business; (2) provide Participants with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities and obligations; and (3) provide DTC with the legal basis to implement those provisions of the R&W Plan when necessary, as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency 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. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

While DTC has not solicited or received any written comments relating to this proposal, DTC has conducted outreach to its Members in order to provide them with notice of the proposal. DTC will notify the Commission of any written comments received by DTC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Amendment No. 1

This filing constitutes Amendment No. 1 (''Amendment'') to the Advance Notice (also referred to below as the ''Original Filing'') previously filed by DTC.[8] DTC is amending the proposed R&W Plan and the Original Filing in order to clarify certain matters and make minor technical and conforming

[1] 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b–4(n)(1)(i), respectively. On December 18, 2017, DTC filed the Advance Notice as a proposed rule change (SR–DTC–2017–021) with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder (''Proposed Rule Change''). (17 CFR 240.19b–4 and 17 CFR 240.19b–4, respectively.) The Proposed Rule Change was published in the **Federal Register** on January 8, 2018. *See* Securities Exchange Act Release No. 82432 (January 2, 2018), 83 FR 884 (January 8, 2018) (SR–DTC–2017–021). On February 8, 2018, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017). On March 20, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82912 (March 20, 2018), 83 FR 12999 (March 26, 2018) (SR–DTC–2017–021). On June 25, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change. Therefore, September 5, 2018 is the date by which the Commission should either approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 83509 (June 25, 2018), 83 FR 30785 (June 29, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017). On June 28, 2018, DTC filed Amendment No. 1 to the Proposed Rule Change. *See* Securities Exchange Act Release No. 83628 (July 13, 2018), 83 FR 34263 (July 19, 2018) (SR–DTC–2017–021). As of the date of this release, the Commission has not received any comments on the Proposed Rule Change.

[2] Securities Exchange Act Release No. 82579 (January 24, 2018), 83 FR 4310 (January 30, 2018) (SR–DTC–2017–803). Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. 12 U.S.C. 5465(e)(1)(H). The Commission found that the Advance Notice raised novel and complex issues and, accordingly, extended the review period of the Advance Notice for an additional 60 days until April 17, 2018, pursuant to Section 806(e)(1)(H). *Id.*

[3] 12 U.S.C. 5465(e)(1)(D); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Commission's Request for Additional Information,'' *available at http://www.sec.gov/rules/sro/dtc-an.shtml.*

[4] To promote the public availability and transparency of its post-notice amendment, DTC submitted a copy of Amendment No. 1 through the Commission's electronic public comment letter mechanism. Accordingly, Amendment No. 1 has been posted on the Commission's website at *http://www.sec.gov/rules/sro/dtc-an.shtml* and thus been publicly available since June 29, 2018.

[5] 12 U.S.C. 5465(e)(1)(E) and (G); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Response to the Commission's Request for Additional Information,'' *available at http://www.sec.gov/rules/sro/dtc-an.shtml.*

[6] Capitalized terms used herein and not otherwise defined herein are defined in the Rules, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/DTC_rules.pdf.*

[7] 17 CFR 240.17Ad–22(e)(3)(ii).

[8] *See* Securities Exchange Act Release No. 82579 (January 24, 2018), 83 FR 4310 (January 30, 2018) (SR–DTC–2017–803).

changes to the R&W Plan, as described below and as marked on Exhibit 4 hereto. To the extent such changes to the Plan require changes to the Original Filing, the information provided under ''*Description of Proposed Changes*'' in the Original Filing has been amended and is restated in its entirety below. Other sections of the Original Filing are unchanged and are restated in their entity for convenience.

First, this Amendment would clarify the use in the Plan of the term ''Participant Default Losses.'' This Amendment would also clarify the actions and tools available in the third phase of the Crisis Continuum, which is referred to as the ''Participant Default phase.'' This Amendment would also make conforming changes as necessary to reflect the use of these terms.

Second, this Amendment would clarify that actions and tools described in the Plan that are available in one phase of the Crisis Continuum may be used in subsequent phases of the Crisis Continuum, when appropriate to address the applicable situation. This Amendment would also clarify that allocation of losses resulting from a Participant Default would be applied when provide for in, and in accordance with, Rule 4.

Third, this Amendment would clarify that the Recovery Corridor (as defined therein) is not a ''sub-phase'' of the recovery phase. Rather, the Recovery Corridor is a period of time that would occur toward the end of the Participant Default phase, when indicators are that DTC may transition into the recovery phase. Thus, the Recovery Corridor precedes the recovery phase.

Fourth, this Amendment would make revisions to address the allocation of losses resulting from a Participant Default in order to more closely conform such statements to the changes proposed by the Loss Allocation Filing, as defined below.

Fifth, this Amendment would clarify the notifications that DTC would be required to make under the Proposed Rule 38 (Market Disruption and Force Majeure).

Finally, this Amendment would make minor, technical and conforming revisions to correct typographical errors and to simplify descriptions. For example, such revisions would use lower case for terms that are not defined therein, and would use upper case for terms that are defined. The Amendment would also simplify certain descriptions by removing extraneous words and statements that are repetitive. These minor, technical revisions would not alter the substance of the proposal.

Description of Proposed Changes

DTC is proposing to adopt the R&W Plan to be used by the Board and management in the event DTC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would identify (i) the recovery tools available to DTC to address the risks of (a) uncovered losses or liquidity shortfalls resulting from the default of one or more of its Participants, and (b) losses arising from non-default events, such as damage to its physical assets, a cyber-attack, or custody and investment losses, and (ii) the strategy for implementation of such tools. The R&W Plan would also establish the strategy and framework for the orderly wind-down of DTC and the transfer of its business in the remote event the implementation of the available recovery tools does not successfully return DTC to financial viability.

As discussed in greater detail below, the R&W Plan would provide, among other matters, (i) an overview of the business of DTC and its parent, The Depository Trust & Clearing Corporation (''DTCC''); (ii) an analysis of DTC's intercompany arrangements and critical links to other financial market infrastructures (''FMIs''); (iii) a description of DTC's services, and the criteria used to determine which services are considered critical; (iv) a description of the DTC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to DTC to mitigate credit/market and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a ''Crisis Continuum'' timeline; (vii) a discussion of potential non-default losses and the resources available to DTC to address such losses, including recovery triggers and tools to mitigate such losses; (viii) an analysis of the recovery tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Participants to, among other things, control and monitor the risks they may present to DTC, and how DTC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of DTC's business, including an estimate of the time and costs to effect a recovery or orderly wind-down of DTC.

The R&W Plan would be structured as a roadmap, and would identify and describe the tools that DTC may use to effect a recovery from the events and scenarios described therein. Certain recovery tools that would be identified in the R&W Plan are based in the Rules (including the Proposed Rules) and, as such, descriptions of those tools would include descriptions of, and reference to, the applicable Rules and any related internal policies and procedures. Other recovery tools that would be identified in the R&W Plan are based in contractual arrangements to which DTC is a party, including, for example, existing committed or pre-arranged liquidity arrangements. Further, the R&W Plan would state that DTC may develop further supporting internal guidelines and materials that may provide operationally for matters described in the Plan, and that such documents would be supplemental and subordinate to the Plan.

Key factors considered in developing the R&W Plan and the types of tools available to DTC were its governance structure and the nature of the markets within which DTC operates. As a result of these considerations, many of the tools available to DTC that would be described in the R&W Plan are DTC's existing, business-as-usual risk management and default management tools, which would continue to be applied in scenarios of increasing stress. In addition to these existing, business-as-usual tools, the R&W Plan would describe DTC's other principal recovery tools, which include, for example, (i) identifying, monitoring and managing general business risk and holding sufficient liquid net assets funded by equity (''LNA'') to cover potential general business losses pursuant to the Clearing Agency Policy on Capital Requirements (''Capital Policy''),[9] (ii) maintaining the Clearing Agency Capital Replenishment Plan (''Replenishment Plan'') as a viable plan for the replenishment of capital should DTC's equity fall close to or below the amount being held pursuant to the Capital Policy,[10] and (iii) the process for the allocation of losses among Participants as provided in Rule 4.[11] The R&W Plan

[9] *See* Securities Exchange Act Release No. 81105 (July 7, 2017), 82 FR 32399 (July 13, 2017) (SR–DTC–2017–003; SR–FICC–2017–007; SR–NSCC–2017–004).

[10] *See id.*

[11] *See* Rule 4 (Participants Fund and Participants Investment), *supra* note 6. DTC is proposing changes to Rule 4 regarding allocation of losses in a separate filing submitted simultaneously with the Original Filing. See Securities Exchange Act Release Nos. 82432 (January 2, 2018), 83 FR 884 (January 8, 2018) (SR–DTC–2017–021) and 82579 (January 24, 2018), 83 FR 4310 (January 30, 2018) (SR–DTC–2017–803) (collectively referred to herein

Continued

would provide governance around the selection and implementation of the recovery tool or tools most relevant to mitigate a stress scenario and any applicable loss or liquidity shortfall.

The development of the R&W Plan is facilitated by the Office of Recovery & Resolution Planning (''R&R Team'') of DTCC.[12] The R&R Team reports to the DTCC Management Committee (''Management Committee'') and is responsible for maintaining the R&W Plan and for the development and ongoing maintenance of the overall recovery and wind-down planning process. The Board, or such committees as may be delegated authority by the Board from time to time pursuant to its charter, would review and approve the R&W Plan biennially, and would also review and approve any changes that are proposed to the R&W Plan outside of the biennial review.

As discussed in greater detail below, the Proposed Rules would define the procedures that may be employed in the event of a DTC wind-down, and would provide for DTC's authority to take certain actions on the occurrence of a ''Market Disruption Event,'' as defined therein. Significantly, the Proposed Rules would provide Participants with transparency and certainty with respect to these matters. The Proposed Rules would facilitate the implementation of the R&W Plan, particularly DTC's strategy for winding down and transferring its business, and would provide DTC with the legal basis to implement those aspects of the R&W Plan.

DTC R&W Plan

The R&W Plan is intended to be used by the Board and DTC's management in the event DTC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would be structured to provide a roadmap, define the strategy, and identify the tools available to DTC to either (i) recover, in the event it experiences losses that exceed its prefunded resources (such strategies and tools referred to herein as the ''Recovery Plan'') or (ii) wind-down its business in a manner designed to permit the continuation of its critical services in the event that such recovery efforts are not successful (such strategies and tools referred to herein as the ''Wind-down Plan''). The description of the R&W Plan below is intended to highlight the purpose and expected effects of the material aspects of the R&W Plan, and to provide Participants with appropriate transparency into these features.

Business Overview, Critical Services, and Governance

The introduction to the R&W Plan would identify the document's purpose and its regulatory background, and would outline a summary of the Plan. The stated purpose of the R&W Plan is that it is to be used by the Board and DTC management in the event DTC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would be maintained by DTC in compliance with Rule 17Ad–22(e)(3)(ii) under the Act[13] by providing plans for the recovery and orderly wind-down of DTC.

The R&W Plan would describe DTCC's business profile, provide a summary of DTC's services, and identify the intercompany arrangements and critical links between DTC and other FMIs. This overview section would provide a context for the R&W Plan by describing DTC's business, organizational structure and critical links to other entities. By providing this context, this section would facilitate the analysis of the potential impact of utilizing the recovery tools set forth in later sections of the Recovery Plan, and the analysis of the factors that would be addressed in implementing the Wind-down Plan.

DTCC is a user-owned and user-governed holding company and is the parent company of DTC and its affiliates, National Securities Clearing Corporation (''NSCC'') and Fixed Income Clearing Corporation (''FICC,'' and, together with NSCC and DTC, the ''Clearing Agencies''). The Plan would describe how corporate support services are provided to DTC from DTCC and DTCC's other subsidiaries through intercompany agreements under a shared services model.

The Plan would provide a description of established links between DTC and other FMIs, both domestic and foreign, including central securities depositories (''CSDs'') and central counterparties (''CCPs''), as well as the twelve U.S. Federal Reserve Banks. In general, these links are either ''inbound'' or ''issuer'' links, in which the other FMI is a Participant and/or a Pledgee and maintains one or more accounts at DTC, or ''outbound'' or ''investor'' links in which DTC maintains one or more accounts at another FMI. Key FMIs with which DTC maintains critical links include CDS Clearing and Depository Services Inc. (''CDS''), the Canadian CSD, with participant links in both directions; Euroclear Bank SA/NV (''EB'') for cross-border collateral management services; and The Options Clearing Corporation (''OCC'') and the Federal Reserve Bank of New York (''FRBNY''), each of which is both a Participant and a Pledgee. The critical link for the U.S. marketplace is the relationship between DTC and NSCC, through which continuous net settlement (''CNS'') transactions are completed by settlement at DTC, and DTC acts as settlement agent for NSCC for end-of-day funds settlement.[14] This section of the Plan, identifying and briefly describing DTC's established links, would provide a mapping of critical connections and dependencies that may need to be relied on or otherwise addressed in connection with the implementation of either the Recovery Plan or the Wind-down Plan.

The Plan would define the criteria for classifying certain of DTC's services as ''critical,'' and would identify those critical services and the rationale for their classification. This section would provide an analysis of the potential systemic impact from a service disruption, and is important for evaluating how the recovery tools and the wind-down strategy would facilitate and provide for the continuation of DTC's critical services to the markets it serves. The criteria that would be used to identify a DTC service or function as critical would include consideration as to (1) whether there is a lack of alternative providers or products; (2) whether failure of the service could impact DTC's ability to perform its book-entry and settlement services; (3) whether failure of the service could impact DTC's ability to perform its payment system functions; and (4) whether the service is interconnected with other participants and processes within the U.S. financial system, for example, with other FMIs, settlement banks and broker-dealers. The Plan would then list each of those services, functions or activities that DTC has identified as ''critical'' based on the

as the ''Loss Allocation Filing''). DTC has submitted an amendment to the Loss Allocation Filing. A copy of the amendment to the Loss Allocation Filing is available at *http://www.dtcc.com/legal/sec-rule-filings.aspx*. DTC expects the Commission to review both proposals, as amended, together, and, as such, the proposal described in this filing anticipates the approval and implementation of those proposed changes to the Rules.

[12] DTCC operates on a shared services model with respect to DTC and its other subsidiaries. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a subsidiary, including DTC.

[13] 17 CFR 240.17Ad–22(e)(3)(ii).

[14] DTC has other links in addition to those mentioned above. The current list of linked CSDs is available on the DTCC website.

applicability of these four criteria. Such critical services would include, for example, MMIs and Commercial Paper Processing,[15] Mandatory and Voluntary Corporate Actions,[16] Cash and Stock Distributions,[17] and End of Day Net Money Settlement.[18] The R&W Plan would also include a non-exhaustive list of DTC services that are not deemed critical.

The evaluation of which services provided by DTC are deemed critical is important for purposes of determining how the R&W Plan would facilitate the continuity of those services. As discussed further below, while DTC's Wind-down Plan would provide for the transfer of all critical services to a transferee in the event DTC's wind-down is implemented, it would anticipate that any non-critical services that are ancillary and beneficial to a critical service, or that otherwise have substantial user demand from the continuing membership, would also be transferred.

The Plan would describe the governance structure of both DTCC and DTC. This section of the Plan would identify the ownership and governance model of these entities at both the Board of Directors and management levels. The Plan would state that the stages of escalation required to manage recovery under the Recovery Plan or to invoke DTC's wind-down under the Wind-down Plan would range from relevant business line managers up to the Board through DTC's governance structure. The Plan would then identify the parties responsible for certain activities under both the Recovery Plan and the Wind-down Plan, and would describe their respective roles. The Plan would identify the Risk Committee of the Board (''Board Risk Committee'') as being responsible for oversight of risk management activities at DTC, which include focusing on both oversight of risk management systems and processes designed to identify and manage various risks faced by DTC, and, due to DTC's critical role in the markets in which it operates, oversight of DTC's efforts to mitigate systemic risks that could impact those markets and the broader financial system.[19] The Plan would identify the DTCC Management Risk Committee (''Management Risk Committee'') as primarily responsible for general, day-to-day risk management through delegated authority from the Board Risk Committee. The Plan would state that the Management Risk Committee has delegated specific day-to-day risk management, including management of risks addressed through margining systems and related activities, to the DTCC Group Chief Risk Office (''GCRO''), which works with staff within the DTCC Financial Risk Management group. Finally, the Plan would describe the role of the Management Committee, which provides overall direction for all aspects of DTC's business, technology, and operations and the functional areas that support these activities.

The Plan would describe the governance of recovery efforts in response to both default losses and non-default losses under the Recovery Plan, identifying the groups responsible for those recovery efforts. Specifically, the Plan would state that the Management Risk Committee provides oversight of actions relating to the default of a Participant, which would be reported and escalated to it through the GCRO, and the Management Committee provides oversight of actions relating to non-default events that could result in a loss, which would be reported and escalated to it from the DTCC Chief Financial Officer (''CFO'') and the DTCC Treasury group that reports to the CFO, and from other relevant subject matter experts based on the nature and circumstances of the non-default event.[20] More generally, the Plan would state that the type of loss and the nature and circumstances of the events that lead to the loss would dictate the components of governance to address that loss, including the escalation path to authorize those actions. As described further below, both the Recovery Plan and the Wind-down Plan would describe the governance of escalations, decisions, and actions under each of those plans.

Finally, the Plan would describe the role of the R&R Team in managing the overall recovery and wind-down program and plans for each of the Clearing Agencies.

DTC Recovery Plan

The Recovery Plan is intended to be a roadmap of those actions that DTC may employ to monitor and, as needed, stabilize its financial condition. As each event that could lead to a financial loss could be unique in its circumstances, the Recovery Plan would not be prescriptive and would permit DTC to maintain flexibility in its use of identified tools and in the sequence in which such tools are used, subject to any conditions in the Rules or the contractual arrangement on which such tool is based. DTC's Recovery Plan would consist of (1) a description of the risk management surveillance, tools, and governance that DTC would employ across evolving stress scenarios that it may face as it transitions through a ''Crisis Continuum,'' described below; (2) a description of DTC's risk of losses that may result from non-default events, and the financial resources and recovery tools available to DTC to manage those risks and any resulting losses; and (3) an evaluation of the characteristics of the recovery tools that may be used in response to either losses arising out of a Participant Default (as defined below) or non-default losses, as described in greater detail below. In all cases, DTC would act in accordance with the Rules, within the governance structure described in the R&W Plan, and in accordance with applicable regulatory oversight to address each situation in order to best protect DTC, its Participants and the markets in which it operates.

Managing Participant Default Losses and Liquidity Needs Through the Crisis Continuum. The Plan would describe the risk management surveillance, tools, and governance that DTC may employ across an increasing stress environment, which is referred to as the ''Crisis Continuum.'' This description would identify those tools that can be employed to mitigate losses, and mitigate or minimize liquidity needs, as the market environment becomes increasingly stressed. The phases of the Crisis Continuum would include (1) a stable market phase, (2) a stressed market phase, (3) a phase commencing with DTC's decision to cease to act for a Participant or Affiliated Family of Participants (referred to in the Plan as

[15] *See* Rule 9(C) (Transactions in MMI Securities), *supra* note 6.

[16] *See* DTC Reorganizations Service Guide, *available at www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Reorganizations.pdf.*

[17] *See* DTC Distributions Service Guide, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Service%20Guide%20Distributions.pdf.*

[18] *See* DTC Settlement Service Guide, *available at www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Settlement.pdf.*

[19] The charter of the Board Risk Committee is *available at http://www.dtcc.com/~/media/Files/Downloads/legal/policy-and-compliance/DTCC-BOD-Risk-Committee-Charter.pdf.*

[20] The Plan would state that these groups would be involved to address how to mitigate the financial impact of non-default losses, and in recommending mitigating actions, the Management Committee would consider information and recommendations from relevant subject matter experts based on the nature and circumstances of the non-default event. Any necessary operational response to these events, however, would be managed in accordance with applicable incident response/business continuity process; for example, processes established by the DTCC Technology Risk Management group would be followed in response to a cyber event.

the ''Participant Default phase''),[21] and (4) a recovery phase. This section of the Recovery Plan would address conditions and circumstances relating to DTC's decision to cease to act for a Participant pursuant to the Rules.[22] For ease of reference, the R&W Plan would, for purposes of the Plan, use the term ''Participant Default Losses'' to refer to losses that arise out of or relate to the Participant Default and resulting cease to act (including any losses that arise from liquidation of the Participant's Collateral).

The Recovery Plan would provide context to its roadmap through this Crisis Continuum by describing DTC's ongoing management of credit, market risk and liquidity risk, and its existing process for measuring and reporting its risks as they align with established thresholds for its tolerance of those risks. The Recovery Plan would discuss the management of credit/market risk and liquidity exposures together, because the tools that address these risks can be deployed either separately or in a coordinated approach in order to address both exposures. DTC manages these risk exposures collectively to limit their overall impact on DTC and its Participants. DTC has built-in mechanisms to limit exposures and replenish financial resources used in a stress event, in order to continue to operate in a safe and sound manner. DTC is a closed, collateralized system in which liquidity resources are matched against risk management controls, so, at any time, the potential net settlement obligation of the Participant or Affiliated Family of Participants with the largest net settlement obligation cannot exceed the amount of liquidity resources.[23] While Collateral securities are subject to market price risk, DTC manages its liquidity and market risks through the calculation of the required deposits to the Participants Fund [24] and risk management controls, *i.e.,* collateral haircuts, the Collateral Monitor [25] and Net Debit Cap.[26]

The Recovery Plan would outline the metrics and indicators that DTC has developed to evaluate a stress situation against established risk tolerance thresholds. Each risk mitigation tool identified in the Recovery Plan would include a description of the escalation thresholds that allow for effective and timely reporting to the appropriate internal management staff and committees, or to the Board. The Recovery Plan would make clear that these tools and escalation protocols would be calibrated across each phase of the Crisis Continuum. The Recovery Plan would also establish that DTC would retain the flexibility to deploy such tools either separately or in a coordinated approach, and to use other alternatives to these actions and tools as necessitated by the circumstances of a particular Participant Default event, in accordance with the Rules. Therefore, the Recovery Plan would both provide DTC with a roadmap to follow within each phase of the Crisis Continuum, and would permit it to adjust its risk management measures to address the unique circumstances of each event.

The Recovery Plan would describe the conditions that mark each phase of the Crisis Continuum, and would identify actions that DTC could take as it transitions through each phase in order to both prevent losses from materializing through active risk management, and to restore the financial health of DTC during a period of stress.

The stable market phase of the Crisis Continuum would describe active risk management activities in the normal course of business. These activities would include performing (1) backtests to evaluate the adequacy of the collateral level and the haircut sufficiency for covering market price volatility and (2) stress testing to cover market price moves under real historical and hypothetical scenarios to assess the haircut adequacy under extreme but plausible market conditions. The backtesting and stress testing results are escalated, as necessary, to internal and Board committees.[27]

The Recovery Plan would describe some of the indicators of the stress market phase of the Crisis Continuum, which would include, for example, volatility in market prices of certain assets where there is increased uncertainty among market participants about the fundamental value of those assets. This phase would involve general market stresses, when no Participant Default would be imminent. Within the description of this phase, the Recovery Plan would provide that DTC may take targeted, routine risk management measures as necessary and as permitted by the Rules.

Within the Participant Default phase of the Crisis Continuum, the Recovery Plan would provide a roadmap for the existing procedures that DTC would follow in the event of a Participant Default and any decision by DTC to cease to act for that Participant.[28] The Recovery Plan would provide that the objectives of DTC's actions upon a Participant Default are to (1) minimize losses and market exposure, and (2), to the extent practicable, minimize disturbances to the affected markets. The Recovery Plan would describe tools, actions, and related governance for both market risk monitoring and liquidity risk monitoring through this phase. For example, in connection with managing its market risk during this phase, DTC would, pursuant to its Rules and existing procedures, (1) monitor and assess the adequacy of its Participants Fund and Net Debit Caps; and (2) follow its operational procedures relating to the execution of a liquidation of the Defaulting Participant's Collateral securities through close collaboration and coordination across multiple functions. Management of liquidity risk through this phase would involve ongoing monitoring of, among other things, the adequacy of the Participants Fund and risk controls, and the Recovery Plan would identify certain actions DTC may deploy as it deems necessary to mitigate a potential liquidity shortfall, which

[21] The Plan defines an ''Affiliated Family'' of Participants as a number of affiliated entities that are all Participants of DTC.

[22] In the Plan, ''cease to act'' and the actions that may lead to such decision, are used within the context of the Rules, including Rule 4 (Participants Fund and Participants Investment), Rule 9(A) (Transactions in Securities and Money Payments), Rule 9(B) (Transactions in Eligible Securities), Rule 9(C) (Transactions in MMI Securities), Rule 10 (Discretionary Termination), Rule 11 (Mandatory Termination) and Rule 12 (Insolvency), *supra* note 6. Further, the term ''Participant Default'' would also be used in the Plan as such term is defined in Rule 4, as proposed to be amended by the Loss Allocation filing, *supra* note 11.

[23] DTC's liquidity risk management strategy, including the manner in which DTC would deploy liquidity tools as well as its intraday use of liquidity, is described in the Clearing Agency Liquidity Risk Management Framework. *See* Securities Exchange Act Release No. 80489 (April 19, 2017), 82 FR 19120 (April 25, 2017) (SR–DTC–2017–004, SR–DTC–2017–005, SR–FICC–2017–008).

[24] *See* Rule 4 (Participants Fund and Participants Investment), *supra* note 6.

[25] *See* Rule 1, Section 1, *supra* note 6. For DTC, credit risk and market risk are closely related, as DTC monitors credit exposures from Participants through these risk management controls, which limit Participant settlement obligations to the amount of available liquidity resources and require those obligations to be fully collateralized. The pledge or liquidation of collateral in an amount sufficient to restore liquidity resources depends on market values and demand, *i.e.,* market risk exposure. Such risk management controls are part of DTC's market risk management strategy and are designed to comply with Rule 17Ad-22(e)(4) under the Act, where these risks are referred to as ''credit risks.'' *See also* 17 CFR 240.17Ad–22(e)(4).

[26] *Id.*

[27] DTC's stress testing practices are described in the Clearing Agency Stress Testing Framework (Market Risk). *See* Securities Exchange Act Release No. 80485 (April 19, 2017), 82 FR 19131 (April 25, 2017) (SR–DTC–2017–005, SR–FICC–2017–009, SR–NSCC–2017–006).

[28] *See* Rule 10 (Discretionary Termination); Rule 11 (Mandatory Termination); Rule 12 (Insolvency), *supra* note 6.

would include, for example, the reduction of Net Debit Caps of some or all Participants, or seeking additional liquidity resources. The Recovery Plan would state that, throughout this phase, relevant information would be escalated and reported to both internal management committees and the Board Risk Committee.

The Recovery Plan would also identify financial resources available to DTC, pursuant to the Rules, to address losses arising out of a Participant Default. Specifically, Rule 4, as proposed to be amended by the Loss Allocation Filing, would provide that losses remaining after application of the Defaulting Participant's resources be satisfied first by applying a ''Corporate Contribution,'' and then, if necessary, by allocating remaining losses among the membership in accordance with such Rule 4, as amended.[29]

In order to provide for an effective and timely recovery, the Recovery Plan would describe the period of time that would occur near the end of the Participant Default phase, during which DTC may experience stress events or observe early warning indicators that allow it to evaluate its options and prepare for the recovery phase (referred to in the Plan as the ''Recovery Corridor''). The Recovery Plan would then describe the recovery phase of the Crisis Continuum, which would begin on the date that DTC issues the first Loss Allocation Notice of the second loss allocation round with respect to a given ''Event Period.'' [30] The recovery phase would describe actions that DTC may take to avoid entering into a wind-down of its business.

DTC expects that significant deterioration of liquidity resources would cause it to enter the Recovery Corridor. As such, the Plan would describe the actions DTC may take aimed at replenishing those resources Recovery Corridor indicators may include, for example, a rapid and material increase in market prices or sequential or simultaneous failures of multiple Participants or Affiliated Families of Participants over a compressed time period. Throughout the Recovery Corridor, DTC would monitor the adequacy of its resources and the expected timing of replenishment of those resources, and would do so through the monitoring of certain corridor indicator metrics.

The majority of the corridor indicators, as identified in the Recovery Plan, relate directly to conditions that may require DTC to adjust its strategy for hedging and liquidating Collateral securities, and any such changes would include an assessment of the status of the corridor indicators. Corridor indicators would include, for example, effectiveness and speed of DTC's efforts to liquidate Collateral securities, and an impediment to the availability of its resources to repay any borrowings due to any Participant default. For each corridor indicator, the Recovery Plan would identify (1) measures of the indicator, (2) evaluations of the status of the indicator, (3) metrics for determining the status of the deterioration or improvement of the indicator, and (4) ''Corridor Actions,'' which are steps that may be taken to improve the status of the indicator,[31] as well as management escalations required to authorize those steps. Because DTC has never experienced the default of multiple Participants, it has not, historically, measured the deterioration or improvements metrics of the corridor indicators. As such, these metrics were chosen based on the business judgment of DTC management.

The Recovery Plan would also describe the reporting and escalation of the status of the corridor indicators throughout the Recovery Corridor. Significant deterioration of a corridor indicator, as measured by the metrics set out in the Recovery Plan, would be escalated to the Board. DTC management would review the corridor indicators and the related metrics at least annually, and would modify these metrics as necessary in light of observations from simulations of Participant Defaults and other analyses. Any proposed modifications would be reviewed by the Management Risk Committee and the Board Risk Committee. The Recovery Plan would estimate that DTC may remain in the Recovery Corridor stage between one day and two weeks. This estimate is based on historical data observed in past Participant Default events, the results of simulations of Participant Defaults, and periodic liquidity analyses conducted by DTC. The actual length of a Recovery Corridor would vary based on actual market conditions observed at the time, and DTC would expect the Recovery Corridor to be shorter in market conditions of increased stress.

The Recovery Plan would outline steps by which DTC may allocate its losses, which would occur when and in the order provided in Rule 4, as amended.[32] The Recovery Plan would also identify tools that may be used to address foreseeable shortfalls of DTC's liquidity resources following a Participant Default, and would provide that these tools may be used as appropriate during the Crisis Continuum to address liquidity shortfalls if they arise. The goal in managing DTC's liquidity resources is to maximize resource availability in an evolving stress situation, to maintain flexibility in the order and use of sources of liquidity, and to repay any third party lenders in a timely manner. Liquidity tools include, for example, DTC's committed 364-day credit facility [33] and Net Credit Reductions.[34] The Recovery Plan would state that the availability and capacity of these liquidity tools cannot be accurately predicted and are dependent on the circumstances of the applicable stress period, including market price volatility, actual or perceived

[29] *See supra* note 11. The Loss Allocation Filing proposes to amend Rule 4 to define the amount DTC would contribute to address a loss resulting from either a Participant Default or a non-default event as the ''Corporate Contribution.'' This amount would be 50 percent (50%) of the ''General Business Risk Capital Requirement,'' which is calculated pursuant to the Capital Policy and is an amount sufficient to cover potential general business losses so that DTC can continue operations and services as a going concern if those losses materialize, in compliance with Rule 17Ad–22(e)(15) under the Act. *See also supra* note 9; 17 CFR 240.17Ad–22(e)(15).

[30] The Loss Allocation Filing proposes to amend Rule 4 to introduce the concept of an ''Event Period'' as the ten (10) Business Days beginning on (i) with respect to a Participant Default, the day on which DTC notifies Participants that it has ceased to act for a Participant, or (ii) with respect to a non-default loss, the day that DTC notifies Participants of the determination by the Board of Directors that there is a non-default loss event, as described in greater detail in that filing. The proposed Rule 4 would define a ''round'' as a series of loss allocations relating to an Event Period, and would provide that the first Loss Allocation Notice in a first, second, or subsequent round shall expressly state that such notice reflects the beginning of a first, second, or subsequent round. The maximum allocable loss amount of a round is equal to the sum of the ''Loss Allocation Caps'' (as defined in the proposed Rule 4) of those Participants included in the round. *See supra* note 11.

[31] The Corridor Actions that would be identified in the Plan are indicative, but not prescriptive; therefore, if DTC needs to consider alternative actions due to the applicable facts and circumstances, the escalation of those alternative actions would follow the same escalation protocol identified in the Plan for the Corridor Indicator to which the action relates.

[32] As these matters are described in greater detail in the Loss Allocation Filing and in the proposed amendments to Rule 4, described therein, reference is made to that filing and the details are not repeated here. *See supra* note 11.

[33] *See* Securities Exchange Act Release No. 80605 (May 5, 2017), 82 FR 21850 (May 10, 2017) (SR–DTC–2017–802; SR–NSCC–2017–802).

[34] DTC may borrow amounts needed to complete settlement from Participants by net credit reductions to their settlement accounts, secured by the Collateral of the defaulting Participant. *See* Securities Exchange Act Release Nos. 24689 (July 9, 1987), 52 FR 26613 (July 15, 1987) (SR–DTC–87–4); 41879 (September 15, 1999), 64 FR 51360 (September 22, 1999) (SR–DTC–99–15); 42281 (December 28, 1999), 65 FR 1420 (January 10, 2000) (SR–DTC–99–25).

disruptions in financial markets, the costs to DTC of utilizing these tools, and any potential impact on DTC's credit rating.

As stated above, the Recovery Plan would state that DTC will have entered the recovery phase on the date that it issues the first Loss Allocation Notice of the second loss allocation round with respect to a given Event Period. The Recovery Plan would provide that, during the recovery phase, DTC would continue and, as needed, enhance, the monitoring and remedial actions already described in connection with previous phases of the Crisis Continuum, and would remain in the recovery phase until its financial resources are expected to be or are fully replenished, or until the Wind-down Plan is triggered, as described below.

The Recovery Plan would describe governance for the actions and tools that may be employed within each phase of the Crisis Continuum, which would be dictated by the facts and circumstances applicable to the situation being addressed. Such facts and circumstances would be measured by the various indicators and metrics applicable to that phase of the Crisis Continuum, and would follow relevant escalation protocol that would be described in the Recovery Plan. The Recovery Plan would also describe the governance procedures around a decision to cease to act for a Participant, pursuant to the Rules, and around the management and oversight of the subsequent liquidation of Collateral securities. The Recovery Plan would state that, overall, DTC would retain flexibility in accordance with the Rules, its governance structure, and its regulatory oversight, to address a particular situation in order to best protect DTC and its Participants, and to meet the primary objectives, throughout the Crisis Continuum, of minimizing losses and, where consistent and practicable, minimizing disturbance to affected markets.

Non-Default Losses. The Recovery Plan would outline how DTC may address losses that result from events other than a Participant Default. While these matters are addressed in greater detail in other documents, this section of the Plan would provide a roadmap to those documents and an outline for DTC's approach to monitoring and managing losses that could result from a non-default event. The Plan would first identify some of the risks DTC faces that could lead to these losses, which include, for example, the business and profit/loss risks of unexpected declines in revenue or growth of expenses; the operational risks of disruptions to systems or processes that could lead to large losses, including those resulting from, for example, a cyber-attack; and custody or investment risks that could lead to financial losses. The Recovery Plan would describe DTC's overall strategy for the management of these risks, which includes a ''three lines of defense'' approach to risk management that allows for comprehensive management of risk across the organization.[35] The Recovery Plan would also describe DTC's approach to financial risk and capital management. The Plan would identify key aspects of this approach, including, for example, an annual budget process, business line performance reviews with management, and regular review of capital requirements against LNA. These risk management strategies are collectively intended to allow DTC to effectively identify, monitor, and manage risks of non-default losses.

The Plan would identify the two categories of financial resources DTC maintains to cover losses and expenses arising from non-default risks or events as (1) LNA, maintained, monitored, and managed pursuant to the Capital Policy, which include (a) amounts held in satisfaction of the General Business Risk Capital Requirement,[36] (b) the Corporate Contribution,[37] and (c) other amounts held in excess of DTC's capital requirements pursuant to the Capital Policy; and (2) resources available pursuant to the loss allocation provisions of Rule 4.[38]

The Plan would address the process by which the CFO and the DTCC Treasury group would determine which available LNA resources are most appropriate to cover a loss that is caused by a non-default event. This determination involves an evaluation of a number of factors, including the current and expected size of the loss, the expected time horizon over when the loss or additional expenses would materialize, the current and projected available LNA, and the likelihood LNA could be successfully replenished pursuant to the Replenishment Plan, if triggered.[39] Finally the Plan would discuss how DTC would apply its resources to address losses resulting from a non-default event, including the order of resources it would apply if the loss or liability is expected to exceed DTC's excess LNA amounts, or is large relative thereto, and the Board has declared the event a ''Declared Non-Default Loss Event'' pursuant to Rule 4.[40]

The Plan would also describe proposed Rule 38 (Market Disruption and Force Majeure), which DTC is proposing to adopt in its Rules. This Proposed Rule would provide transparency around how DTC would address extraordinary events that may occur outside its control. Specifically, the Proposed Rule would define a ''Market Disruption Event'' and the governance around a determination that such an event has occurred. The Proposed Rule would also describe DTC's authority to take actions during the pendency of a Market Disruption Event that it deems appropriate to address such an event and facilitate the continuation of its services, if practicable, as described in greater detail below.

The Plan would describe the interaction between the Proposed Rule and DTC's existing processes and procedures addressing business continuity management and disaster recovery (generally, the ''BCM/DR procedures''), making clear that the Proposed Rule is designed to support those BCM/DR procedures and to address circumstances that may be exogenous to DTC and not necessarily addressed by the BCM/DR procedures. Finally, the Plan would describe that, because the operation of the Proposed Rule is specific to each applicable Market Disruption Event, the Proposed Rule does not define a time limit on its application. However, the Plan would note that actions authorized by the Proposed Rule would be limited to the pendency of the applicable Market Disruption Event, as made clear in the Proposed Rule. Overall, the Proposed Rule is designed to mitigate risks caused by Market Disruption Events and,

[35] This ''three lines of defense'' approach to risk management includes (1) a first line of defense comprised of the various business lines and functional units that support the products and services offered by DTC; (2) a second line of defense comprised of control functions that support DTC, including the risk management, legal and compliance areas; and (3) a third line of defense, which is performed by an internal audit group. The Clearing Agency Risk Management Framework includes a description of this ''three lines of defense'' approach to risk management, and addresses how DTC comprehensively manages various risks, including operational, general business, investment, custody, and other risks that arise in or are borne by it. *See* Securities Exchange Act Release No. 81635 (September 15, 2017), 82 FR 44224 (September 21, 2017) (SR–DTC–2017–013; SR–FICC–2017–016; SR–NSCC–2017–012). The Clearing Agency Operational Risk Management Framework describes the manner in which DTC manages operational risks, as defined therein. *See* Securities Exchange Act Release No. 81745 (September 28, 2017), 82 FR 46332 (October 4, 2017) (SR–DTC–2017–014; SR–FICC–2017–017; SR–NSCC–2017–013).

[36] *See supra* note 29.

[37] *See supra* note 29.

[38] *See supra* note 11.

[39] *See supra* note 9.

[40] *See supra* note 11.

thereby, minimize the risk of financial loss that may result from such events.

Recovery Tool Characteristics. The Recovery Plan would describe DTC's evaluation of the tools identified within the Recovery Plan, and its rationale for concluding that such tools are comprehensive, effective, and transparent, and that such tools provide appropriate incentives to Participants and minimize negative impact on Participants and the financial system, in compliance with guidance published by the Commission in connection with the adoption of Rule 17Ad–22(e)(3)(ii) under the Act.[41] DTC's analysis and the conclusions set forth in this section of the Recovery Plan are described in greater detail in Item 3(b) of this filing, below.

DTC Wind-Down Plan

The Wind-down Plan would provide the framework and strategy for the orderly wind-down of DTC if the use of the recovery tools described in the Recovery Plan do not successfully return DTC to financial viability. While DTC believes that, given the comprehensive nature of the recovery tools, such event is extremely unlikely, as described in greater detail below, DTC is proposing a wind-down strategy that provides for (1) the transfer of DTC's business, assets, securities inventory, and membership to another legal entity, (2) such transfer being effected in connection with proceedings under Chapter 11 of the U.S. Federal Bankruptcy Code,[42] and (3) after effectuating this transfer, DTC liquidating any remaining assets in an orderly manner in bankruptcy proceedings. DTC believes that the proposed transfer approach to a wind-down would meet its objectives of (1) assuring that DTC's critical services will be available to the market as long as there are Participants in good standing, and (2) minimizing disruption to the operations of Participants and financial markets generally that might be caused by DTC's failure.

In describing the transfer approach to DTC's Wind-down Plan, the Plan would identify the factors that DTC considered in developing this approach, including the fact that DTC does not own material assets that are unrelated to its clearance and settlement activities. As such, a business reorganization or ''bail-in'' of debt approach would be unlikely to mitigate significant losses. Additionally, DTC's approach was developed in consideration of its critical and unique position in the U.S. markets, which precludes any approach that would cause DTC's critical services to no longer be available.

First, the Wind-down Plan would describe the potential scenarios that could lead to the wind-down of DTC, and the likelihood of such scenarios. The Wind-down Plan would identify the time period leading up to a decision to wind-down DTC as the ''Runway Period.'' This period would follow the implementation of any recovery tools, as it may take a period of time, depending on the severity of the market stress at that time, for these tools to be effective or for DTC to realize a loss sufficient to cause it to be unable to borrow to complete settlement and to repay such borrowings.[43] The Plan would identify some of the indicators that DTC has entered this Runway Period, which would include, for example, simultaneous successive Participant Defaults, significant Participant retirements, and DTC's inability to replenish financial resources following the liquidation of Collateral securities.

The trigger for implementing the Wind-down Plan would be a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning DTC to viability as a going concern. As described in the Plan, DTC believes this is an appropriate trigger because it is both broad and flexible enough to cover a variety of scenarios, and would align incentives of DTC and Participants to avoid actions that might undermine DTC's recovery efforts. Additionally, this approach takes into account the characteristics of DTC's recovery tools and enables the Board to consider (1) the presence of indicators of a successful or unsuccessful recovery, and (2) potential for knock-on effects of continued iterative application of DTC's recovery tools.

The Wind-down Plan would describe the general objectives of the transfer strategy, and would address assumptions regarding the transfer of DTC's critical services, business, assets, securities inventory, and membership[44] to another legal entity that is legally, financially, and operationally able to provide DTC's critical services to entities that wish to continue their membership following the transfer (''Transferee''). The Wind-down Plan would provide that the Transferee would be either (1) a third party legal entity, which may be an existing or newly established legal entity or a bridge entity formed to operate the business on an interim basis to enable the business to be transferred subsequently (''Third Party Transferee''); or (2) an existing, debt-free failover legal entity established ex-ante by DTCC (''Failover Transferee'') to be used as an alternative Transferee in the event that no viable or preferable Third Party Transferee timely commits to acquire DTC's business. DTC would seek to identify the proposed Transferee, and negotiate and enter into transfer arrangements during the Runway Period and prior to making any filings under Chapter 11 of the U.S. Federal Bankruptcy Code.[45] As stated above, the Wind-down Plan would anticipate that the transfer to the Transferee, including the transfer and establishment of the Participant and Pledgee securities accounts on the books of the Transferee, be effected in connection with proceedings under Chapter 11 of the U.S. Federal Bankruptcy Code, and pursuant to a bankruptcy court order under Section 363 of the Bankruptcy Code, such that the transfer would be free and clear of claims against, and interests in, DTC, except to the extent expressly provided in the court's order.[46]

In order to effect a timely transfer of its services and minimize the market and operational disruption of such transfer, DTC would expect to transfer all of its critical services and any non-critical services that are ancillary and beneficial to a critical service, or that otherwise have substantial user demand from the continuing membership. Given the transfer of the securities inventory and the establishment on the books of the Transferee Participant and Pledgee securities accounts, DTC anticipates that, following the transfer, it would not itself continue to provide any services, critical or not. Following the transfer, the Wind-down Plan would anticipate that the Transferee and its continuing membership would determine whether to continue to provide any transferred non-critical service on an ongoing basis, or terminate the non-critical service following some transition period. DTC's Wind-down Plan would anticipate that

[41] Standards for Covered Clearing Agencies, Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14).

[42] 11 U.S.C. 1101 *et seq.*

[43] The Wind-down Plan would state that, given DTC's position as a user-governed financial market utility, it is possible that its Participants might voluntarily elect to provide additional support during the recovery phase leading up to a potential trigger of the Wind-down Plan, but would also make clear that DTC cannot predict the willingness of Participants to do so.

[44] Arrangements with FAST Agents and DRS Agents (each as defined in proposed Rule 32(A)) and with Settling Banks would also be assigned to the Transferee, so that the approach would be transparent to issuers and their transfer agents, as well as to Settling Banks.

[45] 11 U.S.C. 1101 *et seq.*

[46] *See id.* at 363.

the Transferee would enter into a transition services agreement with DTCC so that DTCC would continue to provide the shared services it currently provides to DTC, including staffing, infrastructure and operational support. The Wind-down Plan would also anticipate the assignment of DTC's ''inbound'' link arrangements to the Transferee. The Wind-down Plan would provide that in the case of ''outbound'' links, DTC would seek to have the linked FMIs agree, at a minimum, to accept the Transferee as a link party for a transition period.[47]

The Wind-down Plan would provide that, following the effectiveness of the transfer to the Transferee, the wind-down of DTC would involve addressing any residual claims against DTC through the bankruptcy process and liquidating the legal entity. As such, and as stated above, the Wind-down Plan does not contemplate DTC continuing to provide services in any capacity following the transfer time, and any services not transferred would be terminated.

The Wind-down Plan would also identify the key dependencies for the effectiveness of the transfer, which include regulatory approvals that would permit the Transferee to be legally qualified to provide the transferred services from and after the transfer, and approval by the applicable bankruptcy court of, among other things, the proposed sale, assignments, and transfers to the Transferee.

The Wind-down Plan would address governance matters related to the execution of the transfer of DTC's business and its wind-down. The Wind-down Plan would address the duties of the Board to execute the wind-down of DTC in conformity with (1) the Rules, (2) the Board's fiduciary duties, which mandate that it exercise reasonable business judgment in performing these duties, and (3) DTC's regulatory obligations under the Act as a registered clearing agency. The Wind-down Plan would also identify certain factors the Board may consider in making these decisions, which would include, for example, whether DTC could safely stabilize the business and protect its value without seeking bankruptcy protection, and DTC's ability to continue to meet its regulatory requirements.

The Wind-down Plan would describe (1) actions DTC or DTCC may take to prepare for wind-down in the period before DTC experiences any financial distress, (2) actions DTC would take both during the recovery phase and the Runway Period to prepare for the execution of the Wind-down Plan, and (3) actions DTC would take upon commencement of bankruptcy proceedings to effectuate the Wind-down Plan.

Finally, the Wind-down Plan would include an analysis of the estimated time and costs to effectuate the plan, and would provide that this estimate be reviewed and approved by the Board annually. In order to estimate the length of time it might take to achieve a recovery or orderly wind-down of DTC's critical operations, as contemplated by the R&W Plan, the Wind-down Plan would include an analysis of the possible sequencing and length of time it might take to complete an orderly wind-down and transfer of critical operations, as described in earlier sections of the R&W Plan. The Wind-down Plan would also include in this analysis consideration of other factors, including the time it might take to complete any further attempts at recovery under the Recovery Plan. The Wind-down Plan would then multiply this estimated length of time by DTC's average monthly operating expenses, including adjustments to account for changes to DTC's profit and expense profile during these circumstances, over the previous twelve months to determine the amount of LNA that it should hold to achieve a recovery or orderly wind-down of DTC's critical operations. The estimated wind-down costs would constitute the ''Recovery/Wind-down Capital Requirement'' under the Capital Policy.[48] Under that policy, the General Business Risk Capital Requirement is calculated as the greatest of three estimated amounts, one of which is this Recovery/Wind-down Capital Requirement.[49]

The R&W Plan is designed as a roadmap, and the types of actions that may be taken both leading up to and in connection with implementation of the Wind-down Plan would be primarily addressed in other supporting documentation referred to therein.

The Wind-down Plan would address proposed Rule 32(A) (Wind-down of the Corporation and proposed Rule 38 (Force Majeure and Market Disruption)), which would be adopted to facilitate the implementation of the Wind-down Plan, as discussed below.

Proposed Rules

In connection with the adoption of the R&W Plan, DTC is proposing to adopt the Proposed Rules, each described below. The Proposed Rules would facilitate the execution of the R&W Plan and would provide Participants with transparency as to critical aspects of the Plan, particularly as they relate to the rights and responsibilities of both DTC and its Participants. The Proposed Rules also provide a legal basis to these aspects of the Plan.

Rule 32(A) (Wind-Down of the Corporation)

The proposed Rule 32(A) (''Wind-down Rule'') would be adopted to facilitate the execution of the Wind-down Plan. The Wind-down Rule would include a proposed set of defined terms that would be applicable only to the provisions of this Proposed Rule. The Wind-down Rule would make clear that a wind-down of DTC's business would occur (1) after a decision is made by the Board, and (2) in connection with the transfer of DTC's services to a Transferee, as described therein. Generally, the proposed Wind-down Rule is designed to create clear mechanisms for the transfer of Eligible Participants and Pledgees, Settling Banks, DRS Agents, and FAST Agents (as these terms would be defined in the Wind-down Rule), and DTC's inventory of financial assets in order to provide for continued access to critical services and to minimize disruption to the markets in the event the Wind-down Plan is initiated.

Wind-down Trigger. First, the Proposed Rule would make clear that the Board is responsible for initiating the Wind-down Plan, and would identify the criteria the Board would consider when making this determination. As provided for in the Wind-down Plan and in the proposed Wind-down Rule, the Board would initiate the Plan if, in the exercise of its business judgment and subject to its fiduciary duties, it has determined that the execution of the Recovery Plan has not or is not likely to restore DTC to viability as a going concern, and the implementation of the Wind-down Plan, including the transfer of DTC's business, is in the best interests of DTC, its Participants and Pledgees, its shareholders and creditors, and the U.S. financial markets.

Identification of Critical Services; Designation of Dates and Times for

[47] The proposed transfer arrangements outlined in the Wind-down Plan do not contemplate the transfer of any credit or funding agreements, which are generally not assignable by DTC. However, to the extent the Transferee adopts rules substantially identical to those DTC has in effect prior to the transfer, it would have the benefit of any rules-based liquidity funding. The Wind-down Plan contemplates that no Participants Fund would be transferred to the Transferee, as it is not held in a bankruptcy remote manner and it is the primary prefunded liquidity resource to be accessed in the recovery phase.

[48] *See supra* note 9.

[49] *See supra* note 9.

Specific Actions. The Proposed Rule would provide that, upon making a determination to initiate the Wind-down Plan, the Board would identify the critical and non-critical services that would be transferred to the Transferee at the Transfer Time (as defined below and in the Proposed Rule), as well as any non-critical services that would not be transferred to the Transferee. The proposed Wind-down Rule would establish that any services transferred to the Transferee will only be provided by the Transferee as of the Transfer Time, and that any non-critical services that are not transferred to the Transferee would be terminated at the Transfer Time. The Proposed Rule would also provide that the Board would establish (1) an effective time for the transfer of DTC's business to a Transferee (''Transfer Time''), and (2) the last day that instructions in respect of securities and other financial products may be effectuated through the facilities of DTC (the ''Last Activity Date''). The Proposed Rule would make clear that DTC would not accept any transactions for settlement after the Last Activity Date. Any transactions to be settled after the Transfer Time would be required to be submitted to the Transferee, and would not be DTC's responsibility.

Notice Provisions. The proposed Wind-down Rule would provide that, upon a decision to implement the Wind-down Plan, DTC would provide its Participants, Pledgees, DRS Agents, FAST Agents, Settling Banks and regulators with a notice that includes material information relating to the Wind-down Plan and the anticipated transfer of DTC's Participants and business, including, for example, (1) a brief statement of the reasons for the decision to implement the Wind-down Plan; (2) identification of the Transferee and information regarding the transaction by which the transfer of DTC's business would be effected; (3) the Transfer Time and Last Activity Date; and (4) identification of Participants and the critical and non-critical services that would be transferred to the Transferee at the Transfer Time, as well as those Non-Eligible Participants (as defined below and in the Proposed Rule) and any non-critical services that would not be included in the transfer. DTC would also make available the rules and procedures and membership agreements of the Transferee.

Transfer of Membership. The proposed Wind-down Rule would address the expected transfer of DTC's membership to the Transferee, which DTC would seek to effectuate by entering into an arrangement with a Failover Transferee, or by using commercially reasonable efforts to enter into such an arrangement with a Third Party Transferee. Thus, under the proposal, in connection with the implementation of the Wind-down Plan and with no further action required by any party:

(1) Each Eligible Participant would become (i) a Participant of the Transferee and (ii) a party to a Participants agreement with the Transferee;

(2) each Participant that is delinquent in the performance of any obligation to DTC or that has provided notice of its election to withdraw as a Participant (a ''Non-Eligible Participant'') as of the Transfer Time would become (i) the holder of a transition period securities account maintained by the Transferee on its books (''Transition Period Securities Account'') and (ii) a party to a Transition Period Securities Account agreement of the Transferee;

(3) each Pledgee would become (i) a Pledgee of the Transferee and (ii) a party to a Pledgee agreement with the Transferee;

(4) each DRS Agent would become (i) a DRS Agent of the Transferee and (ii) a party to a DRS Agent agreement with the Transferee;

(5) each FAST Agent would become (i) a FAST Agent of the Transferee and (ii) a party to a FAST Agent agreement with the Transferee; and

(6) each Settling Bank for Participants and Pledgees would become (i) a Settling Bank for Participants and Pledgees of the Transferee and (ii) a party to a Settling Bank Agreement with the Transferee.

Further, the Proposed Rule would make clear that it would not prohibit (1) Non-Eligible Participants from applying for membership with the Transferee, (2) Non-Eligible Participants that have become holders of Transition Period Securities Accounts (''Transition Period Securities Account Holders'') of the Transferee from withdrawing as a Transition Period Securities Account Holder from the Transferee, subject to the rules and procedures of the Transferee, and (3) Participants, Pledgees, DRS Agents, FAST Agents, and Settling Banks that would be transferred to the Transferee from withdrawing from membership with the Transferee, subject to the rules and procedures of the Transferee. Under the Proposed Rule, Non-Eligible Participants that have become Transition Period Securities Account Holders of the Transferee shall have the rights and be subject to the obligations of Transition Period Securities Account Holders set forth in special provisions of the rules and procedures of the Transferee applicable to such Transition Period Securities Account Holder. Specifically, Non-Eligible Participants that become Transition Period Securities Account Holders must, within the Transition Period (as defined in the Proposed Rule), instruct the Transferee to transfer the financial assets credited to its Transition Period Securities Account (i) to a Participant of the Transferee through the facilities of the Transferee or (ii) to a recipient outside the facilities of the Transferee, and no additional financial assets may be delivered versus payment to a Transition Period Securities Account during the Transition Period.

Transfer of Inventory of Financial Assets. The proposed Wind-down Rule would provide that DTC would enter into arrangements with a Failover Transferee, or would use commercially reasonable efforts to enter into arrangements with a Third Party Transferee, providing that, in either case, at Transfer Time:

(1) DTC would transfer to the Transferee (i) its rights with respect to its nominee Cede & Co. (''Cede'') (and thereby its rights with respect to the financial assets owned of record by Cede), (ii) the financial assets held by it at the FRBNY, (iii) the financial assets held by it at other CSDs, (iv) the financial assets held in custody for it with FAST Agents, (v) the financial assets held in custody for it with other custodians and (vi) the financial assets it holds in physical custody.

(2) The Transferee would establish security entitlements on its books for Eligible Participants of DTC that become Participants of the Transferee that replicate the security entitlements that DTC maintained on its books immediately prior to the Transfer Time for such Eligible Participants, and DTC would simultaneously eliminate such security entitlements from its books.

(3) The Transferee would establish security entitlements on its books for Non-Eligible Participants of DTC that become Transition Period Securities Account Holders of the Transferee that replicate the security entitlements that DTC maintained on its books immediately prior to the Transfer Time for such Non-Eligible Participants, and DTC would simultaneously eliminate such security entitlements from its books.

(4) The Transferee would establish pledges on its books in favor of Pledgees that become Pledgees of the Transferee that replicate the pledges that DTC maintained on its books immediately prior to the Transfer Time in favor of such Pledgees, and DTC shall

simultaneously eliminate such pledges from its books.

Comparability Period. The proposed automatic mechanism for the transfer of DTC's membership is intended to provide DTC's membership with continuous access to critical services in the event of DTC's wind-down, and to facilitate the continued prompt and accurate clearance and settlement of securities transactions. Further to this goal, the proposed Wind-down Rule would provide that DTC would enter into arrangements with a Failover Transferee, or would use commercially reasonable efforts to enter into arrangements with a Third Party Transferee, providing that, in either case, with respect to the critical services and any non-critical services that are transferred from DTC to the Transferee, for at least a period of time to be agreed upon (''Comparability Period''), the business transferred from DTC to the Transferee would be operated in a manner that is comparable to the manner in which the business was previously operated by DTC. Specifically, the proposed Wind-down Rule would provide that: (1) The rules of the Transferee and terms of Participant, Pledgee, DRS Agent, FAST Agent and Settling Bank agreements would be comparable in substance and effect to the analogous Rules and agreements of DTC, (2) the rights and obligations of any Participants, Pledgees, DRS Agents, FAST Agents, and Settling Banks that are transferred to the Transferee would be comparable in substance and effect to their rights and obligations as to DTC, and (3) the Transferee would operate the transferred business and provide any services that are transferred in a comparable manner to which such services were provided by DTC.

The purpose of these provisions and the intended effect of the proposed Wind-down Rule is to facilitate a smooth transition of DTC's business to a Transferee and to provide that, for at least the Comparability Period, the Transferee (1) would operate the transferred business in a manner that is comparable in substance and effect to the manner in which the business was operated by DTC, and (2) would not require sudden and disruptive changes in the systems, operations and business practices of the new Participants, Pledgees, DRS Agents, FAST Agents, and Settling Banks of the Transferee.

Subordination of Claims Provisions and Miscellaneous Matters. The proposed Wind-down Rule would also include a provision addressing the subordination of unsecured claims against DTC of its Participants who fail to participate in DTC's recovery efforts (*i.e.,* such firms are delinquent in their obligations to DTC or elect to retire from DTC in order to minimize their obligations with respect to the allocation of losses, pursuant to the Rules). This provision is designed to incentivize Participants to participate in DTC's recovery efforts.[50]

The proposed Wind-down Rule would address other ex-ante matters, including provisions providing that its Participants, Pledgees, DRS Agents, FAST Agents and Settling Banks (1) will assist and cooperate with DTC to effectuate the transfer of DTC's business to a Transferee, (2) consent to the provisions of the rule, and (3) grant DTC power of attorney to execute and deliver on their behalf documents and instruments that may be requested by the Transferee. Finally, the Proposed Rule would include a limitation of liability for any actions taken or omitted to be taken by DTC pursuant to the Proposed Rule. The purpose of the limitation of liability is to facilitate and protect DTC's ability to act expeditiously in response to extraordinary events. As noted, such limitation of liability would be available only following triggering of the Wind-down Plan. In addition, and as a separate matter, the limitation of liability provides Participants with transparency for the unlikely situation when those extraordinary events could occur, as well supporting the legal framework within which DTC would take such actions. These provisions, collectively, are designed to enable DTC to take such acts as the Board determines necessary to effectuate an orderly transfer and wind-down of its business should recovery efforts prove unsuccessful.

Rule 38 (Market Disruption and Force Majeure)

The proposed Rule 38 (''Force Majeure Rule'') would address DTC's authority to take certain actions upon the occurrence, and during the pendency, of a ''Market Disruption Event,'' as defined therein. The Proposed Rule is designed to clarify DTC's ability to take actions to address extraordinary events outside of the control of DTC and of its membership, and to mitigate the effect of such events by facilitating the continuity of services (or, if deemed necessary, the temporary suspension of services). To that end, under the proposed Force Majeure Rule, DTC would be entitled, during the pendency of a Market Disruption Event, to (1) suspend the provision of any or all services, and (2) take, or refrain from taking, or require its Participants and Pledgees to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of DTC's services as may be practicable.

The proposed Force Majeure Rule would identify the events or circumstances that would be considered a ''Market Disruption Event,'' including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which DTC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. The proposed Force Majeure Rule would define the governance procedures for how DTC would determine whether, and how, to implement the provisions of the rule. A determination that a Market Disruption Event has occurred would generally be made by the Board, but the Proposed Rule would provide for limited, interim delegation of authority to a specified officer or management committee if the Board would not be able to take timely action. In the event such delegated authority is exercised, the proposed Force Majeure Rule would require that the Board be convened as promptly as practicable, no later than five Business Days after such determination has been made, to ratify, modify, or rescind the action. The proposed Force Majeure Rule would also provide for prompt notification to the Commission, and advance consultation with Commission staff, when practicable, including notification when an event is no longer continuing and the relevant actions are terminated. The Proposed Rule would require Participants and Pledgees to notify DTC immediately upon becoming aware of a Market Disruption Event, and, likewise, would require DTC to notify its Participants and Pledgees if it has triggered the Proposed Rule and of actions taken or intended to be taken thereunder.

Finally, the Proposed Rule would address other related matters, including a limitation of liability for any failure or delay in performance, in whole or in part, arising out of the Market Disruption Event. The purpose of the limitation of liability would be similar to the purpose of the analogous provision in the proposed Wind-down Rule, which is to facilitate and protect

[50] Nothing in the proposed Wind-down Rule would seek to prevent a Participant that retired its membership at DTC from applying for membership with the Transferee. Once its DTC membership is terminated, however, such firm would not be able to benefit from the membership assignment that would be effected by this proposed Wind-down Rule, and it would have to apply for membership directly with the Transferee, subject to its membership application and review process.

DTC's ability to act expeditiously in response to extraordinary events.

Expected Effect on and Management of Risk

DTC believes the proposal to adopt the R&W Plan and the Proposed Rules would enable it to better manage its risks. As described above, the Recovery Plan would identify the recovery tools and the risk management activities that DTC may use to address risks of uncovered losses or shortfalls resulting from a Participant Default and losses arising from non-default events. By creating a framework for its management of risks across an evolving stress scenario and providing a roadmap for actions it may employ to monitor and, as needed, stabilize its financial condition, the Recovery Plan would strengthen DTC's ability to manage risk. The Wind-down Plan would also enable DTC to better manage its risks by establishing the strategy and framework for its orderly wind-down and the transfer of DTC's business, including the transfer of the securities inventory and establishment of the Participant and Pledgee securities accounts on the books of the transferee, when the Wind-down Plan is triggered. By creating clear mechanisms for the transfer of DTC's membership and business, the Wind-down Plan would facilitate continued access to DTC's critical services and minimize market impact of the transfer and enable DTC to better manage risks related to the wind-down of DTC.

DTC believes the Proposed Rules would enable it to better manage its risks by facilitating, and providing a legal basis for, the implementation of critical aspects of the R&W Plan. The Proposed Rules would provide Participants with transparency around those provisions of the R&W Plan that relate to their and DTC's rights, responsibilities and obligations. Therefore, DTC believes the Proposed Rules would enable it to better manage its risks by providing this transparency and creating some certainty, to the extent practicable, around the occurrence of a Market Disruption Event (as such term is defined in the Proposed Rule), and around the implementation of the Wind-down Plan.

Consistency With the Clearing Supervision Act

The stated purpose of Title VIII 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.[51] Section 805(a)(2) of the Clearing Supervision Act[52] also authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities, like DTC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act[53] 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.

DTC believes that the proposed change is consistent with Section 805(b) of the Clearing Supervision Act because it is designed to address each of these objectives. The Recovery Plan and the proposed Force Majeure Rule would promote robust risk management and would reduce systemic risks by providing DTC with a roadmap for actions it may employ to monitor and manage its risks, and, as needed, to stabilize its financial condition in the event those risks materialize. Further, the Recovery Plan would identify the triggers of recovery tools, but would not provide that those triggers necessitate the use of that tool. Instead, the Recovery Plan would provide that the triggers of these tools lead to escalation to an appropriate management body, which would have authority and flexibility to respond appropriately to the situation. Essentially, the Recovery Plan and the proposed Force Majeure Rule are designed to minimize losses to both DTC and its Participants by giving DTC the ability to determine the most appropriate way to address each stress situation. This approach would allow for proper evaluation of the situation and the possible impacts of the use of a recovery tool in order to minimize the negative effects of the stress situation, and would reduce systemic risks related to the implementation of the Recovery Plan and the underlying recovery tools.

The Wind-down Plan and the proposed Wind-down Rule, which would facilitate the implementation of the Wind-down Plan, would promote safety and soundness and would support the stability of the broader financial system because they would establish a framework for the orderly wind-down of DTC's business and would set forth clear mechanics for the transfer of its critical services and membership as well as clear provisions concerning the transfer of the securities inventory that DTC holds in fungible bulk on behalf of its Participants. By designing the Wind-down Plan and the proposed Wind-down Rule to provide for the continued access to DTC's critical services and membership, DTC believes they would promote safety and soundness and would support stability in the broader financial system in the event the Wind-down Plan is implemented.

By assisting DTC to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system, as described above, DTC believes the proposal is consistent with Section 805(b) of the Clearing Supervision Act.[54]

DTC also believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, DTC believes that the R&W Plan and each of the Proposed Rules are consistent with Section 17A(b)(3)(F) of the Act,[55] the R&W Plan and each of the Proposed Rules are consistent with Rule 17Ad–22(e)(3)(ii) under the Act,[56] and the R&W Plan is consistent with Rule 17Ad–22(e)(15)(ii) under the Act,[57] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of DTC be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of DTC or for which it is responsible.[58] The Recovery Plan and the proposed Force Majeure Rule would promote the prompt and accurate clearance and settlement of securities transactions by providing DTC with a roadmap for actions it may employ to mitigate losses, and monitor and, as needed, stabilize, its financial condition, which would allow it to continue its critical clearance and settlement services in stress situations. Further, as described above, the Recovery Plan is designed to identify the actions and tools DTC may use to address and minimize losses to both DTC and its Participants. The Recovery Plan and the proposed Force Majeure Rule would provide DTC's management and the Board with guidance in this regard by identifying the indicators and governance around the use and application of such tools to

[51] 12 U.S.C. 5461(b).

[52] *Id.* at 5464(a)(2).

[53] *Id.* at 5464(b).

[54] *Id.*

[55] 15 U.S.C. 78q–1(b)(3)(F).

[56] 17 CFR 240.17Ad–22(e)(3)(ii).

[57] *Id.* at 240.17Ad–22(e)(15)(ii).

[58] 15 U.S.C. 78q–1(b)(3)(F).

enable them to address stress situations in a manner most appropriate for the circumstances. Therefore, the Recovery Plan and the proposed Force Majeure Rule would also contribute to the safeguarding of securities and funds which are in the custody or control of DTC or for which it is responsible by enabling actions that would address and minimize losses.

The Wind-down Plan and the proposed Wind-down Rule, which would facilitate the implementation of the Wind-down Plan, would also promote the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds which are in the custody or control of DTC or for which it is responsible. The Wind-down Plan and the proposed Wind-down Rule would collectively establish a framework for the transfer and orderly wind-down of DTC's business. These proposals would establish clear mechanisms for the transfer of DTC's critical services and membership as well as clear provision for the transfer of the securities inventory it holds in fungible bulk for Participants. By doing so, the Wind-down Plan and these Proposed Rules are designed to facilitate the continuity of DTC's critical services and enable its Participants and Pledgees to maintain access to DTC's services through the transfer of its membership in the event DTC defaults or the Wind-down Plan is triggered by the Board. Therefore, by facilitating the continuity of DTC's critical clearance and settlement services, DTC believes the proposals would promote the prompt and accurate clearance and settlement of securities transactions. Further, by creating a framework for the transfer and orderly wind-down of DTC's business, DTC believes the proposals would enhance the safeguarding of securities and funds which are in the custody or control of DTC or for which it is responsible.

Therefore, DTC believes the R&W Plan and each of the Proposed Rules are consistent with the requirements of Section 17A(b)(3)(F) of the Act.[59]

Rule 17Ad–22(e)(3)(ii) under the Act requires DTC to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[60] The R&W Plan and each of the Proposed Rules are designed to meet the requirements of Rule 17Ad–22(e)(3)(ii).

The R&W Plan would be maintained by DTC in compliance with Rule 17Ad–22(e)(3)(ii) in that it provides plans for the recovery and orderly wind-down of DTC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, as described above.[61] Specifically, the Recovery Plan would define the risk management activities, stress conditions and indicators, and tools that DTC may use to address stress scenarios that could eventually prevent it from being able to provide its critical services as a going concern. Through the framework of the Crisis Continuum, the Recovery Plan would address measures that DTC may take to address risks of credit losses and liquidity shortfalls, and other losses that could arise from a Participant Default. The Recovery Plan would also address the management of general business risks and other non-default risks that could lead to losses.

The Wind-down Plan would be triggered by a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning DTC to viability as a going concern. Once triggered, the Wind-down Plan would set forth clear mechanisms for the transfer of DTC's membership and business, and would be designed to facilitate continued access to DTC's critical services and to minimize market impact of the transfer. By establishing the framework and strategy for the execution of the transfer and wind-down of DTC in order to facilitate continuous access to DTC's critical services, the Wind-down Plan establishes a plan for the orderly wind-down of DTC. Therefore, DTC believes the R&W Plan would provide plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, and, as such, meets the requirements of Rule 17Ad–22(e)(3)(ii).[62]

As described in greater detail above, the Proposed Rules are designed to facilitate the execution of the R&W Plan, provide Participants with transparency regarding the material provisions of the Plan, and provide DTC with a legal basis for implementation of those provisions. As such, DTC also believes the Proposed Rules meet the requirements of Rule 17Ad–22(e)(3)(ii).[63]

DTC has evaluated the recovery tools that would be identified in the Recovery Plan and has determined that these tools are comprehensive, effective, and transparent, and that such tools provide appropriate incentives to DTC's Participants to manage the risks they present. The recovery tools, as outlined in the Recovery Plan and in the proposed Force Majeure Rule, provide DTC with a comprehensive set of options to address its material risks and support the resiliency of its critical services under a range of stress scenarios. DTC also believes the recovery tools are effective, as DTC has both legal basis and operational capability to execute these tools in a timely and reliable manner. Many of the recovery tools are provided for in the Rules; Participants are bound by the Rules through their Participants Agreements with DTC, and the Rules are adopted pursuant to a framework established by Rule 19b–4 under the Act,[64] providing a legal basis for the recovery tools found therein. Other recovery tools have legal basis in contractual arrangements to which DTC is a party, as described above. Further, as many of the tools are embedded in DTC's ongoing risk management practices or are embedded into its predefined default-management procedures, DTC is able to execute these tools, in most cases, when needed and without material operational or organizational delay.

The majority of the recovery tools are also transparent, as they are or are proposed to be included in the Rules, which are publicly available. DTC believes the recovery tools also provide appropriate incentives to its owners and Participants, as they are designed to control the amount of risk they present to DTC's clearance and settlement system. Finally, DTC's Recovery Plan provides for a continuous evaluation of the systemic consequences of executing its recovery tools, with the goal of minimizing their negative impact. The Recovery Plan would outline various indicators over a timeline of increasing stress, the Crisis Continuum, with escalation triggers to DTC management or the Board, as appropriate. This approach would allow for timely evaluation of the situation and the possible impacts of the use of a recovery tool in order to minimize the negative effects of the stress scenario. Therefore, DTC believes that the recovery tools that

[59] *Id.*

[60] 17 CFR 240.17Ad–22(e)(3)(ii).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 240.19b–4.

would be identified and described in its Recovery Plan, including the authority provided to it in the proposed Force Majeure Rule, would meet the criteria identified within guidance published by the Commission in connection with the adoption of Rule 17Ad–22(e)(3)(ii).[65]

Therefore, DTC believes the R&W Plan and each of the Proposed Rules are consistent with Rule 17Ad–22(e)(3)(ii).[66]

Rule 17Ad–22(e)(15)(ii) under the Act requires DTC to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient LNA to cover potential general business losses so that DTC can continue operations and services as a going concern if those losses materialize, including by holding LNA equal to the greater of either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency.[67] While the Capital Policy addresses how DTC holds LNA in compliance with these requirements, the Wind-down Plan would include an analysis that would estimate the amount of time and the costs to achieve a recovery or orderly wind-down of DTC's critical operations and services, and would provide that the Board review and approve this analysis and estimation annually. The Wind-down Plan would also provide that the estimate would be the ''Recovery/Wind-down Capital Requirement'' under the Capital Policy. Under that policy, the General Business Risk Capital Requirement, which is the sufficient amount of LNA that DTC should hold to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize, is calculated as the greatest of three estimated amounts, one of which is this Recovery/Wind-down Capital Requirement. Therefore, DTC believes the R&W Plan, as it interrelates with the Capital Policy, is consistent with Rule 17Ad–22(e)(15)(ii).[68]

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 that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

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.

The clearing agency 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. 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–DTC–2017–803 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–DTC–2017–803. 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 DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2017–803 and should be submitted on or before August 21, 2018.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16708 Filed 8–3–18; 8:45 am]

BILLING CODE 8011–01–P

[65] *Supra* note 41.

[66] 17 CFR 240.17Ad–22(e)(3)(ii).

[67] *Id.* at 240.17Ad–22(e)(15)(ii).

[68] *Id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83746; File No. SR–DTC–2017–804]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Amendment No. 1 to an Advance Notice To Amend the Loss Allocation Rules and Make Other Changes

July 31, 2018.

On December 18, 2017, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–DTC–2017–804 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act'').[1] The

[1] 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b–4(n)(1)(i), respectively. On December 18, 2017, DTC filed the Advance Notice as a proposed rule change (SR–DTC–2017–022) with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder (''Proposed Rule Change''). (17 CFR 240.19b–4 and 17 CFR 240.19b–4, respectively.) The Proposed Rule Change was published in the **Federal Register** on January 8, 2018. *See* Securities Exchange Act Release No. 82426 (January 2, 2018), 83 FR 913 (January 8, 2018) (SR–DTC–2017–022). On February 8, 2018, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See*

Continued

notice of filing and extension of the review period of the Advance Notice was published for comment in the **Federal Register** on January 30, 2018.[2]

On April 10, 2018, the Commission required additional information from DTC pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice.[3] On June 28, 2018, DTC filed Amendment No. 1 to the Advance Notice to amend and replace in its entirety the Advance Notice as originally submitted on December 18, 2017, and on July 6, 2018, submitted a response to the Commission's request for additional information in consideration of the Advance Notice, which added a further 60-days to the review period pursuant to Section 806(e)(1)(E) and (G) of the Clearing Supervision Act.[4]

The Advance Notice, as amended by Amendment No. 1, is described in Items I and II below, which Items have been prepared by DTC. The Commission is publishing this notice to solicit comments on the Advance Notice, as amended by Amendment No. 1, from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice is filed by The Depository Trust Company (''DTC'') in connection with proposed modifications to the Rules, By-Laws and Organization Certificate of DTC (''Rules'').[5] The proposed rule change would revise Rule 4 (Participants Fund and Participants Investment) to (i) provide separate sections for (x) the use of the Participants Fund as a liquidity resource for settlement and (y) loss allocation among Participants of losses and liabilities arising out of Participant defaults or due to non-default events; and (ii) enhance the resiliency of DTC's loss allocation process so that DTC can take timely action to contain multiple loss events that occur in succession during a short period of time. In connection therewith, the proposed rule change would (i) align the loss allocation rules of the three clearing agencies of The Depository Trust & Clearing Corporation (''DTCC''), namely DTC, National Securities Clearing Corporation (''NSCC''), and Fixed Income Clearing Corporation (''FICC'') (collectively, the ''DTCC Clearing Agencies''), so as to provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies, (ii) increase transparency and accessibility of the provisions relating to the use of the Participants Fund as a liquidity resource for settlement and the loss allocation provisions, by enhancing their readability and clarity, (iii) require a defined corporate contribution to losses and liabilities that are incurred by DTC prior to any allocation among Participants, whether such losses and liabilities arise out of Participant defaults or due to non-default events, (iv) reduce the time within which DTC is required to return a former Participant's Actual Participants Fund Deposit, and (v) make conforming and technical changes. In addition, the proposed rule change would amend Section 6 of Rule 4 to clarify the requirements for a Participant that wants to voluntarily terminate its business with DTC, and to align, where appropriate, with the proposed voluntary termination provisions of the NSCC and FICC rules. The proposed rule change would also amend Rule 1 (Definitions; Governing Law) to add cross-references to terms that would be defined in proposed Rule 4, and would amend Rule 2 (Participants and Pledgees), in relevant part, to align with proposed Section 6 of Rule 4, as discussed below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency 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. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments relating to this proposal have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Amendment No. 1

This filing constitutes Amendment No. 1 (''Amendment'') to the Advance Notice previously filed by DTC on December 18, 2017.[6] This Amendment amends and replaces the Advance Notice in its entirety. DTC submits this Amendment in order to further clarify the operation of the proposed rule changes on loss allocation by providing additional information and examples. This Amendment would also clarify the requirements for a Participant that wants to voluntarily terminate its business with DTC. In particular, this Amendment would:

(i) Clarify that the term ''Participant Default,'' referring to the failure of a Participant to satisfy any obligation to

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Securities Exchange Act Release No. 82670 (February 8, 2018), 83 FR 6626 (February 14, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018). On March 20, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82914 (March 20, 2018), 83 FR 12978 (March 26, 2018) (SR–DTC–2017–022). On June 25, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change. Therefore, September 5, 2018 is the date by which the Commission should either approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release Nos. 83510 (June 25, 2018), 83 FR 30791 (June 29, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018). On June 28, 2018, DTC filed Amendment No. 1 to the Proposed Rule Change. *See* Securities Exchange Act Release No. 83629 (July 13, 2018), 83 FR 34246 (July 19, 2018) (SR–DTC–2017–022). As of the date of this release, the Commission has not received any comments on the Proposed Rule Change.

[2] Securities Exchange Act Release No. 82582 (January 24, 2018), 83 FR 4297 (January 30, 2018) (SR–DTC–2017–804). Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. 12 U.S.C. 5465(e)(1)(H). The Commission found that the Advance Notice raised complex issues and, accordingly, extended the review period of the Advance Notice for an additional 60 days until April 17, 2018, pursuant to Section 806(e)(1)(H). *Id.*

[3] 12 U.S.C. 5465(e)(1)(D); *See* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Commission's Request for Additional Information,'' *available at http://www.sec.gov/rules/sro/dtc-an.shtml.*

[4] To promote the public availability and transparency of its post-notice amendment, DTC submitted a copy of Amendment No. 1 through the Commission's electronic public comment letter mechanism. Accordingly, Amendment No. 1 has been posted on the Commission's website at *http://www.sec.gov/rules/sro/dtc-an.shtml* and thus been publicly available since June 29, 2018. 12 U.S.C. 5465(e)(1)(E) and (G); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Response to the Commission's Request for Additional Information,'' *available at http://www.sec.gov/rules/sro/dtc-an.shtml.*

[5] Each capitalized term not otherwise defined herein has its respective meaning as set forth in the Rules, *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[6] *See* Securities Exchange Act Release No. 82582 (January 24, 2018), 83 FR 4297 (January 30, 2018) (SR–DTC–2017–804).

DTC, includes the failure of a Defaulting Participant to satisfy its obligations as provided in Rule 9(B).[7]

(ii) Add the defined term ''CTA Participant,'' which would be defined as a Participant for which the Corporation has ceased to act pursuant to Rule 10 (Discretionary Termination), Rule 11 (Voluntary Termination) or Rule 12 (Insolvency).

(iii) Clarify which Participants would be subject to loss allocation with respect to Default Loss Events (defined below) and Declared Non-Default Loss Events (defined below) occurring during an Event Period (defined below). Specifically, pursuant to the Amendment, proposed Section 5 of Rule 4 would provide that each Participant that is a Participant on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Default Loss Event (other than a Default Loss Event with respect to which it is the CTA Participant) and each Declared Non-Default Loss Event occurring during the Event Period. In addition, proposed Section 5 of Rule 4 would make it clear that any CTA Participant for which DTC ceases to act on a non-Business Day, triggering an Event Period that commences on the next Business Day, would be deemed to be a Participant on the first day of that Event Period.

(iv) Clarify the obligations and Loss Allocation Cap (defined below) of a Participant that terminates its business with DTC in respect of a loss allocation round. Specifically, pursuant to the Amendment, the Participant would nevertheless remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under Rule 4; however, its aggregate obligation would be limited to the amount of its Loss Allocation Cap, as fixed in the loss allocation round for which it withdrew.

(v) Clarify that each CTA Participant would be obligated to DTC for the entire amount of any loss or liability incurred by DTC arising out of or relating to any Default Loss Event with respect to such CTA Participant. To the extent that such loss or liability is not satisfied pursuant to proposed Section 3 of Rule 4, DTC would apply a Corporate Contribution and charge the remaining amount of such loss or liability as provided in proposed Section 5 of Rule 4.

(vi) Clarify that, although a CTA Participant would not be allocated a ratable share of losses and liabilities arising out of or relating to its own Default Loss Event, it would remain obligated to DTC for such losses and liabilities. More particularly, pursuant to the Amendment, the proposed rule change would provide that no loss allocation under proposed Rule 4 would constitute a waiver of any claim DTC may have against a Participant for any losses or liabilities to which the Participant is subject under DTC Rules and Procedures, including, without limitation, any loss or liability to which it may be subject under proposed Rule 4.

(vii) For enhanced transparency and to align, where appropriate, with the rules of NSCC and FICC, clarify the process for the Voluntary Retirement (defined below) of a Participant.

In addition, pursuant to the Amendment, DTC is making other clarifying and technical changes to the proposed rule change, as proposed herein.

Nature of the Proposed Change

The proposed rule change would revise Rule 4 (Participants Fund and Participants Investment) to (i) provide separate sections for (x) the use of the Participants Fund as a liquidity resource for settlement and (y) loss allocation among Participants of losses and liabilities arising out of Participant defaults or due to non-default events; and (ii) enhance the resiliency of DTC's loss allocation process so that DTC can take timely action to contain multiple loss events that occur in succession during a short period of time. In connection therewith, the proposed rule change would (i) align the loss allocation rules of the DTCC Clearing Agencies, so as to provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies,[8] (ii) increase transparency and accessibility of the provisions relating to the use of the Participants Fund as a liquidity resource for settlement and the loss allocation provisions, by enhancing their readability and clarity, (iii) require a defined corporate contribution to losses and liabilities that are incurred by DTC prior to any allocation among Participants, whether such losses and liabilities arise out of Participant defaults or due to non-default events, (iv) reduce the time within which DTC is required to return a former Participant's Actual Participants Fund Deposit, and (v) make conforming and technical changes. In addition, the proposed rule change would amend Section 6 of Rule 4 to clarify the requirements for a Participant that wants to voluntarily terminate its business with DTC, and to align, where appropriate, with the proposed voluntary termination provisions of the NSCC and FICC rules. The proposed rule change would also amend Rule 1 (Definitions; Governing Law) to add cross-references to terms that would be defined in proposed Rule 4, and would amend Rule 2 (Participants and Pledgees), in relevant part, to align with proposed Section 6 of Rule 4, as discussed below.

(i) Background

Current Rule 4 provides a single set of tools and a common process for the use of the Participants Fund for both liquidity purposes to complete settlement among non-defaulting Participants, if one or more Participants fails to settle,[9] and for the satisfaction of

[7] Although Rule 4 is being amended to align with NSCC and FICC, where appropriate, a ''Defaulting Participant'' is not analogous to a ''Defaulting Member'' under the proposed NSCC and FICC rules. This is because the term ''Defaulting Participant'' already has a specific meaning pursuant to Rule 9(B) which is necessary and appropriate to that Rule. Instead, the proposed new term ''CTA Participant'' would be analogous to the NSCC and FICC proposed term ''Defaulting Member.''

[8] On December 18, 2017, NSCC and FICC submitted proposed rule changes and advance notices to enhance their rules regarding allocation of losses. Securities Exchange Act Release Nos. 82428 (January 2, 2018), 83 FR 897 (January 8, 2018) (SR–NSCC–2017–018), and 82584 (January 24, 2018), 83 FR 4377 (January 30, 2018) (SR–NSCC–2017–806); Securities Exchange Act Release Nos. 82427 (January 2, 2018), 83 FR 854 (January 8, 2018) (SR–FICC–2017–022) and 82583 (January 24, 2018), 83 FR 4358 (January 30, 2018) (SR–FICC–2017–806). On June 28, 2018, NSCC and FICC filed proposed amendments to the proposed rule changes and advance notices with the Commission and the Board of Governors of the Federal Reserve System, respectively, *available at http://www.dtcc.com/legal/sec-rule-filings.aspx.*

[9] DTC is a central securities depository providing key services that are structured to support daily settlement of book-entry transfers of securities, in accordance with its Rules and Procedures. In particular, Rule 9(A) (Transactions in Securities and Money Payments), Rule 9(B) (Transactions in Eligible Securities), Rule 9(C) (Transactions in MMI Securities), Rule 9(D) (Settling Banks), and Rule 9(E) (Clearing Agency Agreements) provide the mechanism to achieve a ''DVP Model 2 Deferred Net Settlement System'' (as defined in Annex D of the Principles for Financial Market Infrastructures issued by The Committee on Payments and Market Infrastructures and the Technical Committee of the International Organization of Securities Commissions (April 2012), *available at https://www.bis.org/cpmi/publ/d101a.pdf.* Briefly, in relevant part, Rule 9(B) provides that ''[e]ach Participant and the Corporation shall settle the balance of the Settlement Account of the Participant on a daily basis in accordance with these Rules and the Procedures. Except as provided in the Procedures, the Corporation shall not be obligated to make any settlement payments to any Participants until the Corporation has received all of the settlement payments that Settling Banks and Participants are required to make to the Corporation.'' *Supra* note 5. Pursuant to these provisions of Rule 9(B), securities will be delivered to Participants that satisfy their settlement obligations in the end-of-day net settlement process.

losses and liabilities due to Participant defaults [10] or certain other losses or liabilities incident to the business of DTC.[11] The proposed rule change would amend and add provisions to separate use of the Participants Fund as a liquidity resource to complete settlement, reflected in proposed Section 4 of Rule 4, and for loss allocation, reflected in proposed Section 5 of Rule 4. There wouldn't be any substantive change to the rights and obligations of Participants under proposed Sections 4 and 5 of Rule 4.[12]

The proposed rule changes reinforce the distinction, conceptual and sequential, between the mechanisms to complete settlement on a Business Day and to mutualize losses that may result from a failure to settle, or other loss-generating events. The change is also proposed so that the loss allocation provisions of proposed Section 5 of Rule 4 more closely align to similar provisions of the NSCC and FICC rules, to the extent appropriate.

The proposed rule change would retain the core principles of current Rule 4 for both application of the Participants Fund as a liquidity resource to complete settlement and for loss allocation, while clarifying or refining certain provisions and introducing certain new concepts relating to loss allocation. In connection with the use of the Participants Fund as a liquidity resource to complete settlement when a Participant fails to settle, the proposed rule would introduce the term ''pro rata settlement charge,'' for the use of the Participants Fund to complete settlement as apportioned among non-defaulting Participants. The existing term generically applied to such a use or to a loss allocation is simply a ''pro rata charge''.[13]

For loss allocation, the proposed rule change, like current Rule 4, would continue to apply to both default and non-default losses and liabilities, and, to the extent allocated among Participants, would be charged ratably in accordance with their Required Participants Fund Deposits.[14] A new provision would require DTC to contribute to a loss or liability, either arising from a Participant default or non-default event, prior to any allocation among Participants. The proposed rule change would also introduce the new concepts of an ''Event Period'' and a ''round'' to address the allocation of losses arising from multiple events that occur in succession during a short period of time. These proposed rule changes would be substantially similar in these respects to analogous proposed rule changes for NSCC and FICC.

Current Rule 4 Provides for Application of the Participants Fund Through Pro Rata Charges

Current Rule 4 addresses the Participants Fund and Participants Investment requirements and, among other things, the permitted uses of the Participants Fund and Participants Investment.[15] Pursuant to current Rule 4, DTC maintains a cash Participants Fund. The Required Participants Fund Deposit for any Participant is based on the liquidity risk it poses to DTC relative to other Participants.

Default of a Participant. Under current Section 3 of Rule 4, if a Participant is obligated to DTC and fails to satisfy any obligation, DTC may, in such order and in such amounts as DTC shall determine in its sole discretion: (a) Apply some or all of the Actual Participants Fund Deposit of such Participant to such obligation; (b) Pledge some or all of the shares of Preferred Stock of such Participant to its lenders as collateral security for a loan under the End-of-Day Credit Facility; [16] and/or (c) sell some or all of the shares of Preferred Stock of such Participant to other Participants (who shall be required to purchase such shares pro rata their Required Preferred Stock Investments at the time of such purchase), and apply the proceeds of such sale to satisfy such obligation.

Application of the Participants Fund. Current Section 4 of Rule 4 addresses the application of the Participants Fund if DTC incurs a loss or liability, which would include application of the Participants Fund to complete settlement [17] or the allocation of losses once determined, including non-default losses. For both liquidity and loss scenarios, current Section 4 of Rule 4

[10] The failure of a Participant to satisfy its settlement obligation constitutes a liability to DTC. Insofar as DTC undertakes to complete settlement among Participants other than the Participant that failed to settle, that liability may give rise to losses as well. DTC is designed to provide settlement finality at the end of the day and notwithstanding the failure to settle of a Participant or Affiliated Family of Participants with the largest net settlement obligation, a ''cover 1'' standard. There are no reversals of deliveries; a Participant that fails to settle will not receive securities that were intended to be delivered to it, because it has not paid for them. These securities, among others, serve as collateral for DTC to use to secure a borrowing of funds in order, in accordance with its Rules and Procedures, to settle with non-defaulting Participants (including those delivering Participants that delivered to the non-settling Participant). To this end, delivery versus payment transactions (''DVP'') will not be processed intraday to a receiving Participant that will incur a related payment obligation unless that Participant satisfies risk management controls. The two risk management controls are the Collateral Monitor and Net Debit Cap. Net Debit Caps limit the potential settlement obligation of any Participant to an amount for which DTC has sufficient liquidity resources to cover this risk. The Collateral Monitor tests whether a Participant has sufficient collateral for DTC to pledge or liquidate if that Participant were to fail to meet its settlement obligation. To process a DVP, the value of the delivery that is debited to the receiving Participant cannot cause the net debit balance of the Participant to exceed its Net Debit Cap, and the amount of the net debit balance after giving effect to the debit must be fully collateralized. Accordingly, DTC may incur a liability or loss whenever it completes settlement despite the failure to settle of a Participant, or Affiliated Family of Participants, because it is either using the Participants Fund deposits of other Participants in the manner specified in existing and proposed Rule 4 and/or borrowing the necessary funds. DTC obligations under the line of credit include the obligation to pay interest on loans outstanding and to repay the loan; the Participants Fund is designed as not only a direct liquidity resource but as a back-up liquidity resource to satisfy these liabilities. As to the Participants Fund itself, DTC undertakes in Section 9 of existing and proposed Rule 4, to restore funds to Participants whose deposits may have been charged if there is ultimately any excess recovery. It should be noted that the Defaulting Participant remains principally obligated for all losses, costs and expenses associated with its Participant Default and, so, a recovery out of the estate of a Defaulting Participant is at least a hypothetical possibility.

[11] Section 1(f) of Rule 4 defines the term ''business'' with respect to DTC as ''the doing of all things in connection with or relating to the Corporation's performance of the services specified in the first and second paragraphs of Rule 6 or the cessation of such services.'' *Supra* note 5.

[12] It may be noted that absent extreme circumstances, DTC believes that it is unlikely that DTC would need to act under proposed Sections 4 or 5 of Rule 4.

[13] *See* Rule 4, Section 5, *supra* note 5.

[14] It may be noted that for NSCC and FICC, the proposed rule changes for loss allocation include a ''look-back'' period to calculate a member's pro rata share and cap. The concept of a look-back or average is already built into DTC's calculation of Participants Fund requirements, which are based on a rolling sixty (60) day average of a Participant's six highest intraday net debit peaks.

[15] Each Participant is required to invest in DTC Series A Preferred Stock, ratably on a basis calculated in substantially the same manner as the Required Participants Fund Deposit. The Preferred Stock constitutes capital of DTC and is also available for use as provided in current and proposed Section 3 of Rule 4. This proposed rule change does not alter the Required Preferred Stock Investment.

[16] As part of its liquidity risk management regime, DTC maintains a 364-day committed revolving line of credit with a syndicate of commercial lenders, renewed every year. The committed aggregate amount of the End-of-Day Credit Facility (currently $1.9 billion) together with the Participants Fund constitute DTC's liquidity resources for settlement. Based on these amounts, DTC sets Net Debit Caps that limit settlement obligations.

[17] In contrast to NSCC and FICC, DTC is not a central counterparty and does not guarantee obligations of its membership. The Participants Fund is a mutualized pre-funded liquidity and loss resource. As such, in contrast to NSCC and FICC, DTC does not have an obligation to ''repay'' the Participants Fund, and the application of the Participants Fund does not convert to a loss. *See supra* note 10.

provides that an application of the Participants Fund would be apportioned among Participants ratably in accordance with their Required Participants Fund Deposits, less any additional amount that a Participant was required to Deposit to the Participants Fund pursuant to Section 2 of Rule 9(A).[18] It also provides for the optional use of an amount of DTC's retained earnings and undivided profits.

After the Participants Fund is applied pursuant to current Section 4, DTC must promptly notify each Participant and the Commission of the amount applied and the reasons therefor.

Current Rule 4 further requires Participants whose Actual Participants Fund Deposits have been ratably charged to restore their Required Participants Fund Deposits, if such charges create a deficiency. Such payments are due upon demand. Iterative pro rata charges relating to the same loss or liability are permitted in order to satisfy the loss or liability.

Rule 4 currently provides that a Participant may, within ten (10) Business Days after receipt of notice of any pro rata charge, notify DTC of its election to terminate its business with DTC, and the exposure of the terminating Participant for pro rata charges would be capped at the greater of (a) the amount of its Aggregate Required Deposit and Investment, as fixed immediately prior to the time of the first pro rata charge, plus 100% of the amount thereof, or (b) the amount of all prior pro rata charges attributable to the same loss or liability with respect to which the Participant has not timely exercised its right to terminate.

Overview of the Proposed Rule Changes

A. Application of Participants Fund to Participant Default and for Settlement

Proposed Section 3 of Rule 4 would retain the concept that when a Participant is obligated to DTC and fails to satisfy such obligation, which would be defined as a ''Participant Default,'' DTC may apply the Actual Participants Fund Deposit of the Participant to such obligation to satisfy the Participant Default. The proposed rule change would reflect that the defined term ''Participant Default,'' referring to the failure of a Participant to satisfy any obligation to DTC, includes the failure of a Defaulting Participant to satisfy its obligations as provided in Rule 9(B) (where ''Defaulting Participant'' is defined). The proposed definition of ''Participant Default'' is for drafting clarity and use in related provisions of proposed Rule 4.

Proposed Section 4 would address the situation of a Defaulting Participant failure to settle (which is one type of Participant Default) if the application of the Actual Participants Fund Deposit of that Defaulting Participant, pursuant to proposed Section 3, is not sufficient to complete settlement among Participants other than the Defaulting Participant (each, a ''non-defaulting Participant'').[19]

Proposed Section 4 would expressly state that the Participants Fund shall constitute a liquidity resource which may be applied by DTC, in such amounts as it may determine, in its sole discretion, to fund settlement among non-defaulting Participants in the event of the failure of a Defaulting Participant to satisfy its settlement obligation on any Business Day. Such an application of the Participants Fund would be charged ratably to the Actual Participants Fund Deposits of the non-defaulting Participants on that Business Day. The pro rata charge per non-defaulting Participant would be based on the ratio of its Required Participants Fund Deposit to the sum of the Required Participants Fund Deposits of all such Participants on that Business Day (excluding any Additional Participants Fund Deposits in both the numerator and denominator of such ratio). The proposed rule change would identify this as a ''pro rata settlement charge,'' in order to distinguish application of the Participants Fund to fund settlement from pro rata loss allocation charges that would be established in proposed Section 5 of Rule 4.

The calculation of each non-defaulting Participant's pro rata settlement charge would be similar to the current Section 4 calculation of a pro rata charge except that, for greater simplicity, it would not include the current distinction for common members of another clearing agency pursuant to a Clearing Agency Agreement.[20] For enhanced clarity as to the date of determination of the ratio, it would be based on the Required Participants Fund Deposits as fixed on the Business Day of the application of the Participants Fund, as opposed to the current language ''at the time the loss or liability was discovered.'' [21]

The proposed rule change would retain the concept that requires DTC, following the application of the Participants Fund to complete settlement, to notify each Participant and the Commission of the charge and the reasons therefor (''Settlement Charge Notice'').

The proposed rule change also would retain the concept of providing each non-defaulting Participant an opportunity to elect to terminate its business with DTC and thereby cap its exposure to further pro rata settlement charges. The proposed rule change would shorten the notification period for the election to terminate from ten (10) Business Days to five (5) Business Days,[22] and would also change the beginning date of such notification period from the receipt of the notice to the date of the issuance of the Settlement Charge Notice.[23] A Participant that elects to terminate its business with DTC would, subject to its cap, remain responsible for (i) its pro rata settlement charge that was the subject of the Settlement Charge Notice

[18] Section 2 of Rule 9(A) provides, in part, ''At the request of the Corporation, a Participant or Pledgee shall immediately furnish the Corporation with such assurances as the Corporation shall require of the financial ability of the Participant or Pledgee to fulfill its commitments and shall conform to any conditions which the Corporation deems necessary for the protection of the Corporation, other Participants or Pledgees, including deposits to the Participants Fund . . .'' *Supra* note 5. Pursuant to the proposed rule change, the additional amount that a Participant is required to Deposit to the Participants Fund pursuant to Section 2 of Rule 9(A) would be defined as an ''Additional Participants Fund Deposit.'' This is not a new concept, only the addition of a defined term for greater clarity.

[19] As described above, proposed Rule 4 splits the liquidity and loss provisions to more closely align to similar loss allocation provisions in NSCC and FICC rules. Pursuant to the proposed rule change, DTC would also align, where appropriate, the liquidity and loss provisions within proposed Rule 4. DTC would retain the existing Rule 4 concepts of calculating the ratable share of a Participant, charging each non-defaulting Participant a pro rata share of an application of the Participants Fund to complete settlement, providing notice to Participants of such charge, and providing each Participant the option to cap its liability for such charges by electing to terminate its business with DTC. However, pursuant to the proposed rule change, DTC would modify these concepts and certain associated processes to more closely align with the analogous proposed loss allocation provisions in proposed Rule 4 (*e.g.,* Loss Allocation Notice, Loss Allocation Termination Notification Period, and Loss Allocation Cap).

[20] Rule 4, Section 4(a)(1), *supra* note 5. DTC has determined that this option is unnecessary because, in practice, DTC would never have liability under a Clearing Agency Agreement that exceeds the excess assets of the Participant that defaulted.

[21] DTC believes that this change would provide an objective date that is more appropriate for the application of the Participants Fund to complete settlement, because the ''time the loss or liability was discovered'' would necessarily have to be the day the Participants Fund was applied to complete settlement.

[22] DTC believes this shorter period would be sufficient for a Participant to decide whether to give notice to terminate its business with DTC in response to a settlement charge. In addition, a five (5) Business Day pro rata settlement charge notification period would conform to the proposed loss allocation notification period in this proposed rule change and in the proposed rule changes for NSCC and FICC. *See infra* note 37.

[23] DTC believes that setting the start date of the notification period to an objective date would enhance transparency and provide a common timeframe to all affected Participants.

and (ii) all other pro rata settlement charges until the Participant Termination Date (as defined below and in the proposed rule change). The proposed cap on pro rata settlement charges of a Participant that has timely notified DTC of its election to terminate its business with DTC would be the amount of its Aggregate Required Deposit and Investment, as fixed on the day of the pro rata settlement charge that was the subject of the Settlement Charge Notice, plus 100% of the amount thereof (''Settlement Charge Cap''). The proposed Settlement Charge Cap would be no greater than the current cap.[24]

The pro rata application of the Actual Participants Fund Deposits of non-defaulting Participants to complete settlement when there is a Participant Default is not the allocation of a loss. A pro rata settlement charge would relate solely to the completion of settlement. New proposed loss allocation concepts described below, including, but not limited to, a ''round,'' ''Event Period,'' and ''Corporate Contribution,'' would not apply to pro rata settlement charges.[25]

B. Changes To Enhance Resiliency of DTC's Loss Allocation Process

In order to enhance the resiliency of DTC's loss allocation process and to align, to the extent practicable and appropriate, its loss allocation approach to that of the other DTCC Clearing Agencies, DTC proposes to introduce certain new concepts and to modify other aspects of its loss allocation waterfall. The proposed rule change would adopt an enhanced allocation approach for losses, whether arising from Default Loss Events or Declared Non-Default Loss Events (as defined below and in the proposed rule change). In addition, the proposed rule change would clarify the loss allocation process as it relates to losses arising from or relating to multiple default or non-default events in a short period of time.

Accordingly, DTC is proposing four (4) key changes to enhance DTC's loss allocation process:

(1) Mandatory Corporate Contribution

Current Section 4 of Rule 4 provides that if there is an unsatisfied loss or liability, DTC may, in its sole discretion and in such amount as DTC would determine, ''charge the existing retained earnings and undivided profits'' of DTC.

Under the proposed rule change, DTC would replace the discretionary application of an unspecified amount of retained earnings and undivided profits with a mandatory, defined Corporate Contribution (as defined below and in the proposed rule change). The Corporate Contribution would be used for losses and liabilities that are incurred by DTC with respect to an Event Period (as defined below and in the proposed rule change), whether arising from a Default Loss Event or Declared Non-Default Loss Event, before the allocation of losses to Participants.

The proposed ''Corporate Contribution'' would be defined to be an amount equal to fifty percent (50%) of DTC's General Business Risk Capital Requirement.[26] DTC's General Business Risk Capital Requirement, as defined in DTC's Clearing Agency Policy on Capital Requirements,[27] is, at a minimum, equal to the regulatory capital that DTC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Securities Exchange Act of 1934, as amended (the ''Act'').[28] The proposed Corporate Contribution would be held in addition to DTC's General Business Risk Capital Requirement.

The proposed Corporate Contribution would apply to losses arising from Default Loss Events and Declared Non-Default Loss Events, and would be a mandatory contribution of DTC prior to any allocation among Participants.[29] As proposed, if the proposed Corporate Contribution is fully or partially used against a loss or liability relating to an Event Period, the Corporate Contribution would be reduced to the remaining unused amount, if any, during the following two hundred fifty (250) Business Days in order to permit DTC to replenish the Corporate Contribution.[30] To ensure transparency, Participants would receive notice of any such reduction to the Corporate Contribution.

By requiring a defined contribution of DTC corporate funds towards losses and liabilities arising from Default Loss Events and Declared Non-Default Loss Events, the proposed rule change would limit Participant obligations to the extent of such Corporate Contribution and thereby provide greater clarity and transparency to Participants as to the calculation of their exposure to losses and liabilities.

Proposed Rule 4 would also further clarify that DTC can voluntarily apply amounts greater than the Corporate Contribution against any loss or liability (including non-default losses) of DTC, if the Board of Directors, in its sole discretion, believes such to be appropriate under the factual situation existing at the time.

The proposed rule changes relating to the calculation and mandatory application of the Corporate

[24] Current Section 8 of Rule 4 provides for a cap that is equal to the greater of (a) the amount of its Aggregate Required Deposit and Investment, as fixed immediately prior to the time of the first pro rata charge, plus 100% of the amount thereof, or (b) the amount of all prior pro rata charges attributable to the same loss or liability with respect to which the Participant has not timely exercised its right to limit its obligation as provided above. *Supra* note 5. The alternative limit in clause (b) would be eliminated in proposed Section 8(a) in favor of a single defined standard.

[25] Proposed Sections 3, 4 and 5 of Rule 4 together relate, in whole or in part, to what may happen when there is a Participant Default. Proposed Section 3 is the basic provision of remedies if a Participant fails to satisfy an obligation to DTC. Proposed Section 4 is a specific remedy for a failure to settle by a Defaulting Participant, *i.e.,* a specific type of Participant Default. Proposed Section 5 is also a remedial provision for a Participant Default when, additionally, DTC ceases to act for the Participant and there are remaining losses or liabilities. If a Participant Default occurs, the application of proposed Section 3 would be required, the application of proposed Section 4 would be at the discretion of DTC. Whether or not proposed Section 4 has been applied, once there is a loss due to a Participant Default and DTC ceases to act for the Participant, proposed Section 5 would apply. *See supra* note 10.

A principal type of Participant Default is a failure to settle. A Participant's obligation to pay any amount due in settlement is secured by Collateral of the Participant. When the Defaulting Participant fails to pay its settlement obligation, under Rule 9(B), Section 2, DTC has the right to Pledge or sell such Collateral to satisfy the obligation. *Supra* note 5. (It is more likely that DTC would borrow against the Collateral to complete settlement on the Business Day, because it is unlikely to be able to liquidate Collateral for same day funds in time to settle on that Business Day.) If DTC Pledges the Collateral to secure a loan to fund settlement (*e.g.,* under the End-of-Day Credit Facility), the Collateral would have to be sold to obtain funds to repay the loan. In any such sale of the Collateral, there is a risk, heightened in times of market stress, that the proceeds of the sale would be insufficient to repay the loan. That deficiency would be a liability or loss to which proposed Section 5 of Rule 4 would apply, *i.e.,* a Default Loss Event.

[26] DTC calculates its General Business Risk Capital Requirement as the amount equal to the greatest of (i) an amount determined based on its general business profile, (ii) an amount determined based on the time estimated to execute a recovery or orderly wind-down of DTC's critical operations, and (iii) an amount determined based on an analysis of DTC's estimated operating expenses for a six (6) month period.

[27] *See* Securities Exchange Act Release No. 81105 (July 7, 2017), 82 FR 32399 (July 13, 2017) (SR–DTC–2017–003).

[28] 17 CFR 240.17Ad–22(e)(15).

[29] The proposed rule change would not require a Corporate Contribution with respect to a pro rata settlement charge. However, as discussed above, if, after a Participant Default, the proceeds of the sale of the Collateral of the Participant are insufficient to repay the lenders under the End-of-Day Credit Facility, and DTC has ceased to act for the Participant, the shortfall would be a loss arising from a Default Loss Event, subject to the Corporate Contribution.

[30] DTC believes that two hundred fifty (250) Business Days would be a reasonable estimate of the time frame that DTC would require to replenish the Corporate Contribution by equity in accordance with DTC's Clearing Agency Policy on Capital Requirements, including a conservative additional period to account for any potential delays and/or unknown exigencies in times of distress.

Contribution are set forth in proposed Section 5 of Rule 4.

(2) Introducing an Event Period

The proposed rule change would clearly define the obligations of DTC and its Participants regarding the allocation of losses or liabilities relating to or arising out of a Default Loss Event or a Declared Non-Default Loss Event. The proposed rule change would define ''Default Loss Event'' as the determination by DTC to cease to act for a Participant pursuant to Rule 10, Rule 11, or Rule 12 (such Participant, a ''CTA Participant''). ''Declared Non-Default Loss Event'' would be defined as the determination by the Board of Directors that a loss or liability incident to the clearance and settlement business of DTC may be a significant and substantial loss or liability that may materially impair the ability of DTC to provide clearance and settlement services in an orderly manner and will potentially generate losses to be mutualized among Participants in order to ensure that DTC may continue to offer clearance and settlement services in an orderly manner. In order to balance the need to manage the risk of sequential loss events against Participants' need for certainty concerning maximum loss allocation exposures, DTC is proposing to introduce the concept of an ''Event Period'' to address the losses and liabilities that may arise from or relate to multiple Default Loss Events and/or Declared Non-Default Loss Events that arise in quick succession. Specifically, the proposal would group Default Loss Events and Declared Non-Default Loss Events occurring in a period of ten (10) Business Days (''Event Period'') for purposes of allocating losses to Participants in one or more rounds, subject to the limits of loss allocation set forth in the proposed rule change and as explained below.[31] In the case of a loss or liability arising from or relating to a Default Loss Event, an Event Period would begin on the day on which DTC notifies Participants that it has ceased to act for a Participant (or the next Business Day, if such day is not a Business Day). In the case of a Declared Non-Default Loss Event, the Event Period would begin on the day that DTC notifies Participants of the Declared Non-Default Loss Event (or the next Business Day, if such day is not a Business Day). If a subsequent Default Loss Event or Declared Non-Default Loss Event occurs within the Event Period, any losses or liabilities arising out of or relating to any such subsequent event would be resolved as losses or liabilities that are part of the same Event Period, without extending the duration of such Event Period. An Event Period may include both Default Loss Events and Declared Non-Default Loss Events, and there would not be separate Event Periods for Default Loss Events or Declared Non-Default Loss Events occurring within overlapping ten (10) Business Day periods.

The amount of losses that may be allocated by DTC, subject to the required Corporate Contribution, and to which a Loss Allocation Cap would apply for any Participant that elects to terminate its business with DTC in respect of a loss allocation round, would include any and all losses from any Default Loss Events and any Declared Non-Default Loss Events during the Event Period, regardless of the amount of time, during or after the Event Period, required for such losses to be crystallized and allocated.[32]

The proposed rule changes relating to the implementation of an Event Period are set forth in proposed Section 5 of Rule 4.

(3) Introducing the Concept of ''Rounds'' and Loss Allocation Notice

Pursuant to the proposed rule change, a loss allocation ''round'' would mean a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Participants (a ''round cap''). When the aggregate amount of losses allocated in a round equals the round cap, any additional losses relating to the applicable Event Period would be allocated in one or more subsequent rounds, in each case subject to a round cap for that round. DTC would continue the loss allocation process in successive rounds until all losses from the Event Period are allocated among Participants that have not submitted a Termination Notice (as defined below and in the proposed rule change) in accordance with proposed Section 6(b) of Rule 4.

Each loss allocation would be communicated to Participants by the issuance of a notice that advises each Participant of the amount being allocated to it (each, a ''Loss Allocation Notice''). The calculation of each Participant's pro rata allocation charge would be similar to the current Section 4 calculation of a pro rata charge except that, for greater simplicity, it would not include the current distinction for common members of another clearing agency pursuant to a Clearing Agency Agreement.[33] In addition, for enhanced clarity as to the date of determination of the ratio, it would be based on the Required Participants Fund Deposits as fixed on the first day of the Event Period, as opposed to the current language ''at the time the loss or liability was discovered.''[34]

Each Loss Allocation Notice would specify the relevant Event Period and the round to which it relates. Participants would receive two (2) Business Days' notice of a loss allocation,[35] and Participants would be required to pay the requisite amount no later than the second Business Day following the issuance of such notice.[36] Multiple Loss Allocation Notices may

[31] DTC believes that having a ten (10) Business Day Event Period would provide a reasonable period of time to encompass potential sequential Default Loss Events and/or Declared Non-Default Loss Events that are likely to be closely linked to an initial event and/or a severe market dislocation episode, while still providing appropriate certainty for Participants concerning their maximum exposure to allocated losses with respect to such events.

[32] As discussed below, each Participant that is a Participant on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Default Loss Event (other than a Default Loss Event with respect to which it is the CTA Participant) and each Declared Non-Default Loss Event occurring during the Event Period.

[33] *See supra* note 20.

[34] DTC believes that this change would provide an objective date that is appropriate for the new proposed loss allocation process, which would be designed to allocate aggregate losses relating to an Event Period, rather than one loss at a time.

[35] DTC believes allowing Participants two (2) Business Days to satisfy their loss allocation obligations would provide Participants sufficient notice to arrange funding, if necessary, while allowing DTC to address losses in a timely manner.

[36] Current Section 4 of Rule 4 provides that if the Participants Fund is applied to a loss or liability, DTC must notify each Participant of the charge and the reasons therefor. Proposed Section 5 would modify this process to (i) require DTC to give *prior* notice; and (ii) require Participants to pay loss allocation charges, rather than directly charging their Required Participants Fund Deposits. DTC believes that shifting from the two-step methodology of applying the Participants Fund and then requiring Participants to immediately replenish it to requiring direct payment would increase efficiency, while preserving the right to charge the Settlement Account of the Participant in the event the Participant doesn't timely pay. Such a failure to pay would be, self-evidently, a Participant Default, triggering recourse to the Actual Participants Fund Deposit of the Participant under proposed Section 3 of Rule 4. In addition, this change would provide greater stability for DTC in times of stress by allowing DTC to retain the Participants Fund, its critical pre-funded resource, while charging loss allocations. DTC believes doing so would allow DTC to retain the Participants Fund as a liquidity resource which may be applied to fund settlement among non-defaulting Participants, if a Defaulting Participant fails to settle. By being able to manage its liquidity resources throughout the loss allocation process, DTC would be able to continue to provide its critical operations and services during what would be expected to be a stressful period.

be issued with respect to each round, up to the round cap.

The first Loss Allocation Notice in any first, second, or subsequent round would expressly state that such Loss Allocation Notice reflects the beginning of the first, second, or subsequent round, as the case may be, and that each Participant in that round has five (5) Business Days [37] from the issuance [38] of such first Loss Allocation Notice for the round (such period, a ''Loss Allocation Termination Notification Period'') to notify DTC of its election to terminate its business with DTC (such notification, whether with respect to a Settlement Charge Notice or Loss Allocation Notice, a ''Termination Notice'') pursuant to proposed Section 8(b) of Rule 4 and thereby benefit from its Loss Allocation Cap.

The round cap of any second or subsequent round may differ from the first or preceding round cap because there may be fewer Participants in a second or subsequent round if Participants elect to terminate their business with DTC as provided in proposed Section 8(b) of Rule 4 following the first Loss Allocation Notice in any round.

For example, for illustrative purposes only, after the required Corporate Contribution, if DTC has a $4 billion loss determined with respect to an Event Period and the sum of Loss Allocation Caps for all Participants subject to the loss allocation is $3 billion, the first round would begin when DTC issues the first Loss Allocation Notice for that Event Period. DTC could issue one or more Loss Allocation Notices for the first round until the sum of losses allocated equals $3 billion. Once the $3 billion is allocated, the first round would end and DTC would need a second round in order to allocate the remaining $1 billion of loss. DTC would then issue a Loss Allocation Notice for the $1 billion and this notice would be the first Loss Allocation Notice for the second round. The issuance of the Loss Allocation Notice for the $1 billion would begin the second round.

[37] Current Section 8 of Rule 4 provides that the time period for a Participant to give notice of its election to terminate its business with DTC in respect of a pro rata charge is ten (10) Business Days after receiving notice of a pro rata charge. DTC believes that it is appropriate to shorten such time period from ten (10) Business Days to five (5) Business Days because DTC needs timely notice of which Participants would not be terminating their business with DTC for the purpose of calculating the loss allocation for any subsequent round. DTC believes that five (5) Business Days would provide Participants with sufficient time to decide whether to cap their loss allocation obligations by terminating their business with DTC.

[38] *See supra* note 23.

The proposed rule change would link the Loss Allocation Cap to a round in order to provide Participants the option to limit their loss allocation exposure at the beginning of each round. As proposed, a Participant could limit its loss allocation exposure to its Loss Allocation Cap by providing notice of its election to terminate its business with DTC within five (5) Business Days after the issuance of the first Loss Allocation Notice in any round.

The proposed rule changes relating to the implementation of ''rounds'' and Loss Allocation Notices are set forth in proposed Section 5 of Rule 4.

(4) Capping Terminating Participants' Loss Allocation Exposure and Related Changes

As discussed above, the proposed rule change would continue to provide Participants the opportunity to limit their loss allocation exposure by offering a termination option; however, the associated termination process would be modified.

As proposed, if a Participant timely provides notice of its election to terminate its business with DTC as provided in proposed Section 8(b) of Rule 4, its maximum payment obligation with respect to any loss allocation round would be the amount of its Aggregate Required Deposit and Investment, as fixed on the first day of the Event Period, plus 100% of the amount thereof (''Loss Allocation Cap''),[39] provided that the Participant complies with the requirements of the termination process in proposed Section 6(b) of Rule 4. DTC may retain the entire Actual Participants Fund Deposit of a Participant subject to loss allocation, up to the Participant's Loss Allocation Cap. If a Participant's Loss Allocation Cap exceeds the Participant's then-current Required Participants Fund Deposit, it must still pay the excess amount.

As proposed, Participants would have five (5) Business Days from the issuance of the first Loss Allocation Notice in any round to decide whether to terminate its business with DTC, and thereby benefit from its Loss Allocation Cap. The start of each round [40] would allow a Participant the opportunity to notify DTC of its election to terminate its business with DTC after satisfaction of the losses allocated in such round.

Specifically, the first round and each subsequent round of loss allocation would allocate losses up to a round cap of the aggregate of all Loss Allocation Caps of those Participants included in the round. If a Participant provides notice of its election to terminate its business with DTC, it would be subject to loss allocation in that round, up to its Loss Allocation Cap. If the first round of loss allocation does not fully cover DTC's losses, a second round will be noticed to those Participants that did not elect to terminate in the previous round. As noted above, the amount of any second or subsequent round cap may differ from the first or preceding round cap because there may be fewer Participants in a second or subsequent round if Participants elect to terminate their business with DTC as provided in proposed Section 8(b) of Rule 4 following the first Loss Allocation Notice in any round.

Pursuant to the proposed rule change, in order to avail itself of its Loss Allocation Cap, the Participant would need to follow the requirements in proposed Section 6(b) of Rule 4. In addition to retaining the substance of the existing requirements for any termination that are set forth in current Section 6 of Rule 4, proposed Section 6 also would provide that a Participant that provides a Termination Notice in connection with a loss allocation must: (1) Specify in the Termination Notice an effective date of termination (''Participant Termination Date''), which date shall be no later than ten (10) Business Days following the last day of the applicable Loss Allocation Termination Notification Period; (2) cease all activities and use of the Corporation's services other than activities and services necessary to terminate the business of the Participant with DTC; and (3) ensure that all activities and use of DTC services by such Participant cease on or prior to the Participant Termination Date.

The proposed rule changes are designed to enable DTC to continue the loss allocation process in successive rounds until all of DTC's losses are allocated. Until all losses related to an Event Period are allocated and paid, DTC may retain the entire Actual Participants Fund Deposit of a Participant subject to loss allocation, up to the Participant's Loss Allocation Cap.

The proposed rule changes relating to capping terminating Participants' loss allocation exposure and related changes to the termination process are set forth in proposed Sections 5, 6, and 8 of Rule 4.

[39] The alternative limit in clause (b) would be eliminated in proposed Section 8(b) in favor of a single defined standard. *See supra* note 24.

[40] *i.e.,* a Participant will only have the opportunity to terminate after the first Loss Allocation Notice in any round, and *not* after each Loss Allocation Notice in any round.

C. Clarifying Changes Relating to Loss Allocation for Non-Default Events

The proposed rule changes are intended to make the provisions in the Rules governing loss allocation more transparent and accessible to Participants. In particular, DTC is proposing the following change relating to loss allocation to provide clarity around the governance for the allocation of losses arising from a non-default event.[41]

Currently, DTC can use the Participants Fund to satisfy losses and liabilities arising from a Participant Default or arising from an event that is not due to a Participant Default (*i.e.,* a non-default loss), provided that such loss or liability is incident to the business of DTC.[42]

DTC is proposing to clarify the governance around non-default losses that would trigger loss allocation to Participants by specifying that the Board of Directors would have to determine that there is a non-default loss that may be a significant and substantial loss or liability that may materially impair the ability of DTC to provide clearance and settlement services in an orderly manner and will potentially generate losses to be mutualized among the Participants in order to ensure that DTC may continue to offer clearance and settlement services in an orderly manner. The proposed rule change would provide that DTC would then be required to promptly notify Participants of this determination, which is referred to in the proposed rule as a Declared Non-Default Loss Event, as discussed above.

Finally, as previously discussed, pursuant to the proposed rule change, proposed Rule 4 would include language to clarify that (i) the Corporate Contribution would apply to losses or liabilities arising from a Default Loss Event or a Declared Non-Default Loss Event, and (ii) the loss allocation waterfall would be applied in the same manner regardless of whether a loss arises from a Default Loss Event or a Declared Non-Default Loss Event.

The proposed rule changes relating to Declared Non-Default Loss Events and Participants' obligations for such events are set forth in proposed Section 5 of Rule 4.

D. Loss Allocation Waterfall Comparison

The following example illustrates the differences between the current and proposed loss allocation provisions:

Assumptions:

(i) Participant A defaults on a Business Day (Day 1). On the same day, DTC ceases to act for Participant A, and notifies Participants of the cease to act. After applying Participant A's Participants Fund and liquidating Participant A's Collateral, DTC has a loss of $350 million.

(ii) Participant X voluntarily retires from membership five Business Days after DTC ceases to act for Participant A (Day 6).

(iii) Participant B defaults seven Business Days after DTC ceases to act for Participant A (Day 8). On the same day, DTC ceases to act for Participant B, and notifies Participants of the cease to act. After applying Participant B's Participants Fund and liquidating Participant B's Collateral, DTC has a loss of $350 million.

(iv) The current DTC loss allocation provisions do not require a corporate contribution. DTC may, in its sole discretion and in such amounts as DTC may determine, charge the existing retained earnings and undivided profits of DTC. For the purposes of this example, it is assumed that DTC has determined, in its discretion, that DTC will contribute 25% of its retained earnings and undivided profits. The amount of DTC's retained earnings and undivided profits is $364 million.

(v) DTC's General Business Risk Capital Requirement is $158 million.

Current Loss Allocation:

Under the current loss allocation provisions, with respect to the losses arising out of Participant A's default, DTC will contribute $91 million ($364 million * 25%) from retained earnings and undivided profits, and then allocate the remaining loss of $259 million ($350 million − $91 million) to Participants.

With respect to the losses arising out of Participant B's default, DTC will contribute $68 million (($364 million − $91 million) * 25%) from the balance of its retained earnings and undivided profits, and then allocate the remaining loss of $282 million ($350 million − $68 million) to Participants. Because Participant X voluntarily retired before DTC ceased to act for Participant B, Participant X is not subject to loss allocation with respect to losses arising out of Participant B's default.

Altogether, with respect to the losses arising out of defaults of Participant A and Participant B, DTC will contribute $159 million of retained earnings and undivided profits, and will allocate losses of $541 million to Participants.

Proposed Loss Allocation:

Under the proposed loss allocation provisions, a Default Loss Event with respect to Participant A's default would have occurred on Day 1, and a Default Loss Event with respect to Participant B's default would have occurred on Day 8. Because the Default Loss Events occurred during a 10-Business Day period they would be grouped together into an Event Period for purposes of allocating losses to Participants. The Event Period would begin on the 1st Business Day and end on the 10th Business Day.

With respect to losses arising out of Participant A's default, DTC would apply a Corporate Contribution of $79 million ($158 million * 50%) and then allocate the remaining loss of $271 million ($350 million − $79 million) to Participants. With respect to losses arising out of Participant B's default, DTC would not apply a Corporate Contribution since it would have already contributed the maximum Corporate Contribution of 50% of its General Business Risk Capital Requirement. DTC would allocate the loss of $350 million arising out of Participant B's default to Participants. Because Participant X was a Participant on the first day of the Event Period, it would be subject to loss allocation with respect to all events occurring during the Event Period, even if the event occurred after its retirement. Therefore, Participant X would be subject to loss allocation with respect to Participant B's default.

Altogether, with respect to the losses arising out of defaults of Participant A and Participant B, DTC would apply a Corporate Contribution of $79 million and allocate losses of $621 million to Participants.

The principal differences in the above example are due to: (i) The proposed changes to the calculation and application of Corporate Contribution, and (ii) the proposed introduction of an Event Period.

E. Clarifying Changes Regarding Voluntary Retirement

Section 1 of Rule 2 provides that a Participant may terminate its business with DTC by notifying DTC in the appropriate manner.[43] To provide

[41] Non-default losses may arise from events such as damage to physical assets, a cyber-attack, or custody and investment losses.

[42] *See supra* note 11.

[43] Section 1 of Rule 2 provides, in relevant part, that ''[a] Participant may terminate its business with the Corporation by notifying the Corporation as provided in Sections 7 or 8 of Rule 4 or, if for a reason other than those specified in said Sections 7 and 8, by notifying the Corporation thereof; the Participant shall, upon receipt of such notice by the

Continued

additional transparency to Participants with respect to the voluntary retirement of a Participant, and to align, where appropriate, with the proposed rule changes of NSCC and FICC with respect to voluntary termination, DTC is proposing to add proposed Section 6(a) to Rule 4, which would be titled, ''Upon Any Voluntary Retirement.'' Proposed Section 6(a) of Rule 4 would (i) clarify the requirements [44] for a Participant that wants to voluntarily terminate its business with DTC, and (ii) address the situation where a Participant submits a Voluntary Retirement Notice (defined below) and subsequently receives a Settlement Charge Notice or the first Loss Allocation Notice in a round on or prior to the Voluntary Retirement Date (defined below).

Specifically, DTC is proposing that if a Participant elects to terminate its business with DTC pursuant to Section 1 of Rule 2 for reasons other than those specified in proposed Section 8 (a ''Voluntary Retirement''), the Participant would be required to:

(1) Provide a written notice of such termination to DTC (''Voluntary Retirement Notice''), as provided for in Section 1 of Rule 2;

(2) specify in the Voluntary Retirement Notice a desired date for the termination of its business with DTC (''Voluntary Retirement Date'');

(3) cease all activities and use of DTC services other than activities and services necessary to terminate the business of the Participant with DTC; and

(4) ensure that all activities and use of DTC services by the Participant cease on or prior to the Voluntary Retirement Date.[45]

Proposed Section 6(a) of Rule 4 would provide that if the Participant fails to comply with the requirements of proposed Section 6(a), its Voluntary Retirement Notice would be deemed void.[46]

Further, proposed Section 6(a) of Rule 4 would provide that if a Participant submits a Voluntary Retirement Notice and subsequently receives a Settlement Charge Notice or the first Loss Allocation Notice in a round on or prior to the Voluntary Retirement Date, such Participant must timely submit a Termination Notice in order to benefit from its Settlement Charge Cap or Loss Allocation Cap, as the case may be. In such a case, the Termination Notice would supersede and void the pending Voluntary Retirement Notice submitted by the Participant.

F. Changes to the Retention Time for the Actual Participants Fund Deposit of a Former Participant

Current Rule 4 provides that after three months from when a Person has ceased to be a Participant, DTC shall return to such Person (or its successor in interest or legal representative) the amount of the Actual Participants Fund Deposit of the former Participant plus accrued and unpaid interest to the date of such payment (including any amount added to the Actual Participants Fund Deposit of the former Participant through the sale of the Participant's Preferred Stock), provided that DTC receives such indemnities and guarantees as DTC deems satisfactory with respect to the matured and contingent obligations of the former Participant to DTC. Otherwise, within four years after a Person has ceased to be a Participant, DTC shall return to such Person (or its successor in interest or legal representative) the amount of the Actual Participants Fund Deposit of the former Participant plus accrued and unpaid interest to the date of such payment, except that DTC may offset against such payment the amount of any known loss or liability to DTC arising out of or related to the obligations of the former Participant to DTC.

DTC is proposing to reduce the time, after a Participant ceases to be a Participant, at which DTC would be required to return the amount of the Actual Participants Fund Deposit of the former Participant plus accrued and unpaid interest, whether the Participant ceases to be such because it elected to terminate its business with DTC in response to a Settlement Charge Notice or Loss Allocation Notice or otherwise. Pursuant to the proposed rule change, the time period would be reduced from four (4) years to two (2) years. All other requirements relating to the return of the Actual Participants Fund Deposit would remain the same.

The four (4) year retention period was implemented at a time when there were more deposits and processing of physical certificates, as well as added risks related to manual processing, and related claims could surface many years after an alleged event. DTC believes that the change to two (2) years is appropriate because, currently, as DTC and the industry continue to move toward automation and dematerialization, claims typically surface more quickly. Therefore, DTC believes that a shorter retention period of two (2) years would be sufficient to maintain a reasonable level of coverage for possible claims arising in connection with the activities of a former Participant, while allowing DTC to provide some relief to former Participants by returning their Actual Participants Fund Deposits more quickly.

(ii) Proposed Rule Changes

The foregoing changes as well as other changes (including a number of technical and conforming changes) that DTC is proposing in order to improve the transparency and accessibility of Rule 4 are described in detail below.

A. Changes Relating To Participant Default, Pro Rata Settlement Charges and Loss Allocation

Section 3

As discussed above, current Section 3 of Rule 4 provides that, if a Participant fails to satisfy an obligation to DTC, DTC may, in such order and in such amounts as DTC determines, apply the Actual Participants Fund Deposit of the defaulting Participant, Pledge the shares of Preferred Stock of the defaulting Participant to its lenders as collateral security for a loan, and/or sell the shares of Preferred Stock of the defaulting Participant to other Participants. Pursuant to the proposed rule change, Section 3 would retain most of these provisions, with the following modifications:

Corporation, cease to be a Participant. In the event that a Participant shall cease to be a Participant, the Corporation shall thereupon cease to make sits services available to the Participant, except that the Corporation may perform services on behalf of the Participant or its successor in interest necessary to terminate the business of the Participant or its successor with the Corporation, and the Participant or its successor shall pay to the Corporation the fees and charges provided by these Rules with respect to services performed by the Corporation subsequent to the time when the Participant ceases to be a Participant.'' *Supra* note 5. DTC is proposing to modify the provision to clarify that the termination would be subject to proposed Section 6 of Rule 4.

[44] The requirements would reflect current practice.

[45] Typically, a Participant would ultimately submit a notice after having ceased its transactions and transferred all securities out of its Account.

[46] The purpose of this proposed provision is to clarify that a failure of a Participant to comply with proposed Section 6(a) of Rule 4 would mean that the Participant would continue to be a Participant, as if the Voluntary Retirement Notice had not been received by DTC. For example, Participant A submits a Voluntary Retirement Notice to DTC on April 1st and indicates a Voluntary Retirement Date of April 15th, but fails to comply with the requirements of proposed Section 6(a) of Rule 4 by the Voluntary Retirement Date. The Participant would continue to be a Participant after the Voluntary Retirement Date. If an Event Period subsequently occurs before the Participant submits a new Voluntary Retirement Notice and voluntarily retires in compliance with proposed Section 6(a), such Participant would be obligated to pay its pro rata shares of losses and liabilities arising from that Event Period.

DTC proposes to add the term ''Participant Default'' in proposed Section 3 as a defined term for the failure of a Participant to satisfy an obligation to DTC, for drafting clarity and use in related provisions. The proposed rule change would reflect that the defined term ''Participant Default,'' referring to the failure of a Participant to satisfy any obligation to DTC, includes the failure of a Defaulting Participant to satisfy its obligations as provided in Rule 9(B). In addition, the proposed rule change clarifies that, in the case of a Participant Default, DTC would first apply the Actual Participants Fund Deposit of the Participant to any unsatisfied obligations, before taking any other actions. This proposed clarification would reflect the current practice of DTC, and would provide Participants with enhanced transparency into the actions DTC would take with respect to the Participants Fund deposits and Participants Investment of a Participant that has failed to satisfy its obligations to DTC.

DTC proposes to correct the term ''End-of-Day Facility,'' to the existing defined term ''End-of-Day Credit Facility.'' DTC further proposes to clarify that, if DTC Pledges some or all of the shares of Preferred Stock of a Participant to its lenders as collateral security for a loan under the End-of-Day Credit Facility, DTC would apply the proceeds of such loan to the obligation the Participant had failed to satisfy, which is not expressly stated in current Section 3 of Rule 4.

In addition, DTC is proposing to make three ministerial changes to enhance readability by: (i) Removing the duplicative ''in,'' in the phrase ''in such order and in such amounts,'' (ii) replacing the word ''eliminate'' with ''satisfy,'' and (iii) to conform to proposed changes, renumbering the list of actions that DTC may take when there is a Participant Default.

DTC is also proposing to add the heading ''Application of Participants Fund Deposits and Preferred Stock Investments to Participant Default'' to Section 3.

Section 4 and Section 5

As noted above, current Section 4 of Rule 4 provides that if DTC incurs a loss or liability which is not satisfied by charging the Participant responsible for the loss pursuant to Section 3 of Rule 4, then DTC may, in any order and in any amount as DTC may determine, in its sole discretion, to the extent necessary to satisfy such loss or liability, ratably apply some or all of the Actual Participants Fund Deposits of all other Participants to such loss or liability and/or charge the existing retained earnings and undivided profits of DTC. This provision relates to losses and liabilities that may be due to the failure of a Participant to satisfy obligations to DTC, if the Actual Participants Fund Deposit of that Participant does not fully satisfy the obligation, or to losses and liabilities for which no single Participant is obligated, *i.e.,* a ''non-default loss.''

As discussed above, current Rule 4 currently provides a single set of tools and common processes for using the Participants Fund as both a liquidity resource and for the satisfaction of other losses and liabilities. The proposed rule change would provide separate liquidity and loss allocation provisions. More specifically, proposed Section 4 of Rule 4 would reflect the process for a ''pro rata settlement charge,'' the application of the Actual Participants Fund Deposits of non-defaulting Participants for liquidity purposes in order to complete settlement, when a Defaulting Participant fails to satisfy its settlement obligation and the amount charged to its Actual Participants Fund Deposit by DTC pursuant to Section 3 of Rule 4 is insufficient to complete settlement. Proposed Section 5 of Rule 4 would contain the proposed loss allocation provisions.

Proposed Section 4

Pursuant to the proposed rule change, current Section 4 would be replaced in its entirety by proposed Section 4, and titled ''Application of Participants Fund Deposits of Non-Defaulting Participants.'' First, for clarity, proposed Section 4 would expressly state that ''[t]he Participants Fund shall constitute a liquidity resource which may be applied by the Corporation in such amounts as the Corporation shall determine, in its sole discretion, to fund settlement if there is a Defaulting Participant and the amount charged to the Actual Participants Fund Deposit of the Defaulting Participant pursuant to Section 3 of this Rule is not sufficient to complete settlement. In that case, the Corporation may apply the Actual Participants Fund Deposits of Participants other than the Defaulting Participant (each, a ''non-defaulting Participant'') as provided in this Section and/or apply such other liquidity resources as may be available to the Corporation from time to time, including the End-of-Day Credit Facility.''

Proposed Section 4 would retain the current principle that DTC must notify Participants and the Commission when it applies the Participants Fund deposits of non-defaulting Participants, by stating that if the Actual Participants Fund Deposits of non-defaulting Participants are applied to complete settlement, DTC must promptly notify each Participant and the Commission of the amount of the charge and the reasons therefor, and would define such notice as a Settlement Charge Notice.

Proposed Section 4 would retain the current calculation of pro rata charges by providing that each non-defaulting Participant's pro rata share [47] of any such application of the Participants Fund, defined as a ''pro rata settlement charge,'' would be equal to (i) its Required Participants Fund Deposit, as such Required Participants Fund Deposit was fixed on the Business Day of such application [48] less its Additional Participants Fund Deposit, if any, on that day, divided by (ii) the sum of the Required Participants Fund Deposits of all non-defaulting Participants, as such Required Participants Fund Deposits were fixed on that day, less the sum of the Additional Participants Fund Deposits, if any, of such non-defaulting Participants on that day.

Proposed Section 4 would also provide a period of time within which a Participant could notify DTC of its election to terminate its business with DTC and thereby cap its liability, by providing that a Participant would have a period of five (5) Business Days following the issuance of a Settlement Charge Notice (''Settlement Charge Termination Notification Period'') to notify DTC of its election to terminate its business with DTC pursuant to proposed Section 8(a), and thereby benefit from its Settlement Charge Cap, as set forth in proposed Section 8(a).[49] Proposed Section 4 would also require that any Participant that gives DTC notice of its election to terminate its business with DTC must comply with proposed Section 6(b) of Rule 4,[50] and if it does not, its election to terminate would be deemed void.

Proposed Section 4 would further provide that DTC may retain the entire amount of the Actual Participants Fund Deposit of a Participant subject to a pro rata settlement charge, up to the amount of the Participant's Settlement Charge Cap in accordance with proposed Section 8(a) of Rule 4.

Current Section 5 of Rule 4 provides that ''[e]xcept as provided in Section 8 of this Rule, if a pro rata charge is made pursuant to Section 4 of the current Rule against the Required Participants Fund Deposit of a Participant, and, as a

[47] *See supra* note 20.

[48] *See supra* note 21.

[49] *See supra* note 22.

[50] Proposed Section 6(b) is discussed below.

consequence, the Actual Participants Fund Deposit of such Participant is less than its Required Participants Fund Deposit, the Participant shall, upon the demand of the Corporation, within such time as the Corporation shall require, Deposit to the Participants Fund the amount in cash needed to eliminate any resulting deficiency in its Required Participants Fund Deposit. If the Participant shall fail to make such deposit to the Participants Fund, the Corporation may take disciplinary action against the Participant pursuant to these Rules. Any disciplinary action which the Corporation takes pursuant to these Rules, or the voluntary or involuntary cessation of participation by the Participant, shall not affect the obligations of the Participant to the Corporation or any remedy to which the Corporation may be entitled under applicable law.''

Proposed Section 4 would incorporate current Section 5 of Rule 4, modified as follows: (i) Conformed to reflect the consolidation of Section 5 into proposed Section 4, (ii) replacement of ''Except as provided in'' with ''Subject to,'' to harmonize with language used elsewhere in proposed Rule 4, and (iii) corrections of two typographical errors, in order to accurately reflect that the Actual Participants Fund Deposit of a Participant would be applied, and not the Required Participants Fund Deposit, and to capitalize the word ''deposit'' because it is a defined term.

Proposed Section 5

Proposed Section 5 of Rule 4 would address the substantially new and revised proposed loss allocation, which would apply to losses and liabilities relating to or arising out of a Default Loss Event or a Declared Non-Default Loss Event. Pursuant to the proposed rule change, DTC would restructure and modify its existing loss allocation waterfall as described below. The heading ''Loss Allocation Waterfall'' would be added to proposed Section 5.

Proposed Section 5 would establish the concept of an ''Event Period'' to provide for a clear and transparent way of handling multiple loss events occurring in a period of ten (10) Business Days, which would be grouped into an Event Period. As stated above, both Default Loss Events and Declared Non-Default Loss Events could occur within the same Event Period.

The Event Period with respect to a Default Loss Event would begin on the day on which DTC notifies Participants that it has ceased to act for the Participant (or the next Business Day, if such day is not a Business Day). In the case of a Declared Non-Default Loss Event, the Event Period would begin on the day that DTC notifies Participants of the Declared Non-Default Loss Event (or the next Business Day, if such day is not a Business Day). Proposed Section 5 would provide that if a subsequent Default Loss Event or Declared Non-Default Loss Event occurs during an Event Period, any losses or liabilities arising out of or relating to any such subsequent event would be resolved as losses or liabilities that are part of the same Event Period, without extending the duration of such Event Period.

As proposed, each CTA Participant would be obligated to DTC for the entire amount of any loss or liability incurred by DTC arising out of or relating to any Default Loss Event with respect to such CTA Participant. Under the proposal, to the extent that such loss or liability is not satisfied pursuant to proposed Section 3 of Rule 4, DTC would apply a Corporate Contribution thereto and charge the remaining amount of such loss or liability as provided in proposed Section 5.

Under proposed Section 5, the loss allocation waterfall would begin with a new mandatory Corporate Contribution from DTC. Rule 4 currently provides that the use of any retained earnings and undivided profits by DTC is a voluntary contribution of a discretionary amount of its retained earnings. Proposed Section 5 of Rule 4 would, instead, require a defined corporate contribution to losses and liabilities that are incurred by DTC with respect to an Event Period. As proposed, the Corporate Contribution to losses or liabilities that are incurred by DTC with respect to an Event Period would be defined as an amount that is equal to fifty percent (50%) of the amount calculated by DTC in respect of its General Business Risk Capital Requirement as of the end of the calendar quarter immediately preceding the Event Period.[51] DTC's General Business Risk Capital Requirement, as defined in DTC's Clearing Agency Policy on Capital Requirements,[52] is, at a minimum, equal to the regulatory capital that DTC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[53]

If DTC applies the Corporate Contribution to a loss or liability arising out of or relating to one or more Default Loss Events or Declared Non-Default Loss Events relating to an Event Period, then for any subsequent Event Periods that occur during the next two hundred fifty (250) Business Days, the Corporate Contribution would be reduced to the remaining unused portion of the Corporate Contribution amount that was applied for the first Event Period.[54] Proposed Section 5 would require DTC to notify Participants of any such reduction to the Corporate Contribution.

Proposed Section 5 of Rule 4 would provide that nothing in the Rules would prevent DTC from voluntarily applying amounts greater than the Corporate Contribution against any DTC loss or liability, if the Board of Directors, in its sole discretion, believes such to be appropriate under the factual situation existing at the time.

Proposed Section 5 of Rule 4 would provide that DTC shall apply the Corporate Contribution to losses and liabilities that arise out of or relate to one or more Default Loss Events and/or Declared Non-Default Loss Events that occur within an Event Period. The proposed rule change also provides that if losses and liabilities with respect to such Event Period remain unsatisfied following application of the Corporate Contribution, DTC would allocate such losses and liabilities to Participants, as described below.

Proposed Section 5 of Rule 4 would state that each Participant that is a Participant on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Default Loss Event (other than a Default Loss Event with respect to which it is the CTA Participant) and each Declared Non-Default Loss Event occurring during the Event Period. In addition, proposed Section 5 of Rule 4 would make it clear that any CTA Participant for which DTC ceases to act on a non-Business Day, triggering an Event Period that commences on the next Business Day, would be deemed to be a Participant on the first day of that Event Period. In addition, DTC is proposing to clarify that after a first round of loss allocations with respect to an Event Period, only Participants that have not submitted a Termination Notice in accordance with proposed Section 6(b) of Rule 4 would be subject to loss allocations with respect to subsequent rounds relating to that Event Period. The proposed change would also provide that DTC may retain the entire Actual Participants Fund Deposit of a Participant subject to loss allocation, up to the Participant's Loss Allocation Cap in accordance with proposed Section 8(b) of Rule 4.

Pursuant to the proposed rule change, DTC would notify Participants subject to loss allocation of the amounts being allocated to them by a Loss Allocation Notice in successive rounds of loss

[51] *See supra* note 26.

[52] *See supra* note 27.

[53] 17 CFR 240.17Ad–22(e)(15).

[54] *See supra* note 30.

allocations. Proposed Section 5 would state that a loss allocation ''round'' would mean a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Participants (a ''round cap''). When the aggregate amount of losses allocated in a round equals the round cap, any additional losses relating to the applicable Event Period would be allocated in one or more subsequent rounds, in each case subject to a round cap for that round. DTC may continue the loss allocation process in successive rounds until all losses from the Event Period are allocated among Participants that have not submitted a Termination Notice in accordance with proposed Section 6(b) of Rule 4.

Each Loss Allocation Notice would specify the relevant Event Period and the round to which it relates. The first Loss Allocation Notice in any first, second, or subsequent round would expressly state that such Loss Allocation Notice reflects the beginning of the first, second, or subsequent round, as the case may be, and that each Participant in that round has five (5) Business Days from the issuance of such first Loss Allocation Notice for the round [55] to notify DTC of its election to terminate its business with DTC pursuant to proposed Section 8(b) of Rule 4, and thereby benefit from its Loss Allocation Cap.[56]

Loss allocation obligations would continue to be calculated based upon a Participant's pro rata share of the loss.[57] As proposed, each Participant's pro rata share of losses and liabilities to be allocated in any round would be equal to (i) (A) its Required Participants Fund Deposit, as such Required Participants Fund Deposit was fixed on the first day of the Event Period,[58] less (B) its Additional Participants Fund Deposit, if any, on such day, divided by (ii) (A) the sum of the Required Participants Fund Deposits of all Participants subject to loss allocation in such round, as such Required Participants Fund Deposits were fixed on such day, less (B) the sum of any Additional Participants Fund Deposits, if any, of all Participants subject to loss allocation in such round on such day.[59]

As proposed, Participants would have two (2) Business Days after DTC issues a first round Loss Allocation Notice to pay the amount specified in any such notice. In contrast to the current Section 4, under which DTC may apply the Actual Participants Fund Deposits of Participants directly to the satisfaction of loss allocation amounts, under proposed Section 5, DTC would require Participants to pay their loss allocation amounts (leaving their Actual Participants Fund Deposits intact).[60] On a subsequent round (*i.e.,* if the first round did not cover the entire loss of the Event Period because DTC was only able to allocate up to the sum of the Loss Allocation Caps of those Participants included in the round), Participants would also have two (2) Business Days after notice by DTC to pay their loss allocation amounts (again subject to their Loss Allocation Caps), unless a Participant timely notified (or will timely notify) DTC of its election to terminate its business with DTC with respect to a prior loss allocation round.

Under the proposal, if a Participant fails to make its required payment in respect of a Loss Allocation Notice by the time such payment is due, DTC would have the right to proceed against such Participant as a Participant that has failed to satisfy an obligation in accordance with proposed Section 3 of Rule 4 described above. For additional clarity, proposed Section 5 of Rule 4 would state that all amounts due from a Participant pursuant to proposed Section 5 of Rule 4 may be debited from the Settlement Account of such Participant. Proposed Section 5 of Rule 4 would also provide that DTC may retain the entire Actual Participants Fund Deposit of a Participant subject to loss allocation, up to the Participant's Loss Allocation Cap in accordance with Section 8(b) of Rule 4. Participants that wish to terminate their business with DTC would be required to comply with the requirements in proposed Section 6(b) of Rule 4, described further below. Specifically, proposed Section 5 would provide that if, after notifying DTC of its election to terminate its business with DTC pursuant to proposed Section 8(b) of Rule 4, the Participant fails to comply with the provisions of proposed Section 6(b) of Rule 4, its notice of termination would be deemed void and any further losses resulting from the applicable Event Period may be allocated against it as if it had not given such notice.

Section 6

Section 6 of Rule 4 currently provides that whenever a Participant ceases to be such, it continues to be obligated (a) to satisfy any deficiency in the amount of its Required Participants Fund Deposit and/or Required Preferred Stock Investment that it did not satisfy prior to such time, including (i) any deficiency resulting from a pro rata charge with respect to which the Participant has given notice to DTC of its election to terminate its business with DTC pursuant to Section 8 of Rule 4 and (ii) any deficiency the Participant is required to satisfy pursuant to Sections 3 (an obligation that a Participant failed to satisfy) or 5 (the requirement of a Participant to eliminate the deficiency in its Required Participants Fund Deposit) of Rule 4 and (b) to discharge any liability of the Participant to DTC resulting from the transactions of the Participant open at the time it ceases to be a Participant or on account of transactions occurring while it was a Participant.

The heading ''Obligations of Participant Upon Termination'' would be added to Section 6 of Rule 4. As discussed above, DTC is proposing to add proposed Section 6(a) to Rule 4, which would (i) clarify the requirements for the Voluntary Retirement of a Participant, and (ii) address the situation where a Participant submits a Voluntary Retirement Notice and subsequently receives a Settlement Charge Cap or the first Loss Allocation Notice in a round on or prior to the Voluntary Retirement Date. Proposed Section 6(a) of Rule 4 would also provide that if a Participant submits a Voluntary Retirement Notice and subsequently receives a Settlement Charge Notice or the first Loss Allocation Notice in a round on or prior to the Voluntary Retirement Date, such Participant must timely submit a Termination Notice in order to benefit from its Settlement Charge Cap or Loss Allocation Cap, respectively. In such a case, the Termination Notice would supersede and void the pending Voluntary Retirement Notice submitted by the Participant.

DTC is proposing to add Proposed Section 6(b), titled ''Upon Termination Following Settlement Charge or Loss Allocation.'' Proposed Section 6(b) would state that if a Participant timely notifies DTC of its election to terminate its business with DTC in respect of a pro rata settlement charge as set forth in proposed Section 4 of Rule 4 or a loss allocation as set forth in proposed Section 5 of Rule 4, defined as a ''Termination Notice'', the Participant would be required to: (1) Specify in the Termination Notice a Participant Termination Date, which date shall be no later than ten Business Days following the last day of the applicable Settlement Charge Termination Notification Period or Loss Allocation Termination Notification Period; (2)

[55] *i.e.,* the Loss Allocation Termination Notification Period for that round.

[56] *See supra* note 37.

[57] *See supra* note 20.

[58] *See supra* note 21.

[59] *See supra* note 16.

[60] *See supra* note 36.

cease all activities and use of the Corporation's services other than activities and services necessary to terminate the business of the Participant with DTC; and (3) ensure that all activities and use of DTC services by such Participant cease on or prior to the Participant Termination Date.

Proposed Section 6(b) of Rule 4 would provide that a Participant that terminates its business with DTC in compliance with proposed Section 6(b) would remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated; however, its aggregate obligation would be limited to the amount of its Loss Allocation Cap (as fixed in the round for which it withdrew).

DTC is proposing to include a sentence in proposed Section 6(b) to make it clear that if the Participant fails to comply with the requirements set forth in this section, its Termination Notice will be deemed void, and the Participant will remain subject to further pro rata settlement charges pursuant to proposed Section 4 of Rule 4 or loss allocations pursuant to proposed Section 5 of Rule 4, as applicable, as if it had not given such notice.

For clarity, DTC is proposing to consolidate the requirements from current Section 6 of Rule 4 into proposed Section 6(c) of Rule 4, titled ''After Any Termination,'' and modify them to conform to other proposed rule changes. In particular, DTC is proposing to clarify that a Participant that ceases to be such would continue to be subject to proposed Section 5 of Rule 4 for any Event Period for which it was a Participant on the first day of the Event Period. Proposed Section 6(c) of Rule 4 would state that whenever a Participant ceases to be such, it would continue to be obligated (i) to satisfy any deficiency in the amounts of its Required Participants Fund Deposit and/or Required Preferred Stock Investment that it did not satisfy prior to such time, including any deficiency the Participant is required to satisfy pursuant to proposed Sections 3 or 4 of Rule 4, (ii) subject to proposed Section 8, to satisfy any loss allocation pursuant to proposed Section 5 of Rule 4, and (iii) to discharge any liability of the Participant to DTC resulting from the transactions of the Participant open at the time it ceases to be a Participant or on account of transactions occurring while it was a Participant.

Section 8

Pursuant to the proposed rule change, Section 8 would be titled ''Termination; Obligation for Pro Rata Settlement Charges and Loss Allocations,'' and would be divided among proposed Section 8(a) ''Settlement Charges,'' proposed Section 8(b) ''Loss Allocations,'' proposed Section 8(c) ''Maximum Obligation,'' and proposed Section 8(d) ''Obligation to Replenish Deposit.''

Pursuant to proposed Section 8(a), if a Participant, within five (5) Business Days after issuance of a Settlement Charge Notice pursuant to proposed Section 4 of Rule 4, gives notice to DTC of its election to terminate its business with DTC, the Participant would remain obligated for (i) its pro rata settlement charge that was the subject of such Settlement Charge Notice and (ii) all other pro rata settlement charges made by DTC until the Participant Termination Date. Subject to proposed Section 8(c), the terminating Participant's obligation would be limited to the amount of its Aggregate Required Deposit and Investment, as fixed on the day of the pro rata settlement charge that was the subject of the Settlement Charge Notice, plus 100% of the amount thereof, which is substantively the same limitation as provided for pro rata charges in current Section 8 of Rule 4.[61]

Pursuant to proposed Section 8(b), if a Participant, within five (5) Business Days after the issuance of a first Loss Allocation Notice for any round pursuant to proposed Section 5 of Rule 4 gives notice to DTC of its election to terminate its business with DTC, the Participant would remain liable for (i) the loss allocation that was the subject of such notice and (ii) all other loss allocations made by DTC with respect to the same Event Period. Subject to proposed Section 8(c), the obligation of a Participant which elects to terminate its business with DTC would be limited to the amount of its Aggregate Required Deposit and Investment, as fixed on the first day of the Event Period, plus 100% of the amount thereof, which is substantively the same limitation as provided for pro rata charges in current Section 8 of Rule 4.[62]

Proposed Section 8(c) would provide that under no circumstances would the aggregate obligation of a Participant under proposed Section 8(a) and proposed Section 8(b) exceed the amount of its Aggregate Required Deposit and Investment, as fixed on the earlier of the (i) day of the pro rata settlement charge that was the subject of the Settlement Charge Notice giving rise to a Termination Notice, and (ii) first day of the Event Period that was the subject of the first Loss Allocation Notice in a round giving rise to a Termination Notice, plus 100% of the amount thereof. The purpose of proposed Section 8(c) is to address a situation where a Participant could otherwise be subject to both a Settlement Charge Cap and Loss Allocation Cap.

Proposed Section 8(d) would retain the last paragraph in current Section 8 of Rule 4, replacing ''pro rata charge'' with ''pro rata settlement charge'' and ''loss allocation.''[63] Proposed Section 8(d) would provide that if the amount of the Actual Participants Fund Deposit of a Participant is insufficient to satisfy a pro rata settlement charge pursuant to proposed Section 4 and proposed Section 8(a) or a loss allocation pursuant to proposed Section 5 and proposed Section 8(b), the Participant would be obligated to Deposit the amount of any such deficiency to the Participants Fund notwithstanding the fact that the Participant subsequently ceases to be a Participant.

Section 9

Pursuant to the proposed rule change, proposed Section 9 of Rule 4 would provide that the recovery and repayment provisions in current Rule 4 apply to both pro rata settlement charges and loss allocations.[64] Specifically, proposed Section 9 would provide that if an amount is charged ratably pursuant to proposed Section 4 or allocated ratably pursuant to proposed Section 5 and such amount is recovered by DTC, in whole or in part, the net amount of the recovery shall be repaid ratably (on the same basis that it was originally charged or allocated) to the Persons against which the amount was originally charged or allocated by (i) crediting the appropriate amounts to the Actual Participants Fund Deposits of Persons which are still Participants and (ii) paying the appropriate amounts in cash to Persons which are not still Participants. In addition, proposed Section 9 would clarify that no loss allocation under proposed Rule 4 would constitute a waiver of any claim DTC may have against a Participant for any

[61] *See supra* note 24.

[62] *See supra* note 39.

[63] This is a ministerial change because this paragraph currently applies to current Section 4 of Rule 4, which includes charges to complete settlement and for loss allocation, as would be provided in proposed Section 4 and proposed Section 5 of Rule 4.

[64] This is a ministerial change because Section 9 currently applies to current Section 4 of Rule 4, which includes charges to complete settlement and for loss allocation, as would be provided in proposed Section 4 and proposed Section 5 of Rule 4.

losses or liabilities to which the Participant is subject under DTC Rules and Procedures, including, without limitation, any loss or liability to which it may be subject under proposed Rule 4.

DTC further proposes to add the heading ''No Waiver; Recovery and Repayment'' to proposed Section 9.

B. Other Proposed Clarifying, Conforming and Technical Changes to Rule 4

Section 1

Section 1(a) and Section 1(b). Section 1(a) addresses, among other things, the formula for determining the Required Participants Fund Deposits of Participants. DTC is proposing to insert the words ''or wind-down'' to make it clear that the formulas for determining the Required Participants Fund Deposits of Participants and the amount of the minimum Required Participants Fund Deposit would be fixed by DTC so as to assure that the aggregate amount of Required Participants Fund Deposits of Participants will be increased to provide for the costs and expenses incurred by it incidental to the wind-down of DTC, in addition to the voluntary liquidation of DTC.[65] Further, DTC proposes to delete the extraneous phrase ''if any.'' For increased clarity and readability, DTC is proposing to consolidate Section 1(b) into Section 1(a), and to relocate the sentences ''The Corporation may require a Participant to Deposit an additional amount to the Participants Fund pursuant to Section 2 of Rule 9(A). Any such additional amount shall be part of the Required Participants Fund Deposit of such Participant.'' from Section 1(a) to a new proposed Section 1(b). In addition to the relocation, DTC would add a defined term for such additional amount, as ''Additional Participants Fund Deposit,'' for drafting convenience and transparency throughout proposed Rule 4. Further, DTC proposes to add the headings ''Required Participants Fund Deposits'' and ''Additional Participants Fund Deposits'' to Section 1(a) and proposed Section 1(b), respectively.

Section 1(c). For enhanced readability, DTC is proposing to add the heading ''Voluntary Participants Fund Deposits'' to Section 1(c) of Rule 4, and to replace the word ''as'' with ''in the manner.''

Section 1(d). For enhanced clarity, DTC is proposing to modify Section 1(d) to make it clear that any Additional Participants Fund Deposit is required to be in cash. DTC is also proposing to delete the extraneous phrase ''pursuant to this Section'' and to replace language regarding Section 2 of Rule 9(A) with the proposed defined term ''Additional Participants Fund Deposit.'' Further, DTC proposes to add the heading ''Cash Participants Fund'' to Section 1(d) of Rule 4.

Section 1(e). For enhanced clarity, DTC is proposing to add the language ''among Account Families'' to clarify the scope of the allocation described in Section 1(e). In addition, DTC proposes to add the heading ''Allocation of Participants Fund Deposits Among Account Families'' to Section 1(e) of Rule 4.

Section 1(f). Section 1(f) addresses, among other things, the permitted use of the Participants Fund. For consistency with the balance of Section 1(f), the first paragraph would be amended to state that the Actual Participants Fund Deposits of Participants ''may be used or invested'' instead of stating ''shall be applied.'' Section 1(f) provides, in part, that the Participants Fund is limited to the satisfaction of losses or liabilities of DTC incident to the business of DTC. Section 1(f) currently defines ''business'' with respect to DTC as ''the doing of all things in connection with or relating to [DTC's] performance of the services specified in the first and second paragraphs of Rule 6 or the cessation of such services.'' For enhanced transparency of the permitted uses of the Participants Fund, proposed Section 1(f) would be amended to explicitly state that the Actual Participants Fund Deposits of Participants may be used (i) to satisfy the obligations of Participants to DTC, as provided in proposed Section 3, (ii) to fund settlement among non-defaulting Participants, as provided in proposed Section 4 and (iii) to satisfy losses and liabilities of DTC incident to the business of DTC, as provided in proposed Section 5. Section 1(f) would also be amended to make the definition of ''business'' applicable to the entirety of Rule 4, instead of just Section 1(f), as the term would appear elsewhere in the rule pursuant to the proposed rule change. In addition, DTC proposes to add the heading ''Maintenance, Permitted Use and Investment of Participants Fund'' to Section 1(f) of Rule 4.

Section 1(g) (consolidated into proposed Section 1(f)). Pursuant to the proposed rule change, DTC would consolidate current Section 1(g) into proposed Section 1(f), and modify language to make it clear that DTC may invest cash in the Participants Fund in accordance with the Clearing Agency Investment Policy adopted by DTC.[66] Further, language would be streamlined by replacing ''securities, repurchase agreements or deposits'' with ''financial assets,'' and ''securities and repurchase agreements in which such cash is invested'' with ''its investment of such cash.''

Section 1(h) (proposed Section 1(g)). As discussed above, DTC is proposing to replace ''four'' years with ''two'' years, in order to reduce the time within which DTC would be required to return the Actual Participants Fund Deposit of a former Participant. In addition, DTC is proposing to (i) add the heading ''Return of Participants Fund Deposits to Participants'' to proposed Section 1(g), (ii) update a cross reference, and (iii) correct two typographical errors.

Section 2

Pursuant to the proposed rule change, Section 2 of Rule 4 would be titled ''Participants Investment.''

Section 2(a)–2(d) (Proposed Section 2(a)). For clarity, DTC is proposing to consolidate Sections 2(b)–2(d) into proposed Section 2(a) and would add the heading ''Required Preferred Stock Investments'' to proposed Section 2(a). In addition, DTC proposes to modify certain language to update references and cross-references to specific subsections to reflect the proposed changes to the numbering of the

[65] On December 18, 2017, DTC submitted a proposed rule change and advance notice to adopt the Recovery & Wind-down Plan of DTC, and amend the Rules in order to adopt Rule 32(A) (Wind-down of the Corporation) and Rule 38 (Market Disruption and Force Majeure). *See* Securities Exchange Act Release Nos. 82432 (January 2, 2018), 83 FR 884 (January 8, 2018) (SR–DTC–2017–021) and 82579 (January 24, 2018), 83 FR 4310 (January 30, 2018) (SR–DTC–2017–803). On June 28, 2018, DTC filed amendments to the proposed rule change and advance notice with the Commission and the Board of Governors of the Federal Reserve System, respectively, *available at http://www.dtcc.com/legal/sec-rule-filings.aspx.*

[66] *See* Securities Exchange Act Release No. 79528 (December 12, 2016), 81 FR 91232 (December 16, 2016) (SR–DTC–2016–007). The Clearing Agency Investment Policy (the ''Policy'') governs the management, custody, and investment of cash deposited to the Participants Fund, the proprietary liquid net assets (cash and cash equivalents) of DTC and other funds held by DTC. The Policy sets forth guiding principles for the investment of those funds, which include adherence to a conservative investment philosophy that places the highest priority on maximizing liquidity and avoiding risk, as well as mandating the segregation and separation of funds. The Policy also addresses the process for evaluating credit ratings of counterparties and identifies permitted investments within specified parameters. In general, assets are required to be held by regulated and creditworthy financial institution counterparties and invested in financial instruments that, with respect to the Participants Fund, may include deposits with banks, including the Federal Reserve Bank of New York, collateralized reverse-repurchase agreements, direct obligations of the U.S. government and money-market mutual funds.

subsections in proposed Section 2 of Rule 4.

Section 2(e) (Proposed Section 2(b)). For enhanced clarity, DTC is proposing to add the language ''among Account Families'' to clarify the scope of the allocation described in proposed Section 2(b). In addition, DTC proposes to add the heading ''Allocation of Preferred Stock Investments Among Account Families'' to proposed Section 2(b) of Rule 4.

Section 2(f) (Proposed Section 2(c)). DTC is proposing to add language to clarify that when any Pledge of a Preferred Stock Security Interest pursuant to proposed Section 2(c) of Rule 4 is made by appropriate entries on the books of DTC, the Rules, in addition to such entries, shall be deemed to be a security agreement for purposes of the New York Uniform Commercial Code. In addition, DTC proposes to update a cross-reference to proposed Section 2(c). In addition, DTC proposes to add the heading ''Security Interest in Preferred Stock Investments of Participants'' to proposed Section 2(c).

Sections 2(g)–2(i) (Proposed Sections 2(d)–2(f)). DTC proposes to add the headings ''Dividends on Preferred Stock Investments of Participants,'' ''Sale of Preferred Stock Investments of Participants,'' and ''Permitted Transfers of Preferred Stock Investments of Participants'' to proposed Sections 2(d), 2(e), and 2(f), respectively. Proposed Sections 2(e) and 2(f) would be modified to update cross-references to certain subsections. In addition, proposed Section 2(f) would be modified to renumber paragraphs and internal lists for consistency with the numbering schemes in Rule 4.

Section 7. For clarity, DTC is proposing to amend Section 7 of Rule 4 to (i) replace language referencing Additional Participants Fund Deposits with the proposed defined term, (ii) update cross-references to reflect proposed renumbering, and (iii) add the headings ''Increased Participants Fund Deposits and Preferred Stock Investments,'' ''Required Participants Fund Deposits,'' and ''Required Preferred Stock Investments'' to proposed Sections 7, 7(a) and 7(b) of Rule 4, respectively.

C. Proposed Changes to Rule 1

DTC is proposing to amend Rule 1 (Definitions; Governing Law) to add cross-references to proposed terms that would be defined in Rule 4, and to delete one defined term. The defined terms to be added are: ''Additional Participants Fund Deposit,'' ''Corporate Contribution,'' ''CTA Participant,'' ''Declared Non-Default Loss Event,'' ''Default Loss Event,'' ''Event Period,'' ''Loss Allocation Cap,'' ''Loss Allocation Notice,'' ''Loss Allocation Termination Notification Period,'' ''Participant Default,'' ''Participant Termination Date,'' ''Settlement Charge Cap,'' ''Settlement Charge Notice,'' ''Settlement Charge Termination Notification Period,'' ''Termination Notice,'' ''Voluntary Retirement,'' Voluntary Retirement Date,'' and ''Voluntary Retirement Notice''. The term ''Section 8 Pro Rata Charge'' would be deleted from Rule 1, because it would be deleted from proposed Rule 4 as no longer necessary.

D. Proposed Changes to Rule 2

Section 1. The proposed rule change would modify Section 1 of Rule 2 by adding ''subject to Section 6 of Rule 4'' to the end of the following provision: ''A Participant may terminate its business with the Corporation by notifying the Corporation as provided in Sections 7 or 8 of Rule 4 or, if for a reason other than those specified in said Sections 7 and 8, by notifying the Corporation thereof; the Participant shall, upon receipt of such notice by the Corporation, cease to be a Participant.'' DTC is proposing to add this language in order to clarify that the termination would be subject to the requirements in proposed Section 6 of Rule 4.

Participant Outreach

Beginning in August 2017, DTC has conducted outreach to Participants in order to provide them with advance notice of the proposed changes. As of the date of this filing, no written comments relating to the proposed changes have been received in response to this outreach. The Commission will be notified of any written comments received.

Implementation Timeframe

Pending Commission approval, DTC expects to implement this proposal within two (2) Business Days after approval. Participants would be advised of the implementation date of this proposal through issuance of a DTC Important Notice.

Expected Effect on Risks to the Clearing Agency, Its Participants and the Market

DTC believes that the proposed rule changes to clarify the remedies available to DTC with respect to a Participant Default, including the application of the Participants Fund as a liquidity resource, and by clarifying and providing the related processes, would provide clarity as to the application of the Participants Fund to fund settlement and would mitigate any risk to settlement finality due to Participant Default.

DTC believes that the proposed rule change to enhance the resiliency of DTC's loss allocation process and to shorten the time within which DTC is required to return the Actual Participants Fund Deposit of a former Participant would reduce the risk of uncertainty to DTC, its Participants and the market overall.

By replacing the discretionary application of DTC retained earnings to losses and liabilities with a mandatory and defined amount of the Corporate Contribution, the proposed rule change is designed to provide enhanced transparency and accessibility to Participants as to how much DTC would contribute in the event of a loss or liability. The proposed rule change also clarifies that the proposed Corporate Contribution would apply to both Default Loss Events and Declared Non-Default Loss Events. The proposed rule change would provide greater transparency as to the proposed replenishment period for the Corporate Contribution, which would allow Participants to better assess the adequacy of DTC's loss allocation process. Taken together, the proposed rule changes with respect to the Corporate Contribution would enhance the overall resiliency of DTC's loss allocation process by specifying the calculation and application of DTC's Corporate Contribution, including the proposed replenishment period, and would allow Participants to better assess the adequacy of DTC's loss allocation process.

By introducing the concept of an Event Period, DTC would be able to group Default Loss Events and Declared Non-Default Loss Events occurring within a period of ten (10) Business Days for purposes of allocating losses to Participants. DTC believes that the Event Period would provide a defined structure for the loss allocation process to encompass potential sequential Default Loss Events or Declared Non-Default Loss Events that may or may not be closely linked to an initial event and/or a market dislocation episode. Having this structure would enhance the overall resiliency of DTC's loss allocation process because the proposed rule would expressly address losses that may arise from multiple Default Loss Events and/or Declared Non-Default Loss Events that arise in quick succession. Moreover, the proposed Event Period structure would provide certainty for Participants concerning their maximum exposure to mutualized loss allocation with respect to such events.

By introducing the concept of ''rounds'' (and accompanying Loss Allocation Notices) and applying this concept to the timing of loss allocation payments and the Participant termination process in connection with the loss allocation process, DTC would (i) set forth a defined amount that it would allocate to Participants during each round (*i.e.,* the round cap), (ii) advise Participants of loss allocation obligation information as well as round information through the issuance of Loss Allocation Notices, and (iii) provide Participants with the option to limit their loss allocation exposure after the issuance of the first Loss Allocation Notice in each round. These proposed rule changes would enhance the overall resiliency of DTC's loss allocation process because they would expressly permit DTC to continue the loss allocation process in successive rounds until all of DTC's losses are allocated and enable DTC to identify continuing Participants for purposes of calculating subsequent loss allocation obligations in successive rounds. Moreover, the proposed rule changes would define for Participants a clear manner and process in which they could cap their loss allocation exposure to DTC.

By reducing the time within which DTC is required to return the Actual Participants Fund Deposit of a former Participant, DTC would enable firms that have exited DTC to have access to their funds sooner than under current Rule 4 while maintaining the protection of DTC and its provision of clearance and settlement services. DTC would continue to be protected under the proposed rule change, which will maintain the provision that DTC may offset the return of funds against the amount of any loss or liability of DTC arising out of or relating to the obligations of the former Participant to DTC, and would provide that DTC could retain the funds for up to two (2) years. As such, DTC would maintain a necessary level of coverage for possible claims arising in connection with the DTC activities of a former Participant.

Management of Identified Risks

DTC is proposing the rule changes as described in detail above in order to (i) provide clarity as to the application of the Participants Fund to fund settlement when a Participant fails to settle, (ii) enhance the resiliency of DTC's loss allocation process, (iii) provide clarity and certainty to Participants regarding DTC's loss allocation process, (iv) provide clarity with respect to the Voluntary Retirement of a Participant.

Consistency With the Clearing Supervision Act

The proposed rule change would be consistent with Section 805(b) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'').[67] The objectives and principles of Section 805(b) of the Clearing Supervision Act are to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system.[68]

The proposed rule change would provide clarity and certainty around the use of the Participants Fund in connection with a Participant Default by expressly providing for the application of the Actual Participants Fund Deposit of the defaulting Participant to its unpaid obligations, and by providing a defined process for pro rata settlement charges to non-defaulting Participants that is separate from the loss allocation process. Together, these proposed rule changes more clearly specify the rights and obligations of DTC and its Participants in respect of the application of the Participants Fund. Reducing the risk of uncertainty to DTC, its Participants, and the market overall would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, DTC believes that the proposed rule changes to provide clarity and certainty around the use of the Participants Fund in connection with a Participant Default, and to provide a defined process for pro rata settlement charges to the Actual Participants Fund Deposits of non-defaulting Participants, are consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

The proposed rule change would enhance the resiliency of DTC's loss allocation process by (1) requiring a defined contribution of DTC corporate funds to a loss, (2) introducing an Event Period, and (3) introducing the concept of ''rounds'' (and accompanying Loss Allocation Notices) and applying this concept to the timing of loss allocation payments and the Participant termination process in connection with the loss allocation process. Together, these proposed rule changes would (i) create greater certainty for Participants regarding DTC's obligation towards a loss, (ii) more clearly specify DTC's and Participants' obligations toward a loss and balance the need to manage the risk of sequential defaults and other potential loss events against Participants' need for certainty concerning their maximum exposures, and (iii) provide Participants the opportunity to limit their exposure to DTC by capping their exposure to loss allocation. Reducing the risk of uncertainty to DTC, its Participants and the market overall would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, DTC believes that the proposed rule change to enhance the resiliency of DTC's loss allocation process is consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

By reducing the time within which DTC is required to return the Actual Participants Fund Deposit of a former Participant, DTC would enable firms that have exited DTC to have access to their funds sooner than under current Rule 4 while maintaining the protection of DTC and its provision of clearance and settlement services. DTC would continue to be protected under the proposed rule change, which will maintain the provision that DTC may offset the return of funds against the amount of any loss or liability of DTC arising out of or relating to the obligations of the former Participant to DTC, and would provide that DTC could retain the funds for up to two (2) years. As such, DTC would maintain a necessary level of coverage for possible claims arising in connection with the DTC activities of a former Participant. Enabling DTC to continue to meet its clearance and settlement obligations would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, DTC believes that this proposed rule change is consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

The proposed rule change is also consistent with Rules 17Ad–22(e)(7)(i), 17Ad–22(e)(13), and 17Ad–22 (e)(23)(i), promulgated under the Act.[69]

Rule 17Ad–22(e)(7)(i) under the Act requires, in part, that DTC 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 DTC, including measuring,

[67] 12 U.S.C. 5464(b).

[68] *Id.*

[69] 17 CFR 240.17Ad–22(e)(7)(i), (e)(13) and (e)(23)(i).

monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday liquidity, by maintaining sufficient liquid resources to effect same-day settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios.[70] By clarifying the remedies available to DTC with respect to a Participant Default, including the application of the Participants Fund as a liquidity resource, and by clarifying and providing the related processes, the proposed rule change is designed so that DTC may manage its settlement and funding flows on a timely basis and apply the Participants Fund as a liquid resource in order to effect same day settlement of payment obligations with a high degree of confidence. Therefore, DTC believes that the proposed rule changes with respect to the application of the Actual Participants Fund Deposits of non-defaulting Participants to complete settlement are consistent with Rule 17Ad–22(e)(7)(i) under the Act.

Rule 17Ad–22(e)(13) under the Act requires, in part, that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure DTC has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations.[71] The proposed rule changes to (1) require a defined Corporate Contribution to a loss, (2) introduce an Event Period, (3) introduce the concept of ''rounds'' (and accompanying Loss Allocation Notices) and apply this concept to the timing of loss allocation payments and the Participant termination process in connection with the loss allocation process, taken together, are designed to enhance the resiliency of DTC's loss allocation process. Having a resilient loss allocation process would help ensure that DTC can effectively and timely address losses relating to or arising out of Default Loss Events and/or Declared Non-Default Loss Events, which in turn would help DTC contain losses and continue to conduct its clearance and settlement business. In addition, by providing clarity as to the application of the Participants Fund to fund settlement in the event of a Participant Default, the proposed rule change is designed to clarify that DTC is authorized to use the Participants Fund to fund settlement. Therefore, DTC believes that the proposed rule changes to enhance the resiliency of DTC's loss allocation process, and to provide clarity as to the application of the Participants Fund to fund settlement, are consistent with Rule 17Ad–22(e)(13) under the Act.

Rule 17Ad–22(e)(23)(i) under the Act requires DTC to establish, implement, maintain and enforce written policies and procedures reasonably designed to publicly disclose all relevant rules and material procedures, including key aspects of DTC's default rules and procedures.[72] The proposed rule changes to (i) separate the provisions for the use of the Participants Fund for settlement and for loss allocation, (ii) make clarifying changes to the provisions regarding the application of the Participants Fund to complete settlement and for the allocation of losses, (iii) further align the loss allocation rules of the DTCC Clearing Agencies, (iv) improve the overall transparency and accessibility of the provisions in the Rules governing loss allocation, and (v) make technical and conforming changes, would not only ensure that DTC's loss allocation rules are, to the extent practicable and appropriate, consistent with the loss allocation rules of the other DTCC Clearing Agencies, but also would help to ensure that DTC's loss allocation rules are transparent and clear to Participants. Aligning the loss allocation rules of the DTCC Clearing Agencies would provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies. Having transparent and clear loss allocation rules would enable Participants to better understand the key aspects of DTC's Rules and Procedures relating to Participant Default, as well as non-default events, and provide Participants with increased predictability and certainty regarding their exposures and obligations. As such, DTC believes that the proposed rule changes with respect to pro rata settlement charges, and to align the loss allocation rules across the DTCC Clearing Agencies and to improve the overall transparency and accessibility of DTC's loss allocation rules are consistent with Rule 17Ad-22(e)(23)(i) under the Act.

The proposed rule changes to clarify the Voluntary Retirement of a Participant would improve the clarity of the Rules and help to ensure that DTC's Voluntary Retirement process is transparent and clear to Participants. Having clear Voluntary Retirement provisions would enable Participants to better understand the Voluntary Retirement process and provide Participants with increased predictability and certainty regarding their rights and obligations with respect to such process. As such, DTC believes that the proposed rule changes with respect to Voluntary Retirement are also consistent with Rule 17Ad–22(e)(23)(i) under the Act.

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 that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

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.

The clearing agency 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. 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–DTC–2017–804 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–DTC–2017–804. 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

[70] *Id.* at 240.17Ad–22(e)(7)(i).

[71] *Id.* at 240.17Ad–22(e)(13).

[72] *Id.* at 240.17Ad–22(e)(23)(i).

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 DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2017–804 and should be submitted on or before August 21, 2018.

By the Commission.

Robert W. Errett,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83748; File No. SR–NSCC–2017–806]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Amendment No. 1 to an Advance Notice To Amend the Loss Allocation Rules and Make Other Changes

July 31, 2018.

On December 18, 2017, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–NSCC–2017–806 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act'').[1] The notice of filing and extension of the review period of the Advance Notice was published for comment in the **Federal Register** on January 30, 2018.[2]

On April 10, 2018, the Commission required additional information from NSCC pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice.[3] On June 28, 2018, NSCC filed Amendment No. 1 to the Advance Notice to amend and replace in its entirety the Advance Notice as originally submitted on December 18, 2017, and on July 6, 2018, submitted a response to the Commission's request for additional information in consideration of the Advance Notice, which added a further 60-days to the review period pursuant to Section 806(e)(1)(E) and (G) of the Clearing Supervision Act.[4]

The Advance Notice, as amended by Amendment No. 1, is described in Items I and II below, which Items have been prepared by NSCC. The Commission is publishing this notice to solicit comments on the Advance Notice, as amended by Amendment No. 1, from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This Advance Notice consists of proposed modifications to NSCC's Rules and Procedures (''Rules'') in order to amend provisions in the Rules regarding loss allocation as well as make other changes, as described in greater detail below.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency 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. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments relating to this proposal have not been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

[1] 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b–4(n)(1)(i), respectively. On December 18, 2017, NSCC filed the Advance Notice as a proposed rule change (SR–NSCC–2017–018) with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder (''Proposed Rule Change''). (17 CFR 240.19b–4 and 17 CFR 240.19b–4, respectively.) The Proposed Rule Change was published in the **Federal Register** on January 8, 2018. *See* Securities Exchange Act Release No. 82428 (January 2, 2018), 83 FR 897 (January 8, 2018) (SR–NSCC–2017–018). On February 8, 2018, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82670 (February 8, 2018), 83 FR 6626 (February 14, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018). On March 20, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82910 (March 20, 2018), 83 FR 12968 (March 26, 2018) (SR–NSCC–2017–018). On June 25, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change. Therefore, September 5, 2018 is the date by which the Commission should either approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release Nos. 83510 (June 25, 2018), 83 FR 30791 (June 29, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018). On June 28, 2018, NSCC filed Amendment No. 1 to the Proposed Rule Change. *See* Securities Exchange Act Release No. 83633 (July 13, 2018), 83 FR 34227 (July 19, 2018) (SR–NSCC–2017–018). As of the date of this release, the Commission has not received any comments on the Proposed Rule Change.

[2] Securities Exchange Act Release No. 82584 (January 24, 2018), 83 FR 4377 (January 30, 2018) (SR–NSCC–2017–806). Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. 12 U.S.C. 5465(e)(1)(H). The Commission found that the Advance Notice raised complex issues and, accordingly, extended the review period of the Advance Notice for an additional 60 days until April 17, 2018, pursuant to Section 806(e)(1)(H). *Id.*

[3] 12 U.S.C. 5465(e)(1)(D); *See* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Commission's Request for Additional Information,'' *available at https://www.sec.gov/rules/sro/nscc-an.htm.*

[4] To promote the public availability and transparency of its post-notice amendment, NSCC submitted a copy of Amendment No. 1 through the Commission's electronic public comment letter mechanism. Accordingly, Amendment No. 1 has been posted on the Commission's website at *https://www.sec.gov/rules/sro/nscc-an.htm* and thus been publicly available since June 29, 2018. 12 U.S.C. 5465(e)(1)(E) and (G); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Response to the Commission's Request for Additional Information,'' *available at https://www.sec.gov/rules/sro/nscc-an.htm.*

[5] Capitalized terms not defined herein are defined in the Rules, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Amendment No. 1

This filing constitutes Amendment No. 1 (''Amendment'') to Advance Notice previously filed by NSCC on December 18, 2017.[6] This Amendment amends and replaces the Advance Notice in its entirety. NSCC submits this Amendment in order to further clarify the operation of the proposed rule changes on loss allocation by providing additional information and examples. In particular, this Amendment would:

(i) Clarify which Members would be subject to loss allocation with respect to Defaulting Member Events (as defined below and in the proposed rule change) and Declared Non-Default Loss Events (as defined below and in the proposed rule change) occurring during an Event Period (as defined below and in the proposed rule change). Specifically, pursuant to the Amendment, proposed Section 4 of Rule 4 would provide that each Member that is a Member on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Defaulting Member Event (other than a Defaulting Member Event with respect to which it is the Defaulting Member (as defined below and in the proposed rule change)) and each Declared Non-Default Loss Event occurring during the Event Period. Proposed Section 4 of Rule 4 would also make it clear that any Member for which NSCC ceases to act on a non-business day, triggering an Event Period that commences on the next business day, would be deemed to be a Member on the first day of that Event Period.

(ii) Clarify the obligations and Loss Allocation Cap (as defined below and in the proposed rule change) of a Member that withdraws from membership in respect of a loss allocation round. Specifically, pursuant to the Amendment, proposed Section 6 of Rule 4 would provide that the Member would nevertheless remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under Rule 4; however, its aggregate obligation would be limited to the amount of its Loss Allocation Cap as fixed in the round for which it withdrew.

(iii) Clarify that a Member would be obligated to NSCC for all losses and liabilities incurred by NSCC arising out of or relating to any Defaulting Member Event with respect to the Member. Specifically, pursuant to the Amendment, proposed Section 4 of Rule 4 would provide that each Member would be obligated to NSCC for the entire amount of any loss or liability incurred by NSCC arising out of or relating to any Defaulting Member Event with respect to such Member.

(iv) Clarify that, although a Defaulting Member would not be allocated a ratable share of losses and liabilities arising out of or relating to its own Defaulting Member Event, it would remain obligated to NSCC for all such losses and liabilities. Specifically, pursuant to the Amendment, proposed Section 10 of Rule 4 would provide that no loss allocation under Rule 4 would constitute a waiver of any claim NSCC may have against a Member for any loss or liability to which the Member is subject under the Rules, including, without limitation, any loss or liability to which it may be subject under Rule 4.

In addition, pursuant to the Amendment, NSCC is making other clarifying and technical changes to the proposed rule change, as proposed herein.

Nature of the Proposed Change

The primary purpose of this proposed rule change is to amend NSCC's loss allocation rules in order to enhance the resiliency of NSCC's loss allocation process so that NSCC can take timely action to address multiple loss events that occur in succession during a short period of time (defined and explained in detail below). In connection therewith, the proposed rule change would (i) align the loss allocation rules of the three clearing agencies of The Depository Trust & Clearing Corporation (''DTCC''), namely The Depository Trust Company (''DTC''), Fixed Income Clearing Corporation (''FICC'') (including the Government Securities Division (''FICC/GSD'') and the Mortgage-Backed Securities Division (''FICC/MBSD'')), and NSCC (collectively, the ''DTCC Clearing Agencies''), so as to provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies, (ii) increase transparency and accessibility of the loss allocation rules by enhancing their readability and clarity, (iii) reduce the time within which NSCC is required to return a former Member's Clearing Fund deposit, (iv) increase clarity of the voluntary termination provisions, and (v) make conforming and technical changes.

(i) Background

Central counterparties (''CCPs'') play a key role in financial markets by mitigating counterparty credit risk on transactions between market participants. CCPs achieve this by providing guaranties to participants and, as a consequence, are typically exposed to credit risks that could lead to default losses. In addition, in performing its critical functions, a CCP could be exposed to non-default losses that are otherwise incident to the CCP's clearance and settlement business.

A CCP's rulebook should provide a complete description of how losses would be allocated to participants if the size of the losses exceeded the CCP's pre-funded resources. Doing so provides for an orderly allocation of losses, and potentially allows the CCP to continue providing critical services to the market and thereby results in significant financial stability benefits. In addition, a clear description of the loss allocation process offers transparency and accessibility to the CCP's participants.

Current NSCC Loss Allocation Process

As a CCP, NSCC's loss allocation process is a key component of its risk management process. Risk management is the foundation of NSCC's ability to guarantee settlement, as well as the means by which NSCC protects itself and its Members from the risks inherent in the clearance and settlement process. NSCC's risk management process must account for the fact that, in certain extreme circumstances, the collateral and other financial resources that secure NSCC's risk exposures may not be sufficient to fully cover losses resulting from the liquidation of the portfolio of a Member for whom NSCC has ceased to act.[7]

The Rules currently provide for a loss allocation process through which both NSCC (by applying no less than 25% of its retained earnings in accordance with Addendum E) and its Members would share in the allocation of a loss resulting from the default of a Member for whom NSCC has ceased to act pursuant to the Rules. The Rules also recognize that NSCC may incur losses outside the context of a defaulting Member that are otherwise incident to NSCC's clearance and settlement business.

[6] *See* Securities Exchange Act Release No. 82584 (January 24, 2018), 83 FR 4377 (January 30, 2018) (SR–NSCC–2017–806).

[7] When NSCC restricts a Member's access to services generally, NSCC is said to have ''ceased to act'' for the Member. Rule 46 (Restrictions on Access to Services) sets out the circumstances under which NSCC may cease to act for a Member, and Rule 18 (Procedures for When the Corporation Declines or Ceases to Act) sets out the types of actions NSCC may take when it ceases to act for a Member. *Supra* note 5.

NSCC's loss allocation rules currently provide that in the event NSCC ceases to act for a Member, the amounts on deposit to the Clearing Fund from the defaulting Member, along with any other resources of, or attributable to, the defaulting Member that NSCC may access under the Rules (*e.g.,* payments from Clearing Agency Cross-Guaranty Agreements), are the first source of funds NSCC would use to cover any losses that may result from the closeout of the defaulting Member's guaranteed positions. If these amounts are not sufficient to cover all losses incurred, then NSCC will apply the following available resources, in the following loss allocation waterfall order:

First, as provided in Addendum E, NSCC's corporate contribution of at least 25 percent of NSCC's retained earnings existing at the time of a Member impairment, or such greater amount as the Board of Directors may determine; and

Second, if a loss still remains, as and in the manner provided in Rule 4, the required Clearing Fund deposits of Members who are non-defaulting Members on the date of default.

Pursuant to current Section 5 of Rule 4, if, as a result of applying the Clearing Fund deposit of a Member, the Member's actual Clearing Fund deposit is less than its Required Deposit, it will be required to eliminate such deficiency in order to satisfy its Required Deposit amount. Pursuant to current Section 4 of Rule 4, Members can also be assessed for non-default losses incident to the operation of the clearance and settlement business of NSCC. Pursuant to current Section 8 of Rule 4, Members may withdraw from membership within specified timeframes after a loss allocation charge to limit their obligation for future assessments.

Overview of the Proposed Rule Changes

A. Changes To Enhance Resiliency of NSCC's Loss Allocation Process

In order to enhance the resiliency of NSCC's loss allocation process, NSCC proposes to change the manner in which each of the aspects of the loss allocation waterfall described above would be employed. NSCC would retain the current core loss allocation process following the application of the defaulting Member's resources, *i.e.,* first, by applying NSCC's corporate contribution, and second, by pro rata allocations to Members. However, NSCC would clarify or adjust certain elements and introduce certain new loss allocation concepts, as further discussed below. In addition, the proposed rule change would address the loss allocation process as it relates to losses arising from or relating to multiple default or non-default events in a short period of time, also as described below.

Accordingly, NSCC is proposing five (5) key changes to enhance NSCC's loss allocation process:

(1) Changing the Calculation and Application of NSCC's Corporate Contribution

As stated above, Addendum E currently provides that NSCC will contribute no less than 25% of its retained earnings (or such higher amount as the Board of Directors shall determine) to a loss or liability that is not satisfied by the impaired Member's Clearing Fund deposit. Under the proposal, NSCC would amend the calculation of its corporate contribution from a percentage of its retained earnings to a mandatory amount equal to 50% of the NSCC General Business Risk Capital Requirement.[8] NSCC's General Business Risk Capital Requirement, as defined in NSCC's Clearing Agency Policy on Capital Requirements,[9] is, at a minimum, equal to the regulatory capital that NSCC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[10] The proposed Corporate Contribution (as defined in the proposed rule change) would be held in addition to NSCC's General Business Risk Capital Requirement.

Currently, the Rules do not require NSCC to contribute its retained earnings to losses and liabilities other than those from Member impairments. Under the proposal, NSCC would apply its corporate contribution to non-default losses as well. The proposed Corporate Contribution would apply to losses arising from Defaulting Member Events and Declared Non-Default Loss Events (as such terms are defined below and in the proposed rule change), and would be a mandatory contribution by NSCC prior to any allocation of the loss among NSCC's Members.[11] As proposed, if the Corporate Contribution is fully or partially used against a loss or liability relating to an Event Period, the Corporate Contribution would be reduced to the remaining unused amount, if any, during the following two hundred fifty (250) business days[12] in order to permit NSCC to replenish the Corporate Contribution.[13] To ensure transparency, Members would receive notice of any such reduction to the Corporate Contribution.

As compared to the current approach of applying ''no less than'' a percentage of retained earnings to defaulting Member losses, the proposed Corporate Contribution would be a fixed percentage of NSCC's General Business Risk Capital Requirement, which would provide greater transparency and accessibility to Members. The proposed Corporate Contribution would apply not only towards losses and liabilities arising out of or relating to Defaulting Member Events but also those arising out of or relating to Declared Non-Default Loss Events, which is consistent with the current industry guidance that ''a CCP should identify the amount of its own resources to be applied towards losses arising from custody and investment risk, to bolster confidence that participants' assets are prudently safeguarded.'' [14]

Under the current Addendum E, NSCC has the discretion to contribute amounts higher than the specified percentage of retained earnings, as determined by the Board of Directors, to any loss or liability incurred by NSCC as result of a Member's impairment. This option would be retained and expanded under the proposal so that it would be clear that NSCC can voluntarily apply amounts greater than the Corporate Contribution against any

[8] NSCC calculates its General Business Risk Capital Requirement as the amount equal to the greatest of (i) an amount determined based on its general business profile, (ii) an amount determined based on the time estimated to execute a recovery or orderly wind-down of NSCC's critical operations, and (iii) an amount determined based on an analysis of NSCC's estimated operating expenses for a six (6) month period.

[9] *See* Securities Exchange Act Release No. 81105 (July 7, 2017), 82 FR 32399 (July 13, 2017) (SR–NSCC–2017–004).

[10] 17 CFR 240.17Ad–22(e)(15).

[11] The proposed rule change would not require a Corporate Contribution with respect to the use of the Clearing Fund as a liquidity resource; however, if NSCC uses the Clearing Fund as a liquidity resource for more than 30 calendar days, as set forth in proposed Section 2 of Rule 4, then NSCC would have to consider the amount used as a loss to the Clearing Fund incurred as a result of a Defaulting Member Event and allocate the loss pursuant to proposed Section 4 of Rule 4, which would then require the application of a Corporate Contribution.

[12] Rule 1 defines ''business day'' as ''any day on which the Corporation is open for business. However, on any business day that banks or transfer agencies in New York State are closed or a Qualified Securities Depository is closed, no deliveries of securities and no payments of money shall be made through the facilities of the Corporation.'' *Supra* note 5.

[13] NSCC believes that two hundred and fifty (250) business days would be a reasonable estimate of the time frame that NSCC would require to replenish the Corporate Contribution by equity in accordance with NSCC's Clearing Agency Policy on Capital Requirements, including a conservative additional period to account for any potential delays and/or unknown exigencies in times of distress.

[14] *See Resilience of central counterparties (CCPs): Further guidance on the PFMI,* issued by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions, at 42 (July 2017), *available at www.bis.org/cpmi/publ/d163.pdf.*

loss or liability (including non-default losses) of NSCC, if the Board of Directors, in its sole discretion, believes such to be appropriate under the factual situation existing at the time.

The proposed rule changes relating to the calculation and application of the Corporate Contribution are set forth in proposed Sections 4 and 5 of Rule 4, as further described below.

(2) Introducing an Event Period

In order to clearly define the obligations of NSCC and its Members regarding loss allocation and to balance the need to manage the risk of sequential loss events against Members' need for certainty concerning their maximum loss allocation exposures, NSCC is proposing to introduce the concept of an ''Event Period'' to the Rules to address the losses and liabilities that may arise from or relate to multiple Defaulting Member Events and/or Declared Non-Default Loss Events that arise in quick succession. Specifically, the proposal would group Defaulting Member Events and Declared Non-Default Loss Events occurring in a period of ten (10) business days (''Event Period'') for purposes of allocating losses to Members in one or more rounds (as described below), subject to the limitations of loss allocation set forth in the proposed rule change and as explained below.[15] In the case of a loss or liability arising from or relating to a Defaulting Member Event, an Event Period would begin on the day NSCC notifies Members that it has ceased to act [16] for the Defaulting Member (or the next business day, if such day is not a business day). In the case of a loss or liability arising from or relating to a Declared Non-Default Loss Event, an Event Period would begin on the day that NSCC notifies Members of the Declared Non-Default Loss Event (or the next business day, if such day is not a business day). If a subsequent Defaulting Member Event or Declared Non-Default Loss Event occurs during an Event Period, any losses or liabilities arising out of or relating to any such subsequent event would be resolved as losses or liabilities that are part of the same Event Period, without extending the duration of such Event Period. An Event Period may include both Defaulting Member Events and Declared Non-Default Loss Events, and there would not be separate Event Periods for Defaulting Member Events or Declared Non-Default Loss Events occurring during overlapping ten (10) business day periods.

The amount of losses that may be allocated by NSCC, subject to the required Corporate Contribution, and to which a Loss Allocation Cap would apply for any Member that elects to withdraw from membership in respect of a loss allocation round, would include any and all losses from any Defaulting Member Events and any Declared Non-Default Loss Events during the Event Period, regardless of the amount of time, during or after the Event Period, required for such losses to be crystallized and allocated.[17]

The proposed rule changes relating to the implementation of an Event Period are set forth in proposed Section 4 of Rule 4, as further described below.

(3) Introducing the Concept of ''Rounds'' and Loss Allocation Notice

Pursuant to the proposed rule change, a loss allocation ''round'' would mean a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Members (a ''round cap''). When the aggregate amount of losses allocated in a round equals the round cap, any additional losses relating to the applicable Event Period would be allocated in one or more subsequent rounds, in each case subject to a round cap for that round. NSCC may continue the loss allocation process in successive rounds until all losses from the Event Period are allocated among Members that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 6 of Rule 4.

Each loss allocation would be communicated to Members by the issuance of a notice that advises the Members of the amount being allocated to them (''Loss Allocation Notice''). Each Member's pro rata share of losses and liabilities to be allocated in any round would be equal to (i) the average of its Required Fund Deposit for the seventy (70) business days preceding the first day of the applicable Event Period or such shorter period of time that the Member has been a Member (each Member's ''Average RFD''), divided by (ii) the sum of Average RFD amounts of all Members subject to loss allocation in such round.

Each Loss Allocation Notice would specify the relevant Event Period and the round to which it relates. The first Loss Allocation Notice in any first, second, or subsequent round would expressly state that such Loss Allocation Notice reflects the beginning of the first, second, or subsequent round, as the case may be, and that each Member in that round has five (5) business days from the issuance of such first Loss Allocation Notice for the round to notify NSCC of its election to withdraw from membership with NSCC pursuant to proposed Section 6 of Rule 4, and thereby benefit from its Loss Allocation Cap.[18] The ''Loss Allocation Cap'' of a Member would be equal to the greater of (x) its Required Fund Deposit on the first day of the applicable Event Period and (y) its Average RFD.

After a first round of loss allocations with respect to an Event Period, only Members that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 6 of Rule 4 would be subject to further loss allocation with respect to that Event Period.

The amount of any second or subsequent round cap may differ from the first or preceding round cap because there may be fewer Members in a second or subsequent round if Members elect to withdraw from membership with NSCC as provided in proposed Section 6 of Rule 4 following the first Loss Allocation Notice in any round.

For example, for illustrative purposes only, after the required Corporate Contribution, if NSCC has a $5 billion loss determined with respect to an Event Period and the sum of Loss Allocation Caps for all Members subject to the loss allocation is $4 billion, the first round would begin when NSCC issues the first Loss Allocation Notice for that Event Period. NSCC could issue one or more Loss Allocation Notices for the first round until the sum of losses allocated equals $4 billion. Once the $4 billion is allocated, the first round

[15] NSCC believes that having a ten (10) business day Event Period would provide a reasonable period of time to encompass potential sequential Defaulting Member Events or Declared Non-Default Loss Events that are likely to be closely linked to an initial event and/or a severe market dislocation episode, while still providing appropriate certainty for Members concerning their maximum exposure to mutualized losses with respect to such events.

[16] *Supra* note 7.

[17] As discussed below, each Member that is a Member on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Defaulting Member Event (other than a Defaulting Member Event with respect to which it is the Defaulting Member) and each Declared Non-Default Loss Event occurring during the Event Period.

[18] Pursuant to the current Section 8 of Rule 4, the time period for a participant to give notice of its election to terminate its business with NSCC in respect of a pro rata charge is ten (10) business days after receiving notice of a pro rata charge. *Supra* note 5.

NSCC believes that it is appropriate to shorten such time period from ten (10) business days to five (5) business days because NSCC needs timely notice of which Members would remain in its membership for purposes of calculating the loss allocation for any subsequent round. NSCC believes that five (5) business days would provide Members with sufficient time to decide whether to cap their loss allocation obligations by withdrawing from their membership in NSCC.

would end and NSCC would need a second round in order to allocate the remaining $1 billion of loss. NSCC would then issue a Loss Allocation Notice for the $1 billion and this notice would be the first Loss Allocation Notice for the second round. The issuance of the Loss Allocation Notice for the $1 billion would begin the second round.

The proposed rule change would link the Loss Allocation Cap to a round in order to provide Members the option to limit their loss allocation exposure at the beginning of each round. As proposed and as described further below, a Member could limit its loss allocation exposure to its Loss Allocation Cap by providing notice of its election to withdraw from membership within five (5) business days after the issuance of the first Loss Allocation Notice in any round.

The proposed rule changes relating to the implementation of ''rounds'' and Loss Allocation Notices are set forth in proposed Section 4 of Rule 4, as further described below.

(4) Implementing a ''Look-Back'' Period To Calculate a Member's Loss Allocation Pro Rata Share and Its Loss Allocation Cap

Currently, the Rules calculate a Member's pro rata share for purposes of loss allocation based on the Member's ''allocation for a System,'' which in turn is based on settlement dollar amounts. Therefore, a Member's loss allocation obligations are currently based on the Member's activity in each of the various services or ''Systems'' offered by NSCC.[19] The Rules do not anticipate the possibility of more than one Defaulting Member Event or Declared Non-Default Loss Event in quick succession.

Given NSCC's risk-based margining methodology, NSCC believes that it would be more appropriate to determine a Member's pro rata share of losses and liabilities based on the amount of risk that the Member brings to NSCC, which is represented by the Member's Required Deposit (NSCC is proposing that ''Required Deposits'' be renamed ''Required Fund Deposits,'' as described below). Accordingly, NSCC is proposing to calculate each Member's pro rata share of losses and liabilities to be allocated in any round (as described above and in the proposed rule change) to be equal to (i) the Member's Average RFD divided by (ii) the sum of Average RFD amounts for all Members that are subject to loss allocation in such round.

Additionally, as described above and in the proposed rule change, if a Member withdraws from membership pursuant to proposed Section 6 of Rule 4, NSCC is proposing that the Member's Loss Allocation Cap be equal to the greater of (i) its Required Fund Deposit on the first day of the applicable Event Period or (ii) its Average RFD.

NSCC believes that employing a backward-looking average to calculate a Member's loss allocation pro rata share and Loss Allocation Cap would disincentivize Member behavior that could heighten volatility or reduce liquidity in markets in the midst of a financial crisis. Specifically, the proposed look-back period would discourage a Member from reducing its settlement activity during a time of stress primarily to limit its loss allocation pro rata share, which, as proposed, would now be based on the Member's average settlement activity over the look-back period rather than its settlement activity at a point in time that the Member may not be able to estimate. Similarly, NSCC believes that taking a backward-looking average into consideration when determining a Member's Loss Allocation Cap would also deter a Member from reducing its settlement activity during a time of stress primarily to limit its Loss Allocation Cap.

NSCC believes that having a look-back period of seventy (70) business days is appropriate, because it would be long enough to enable NSCC to capture a full calendar quarter of a Member's activities, including quarterly option expirations, and smooth out the impact from any abnormalities and/or arbitrariness that may have occurred, but not too long that the Member's business strategy and outlook could have shifted significantly, resulting in material changes to the size of its portfolios.

The proposed rule changes relating to the implementation of a look-back period are set forth in proposed Section 4 of Rule 4, as further described below.

(5) Capping Withdrawing Members' Loss Allocation Exposure and Related Changes

NSCC's current loss allocation rules allow a Member to withdraw if the Member notifies NSCC, within ten (10) business days after receipt of notice of a pro rata charge, of its election to terminate its membership and thereby avail itself of a cap on loss allocation, which is its Required Deposit as fixed immediately prior to the time of the pro rata charge. As discussed above, the proposed rule change would continue providing Members the opportunity to limit their loss allocation exposure by offering withdrawal options; however, the cap on loss allocation would be calculated differently and the associated withdrawal process would also be modified as it relates to withdrawals associated with the loss allocation process. In particular, the proposed rule change would shorten the withdrawal notification period from ten (10) business days to five (5) business days, and would also change the beginning of such notification period from the receipt of the notice of a pro rata charge to the issuance of the notice, as further described below. As proposed, if a Member timely provides notice of its withdrawal from membership in respect of a loss allocation round, the maximum amount of losses it would be responsible for would be its Loss Allocation Cap,[20] provided that the Member complies with the requirements of the withdrawal process in proposed Section 6 of Rule 4.[21]

Currently, NSCC's loss allocation provisions provide that if a pro rata charge is made against a Member's actual Clearing Fund deposit, and as result thereof the Member's deposit is less than its Required Deposit, the Member will, upon demand by NSCC, be required to replenish its deposit to eliminate the deficiency within such time as NSCC shall require. To increase transparency of the timeframe under which NSCC would require funds from Members to satisfy their loss allocation obligations, NSCC is proposing that Members would receive two (2) business days' notice of a loss allocation, and Members would be required to pay the requisite amount no later than the second business day following issuance of such notice.[22] Members would have five (5) business days[23] from the issuance of the first Loss Allocation Notice in any round of an Event Period to decide whether to withdraw from membership.[24]

[19] NSCC's current loss allocation rules pre-date NSCC's move to a risk-based margining methodology.

[20] If a Member's Loss Allocation Cap exceeds the Member's then-current Required Fund Deposit, it must still cover the excess amount.

[21] For the avoidance of doubt, pursuant to Section 13(d) of Rule 4(A) (Supplemental Liquidity Deposits), a Special Activity Supplemental Deposit of a Member may not be used to calculate or be applied to satisfy any pro rata charge pursuant to Section 4 of Rule 4. *Supra* note 5.

[22] NSCC believes that allowing Members two (2) business days to satisfy their loss allocation obligations would provide Members sufficient notice to arrange funding, if necessary, while allowing NSCC to address losses in a timely manner.

[23] *Supra* note 18.

[24] NSCC believes that setting the start date of the withdrawal notification period to the date of issuance of a notice would provide a single withdrawal timeframe that would be consistent across the Members.

Each round would allow a Member the opportunity to notify NSCC of its election to withdraw from membership after satisfaction of the losses allocated in such round. Multiple Loss Allocation Notices may be issued with respect to each round to allocate losses up to the round cap.

Specifically, the first round and each subsequent round of loss allocation would allocate losses up to a round cap of the aggregate of all Loss Allocation Caps of those Members included in the round. If a Member provides notice of its election to withdraw from membership, it would be subject to loss allocation in that round, up to its Loss Allocation Cap. If the first round of loss allocation does not fully cover NSCC's losses, a second round will be noticed to those Members that did not elect to withdraw from membership in the previous round; however, as noted above, the amount of any second or subsequent round cap may differ from the first or preceding round cap because there may be fewer Members in a second or subsequent round if Members elect to withdraw from membership with NSCC as provided in proposed Section 6 of Rule 4 following the first Loss Allocation Notice in any round.

Pursuant to the proposed rule change, in order to avail itself of its Loss Allocation Cap, a Member would need to follow the requirements in proposed Section 6 of Rule 4, which would provide that the Member must: (i) Specify in its Loss Allocation Withdrawal Notice (as defined below and in the proposed rule change) an effective date of withdrawal, which date shall be no later than ten (10) business days following the last day of the applicable Loss Allocation Withdrawal Notification Period (as defined below and in the proposed rule change) (*i.e.,* no later than ten (10) business days after the 5th business day following the first Loss Allocation Notice in that round of loss allocation),[25] (ii) cease all activity that would result in transactions being submitted to NSCC for clearance and settlement for which such Member would be obligated to perform, where the scheduled final settlement date would be later than the effective date of the Member's withdrawal, and (iii) ensure that all clearance and settlement activity for which such Member is obligated to NSCC is fully and finally settled by the effective date of the Member's withdrawal, including, without limitation, by resolving by such date all fails and buy-in obligations.

As proposed, a Member that withdraws in compliance with proposed Section 6 of Rule 4 would remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under Rule 4; however, its aggregate obligation would be limited to the amount of its Loss Allocation Cap (as fixed in the round for which it withdrew).

The proposed rule changes are designed to enable NSCC to continue the loss allocation process in successive rounds until all of NSCC's losses are allocated. To the extent that a Member's Loss Allocation Cap exceeds the Member's Required Fund Deposit on the first day of the applicable Event Period, NSCC may in its discretion retain any excess amounts on deposit from the Member, up to the Member's Loss Allocation Cap.

The proposed rule changes relating to capping withdrawing Members' loss allocation exposure and related changes to the withdrawal process are set forth in proposed Sections 4 and 6 of Rule 4, as further described below.

B. Changes To Align Loss Allocation Rules

The proposed rule changes would align the loss allocation rules, to the extent practicable and appropriate, of the three DTCC Clearing Agencies so as to provide consistent treatment, especially for firms that are participants of two or more DTCC Clearing Agencies. As proposed, the loss allocation waterfall and certain related provisions, *e.g.,* returning a former Member's Clearing Fund, would be consistent across the DTCC Clearing Agencies to the extent practicable and appropriate. The proposed rule changes of NSCC that would align loss allocation rules of the DTCC Clearing Agencies are set forth in proposed Sections 1, 2, 7, and 12 of Rule 4, as further described below.

C. Clarifying Changes Relating to Loss Allocation

The proposed rule changes are intended to make the provisions in the Rules governing loss allocation more transparent and accessible to Members. In particular, NSCC is proposing the following changes relating to loss allocation to clarify Members' obligations for Declared Non-Default Loss Events.

Aside from losses that NSCC might face as a result of a Defaulting Member Event, NSCC could incur non-default losses incident to its clearance and settlement business.[26] The Rules currently permit NSCC to apply Clearing Fund to non-default losses. Specifically, pursuant to Section 2(b) of Rule 4,[27] NSCC can use the Clearing Fund to satisfy losses or liabilities of NSCC incident to the operation of the clearance and settlement business of NSCC. Section II of Addendum K provides additional details regarding the application of the Clearing Fund to losses outside of a System.

If there is a failure of NSCC following a non-default loss, such occurrence would affect Members in much the same way as a failure of NSCC following a Defaulting Member Event. Accordingly, NSCC is proposing rule changes to enhance the provisions relating to non-default losses by clarifying Members' obligations for such losses.

Specifically, NSCC is proposing enhancement of the governance around non-default losses that would trigger loss allocation to Members by specifying that the Board of Directors would have to determine that there is a non-default loss that may be a significant and substantial loss or liability that may materially impair the ability of NSCC to provide clearance and settlement services in an orderly manner and will potentially generate losses to be mutualized among the Members in order to ensure that NSCC may continue to offer clearance and settlement services in an orderly manner. The proposed rule change would provide that NSCC would then be required to promptly notify Members of this determination, which is referred to in the proposed rule as a Declared Non-Default Loss Event. In addition, NSCC is proposing to better align the interests of NSCC with those of its Members by stipulating a mandatory Corporate Contribution apply to a Declared Non-Default Loss Event prior to any allocation of the loss among Members, as described above. Additionally, NSCC is proposing language to clarify Members' obligations for Declared Non-Default Loss Events.

The proposed rule changes relating to Declared Non-Default Loss Events and Members' obligations for such events are set forth in proposed Section 4 of Rule 4, as further described below.

[25] NSCC believes that having an effective date of withdrawal that is not later than ten (10) business days following the last day of the Loss Allocation Withdrawal Notification Period would provide Members with a reasonable period of time to wind down their activities at NSCC while minimizing any uncertainty typically associated with a longer withdrawal period.

[26] Non-default losses may arise from events such as damage to physical assets, a cyber-attack, or custody and investment losses.

[27] Section 2(b) of Rule 4 provides that ''the use of the Clearing Fund . . . shall be limited to satisfaction of losses or liabilities of the Corporation incident to the operation of the clearance and settlement business of the Corporation other than losses and liabilities of a System.'' *Supra* note 5.

D. Reduce the Time Within Which NSCC Is Required To Return a Former Member's Clearing Fund Deposit

The proposed rule change would reduce the time period in which NSCC may retain a Member's Clearing Fund deposit. Specifically, NSCC proposes that if a Member gives notice to NSCC of its election to withdraw from membership, NSCC will return the Member's Actual Deposit in the form of (i) cash or securities within thirty (30) calendar days and (ii) Eligible Letters of Credit within ninety (90) calendar days, after all of the Member's transactions have settled and all matured and contingent obligations to NSCC for which the Member was responsible while a Member have been satisfied, except NSCC may retain for up to two (2) years the Actual Deposits from Members who have Sponsored Accounts at DTC.

NSCC believes that shortening the time period for the return of a Member's Clearing Fund deposit would be helpful to firms who have exited NSCC so that they could have use of the deposits sooner than under the current Rules while at the same time protecting NSCC because such return would only occur if all obligations of the terminating Member to NSCC have been satisfied, which would include both matured as well as contingent obligations.

The proposed rule changes relating to the reduced time period in which NSCC is required to return the Clearing Fund deposit of a former Member are set forth in proposed Section 7 of Rule 4, as further described below.

The foregoing changes as well as other changes (including a number of conforming and technical changes) that NSCC is proposing in order to improve the transparency and accessibility of the Rules are described in detail below.

E. Loss Allocation Waterfall Comparison

The following example [28] illustrates the differences between the current and proposed loss allocation provisions:

Assumptions:

(i) Member A defaults on a business day (Day 1). On the same day, NSCC ceases to act for Member A and notifies Members of the cease to act. After liquidating Member A's portfolio and applying Member A's Clearing Fund deposit, NSCC has a loss of $350 million.

(ii) Member X voluntarily retires from membership five (5) business days after NSCC ceases to act for Member A (Day 6).

(iii) Member B defaults seven (7) business days after NSCC ceases to act for Member A (Day 8). On the same day, NSCC ceases to act for Member B and notifies Members of the cease to act. After liquidating Member B's portfolio and applying Member B's Clearing Fund deposit, NSCC has a loss of $350 million.

(iv) The current NSCC loss provisions require NSCC to contribute no less than 25% of its retained earnings as a corporate contribution. For the purposes of this example, it is assumed that NSCC will contribute 25% of its retained earnings. The amount of NSCC's retained earnings is $416 million.

(v) NSCC's General Business Risk Capital Requirement is $154 million.

Current Loss Allocation:

Under the current loss allocation provisions, with respect to the losses arising out of Member A's default, NSCC will contribute $104 million ($416 million * 25%) from retained earnings and then allocate the remaining loss of $246 million ($350 million − $104 million) to Members.

With respect to losses arising out of Member B's default, NSCC will contribute $78 million (($416 million − $104 million) * 25%) from retained earnings and then allocate the remaining loss of $272 million ($350 million − $78 million) to Members. Because Member X voluntarily retired before NSCC ceased to act for Member B, Member X is not subject to loss allocation with respect to losses arising out of Member B's default.

Altogether, with respect to losses arising out of defaults of Member A and Member B, NSCC will contribute $182 million of retained earnings and will allocate losses of $518 million to Members.

Proposed Loss Allocation:

Under the proposed loss allocation provisions, a Defaulting Member Event with respect to Member A's default would have occurred on Day One, and a Defaulting Member Event with respect to Member B's default would have occurred on Day 8. Because the Defaulting Member Events occurred during a 10-business day period, they would be grouped together into an Event Period for purposes of allocating losses to Members. The Event Period would begin on the 1st business day and end on the 10th business day.

With respect to losses arising out of Member A's default, NSCC would apply a Corporate Contribution of $77 million ($154 million * 50%) and then allocate the remaining loss of $273 million ($350 million − $77 million) to Members.

With respect to losses arising out of Member B's default, NSCC would not apply a Corporate Contribution since it would have already contributed the maximum Corporate Contribution of 50% of its General Business Risk Capital Requirement. NSCC would allocate the losses of $350 million arising out of Member B's default to Members. Because Member X was a Member on the first day of the Event Period, Member X would be subject to loss allocation with respect to all events occurring during the Event Period, even if the event occurred after its retirement. Therefore, Member X would be subject to loss allocation with respect to Member B's default.

Altogether, with respect to losses arising out of defaults of Member A and Member B, NSCC would apply a Corporate Contribution of $77 million and would allocate losses of $623 million to Members. The principal differences in the above example are due to (i) the proposed changes to the calculation and application of the Corporate Contribution and (ii) the proposed introduction of an Event Period.

(ii) Detailed Description of the Proposed Rule Changes Related to Loss Allocation

A. Proposed Changes to Rule 4 (Clearing Fund)

Overview of Rule 4 (Clearing Fund)

Rule 4 currently addresses Clearing Fund requirements and loss allocation obligations. While Procedure XV addresses the various Clearing Fund calculations, Rule 4 sets forth rights, obligations and other aspects associated with the Clearing Fund, as well as the loss allocation process. Rule 4 is currently organized into 12 sections. NSCC is proposing changes to each section, and consolidating provisions in Rule 4 relating to Mutual Fund Services and Insurance and Retirement Processing Services into new sections, as described below.

Section 1

Section 1 of Rule 4 currently sets forth the requirement that each Member and Mutual Fund/Insurance Services Member shall, and each Fund Member and Insurance Carrier/Retirement Services Member may, be required to make a deposit to the Clearing Fund. Section 1 currently provides that each participant's Required Deposit is based on one or more formulas specified by NSCC's Board of Directors. The basis of each such formula is participants' usage of NSCC's facilities. Section 1 also currently sets forth the minimum

[28] For purposes of this example, NSCC has assumed that the losses occurred with guaranteed CNS activity of Members, and NSCC allocated all such Members' deposits to the Clearing Fund to CNS activity (which is typically more than 99% of the NSCC daily gross settlement amount).

amount of each participant category's Required Deposit.

Current Section 1 allows a portion of a participant's Clearing Fund deposit to be evidenced by an open account indebtedness secured by Eligible Clearing Fund Securities, subject to certain limitations set forth in Procedure XV, and sets forth the various requirements associated with the deposit of Eligible Clearing Fund Securities. Current Section 1 also permits NSCC to require participants to post a letter of credit where NSCC believes the participants present legal risk.

Current Section 1 also provides that NSCC allocate the Clearing Fund by types of service (*e.g.,* Mutual Fund Services) as well as by Systems (*e.g.,* CNS), and divide the Clearing Fund into separate ''Allocations'' for each such service and separate ''Funds'' for each such System.

Under the proposed rule change, NSCC is proposing to add a subheading of ''Required Fund Deposits'' to Section 1 and restructure Section 1 so that it applies to Members only and delete references to Mutual Fund/Insurance Services Members, Fund Members and Insurance Carrier/Retirement Services Members from Section 1.[29] Provisions of Rule 4 regarding Mutual Fund/Insurance Services Members and Fund Members would be covered in a new proposed Section 13 to Rule 4, discussed below. Provisions of Rule 4 regarding Insurance Carrier/Retirement Services Members would be covered in a new proposed Section 14 to Rule 4, discussed below.

Under the proposed rule change, Section 1 would continue to have the same provisions as they relate to Members except for the following: (i) The language throughout the section would be reorganized, streamlined and clarified, (ii) ''Required Deposits'' would be renamed ''Required Fund Deposits,'' [30] which is a more descriptive term to refer to Members' deposits required for the Clearing Fund, and would harmonize with the rules of FICC/GSD and FICC/MBSD [31] and the term used in such rules,[32] (iii) a sentence would be added regarding additional deposits maintained by the Members at NSCC, (iv) the provision regarding the Clearing Fund being allocated by Systems and services would be deleted,[33] and (v) change ''Rules'' to ''Rules and Procedures'' to better reflect the name of NSCC's rulebook.[34]

The proposed sentence regarding additional deposits to the Clearing Fund would permit Members to post such additional deposits at their discretion and would make clear that such additional deposits would be deemed to be part of the Clearing Fund and the Member's Actual Deposit (as discussed below and as defined in the proposed rule change) but would not be deemed to be part of the Member's Required Fund Deposit.

NSCC proposes to add language in Section 1 to make it clear that each Member would grant NSCC a first priority perfected security interest in its right, title and interest in and to any Eligible Clearing Fund Securities, funds and assets pledged to NSCC to secure the Member's open account indebtedness or placed by the Member in NSCC's possession (or its agents acting on its behalf) to secure all such Member's obligations to NSCC, and that NSCC would be entitled to exercise the rights of a pledgee under common law and a secured party under Articles 8 and 9 of the New York Uniform Commercial Code with respect to such assets. The additional language would further harmonize the Rules with language used in the FICC/GSD Rules and FICC/MBSD Rules,[35] thus providing consistent treatment of pledged resources for firms that are members of both NSCC and FICC.

NSCC proposes to clarify the language in footnote 2 of Section 1. In addition, NSCC proposes to add ''Eligible Letter of Credit'' as a defined term to refer to letters of credit posted by participants if required by NSCC,[36] which would harmonize the term with the term used in the FICC/GSD Rules and FICC/MBSD Rules,[37] thus providing consistent terminology for firms that are members of both NSCC and FICC.

Similarly, NSCC proposes to add ''Actual Deposit'' as a defined term in Section 1 to refer to Eligible Clearing Fund Securities, funds and assets pledged to NSCC to secure a Member's open account indebtedness or placed by a Member in the possession of NSCC (or its agents acting on its behalf) and any Eligible Letters of Credit issued on behalf of a Member in favor of NSCC.

Instead of requiring participants to pledge Eligible Clearing Fund Securities to NSCC's account at a Qualified Securities Depository designated by the participants, NSCC proposes to clarify and streamline Section 1 of proposed Rule 4 to provide that Eligible Clearing Fund Securities pledged to secure a Member's open account indebtedness would be delivered to NSCC's account at DTC.

NSCC would delete the provision regarding allocation of the Clearing Fund by Systems and services, as this provision is no longer relevant under the proposed rule change. Provisions relating to Mutual Fund Services and Insurance and Retirement Processing Services in Section 1 (as well as other sections in Rule 4) would be consolidated in the proposed new Sections 13 and 14, entitled ''Mutual Fund Deposits'' and ''Insurance Deposits,'' respectively.

To consolidate provisions regarding the maintenance, investment and permitted use of Clearing Fund, NSCC would move the last paragraph of Section 1 about segregation and maintenance of Clearing Fund (again, in terms of ''Fund,'' ''System,'' and ''Allocation,'' as discussed above) to Section 2.

In addition, NSCC proposes to correct a typographical error in the reference to a footnote in Section 1 of Rule 4. Specifically, there is an incorrect reference to footnote 22 in the second paragraph of Section 1 in current Rule 4. NSCC is proposing to change this reference to reflect the correct footnote, which is footnote 2.

Section 2

Section 2 of Rule 4 currently covers the permitted uses of the Clearing Fund (again by ''Fund'' and ''Allocation,'' as set forth in current Section 1), including the investment of Clearing Fund Cash and Cash Receipts, as well as participants' rights to any interest earned or paid on pledged Eligible

[29] In addition to Section 1 of Rule 4, NSCC is proposing to delete references to Mutual Fund/Insurance Services Members, Fund Members and Insurance Carrier/Retirement Services Members from Sections 2, 3, 4, 5, 6, 7, 8, 9, and 12 of Rule 4.

[30] In addition to Section 1 of Rule 4, NSCC is proposing to rename ''Required Deposits'' to ''Required Fund Deposits'' in Sections 2, 3, 4, 8, 9, and 11 of Rule 4.

[31] FICC/GSD Rulebook (''FICC/GSD Rules''), *available at http://dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf* and FICC/MBSD Clearing Rules (''FICC/MBSD Rules''), *available at http://dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf.*

[32] *See* FICC/GSD Rule 1 (Definitions) and FICC/MBSD Rule 1 (Definitions), *supra* note 31.

[33] In addition to Section 1 of Rule 4, NSCC is proposing to delete references to the Clearing Fund being allocated by Systems and services from Sections 2, 3, and 4 of Rule 4.

[34] In addition to Section 1 of Rule 4, NSCC is proposing to change ''Rules'' to ''Rules and Procedures'' in Sections 9 and 12 of Rule 4.

[35] *See* Section 4 of FICC/GSD Rule 4 and Section 4 of FICC/MBSD Rule 4, *supra* note 31.

[36] In addition to Section 1 of Rule 4, NSCC is also proposing to rename ''Letter of Credit'' to ''Eligible Letter of Credit'' in Sections 2 and 12 of Rule 4.

[37] *See* FICC/GSD Rule 1 (Definitions) and FICC/MBSD Rule 1 (Definitions), *supra* note 31.

Clearing Fund Securities or cash deposits.

NSCC is proposing to add a subheading of ''Permitted Use, Investment, and Maintenance of Clearing Fund Assets'' to Section 2 and restructure Section 2 so that it applies to Members only. NSCC is also proposing to restructure Section 2 so that the permitted use of Clearing Fund appears first, then the investment of Clearing Fund, followed by maintenance of Clearing Fund.

Under the proposed rule change, the permitted use of Clearing Fund paragraph would continue to have the same provisions as they relate to how the Clearing Fund can be used by NSCC, except the provisions would be streamlined and clarified. Specifically, in order to be consistent with the proposed change in Section 4 (as described below) regarding NSCC requiring Members to pay their loss allocation amounts (leaving their Required Fund Deposits intact), NSCC is proposing to modify the permitted use of Clearing Fund to make it clear that the Clearing Fund can be used by NSCC to secure each Member's performance of obligations to NSCC, including each Member's obligations with respect to any loss allocations as set forth in Section 4 of Rule 4. NSCC is also proposing to delete the defined term of Cash Receipts and related provisions from Rule 4 because, unlike the Clearing Fund, Cash Receipts are money payments received from participants and payable to others; therefore, NSCC believes that continuing to include Cash Receipts in Rule 4 is no longer necessary and may cause confusion among Members.

NSCC is proposing to add a paragraph that provides that each time NSCC uses any part of the Clearing Fund to provide liquidity to NSCC to meet its settlement obligations, including, without limitation, through the direct use of cash in the Clearing Fund or through the pledge or rehypothecation of pledged Eligible Clearing Fund Securities in order to secure liquidity for more than thirty (30) calendar days, NSCC, at the close of business on the 30th calendar day (or on the first business day thereafter) from the day of such use, would consider the amount used but not yet repaid as a loss to the Clearing Fund incurred as a result of a Defaulting Member Event and immediately allocate such loss in accordance with proposed Section 4 of Rule 4. NSCC believes that this proposed change would increase transparency and accessibility of the Rules for Members by specifying a point in time by which NSCC would need to replenish the Clearing Fund through loss allocation if NSCC uses the Clearing Fund to provide or secure liquidity to NSCC to meet its settlement obligations. NSCC believes that a period of thirty (30) calendar days would be appropriate because it would provide sufficient time for NSCC to determine whether it would be able to obtain the necessary funds from liquidation of the portfolio of the Defaulting Member to repay the used Clearing Fund amount. In addition, this proposed change would also harmonize this section with the comparable section in the FICC/GSD Rules and FICC/MBSD Rules,[38] so as to provide consistent treatment for firms that are members of both NSCC and FICC.

Proposed Section 2 would continue to have the same provisions concerning the investment and maintenance of the Clearing Fund, except these provisions would also be streamlined and clarified. Specifically, NSCC is proposing language to make it clear that it may invest cash in the Clearing Fund in accordance with the Clearing Agency Investment Policy adopted by NSCC.[39] NSCC would revise the relocated sentence from Section 1 which provides that NSCC shall not be required to segregate any Clearing Fund (again, in terms of ''Fund,'' ''System,'' and ''Allocation,'' as discussed above) in order to (i) conform to the proposed deletions in Section 1 and use the newly defined term of ''Actual Deposit'' as set forth in Section 1 and (ii) make clear that NSCC would not be required to segregate a Member's Actual Deposit but that NSCC would maintain books and records concerning the assets that constitute each Member's Actual Deposit.

Under the proposed rule change, Members would continue to be entitled to any interest earned or paid on Clearing Fund cash deposits and pledged Eligible Clearing Fund Securities; however, NSCC is proposing additional language to make it clear that interest on pledged Eligible Clearing Fund Securities that is received by NSCC would be credited to a Member's cash deposits to the Clearing Fund, except in the event of a default by such Member on any obligations to NSCC, in which case NSCC may exercise its rights under proposed Section 3 of Rule 4.

Section 3

Section 3 of Rule 4 currently provides that NSCC may apply a participant's actual deposit to any obligation the participant has to NSCC that the participant has failed to satisfy and to any Cross-Guaranty Obligation. Participants are required to eliminate any resulting deficiencies in their Required Deposits within such time as NSCC requires. Section 3 also currently provides for the manner in which loss allocation would apply with respect to Off-the-Market Transactions.

Under the proposed rule change, NSCC is proposing to add a subheading of ''Application of Clearing Fund Deposits and Other Amounts to Members' Obligations'' and to delete provisions that do not apply to Members and/or that reference the Clearing Fund being allocated into Funds/Allocations by Systems and services. Under the proposed rule change, NSCC would retain the provisions in Section 3 regarding applying the Member's Actual Deposit to satisfy an obligation to NSCC that a Member fails to satisfy and the requirement to replenish the Required Fund Deposit as necessary, but NSCC proposes to add clarifying language that, in addition to a Member's Actual Deposit, NSCC will also apply any amounts available under a Clearing Agency Cross-Guaranty Agreement and any proceeds therefrom to satisfy the obligation. NSCC also proposes to add language making it clear that NSCC may take any and all actions with respect to the assets and amounts referenced in the prior sentence, including assignment, transfer, and sale of any Eligible Clearing Fund Securities, that NSCC determines is appropriate.

Under the proposed rule change, NSCC would move the provision regarding allocation of losses from Off-the-Market Transactions to proposed Section 4 of Rule 4, which addresses allocation of losses to Members. NSCC would streamline and clarify the remaining provisions for transparency and accessibility.

[38] *See* Section 5 of FICC/GSD Rule 4 and Section 5 of FICC/MBSD Rule 4, *supra* note 31.

[39] *See* Securities Exchange Act Release No. 79528 (December 12, 2016), 81 FR 91232 (December 16, 2016) (SR–NSCC–2016–003). The Clearing Agency Investment Policy (the ''Policy'') governs the management, custody, and investment of cash deposited to the Clearing Fund, the proprietary liquid net assets (cash and cash equivalents) of NSCC and other funds held by NSCC. The Policy sets forth guiding principles for the investment of those funds, which include adherence to a conservative investment philosophy that places the highest priority on maximizing liquidity and avoiding risk, as well as mandating the segregation and separation of funds. The Policy also addresses the process for evaluating credit ratings of counterparties and identifies permitted investments within specified parameters. In general, assets are required to be held by regulated and creditworthy financial institution counterparties and invested in financial instruments that, with respect to the Clearing Fund, may include deposits with banks, including the Federal Reserve Bank of New York, collateralized reverse-repurchase agreements, direct obligations of the U.S. government and money-market mutual funds.

Section 4 and Section 5

Current Section 4 of Rule 4 contains NSCC's current loss allocation waterfall, which would be initiated if NSCC incurs a loss or liability in a System that is not satisfied pursuant to current Section 3. Section 4 currently provides for the following loss allocation waterfall:

(i) Application of NSCC's existing retained earnings or such lesser part [40] of the existing retained earnings unless the Board of Directors elects to apply the Fund/Allocation for a particular System or service.

(ii) If a loss or liability remains after the application of the retained earnings, NSCC would apply the Clearing Fund (this application is subject to the current structure where the Rules provide that the Clearing Fund is allocated to different Systems/services).

a. NSCC is required to provide participants and the Commission with 5 business days' prior notice before applying the Clearing Fund.

b. Participants (other than those responsible for causing the loss or liability) would be charged pro rata based upon their allocation to the applicable Fund, less any amounts that participants were required to deposit pursuant to Rule 15.

Section 5 of Rule 4 currently states that if a pro rata charge is made pursuant to Rule 4 against a participant's actual Clearing Fund deposit, and as a consequence thereof the participant's remaining deposit is less than its Required Deposit, the participant would, upon demand by NSCC, be required to replenish its deposit to eliminate the deficiency within such time as NSCC shall require. Current Section 5 further provides that if the participant does not take this required action, NSCC may take disciplinary action against the participant, and any disciplinary action taken against the participant or the voluntary or involuntary termination of the participant's membership will not affect the obligations of the participant to NSCC or any remedy to which NSCC may be entitled under applicable law.

Under the proposed rule change, NSCC is proposing to add a subheading of ''Loss Allocation Waterfall, Off-the-Market Transactions'' to Section 4 and delete provisions that do not apply to Members and/or that reference the Clearing Fund being allocated into Funds/Allocations by System or service. In addition, NSCC is proposing to restructure its loss allocation waterfall as described below.

Under the proposal, Section 4 would make clear that the loss allocation waterfall applies to any loss and liability incurred by NSCC arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event.

As proposed, Section 4 would provide that, for the purposes of Rule 4, the term ''Defaulting Member'' would mean a Member for which NSCC has ceased to act pursuant to Rule 46,[41] the term ''Defaulting Member Event'' would mean the determination by NSCC to cease to act for a Member pursuant to Rule 46, and the term ''Declared Non-Default Loss Event'' would mean the determination by the Board of Directors that a loss or liability incident to the clearance and settlement business of NSCC may be a significant and substantial loss or liability that may materially impair the ability of NSCC to provide clearance and settlement services in an orderly manner and will potentially generate losses to be mutualized among Members in order to ensure that NSCC may continue to offer clearance and settlement services in an orderly manner. Proposed Section 4 would establish the concept of an ''Event Period'' to provide for a clear and transparent way of handling multiple loss events occurring in a period of ten (10) business days, which would be grouped into an Event Period.[42] As stated above, both Defaulting Member Events or Declared Non-Default Loss Events could occur within the same Event Period.

Under the proposal, an Event Period with respect to a Defaulting Member Event would begin on the day NSCC notifies participants that it has ceased to act for the Defaulting Member (or the next business day, if such day is not a business day). In the case of a Declared Non-Default Loss Event, an Event Period would begin on the day that NSCC notifies Members of the Declared Non-Default Loss Event (or the next business day, if such day is not a business day). If a subsequent Defaulting Member Event or Declared Non-Default Loss Event occurs during an Event Period, any losses or liabilities arising out of or relating to any such subsequent event would be resolved as losses or liabilities that are part of the same Event Period, without extending the duration of such Event Period.

As proposed, each Member would be obligated to NSCC for the entire amount of any loss or liability incurred by NSCC arising out of or relating to any Defaulting Member Event with respect to such Member. Under the proposal, to the extent that such loss or liability is not satisfied pursuant to proposed Section 3 of Rule 4, NSCC would apply a Corporate Contribution thereto and charge the remaining amount of such loss or liability ratably to other Members, as provided in proposed Section 4.

Under proposed Section 4, the loss allocation waterfall would begin with a corporate contribution from NSCC (''Corporate Contribution''), as is the case under the current Rules, but in a different form than under the current Section 4 of Rule 4. Today, pursuant to Addendum E, in the event of a Member impairment, NSCC is required to apply at least 25% of its retained earnings existing at the time of a Member impairment; however, no corporate contribution from NSCC is currently required for losses resulting other than those from Member impairments. Under the proposal, NSCC would amend Section 5 to add a subheading of ''Corporate Contribution'' and define NSCC's Corporate Contribution with respect to any loss allocation pursuant to proposed Section 4 of Rule 4, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, as an amount that is equal to fifty (50) percent of the amount calculated by NSCC in respect of its General Business Risk Capital Requirement as of the end of the calendar quarter immediately preceding the Event Period.[43] The proposed rule change would specify that NSCC's General Business Risk Capital Requirement, as defined in NSCC's Clearing Agency Policy on Capital Requirements,[44] is, at a minimum, equal to the regulatory capital that NSCC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[45]

As proposed, if NSCC applies the Corporate Contribution to a loss or liability arising out of or relating to one or more Defaulting Member Events or Declared Non-Default Loss Events relating to an Event Period, then for any subsequent Event Periods that occur during the two hundred fifty (250) business days thereafter,[46] the Corporate Contribution would be reduced to the

[40] Addendum E provides that NSCC ''will apply no less than twenty-five percent (25%) of its retained earnings, existing at the time of a Member impairment which gives rise to a loss or liability not satisfied by the impaired Member's Clearing Fund deposit, to such loss or liability.'' *Supra* note 5.

[41] NSCC may cease to act for a Member pursuant to any of the circumstances set forth under Rule 46 (Restrictions on Access to Services), including, but not limited to, in the event the Member is in default of any delivery of funds or securities to NSCC. *Supra* note 5.

[42] *Supra* note 15.

[43] *Supra* note 8.

[44] *Supra* note 9.

[45] *Supra* note 10.

[46] *Supra* note 13.

remaining unused portion of the Corporate Contribution amount that was applied for the first Event Period. Proposed Section 5 would require NSCC to notify Members of any such reduction to the Corporate Contribution.

Currently, the Rules do not require NSCC to contribute its retained earnings to losses and liabilities other than from Member impairments. Under the proposal, NSCC would expand the application of its corporate contribution beyond losses and liabilities from Member impairments. The proposed Corporate Contribution would apply to losses or liabilities relating to or arising out of Defaulting Member Events and Declared Non-Default Loss Events, and would be a mandatory loss contribution by NSCC prior to any allocation of the loss among Members.

Addendum E currently provides NSCC the option to contribute amounts higher than the specified percentage of retained earnings, as determined by the Board of Directors, to any loss or liability incurred by NSCC as the result of a Member's impairment. This option would be retained and expanded under the proposal to also cover non-default losses. Proposed Section 5 would provide that nothing in the Rules would prevent NSCC from voluntarily applying amounts greater than the Corporate Contribution against any NSCC loss or liability, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, if the Board of Directors, in its sole discretion, believes such to be appropriate under the factual situation existing at the time.

Proposed Section 4 of Rule 4 would provide that NSCC shall apply the Corporate Contribution to losses and liabilities that arise out of or relate to one or more Defaulting Member Events and/or Declared Non-Default Loss Events that occur within an Event Period. The proposed rule change also provides that if losses and liabilities with respect to such Event Period remain unsatisfied following application of the Corporate Contribution, NSCC would allocate such losses and liabilities to Members, as described below.

Proposed Section 4 of Rule 4 would also retain the requirement of loss allocation among Members if a loss or liability remains after the application of the Corporate Contribution, as described above. In contrast to the current Section 4 where NSCC would apply Members' Required Deposits to the mutualized loss allocation amounts, under the proposal, NSCC would require Members to pay their loss allocation amounts (leaving their Required Fund Deposits intact).[47] Loss allocation obligations would continue to be calculated based upon a Member's pro rata share of losses and liabilities (although the pro rata share would be calculated differently than it is today), and Members would still retain the ability to voluntarily withdraw from membership and cap their loss allocation obligation (although the loss allocation obligation would also be calculated differently than it is today).

The proposed rule change to Section 4 of Rule 4 would clarify that each Member that is a Member on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Defaulting Member Event (other than a Defaulting Member Event with respect to which it is the Defaulting Member) and each Declared Non-Default Loss Event occurring during the Event Period. The proposal would make it clear that any Member for which NSCC ceases to act on a non-business day, triggering an Event Period that commences on the next business day, shall be deemed to be a Member on the first day of that Event Period.

Under the proposed rule change, a loss allocation ''round'' would mean a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the round cap. When the aggregate amount of losses allocated in a round equals the round cap, any additional losses relating to the applicable Event Period would be allocated in one or more subsequent rounds, in each case subject to a round cap for that round. NSCC may continue the loss allocation process in successive rounds until all losses from the Event Period are allocated among Members that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 6 of Rule 4.

As proposed, each loss allocation would be communicated to Members by the issuance of a Loss Allocation Notice. Under the proposal, each Member's pro rata share of losses and liabilities to be allocated in any round would be equal to (i) the Member's Average RFD divided by (ii) the sum of Average RFD amounts of all Members subject to loss allocation in such round.

Each Loss Allocation Notice would specify the relevant Event Period and the round to which it relates. The first Loss Allocation Notice in any first, second, or subsequent round would expressly state that such Loss Allocation Notice reflects the beginning of the first, second, or subsequent round, as the case may be, and that each Member in that round has five (5) business days from the issuance of such first Loss Allocation Notice for the round (such period, a ''Loss Allocation Withdrawal Notification Period'') to notify NSCC of its election to withdraw from membership with NSCC pursuant to proposed Section 6 of Rule 4, and thereby benefit from its Loss Allocation Cap.[48] As proposed, the ''Loss Allocation Cap'' of a Member would be equal to the greater of (x) its Required Fund Deposit on the first day of the applicable Event Period and (y) its Average RFD.

NSCC is proposing to clarify that after a first round of loss allocation with respect to an Event Period, only Members that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 6 of Rule 4 would be subject to further loss allocation with respect to that Event Period.

As proposed, Members would have two (2) business days after NSCC issues a first round Loss Allocation Notice to pay the amount specified in any such notice.[49] On a subsequent round (*i.e.,* if the first round did not cover the entire loss of the Event Period because NSCC was only able to allocate up to the round cap), Members would also have two (2) business days after notice by NSCC to pay their loss allocation amounts (again subject to their Loss Allocation Caps), unless Members have notified (or will timely notify) NSCC of their election to withdraw from membership with respect to a prior loss allocation round pursuant to proposed Section 6 of Rule 4.

As proposed, Section 4 would also provide that, to the extent that a Member's Loss Allocation Cap exceeds

[47] NSCC believes that shifting from the two-step methodology of applying the Clearing Fund and then requiring Members to immediately replenish it, to requiring direct payment would increase efficiency while preserving the right to charge a Member's Clearing Fund deposits in the event the Member does not timely pay. Such a failure to pay would trigger recourse to the Clearing Fund deposits of the Member under proposed Section 3 of Rule 4. In addition, this change would provide greater stability for NSCC in times of stress by allowing NSCC to retain the Clearing Fund, its critical prefunded resource, while charging loss allocations. NSCC believes doing so would allow NSCC to cover its current credit exposures to Members at all times. By retaining the Clearing Fund as proposed, NSCC could use the Clearing Fund to secure the performance obligations of Members to NSCC, including their payment obligation for any loss allocation, while maintaining access to prefunded resources. By being able to manage its current credit exposures throughout the loss allocation process, NSCC would be able to continue to provide its critical operations and services during what would be expected to be a stressful period.

[48] *Supra* note 18.

[49] *Supra* note 22.

the Member's Required Fund Deposit on the first day of the applicable Event Period, NSCC may in its discretion retain any excess amounts on deposit from the Member, up to the Member's Loss Allocation Cap.

Under the proposal, if a Member fails to make its required payment in respect of a Loss Allocation Notice by the time such payment is due, NSCC would have the right to proceed against such Member as a Member that has failed to satisfy an obligation in accordance with proposed Section 3 of Rule 4 described above. Members who wish to withdraw would be required to comply with the requirements in proposed Section 6 of Rule 4, described further below. Specifically, proposed Section 4 of Rule 4 would provide that if, after notifying NSCC of its election to withdraw from membership pursuant to proposed Section 6 of Rule 4, the Member fails to comply with the provisions of proposed Section 6 of Rule 4, its notice of withdrawal would be deemed void and any further losses resulting from the applicable Event Period may be allocated against it as if it had not given such notice.

Under the proposal, NSCC would delete the provision in current Section 4 of Rule 4 that requires NSCC to provide Members and the Commission with 5 business days' prior notice before applying the Clearing Fund to a loss or liability because such requirement would no longer be relevant under the proposed rule change. Under the proposed rule change, NSCC would notify Members subject to loss allocation of the amounts being allocated to them in one or more Loss Allocation Notices. As proposed, instead of applying the Clearing Fund, NSCC would require Members to pay their loss allocation amounts (leaving their Clearing Fund deposits intact). In order to conform to these proposed rule changes, NSCC is proposing to eliminate the required notification to Members regarding the application of Clearing Fund in current Section 4 of Rule 4. NSCC is also proposing to delete the required notification to the Commission regarding the application of Clearing Fund in the same section. While as a practical matter, NSCC would notify the Commission of a decision to loss allocate, NSCC does not believe such notification needs to be specified in the Rules.

Under the proposed rule change, NSCC would move the provision related to Off-the-Market Transactions from current Section 3 of Rule 4 to proposed Section 4 of Rule 4 and clarify that (i) a loss or liability of NSCC in connection with the close-out or liquidation of an Off-the-Market Transaction would be allocated to the Member that was the counterparty to such transaction and (ii) no allocation would be made if the Defaulting Member satisfied all applicable intraday mark-to-market margin charges assessed by NSCC with respect to the Off-the-Market Transaction prior to its default.[50]

Section 6

Proposed Section 6 of Rule 4 would include the provisions regarding withdrawal from membership currently covered by Section 8 of Rule 4. NSCC believes that relocating the provisions on withdrawal from membership as it pertains to loss allocation, so that it comes right after the section on the loss allocation waterfall, would provide for the better organization of Rule 4. As proposed, the subheading for Section 6 would read ''Withdrawal Following Loss Allocation.''

Currently, Section 8 of Rule 4 provides that participants may notify NSCC within ten (10) business days after receipt of notice of a pro rata charge that they have elected to terminate their membership and thereby avail themselves of a cap on loss allocation, which is currently their Required Deposit as fixed immediately prior to the time of the pro rata charge.

As stated above, under the proposed rule change, a Member who wishes to withdraw from membership in respect of a loss allocation round must provide notice of its election to withdraw (''Loss Allocation Withdrawal Notice'') within five (5) business days from the issuance of the first Loss Allocation Notice in any round.[51] In order to avail itself of its Loss Allocation Cap, the Member would need to follow the requirements in proposed Section 6 of Rule 4, which would provide that the Member must: (i) Specify in its Loss Allocation Withdrawal Notice an effective date for withdrawal from membership, which date shall not be later than ten (10) business days following the last day of the Loss Allocation Withdrawal Notification Period (*i.e.,* no later than ten (10) business days after the 5th business day following the first Loss Allocation Notice in that round of loss allocation),[52] (ii) cease all activity that would result in transactions being submitted to NSCC for clearance and settlement for which such Member would be obligated to perform, where the scheduled final settlement date would be later than the effective date of the Member's withdrawal, and (iii) ensure that all clearance and settlement activity for which such Member is obligated to NSCC is fully and finally settled by the effective date of the Member's withdrawal, including, without limitation, by resolving by such date all fails and buy-in obligations.

Proposed Section 6 of Rule 4 would provide that a Member that withdraws in compliance with the requirements of proposed Section 6 of Rule 4 would nevertheless remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under proposed Rule 4; however, the Member's aggregate obligation would be limited to the amount of its Loss Allocation Cap (as fixed in the round for which it withdrew).

NSCC is proposing to include a sentence in proposed Section 6 of Rule 4 to make it clear that if the Member fails to comply with the requirements set forth in that section, its Loss Allocation Withdrawal Notice will be deemed void, and the Member will remain subject to further loss allocations pursuant to proposed Section 4 of Rule 4 as if it had not given such notice.

Currently, Section 8 also contains provisions regarding additional pro rata charges that may be made by NSCC for the same loss or liability under the existing loss allocation process and the applicable caps that participants wishing to voluntarily terminate their membership after such additional pro rata charges are noticed may avail themselves of. These provisions would be replaced by the loss allocation process contained in proposed Section 4 described above.

Section 7

As proposed, Section 7 would cover the provisions on the return of a Member's Clearing Fund deposit that are currently covered by Section 6 of Rule 4. Proposed Section 7's subheading would be ''Return of Members' Clearing Fund Deposits'' and would apply only to Members.

Currently, with respect to the return of Clearing Fund deposits, Section 6 of Rule 4 states that NSCC will return a participant's Clearing Fund deposit 90 days after 3 conditions are met: (i) The participant ceases to be a participant, (ii) all transactions open at the time the participant ceases to be a participant which could result in a charge to the Clearing Fund have been closed, and (iii) all obligations of the participant to NSCC have been satisfied or have been

[50] *See* Securities Exchange Act Release No. 79598 (December 19, 2016), 81 FR 94462 (December 23, 2016) (SR–NSCC–2016–005), at 94465, and Securities Exchange Act Release No. 79592 (December 19, 2016), 81 FR 94448 (December 23, 2016) (SR–NSCC–2016–803), at 94452.

[51] *Supra* note 18.

[52] *Supra* note 25.

deducted from the participant's Clearing Fund deposit by NSCC, provided that the participant has provided NSCC with satisfactory indemnities or guarantees or another participant has been substituted on all transactions and obligations of the participant.

Current Section 6 provides further that in the absence of an acceptable guarantee, indemnity or substitution, NSCC will retain the entire Clearing Fund deposit of a participant if such deposit is less than $100,000 for two (2) years (or four (4) years for Members who have Sponsored Accounts at a Qualified Securities Depository) after conditions described in (i), (ii) and (iii) of the paragraph above have occurred. If the participant's Clearing Fund deposit is equal to or greater than $100,000, NSCC will retain the greater of twenty-five (25) percent of a participant's average Clearing Fund requirement over the twelve (12) months immediately prior to the date the participant ceased to be a participant, or $100,000 for two (2) years (or four (4) years for Members who have Sponsored Accounts at a Qualified Securities Depository) after conditions described in (i), (ii) and (iii) of the paragraph above have occurred.

Current Section 6 states that if a participant made a deposit with respect to the Mutual Fund Services or Insurance and Retirement Processing Services, the participant will be entitled to the return of this deposit ninety (90) days after all associated transactions in these services have been satisfied.

Finally, Section 6 currently provides that any obligation of a participant to NSCC unsatisfied at the time the participant ceases to be a participant will not be affected by such cessation of membership.

Proposed Section 7 would reduce the period in which NSCC may retain a Member's Clearing Fund deposit. Specifically, NSCC proposes that if a Member gives notice to NSCC of its election to withdraw from membership, NSCC will return the Member's Actual Deposit in the form of (i) cash or securities within thirty (30) calendar days and (ii) Eligible Letters of Credit within ninety (90) calendar days, after all of the Member's transactions have settled and all matured and contingent obligations to NSCC for which the Member was responsible while a Member have been satisfied, except NSCC may retain for up to two (2) years the Actual Deposits from Members who have Sponsored Accounts at DTC. NSCC believes that shortening the time periods for the return of a Member's Clearing Fund deposit would be helpful to firms who have exited NSCC so that they could have use of the deposits sooner than under the current Rules, while at the same time protecting NSCC because such return would only occur if all obligations of the terminating Member to NSCC have been satisfied. Proposed Section 7 would also harmonize the retention period for a Member's deposits to the Clearing Fund with the FICC/GSD Rules,[53] thus providing consistent treatment for firms that are members of both NSCC and FICC. Similarly, the Clearing Fund deposit retention for Members who have Sponsored Accounts at DTC would be reduced in order to stay consistent with the proposed retention period in the rules of DTC.[54] In addition, NSCC proposes to make it clear that a Member's obligations to NSCC would include both matured as well as contingent obligations.

Section 8

Proposed Section 8 of Rule 4 would cover the subject matter currently covered in Section 7 of Rule 4. Proposed Section 8's subheading would be ''Changes in Members' Required Fund Deposits'' and would apply only to Members.

Currently, Section 7 of Rule 4 requires participants to satisfy any increase in their Required Deposit within such time as NSCC requires. At the time the increase becomes effective, the participant's obligations to NSCC will be determined in accordance with the increased Required Deposit whether or not the Member has so increased its deposit. NSCC is not proposing any substantive changes to this provision, which will be renumbered as Section 8 of Rule 4 under the proposed rule change, except for streamlining the provision and limiting its application to Members as stated above.

Section 9

Currently, Section 9 of Rule 4 addresses situations where a participant has excess deposits in the Clearing Fund (*i.e.,* amounts above its Required Deposit). The current provision provides that NSCC will, on any day that NSCC has determined and provided notification that an excess deposit exists with respect to a participant, return an excess amount requested by a participant that follows the formats and timeframe established by NSCC for such request. The current provision makes clear that NSCC will not return the requested excess amount (i) until any amount required to be charged against the participant's Required Deposit is paid by the participant to NSCC and/or (ii) if NSCC determines that the participant's current month's use of one or more services is materially different than the previous month's use upon which such excess is based. Section 9 currently makes clear that, notwithstanding any of the foregoing, NSCC may, in its discretion, withhold any or all of a participant's excess deposit if the participant has been placed on the Watch List.[55] Current Section 9 also makes clear that nothing in this section limits NSCC's rights under Rule 15.[56]

Proposed Section 9 would add a subheading ''Excess Clearing Fund Deposits'' and would apply only to Members. NSCC is not proposing any substantive changes to this provision, except for streamlining the provisions in this section and eliminating the condition described in clause (i) of the paragraph above that limits participants' ability to request the return of excess amounts on deposit in the Clearing Fund and replacing clause (ii) of the paragraph above with a clause that provides NSCC may, in its discretion, withhold any or all of a participant's excess deposit if NSCC determines that the Member's anticipated activities in NSCC in the near future may reasonably be expected to be materially different than its activities of the recent past. NSCC believes that the proposed additional clause would protect NSCC and its participants because the clause would allow NSCC to retain excess

[53] Section 10 of FICC/GSD Rule 4, in relevant part, states that ''If a Netting Member gives notice to the Corporation pursuant to Rule 3 of its election to terminate its membership in the Netting System, the Member's deposits to the Clearing Fund in the form of cash or securities shall be returned to it within 30 calendar days thereafter . . . provided that all amounts owing to the Corporation by the Member have been paid to the Corporation prior to such return and the Member has no remaining open Net Settlement Position, Fail Net Settlement Position, or Forward Net Settlement Position.'' *Supra* note 31.

[54] On December 18, 2017, DTC submitted a proposed rule change and an advance notice to enhance its rules regarding allocation of losses. *See* Securities Exchange Act Release Nos. 82426 (January 2, 2018), 83 FR 913 (January 8, 2018) (SR–DTC–2017–022) and 82582 (January 24, 2018), 83 FR 4297 (January 30, 2018) (SR–DTC–2017–804). On June 28, 2018, DTC submitted amendments to the proposed rule change and advance notice. Copies of the amendments to the proposed rule change and the advance notice are *available at http://www.dtcc.com/legal/sec-rule-filings.aspx.*

[55] Pursuant to Section 4 of Rule 2B, a Member could be placed on the Watch List either based on its credit rating of 5, 6 or 7, which can either be generated by the Credit Risk Rating Matrix or from a manual downgrade, or when NSCC deems such placement as necessary to protect NSCC and its Members. *Supra* note 5.

[56] Rule 15 permits NSCC to require a Member, Limited Member or any applicant to become either to furnish NSCC adequate assurances of the entity's financial responsibility and operational capability as NSCC may deem necessary. *Supra* note 5.

deposits to cover an expected near-term increase in a Member's Required Fund Deposit amount due to the anticipated change in the Member's activities. The proposed additional clause would also align NSCC's Rules with that of FICC/GSD and FICC/MBSD,[57] thus providing consistent treatment for firms that are members of both NSCC and FICC.

Section 10

Current Section 10 of Rule 4 provides for crediting persons against whom losses are charged pursuant to Rule 4 if there is a subsequent recovery of such losses by NSCC. NSCC is not proposing any changes to this section other than (i) making it clear that no loss allocation under proposed Rule 4 would constitute a waiver of any claim NSCC may have against a Member for any losses or liabilities to which the Member is subject under the Rules, including, without limitation, any loss or liability to which it may be subject under proposed Rule 4, and (ii) adding a subheading ''No Waiver; Subsequent Recovery Against Loss Amounts'' and replacing ''persons'' with ''Persons,'' which is currently defined in Rule 1 (Definitions and Descriptions) to mean ''a partnership, corporation, limited liability corporation or other organization, entity or an individual.'' NSCC is proposing the change in (i) above to preserve its legal rights and to make it clear to Members that loss allocation under proposed Rule 4 would not be deemed as NSCC waiving any claims it may have against a Member for any losses or liabilities to which the Member is subject under the Rules. With respect to the proposed change in (ii) above, given that NSCC is a corporation, NSCC believes that the term ''Person'' already includes NSCC; however, for increased clarity, NSCC is proposing to add ''including the Corporation'' to make it clear to Members that if there is a subsequent recovery of losses charged pursuant to Rule 4, the net amount of the recovery would be credited to Persons, including NSCC, against whom the loss was charged in proportion to the amounts charged against them.

Section 11

Current Section 11 of Rule 4 provides that a participant may withdraw Eligible Clearing Fund Securities from pledge, provided that the participant has deposited cash with, or pledged additional Eligible Clearing Fund Securities to, NSCC that, in the aggregate, secure the open account indebtedness of the participant and/or satisfy the participant's Required Deposit. Proposed Section 11 would add a subheading ''Substitution or Withdrawal of Pledged Securities'' and would apply only to Members. NSCC is not proposing any substantive changes to this provision, except for changes to improve the transparency and accessibility of this section.

Section 12

Current Section 12 of Rule 4 makes it clear that NSCC has certain rights with respect to the Clearing Fund. Proposed Section 12 would add a subheading ''Authority of Corporation'' and would apply only to Members. NSCC is not proposing any substantive changes to this provision, except to clarify that a reference to 30 days in current Section 12 would mean 30 calendar days.

Section 13

NSCC is proposing to add a new Section 13 to Rule 4 that would be entitled ''Mutual Fund Deposits.'' Under the proposal, NSCC would consolidate provisions from various sections in the current Rule 4 concerning Mutual Fund/Insurance Services Members and Fund Members and group them into proposed Section 13. Aside from the consolidation, NSCC is not proposing any substantive changes to these provisions, except for changes to (i) reduce NSCC's retention period of Mutual Fund Deposits when a Mutual Fund Participant (as defined below and in the proposed rule change) elects to withdraw from membership, in order to harmonize it with the proposed change in Section 7, as described above, and (ii) improve the transparency and accessibility of the provisions.

Proposed Section 13 would provide that each Member that uses the Mutual Fund Services to submit mutual fund purchases, redemptions, or exchanges to any Fund Member or another Member and each Mutual Fund/Insurance Services Member would, and each Fund Member (collectively with such Members and Mutual Fund/Insurance Services Members, ''Mutual Fund Participants'') may, be required to make a cash deposit to the Clearing Fund in the amounts determined in accordance with Procedure XV and other applicable Rules (its ''Mutual Fund Deposit'' and, unless specified otherwise, for the purposes of the Rules, Required Fund Deposits shall include Mutual Fund Deposits). In the case of a Member, its Mutual Fund Deposit would be a separate and additional component of such Member's deposit to the Clearing Fund but not part of the Member's Required Fund Deposit for purposes of calculating pro rata loss allocations pursuant to proposed Section 4 of Rule 4.

As in the current Rules, proposed Section 13 would also provide that if any Mutual Fund Participant fails to satisfy any obligation to NSCC relating to Mutual Fund Services, notwithstanding NSCC's right to reverse in whole or in part any credit previously given to the contra side to any outstanding Mutual Fund Services transaction of the Mutual Fund/Insurance Services Member, NSCC would first apply such Mutual Fund Participant's Mutual Fund Deposit. If after such application any loss or liability remains and if such Mutual Fund Participant is a Member that is not otherwise obligated to NSCC, NSCC would apply such Member's Actual Deposit in accordance with proposed Section 3 of Rule 4. NSCC would next allocate any further remaining loss or liability to the other Mutual Fund Participants in successive rounds of loss allocations in each case up to the aggregate of Mutual Fund Deposits from non-defaulting Mutual Fund Participants, and after the first such round, Mutual Fund Participants that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 6 of Rule 4, following the procedures and timeframes set forth in proposed Sections 4 and 6 of Rule 4 as if such Mutual Fund Participants are Members. If any loss or liability remains thereafter and there are no continuing Mutual Fund Participants, NSCC would proceed with loss allocations to Members for a Defaulting Member Event in accordance with proposed Section 4 of Rule 4.

As proposed, Section 13 would reduce NSCC's retention period of Mutual Fund Deposits from ninety (90) days under the current Section 6 of Rule 4 to thirty (30) calendar days. Specifically, NSCC is proposing that a Mutual Fund Participant that elects to withdraw from membership would be entitled to the return of its Mutual Fund Deposit no later than thirty (30) calendar days after all of its transactions have settled and it has satisfied all of its matured and contingent obligations to NSCC for which such Mutual Fund Participant was responsible while a Mutual Fund Participant. NSCC is proposing this change in order to harmonize the retention period of Mutual Fund Deposit with the proposed Clearing Fund retention period in proposed Section 7 of Rule 4, as described above.

[57] *See* Section 9 of FICC/GSD Rule 4 (Clearing Fund and Loss Allocation) and Section 9 of FICC/MBSD Rule 4 (Clearing Fund and Loss Allocation). *Supra* note 31.

As proposed, Section 13 would make it clear that NSCC's rights, authority and obligations with respect to deposits to the Clearing Fund as set forth in Rule 4 would apply to Mutual Fund Deposits.

Section 14

NSCC is proposing to add a new Section 14 to Rule 4 that would be entitled ''Insurance Deposits.'' Under the proposal, NSCC would consolidate provisions from various sections in current Rule 4 concerning Insurance Carrier/Retirement Services Members and group them into proposed Section 14. Aside from the consolidation, NSCC is not proposing any substantive changes to these provisions, except for changes to (i) reduce NSCC's retention period of Insurance Deposits when an Insurance Participant (as defined below and in the proposed rule change) elects to withdraw from membership, in order to harmonize it with proposed Section 7, as described above, and (ii) improve the transparency and accessibility of the provisions.

As in the current Rules, proposed Section 14 would provide that each Mutual Fund/Insurance Services Member that uses the Insurance and Retirement Processing Services and each Insurance Carrier/Retirement Services Member (collectively, ''Insurance Participants'') may be required to make a cash deposit to the Clearing Fund in the amounts determined in accordance with Procedure XV and other applicable Rules (its ''Insurance Deposit'' and, unless specified otherwise, for the purposes of the Rules, Required Fund Deposits shall include Insurance Deposits). Proposed Section 14 would also provide that if any Insurance Participant fails to satisfy any obligation to NSCC relating to the Insurance and Retirement Processing Services, NSCC would first apply such Insurance Participant's Insurance Deposit. If after such application any loss or liability remains, NSCC would allocate the remaining loss or liability to the other Insurance Participants in successive rounds of loss allocations in each case up to the aggregate of Insurance Deposits from non-defaulting Insurance Participants, and after the first such round, Insurance Participants that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 6 of Rule 4, following the procedures and timeframes set forth in proposed Sections 4 and 6 of Rule 4 as if such Insurance Participants are Members. If any loss or liability remains thereafter and there are no continuing Insurance Participants, NSCC would proceed with loss allocations to Members for a Defaulting Member Event in accordance with proposed Section 4 of Rule 4.

As proposed, Section 14 would reduce NSCC's retention period of Insurance Deposits from ninety (90) days under the current Section 6 of Rule 4 to thirty (30) calendar days. Specifically, NSCC is proposing that an Insurance Participant that elects to withdraw from membership would be entitled to the return of its Insurance Deposit no later than thirty (30) calendar days after all of its transactions have settled and it has satisfied all of its matured and contingent obligations to NSCC for which such Insurance Participant was responsible while an Insurance Participant. NSCC is proposing this change in order to harmonize the retention period of Insurance Deposit with the proposed Clearing Fund retention period in proposed Section 7 of Rule 4, as described above.

As proposed, Section 14 would make it clear that NSCC's rights, authority and obligations with respect to deposits to the Clearing Fund as set forth in Rule 4 would apply to Insurance Deposits.

B. Proposed Changes to Addendum E (Statement of Policy—Application of Retained Earnings—Member Impairments) and Addendum K (Interpretation of the Board of Directors—Application of Clearing Fund)

Addendum E is a statement of policy that currently provides that NSCC will apply no less than twenty-five (25) percent of its retained earnings to cover losses or liabilities from a Member's impairment that is not otherwise satisfied by the impaired Member's Clearing Fund deposit. NSCC is proposing to delete Addendum E in its entirety because it would no longer be relevant given the proposed rule change relating to the Corporate Contribution discussed above.

NSCC is proposing to modify Addendum K to delete all provisions associated with loss allocation and application of the Clearing Fund in connection with a loss or liability incurred by NSCC, including modifying the title of Addendum K. These provisions would no longer be necessary under the proposed rule change because the loss allocation process in its entirety would be governed by Rule 4. In addition, the current language in Addendum K regarding allocation by System would no longer be applicable under the proposed rule change as described above. NSCC would retain the provisions in Addendum K that pertain to NSCC's guaranty and rename Addendum K ''The Corporation's Guaranty.'' NSCC is also proposing to replace ''Rules'' with ''Rules and Procedures'' to better reflect the name of NSCC's rulebook.

(iii) Other Proposed Rule Changes

NSCC is proposing changes to Rule 1 (Definitions and Descriptions), Rule 2B (Ongoing Membership Requirements and Monitoring), Rule 4(A) (Supplemental Liquidity Deposits), Rule 13 (Exception Processing), Rule 15 (Assurances of Financial Responsibility and Operational Capability), Rule 42 (Wind-Down of a Member, Fund Member or Insurance Carrier/Retirement Services Member), Procedure III (Trade Recording Service (Interface with Qualified Clearing Agencies)), Procedure XV (Clearing Fund Formula and Other Matters), and Addendum O (Admission of Non-US Entities as Direct NSCC Members). NSCC is proposing changes to these Rules in order to conform them with the proposed changes to Rule 4 as well as to make certain technical changes to these Rules.

Specifically, NSCC is proposing to add the following defined terms to Rule 1, in alphabetical order: Actual Deposit, Average RFD, Clearing Fund Cash, Corporate Contribution, Declared Non-Default Loss Event, Defaulting Member, Defaulting Member Event, Eligible Letter of Credit, Event Period, Insurance Deposit, Insurance Participant, Issuer, Lender, Loss Allocation Cap, Loss Allocation Notice, Loss Allocation Withdrawal Notice, Loss Allocation Withdrawal Notification Period, Mutual Fund Deposit, Mutual Fund Participant, Required Fund Deposit, Termination Date, and Voluntary Termination Notice.

NSCC is proposing to delete the defined term ''The Corporation'' in Rule 1 and replace it with ''Corporation'' in Rule 1. NSCC is proposing to replace ''Required Deposits'' with ''Required Fund Deposits'' in Rule 2B, Rule 4(A), Rule 15, Rule 42, Procedure III, and Procedure XV. NSCC is proposing to replace ''Rules'' with ''Rules and Procedures'' in Rule 1, Rule 2B, Rule 13, Rule 15, and Procedure III. NSCC is also proposing to replace ''Letter of Credit'' with ''Eligible Letter of Credit'' in Rule 42 and Addendum O.

In addition, in Section 5 of Rule 2B, NSCC proposes to change the reference to Section 8 of Rule 4 to reflect the updated section number, which would be to Section 4 of Rule 4. NSCC is also proposing conforming changes to this section to ensure that termination provisions in the Rules, whether voluntary or in response to a loss

allocation, are consistent with one another to the extent appropriate.

Currently, Section 5 of Rule 2B provides that participants may elect to voluntarily retire their membership by providing NSCC with written notice of such termination. Such termination will not be effective until accepted by NSCC, which shall be evidenced by a notice to NSCC's participants announcing the participant's retirement and the effective date of the retirement, which is defined as the ''Retirement Date.'' This section also provides that a participant's voluntary termination of membership shall not affect its obligations to NSCC.

Where appropriate, NSCC is proposing changes to align Section 5 of Rule 2B with the proposed new Section 6 of Rule 4, both of which address termination of membership. Specifically, NSCC is proposing to rename the subheading of Section 5 of Rule 2B to ''Voluntary Termination'' and to change ''retirement'' to ''termination'' and ''Retirement Date'' to ''Termination Date'' throughout Section 5 of Rule 2B. NSCC is also proposing to provide that when a participant elects to voluntarily terminate its membership by providing NSCC a written notice of such termination (''Voluntary Termination Notice''), the participant must specify in its Voluntary Termination Notice a desired date for its withdrawal, provided such date shall not be prior to the scheduled final settlement date of any remaining obligation owed by the participant to NSCC as of the time such Voluntary Termination Notice is submitted to NSCC, unless otherwise approved by NSCC. NSCC is retaining the provision that makes it clear that the termination will not be effective until accepted by NSCC.[58] NSCC is also retaining the provision that describes NSCC's acceptance of the termination; however, NSCC is proposing to make it clear that such acceptance, as evidenced by a notice to NSCC's participants, would (i) be no later than ten (10) business days after the receipt of the Voluntary Termination Notice from the participant and (ii) announce the last trade date for the participant instead of the Termination Date. In addition, NSCC is proposing to make it clear that the Termination Date would be the final settlement date of all transactions of the participant. NSCC is proposing these clarifying changes so that the Rules would align more closely with NSCC's current practice.

As an example, Member A submits a Voluntary Termination Notice to NSCC on April 1st indicating its desired termination date is June 15th. NSCC would accept such termination request by issuing a notice to Members within 10 business days from April 1st; such notice would provide that the last trade date for Member A is June 12th, and the effective date of Member A's NSCC membership termination would be the final settlement date of all transactions of Member A. In contrast, if Member A submits a Voluntary Termination Notice on April 1st and indicates its desired termination date is April 5th, NSCC would either (i) accept such termination notice by issuing a notice to Members on or before April 5th; such notice would provide that the last trade date for Member A is April 2nd, and the effective date of Member A's NSCC membership termination would be the final settlement date of all transactions of Member A, or (ii) if NSCC requires additional time to process the termination, NSCC would accept such termination notice by issuing notice to Members after April 5th but still within 10 business days from April 1st; such notice would provide that the last trade date for Member A is a date after April 2nd, and the effective date of Member A's NSCC membership termination would be the final settlement date of all transactions of Member A.

NSCC is also proposing to clarify that after the close of business on the Termination Date,[59] a participant that terminates its membership shall no longer be eligible or required to submit transactions to NSCC for clearance and settlement, unless the Board of Directors determines otherwise in order to ensure an orderly liquidation of the participant's open obligations. If any transaction is submitted to NSCC by such participant that is scheduled to settle after the Termination Date, the participant's Voluntary Termination Notice would be deemed void and the participant would remain subject to the Rules as if it had not given such notice. Furthermore, NSCC is proposing to add a sentence to Section 5 of Rule 2B to refer participants to Sections 7, 13 and 14 of Rule 4, as applicable, regarding provisions on the return of a participant's Clearing Fund deposit and to specify that if an Event Period were to occur after a participant has submitted its Voluntary Termination Notice but on or prior to the Termination Date, in order for such participant to benefit from its Loss Allocation Cap pursuant to Section 4 of Rule 4, the participant would need to comply with the provisions of Section 6 of Rule 4 and submit a Loss Allocation Withdrawal Notice, which notice, upon submission, would supersede and void any pending Voluntary Termination Notice previously submitted by the participant. As an example, if an Event Period occurs after submission of the Voluntary Termination Notice by a Member but on or prior to the Termination Date, and the Member does not subsequently submit a Loss Allocation Withdrawal Notice as proposed in Section 6 of Rule 4, then the Member would not benefit from its Loss Allocation Cap, *i.e.,* the Member would remain obligated for its pro rata share of losses and liabilities with respect to any Event Period that commenced on or prior to the Termination Date.

In Rule 4(A), NSCC proposes to amend Section 11 to update a cross-reference to the time period for the refund of deposits to the Clearing Fund when a Member ceases to be a participant in order to align it with proposed Section 7 of Rule 4, which would reduce the time period from 90 days to 30 calendar days. NSCC is also proposing to add a reference to Section 13 of Rule 4 in clause (c) of Section 13 of Rule 4(A) in order to specify that a Special Activity Supplemental Deposit of a Member may be used to satisfy a loss or liability as provided in such new proposed Section 13. NSCC is also proposing technical changes in Sections 2 and 13 of Rule 4(A) to reflect new proposed defined terms in the Rules.

In Rule 13, NSCC would replace ''System'' with ''system'' to reflect the proposed deletion of ''System'' as a defined term from Rule 4 and Addendum K. In Procedure XV, NSCC would replace ''Qualified Securities Depository'' with ''DTC'' to be consistent with the proposed change in Section 1 of Rule 4.

Member Outreach

Beginning in August 2017, NSCC conducted outreach to Members in order to provide them with advance notice of the proposed changes. As of the date of this filing, no written comments relating to the proposed changes have been received in response to this outreach. The Commission will be notified of any written comments received.

[58] Unlike the Voluntary Termination Notice, the Loss Allocation Withdrawal Notice as proposed in Section 6 of Rule 4 does not require explicit acceptance by NSCC to be effective. NSCC believes that requiring explicit acceptance of the Loss Allocation Withdrawal Notice could complicate the loss allocation process and potentially result in membership withdrawal being delayed as well as detract from the objective to have NSCC know on a timely basis which Members would remain subject to the subsequent rounds of loss allocation.

[59] Account(s) of a terminating participant are generally deactivated after the close of business on the Termination Date.

Implementation Timeframe

Pending Commission approval, NSCC expects to implement this proposal within two (2) business days after approval. Members would be advised of the implementation date of this proposal through issuance of an NSCC Important Notice.

Expected Effect on Risks to the Clearing Agency, Its Participants and the Market

NSCC believes that the proposed rule changes to enhance the resiliency of NSCC's loss allocation process and to shorten the time within which NSCC is required to return a former Member's Clearing Fund deposit would reduce the risk of uncertainty to NSCC, its Members and the market overall. Specifically, by modifying the calculation of NSCC's corporate contribution, NSCC would apply a mandatory fixed percentage of its General Business Risk Capital Requirement (as compared to the current Rules which provide for ''no less than'' a percentage of retained earnings), which would provide greater transparency and accessibility to Members as to how much NSCC would contribute in the event of a loss or liability. By modifying the application of NSCC's corporate contribution to apply to Declared Non-Default Loss Events, in addition to Defaulting Member Events, on a mandatory basis, NSCC would expand the application of its corporate contribution beyond losses and liabilities from Member impairments, which would better align the interests of NSCC with those of its Members by stipulating a mandatory application of the Corporate Contribution to a Declared Non-Default Loss Event prior to any allocation of the loss among Members. Taken together, these proposed rule changes would enhance the overall resiliency of NSCC's loss allocation process by enhancing the calculation and application of NSCC's Corporate Contribution, which is one of the key elements of NSCC's loss allocation process. Moreover, by providing greater transparency and accessibility to Members, as stated above, the proposed rule changes regarding the Corporate Contribution, including the proposed replenishment period, would allow Members to better assess the adequacy of NSCC's loss allocation process.

By introducing the concept of an Event Period, NSCC would be able to group Defaulting Member Events and Declared Non-Default Loss Events occurring in a period of ten (10) business days for purposes of allocating losses to Members. NSCC believes that the Event Period would provide a defined structure for the loss allocation process to encompass potential sequential Defaulting Member Events or Declared Non-Default Loss Events that are likely to be closely linked to an initial event and/or market dislocation episode. Having this structure would enhance the overall resiliency of NSCC's loss allocation process because NSCC would be better equipped to address losses that may arise from multiple Defaulting Member Events and/or Declared Non-Default Loss Events that arise in quick succession. Moreover, the proposed Event Period structure would provide certainty for Members concerning their maximum exposure to mutualized losses with respect to such events.

By introducing the concept of ''rounds'' (and accompanying Loss Allocation Notices) and applying this concept to the timing of loss allocation payments and the Member withdrawal process in connection with the loss allocation process, NSCC would (i) set forth a defined amount that it would allocate to Members during each round (*i.e.,* the round cap), (ii) advise Members of loss allocation obligation information as well as round information through the issuance of Loss Allocation Notices, and (iii) provide Members with the option to limit their loss allocation exposure after the issuance of the first Loss Allocation Notice in each round. These proposed rule changes would enhance the overall resiliency of NSCC's loss allocation process because they would enable NSCC to continue the loss allocation process in successive rounds until all of NSCC's losses are allocated and enable NSCC to identify continuing Members for purposes of calculating subsequent loss allocation obligations in successive rounds. Moreover, the proposed rule changes would define for Members a clear manner and process in which they could cap their loss allocation exposure to NSCC.

By implementing a ''look-back'' period to calculate a Member's loss allocation obligations and its Loss Allocation Cap, NSCC would discourage Members from reducing their settlement activity during a time of stress primarily to limit their loss allocation obligations. By determining a Member's loss allocation obligations based on the average of its Required Fund Deposit over a look-back period and its Loss Allocation Cap based on the greater of its Required Fund Deposit or the average thereof over a look-back period, NSCC would be able to calculate a Member's pro rata share of losses and liabilities based on the amount of risk that the Member brings to NSCC. These proposed rule changes would enhance the overall resiliency of NSCC's loss allocation process because they would deter Members from reducing their settlement activity during a time of stress primarily to limit their Loss Allocation Caps.

By reducing the time within which NSCC is required to return a former Member's Clearing Fund deposit, NSCC would enable firms that have exited NSCC to have access to their funds sooner than under the current Rules, while at the same time protecting NSCC and its provision of clearance and settlement services because such return would only occur if all obligations of the terminating Member to NSCC have been satisfied. As such, NSCC would maintain the requisite level of Clearing Fund deposit to ensure that it can continue to meet its clearance and settlement obligations.

Management of Identified Risks

NSCC is proposing the rule changes as described in detail above in order to enhance the resiliency of NSCC's loss allocation process and provide transparency and accessibility to Members regarding NSCC's loss allocation process.

Consistency With the Clearing Supervision Act

The proposed rule change would be consistent with Section 805(b) of the Clearing Supervision Act.[60] The objectives and principles of Section 805(b) of the Clearing Supervision Act are to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system.[61]

The proposed rule change would enhance the resiliency of NSCC's loss allocation process by (1) modifying the calculation and application of NSCC's corporate contribution, (2) introducing an Event Period, (3) introducing the concept of ''rounds'' (and accompanying Loss Allocation Notices) and applying this concept to the timing of loss allocation payments and the Member withdrawal process in connection with the loss allocation process, and (4) implementing a ''look-back'' period to calculate a Member's loss allocation obligation (which would replace the current calculation of a Member's loss allocation obligation based on the Member's activity in each of the various services or ''Systems'' offered by NSCC) and its Loss Allocation Cap. Together, these proposed rule changes would (i) create greater certainty for Members

[60] 12 U.S.C. 5464(b).

[61] *Id.*

regarding NSCC's obligation towards a loss, (ii) more clearly specify NSCC's and Members' obligations toward a loss and balance the need to manage the risk of sequential defaults and other potential loss events against Members' need for certainty concerning their maximum exposures, and (iii) provide Members the opportunity to limit their exposure to NSCC by capping their exposure to loss allocation. Reducing the risk of uncertainty to NSCC, its Members and the market overall would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, NSCC believes that the proposed rule change to enhance the resiliency of NSCC's loss allocation process is consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

By reducing the time within which NSCC is required to return a former Member's Clearing Fund deposit, NSCC would enable firms that have exited NSCC to have access to their funds sooner than under the current Rules while at the same time protecting NSCC and its provision of clearance and settlement services because such return would only occur if all obligations of the terminating Member to NSCC have been satisfied. As such, NSCC would maintain the requisite level of Clearing Fund deposit to ensure that it can continue to meet its clearance and settlement obligations. Enabling NSCC to continue to meet its clearance and settlement obligations would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, NSCC believes that this proposed rule change is consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

The proposed rule change is also consistent with Rules 17Ad–22(e)(13) and 17Ad–22(e)(23)(i), promulgated under the Act.[62] Rule 17Ad–22(e)(13) under the Act requires, in part, that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure NSCC has the authority and operational capacity to take timely action to contain losses and continue to meet its obligations.[63] As described above, the proposed rule changes to (1) modify the calculation and application of NSCC's corporate contribution, (2) introduce an Event Period, (3) introduce the concept of ''rounds'' (and accompanying Loss Allocation Notices) and apply this concept to the timing of loss allocation payments and the Member withdrawal process in connection with the loss allocation process, and (4) implement a ''look-back'' period to calculate a Member's loss allocation obligation (which would replace the current calculation of a Member's loss allocation obligation based on the Member's activity in each of the various services or ''Systems'' offered by NSCC) and its Loss Allocation Cap, taken together, are designed to enhance the resiliency of NSCC's loss allocation process. Having a resilient loss allocation process would help ensure that NSCC can effectively and timely address losses relating to or arising out of either the default of one or more Members or one or more non-default loss events, which in turn would help NSCC contain losses and continue to meet its clearance and settlement obligations. Therefore, NSCC believes that the proposed rule changes to enhance the resiliency of NSCC's loss allocation process are consistent with Rule 17Ad–22(e)(13) under the Act.

Rule 17Ad–22(e)(23)(i) under the Act requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to publicly disclose all relevant rules and material procedures, including key aspects of NSCC's default rules and procedures.[64] The proposed rule changes to (i) align the loss allocation rules of the DTCC Clearing Agencies, (ii) improve the overall transparency and accessibility of the provisions in the Rules governing loss allocation, and (iii) make conforming and technical changes, would not only ensure that NSCC's loss allocation rules are, to the extent practicable and appropriate, consistent with the loss allocation rules of other DTCC Clearing Agencies, but also would help to ensure that NSCC's loss allocation rules are transparent and clear to Members. Aligning the loss allocation rules of the DTCC Clearing Agencies would provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies. Having transparent and clear loss allocation rules would enable Members to better understand the key aspects of NSCC's default rules and procedures and provide Members with increased predictability and certainty regarding their exposures and obligations. As such, NSCC believes that the proposed rule changes to align the loss allocation rules of the DTCC Clearing Agencies as well as to improve the overall transparency and accessibility of NSCC's loss allocation rules are consistent with Rule 17Ad-22(e)(23)(i) under the Act.

Similarly, the proposed rule changes to NSCC's voluntary termination provisions would improve the clarity of the Rules and help to ensure that NSCC's voluntary termination process is transparent and clear to Members. Having clear voluntary termination provisions would enable Members to better understand NSCC's voluntary termination process and provide Members with increased predictability and certainty regarding their rights and obligations with respect to such process. As such, NSCC believes that the proposed rule changes to the voluntary termination provision are also consistent with Rule 17Ad–22(e)(23)(i) under the Act.

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 that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

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.

The clearing agency 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. 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

[62] 17 CFR 240.17Ad–22(e)(13) and (e)(23)(i).

[63] 17 CFR 240.17Ad–22(e)(13).

[64] 17 CFR 240.17Ad–22(e)(23)(i).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2017–806 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–NSCC–2017–806. 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 NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–NSCC–2017–806 and should be submitted on or before August 21, 2018.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16712 Filed 8–3–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83749; File No. SR–NYSE 2018–28]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of a Longer Period on Commission Action of Proposed Rule Change To Make Permanent the Retail Liquidity Program Pilot, NYSE Rule 107C, Which Is Set To Expire on December 31, 2018

July 31, 2018.

On June 4, 2018, New York Stock Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to make permanent the Exchange's Retail Liquidity Program Pilot. The proposed rule change was published for comment in the **Federal Register** on June 21, 2018.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 5, 2018. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates September 19, 2018, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSE–2018–28).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16723 Filed 8–3–18; 8:45 am]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83454 (June 15, 2018), 83 FR 28874.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83747; File No. SR–FICC–2017–806]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Amendment No. 1 to an Advance Notice To Amend the Loss Allocation Rules and Make Other Changes

July 31, 2018.

On December 18, 2017, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–FICC–2017–806 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act'').[1] The

[1] 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b–4(n)(1)(i), respectively. On December 18, 2017, FICC filed the Advance Notice as a proposed rule change (SR–FICC–2017–022) with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder (''Proposed Rule Change''). (17 CFR 240.19b–4 and 17 CFR 240.19b–4, respectively.) The Proposed Rule Change was published in the **Federal Register** on January 8, 2018. *See* Securities Exchange Act Release No. 82427 (January 2, 2018), 83 FR 854 (January 8, 2018) (SR–FICC–2017–022). On February 8, 2018, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82670 (February 8, 2018), 83 FR 6626 (February 14, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018). On March 20, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82909 (March 20, 2018), 83 FR 12990 (March 26, 2018) (SR–FICC–2017–022). On June 25, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change. Therefore, September 5, 2018 is the date by which the Commission should either approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release Nos. 83510 (June 25, 2018), 83 FR 30791 (June 29, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018). On June 28, 2018, FICC filed Amendment No. 1 to the Proposed Rule Change.

Continued

notice of filing and extension of the review period of the Advance Notice was published for comment in the **Federal Register** on January 30, 2018.[2]

On April 10, 2018, the Commission required additional information from FICC pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice.[3] On June 28, 2018, FICC filed Amendment No. 1 to the Advance Notice to amend and replace in its entirety the Advance Notice as originally submitted on December 18, 2017, and on July 6, 2018, submitted a response to the Commission's request for additional information in consideration of the Advance Notice, which added a further 60-days to the review period pursuant to Section 806(e)(1)(E) and (G) of the Clearing Supervision Act.[4]

The Advance Notice, as amended by Amendment No. 1, is described in Items I and II below, which Items have been prepared by FICC. The Commission is publishing this notice to solicit comments on the Advance Notice, as amended by Amendment No. 1, from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This Advance Notice consists of proposed modifications to FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') and Mortgage-Backed Securities Division (''MBSD'' and, together with GSD, the ''Divisions'' and, each, a ''Division'') Clearing Rules (''MBSD Rules,'' and collectively with the GSD Rules, the ''Rules'') in order to amend provisions in the Rules regarding loss allocation as well as make other changes, as described in greater detail below.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

Written comments relating to this proposal have not been solicited or received. FICC will notify the Commission of any written comments received by FICC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Amendment No. 1

This filing constitutes Amendment No. 1 (''Amendment'') to Advance Notice previously filed by FICC on December 18, 2017.[6] This Amendment amends and replaces the Advance Notice in its entirety. FICC submits this Amendment in order to further clarify the operation of the proposed rule changes on loss allocation by providing additional information and examples. In particular, this Amendment would:

(i) Clarify which Tier One Netting Members and Tier One Members would be subject to loss allocation with respect to Defaulting Member Events (as defined below and in the proposed rule change) and Declared Non-Default Loss Events (as defined below and in the proposed rule change) occurring during an Event Period (as defined below and in the proposed rule change). Specifically, pursuant to the Amendment, proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that each Tier One Netting Member or Tier One Member, as applicable, that is a Tier One Netting Member or Tier One Member on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Defaulting Member Event (other than a Defaulting Member Event with respect to which it is the Defaulting Member (as defined below and in the proposed rule change)) and each Declared Non-Default Loss Event occurring during the Event Period. Proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would also make it clear that any Tier One Netting Member or Tier One Member, as applicable, for which FICC ceases to act on a non-Business Day, triggering an Event Period that commences on the next Business Day, would be deemed to be a Tier One Netting Member or Tier One Member, as applicable, on the first day of that Event Period.

(ii) Clarify the obligations and Loss Allocation Cap (as defined below and in the proposed rule change) of a Tier One Netting Member or a Tier One Member, as applicable, that withdraws from membership in respect of a loss allocation round. Specifically, pursuant to the Amendment, proposed Section 7b of GSD Rule 4 and MBSD Rule 4 would provide that the Tier One Netting Member or Tier One Member, as applicable, would nevertheless remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under GSD Rule 4 or MBSD Rule 4, as applicable; however, its aggregate obligation would be limited to the amount of its Loss Allocation Cap as fixed in the round for which it withdrew.

(iii) Clarify that a member would be obligated to FICC for all losses and liabilities incurred by FICC arising out of or relating to any Defaulting Member Event with respect to the member. Specifically, pursuant to the Amendment, proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that each member would be obligated to FICC for the entire amount of any loss or liability incurred by FICC arising out of or relating to any Defaulting Member Event with respect to such member.

(iv) Clarify that, although a Defaulting Member would not be allocated a ratable share of losses and liabilities arising out of or relating to its own Defaulting Member Event, it would remain obligated to FICC for all such losses and liabilities. Specifically, pursuant to the Amendment, proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that no loss allocation under GSD Rule 4 or MBSD Rule 4, as applicable, would constitute a waiver of any claim FICC may have against a GSD Member or MBSD Member, as applicable, for any loss or liability to which the GSD Member or MBSD Member is subject under the GSD Rules

See Securities Exchange Act Release No. 83631 (July 13, 2018), 83 FR 34193 (July 19, 2018) (SR–FICC–2017–022). As of the date of this release, the Commission has not received any comments on the Proposed Rule Change.

[2] Securities Exchange Act Release No. 82583 (January 24, 2018), 83 FR 4358 (January 30, 2018) (SR–FICC–2017–806). Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. 12 U.S.C. 5465(e)(1)(H). The Commission found that the Advance Notice raised complex issues and, accordingly, extended the review period of the Advance Notice for an additional 60 days until April 17, 2018, pursuant to Section 806(e)(1)(H). *Id.*

[3] 12 U.S.C. 5465(e)(1)(D). The Commission's memo regarding Commission's Request for Additional Information and the tolled due date has been publicly available on the Commission's website at *http://www.sec.gov/rules/sro/ficc-an.shtml.*

[4] To promote the public availability and transparency of its post-notice amendment, FICC submitted a copy of Amendment No. 1 through the Commission's electronic public comment letter mechanism. Accordingly, Amendment No. 1 has been posted on the Commission's website at *http://www.sec.gov/rules/sro/ficc-an.shtml* and thus been publicly available since June 29, 2018. 12 U.S.C. 5465(e)(1)(E) and (G); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Response to the Commission's Request for Additional Information,'' *available at http://www.sec.gov/rules/sro/ficc-an.shtml.*

[5] Capitalized terms not defined herein are defined in the GSD Rules, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_gov_rules.pdf,* and the MBSD Rules, *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf.*

[6] *See* Securities Exchange Act Release No. 82583 (January 24, 2018), 83 FR 4358 (January 30, 2018) (SR–FICC–2017–806).

or MBSD Rules, as applicable, including, without limitation, any loss or liability to which it may be subject under GSD Rule 4 or MBSD Rule 4, as applicable.

In addition, pursuant to the Amendment, FICC is making other clarifying and technical changes to the proposed rule change, as proposed herein.

Nature of the Proposed Change

The primary purpose of this proposed rule change is to amend GSD's and MBSD's loss allocation rules in order to enhance the resiliency of the Divisions' loss allocation processes so that each Division can take timely action to address multiple loss events that occur in succession during a short period of time (defined and explained in detail below). In connection therewith, the proposed rule change would (i) align the loss allocation rules of the three clearing agencies of The Depository Trust & Clearing Corporation (''DTCC''), namely The Depository Trust Company (''DTC''), National Securities Clearing Corporation (''NSCC''), and FICC (collectively, the ''DTCC Clearing Agencies''), so as to provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies, (ii) increase transparency and accessibility of the loss allocation rules by enhancing their readability and clarity, (iii) amend language regarding FICC's use of MBSD Clearing Fund, and (iv) make conforming and technical changes.

(i) Background

Central counterparties (''CCPs'') play a key role in financial markets by mitigating counterparty credit risk on transactions between market participants. CCPs achieve this by providing guaranties to participants and, as a consequence, are typically exposed to credit risks that could lead to default losses. In addition, in performing its critical functions, a CCP could be exposed to non-default losses that are otherwise incident to the CCP's clearance and settlement business.

A CCP's rulebook should provide a complete description of how losses would be allocated to participants if the size of the losses exceeded the CCP's pre-funded resources. Doing so provides for an orderly allocation of losses, and potentially allows the CCP to continue providing critical services to the market and thereby results in significant financial stability benefits. In addition, a clear description of the loss allocation process offers transparency and accessibility to the CCP's participants.

Current FICC Loss Allocation Process

As CCPs, FICC's Divisions' loss allocation processes are key components of their respective risk management processes. Risk management is the foundation of FICC's ability to guarantee settlement in each Division, as well as the means by which FICC protects itself and its members from the risks inherent in the clearance and settlement process. FICC's risk management processes must account for the fact that, in certain extreme circumstances, the collateral and other financial resources that secure FICC's risk exposures may not be sufficient to fully cover losses resulting from the liquidation of the portfolio of a member for whom a Division has ceased to act.[7]

The GSD Rules and the MBSD Rules each currently provide for a loss allocation process through which both FICC (by applying up to 25% of its retained earnings in accordance with Section 7(b) of GSD Rule 4 and Section 7(c) of MBSD Rule 4) and its members would share in the allocation of a loss resulting from the default of a member for whom a Division has ceased to act pursuant to the Rules. The GSD Rules and the MBSD Rules also recognize that FICC may incur losses outside the context of a defaulting member that are otherwise incident to each Division's clearance and settlement business.

The current GSD and MBSD loss allocation rules provide that, in the event the Division ceases to act for a member, the amounts on deposit to the Clearing Fund from the defaulting member, along with any other resources of, or attributable to, the defaulting member that FICC may access under the GSD Rules or the MBSD Rules (*e.g.,* payments from Cross-Guaranty Agreements), are the first source of funds the Division would use to cover any losses that may result from the closeout of the defaulting member's guaranteed positions. If these amounts are not sufficient to cover all losses incurred, then each Division will apply the following available resources, in the following loss allocation waterfall order:

First, as provided in the current Section 7(b) of GSD Rule 4 and Section 7(c) of MBSD Rule 4, FICC's corporate contribution of up to 25 percent of FICC's retained earnings existing at the time of the failure of a defaulting member to fulfill its obligations to FICC, or such greater amount as the Board of Directors may determine; and

Second, if a loss still remains, use of the Clearing Fund of the Division and assessing the Division's Members in the manner provided in GSD Rule 4 and MBSD Rule 4, as the case may be. Specifically, FICC will divide the loss ratably between Tier One Netting Members and Tier Two Members with respect to GSD, or between Tier One Members and Tier Two Members with respect to MBSD, based on original counterparty activity with the defaulting member. Then the loss allocation process applicable to Tier One Netting Members or Tier One Members, as applicable, and Tier Two Members will proceed in the manner provided in GSD Rule 4 and MBSD Rule 4, as the case may be.

Specifically, the applicable Division will first assess each Tier One Netting Member or Tier One Member, as applicable, an amount up to $50,000, in an equal basis per such member. If a loss remains, the Division will allocate the remaining loss ratably among Tier One Netting Members or Tier One Members, as applicable, in accordance with the amount of each Tier One Netting Member's or Tier One Member's, as applicable, respective average daily Required Fund Deposit over the prior twelve (12) months. If a Tier One Netting Member or Tier One Member, as applicable, did not maintain a Required Fund Deposit for twelve (12) months, its loss allocation amount will be based on its average daily Required Fund Deposit over the time period during which such member did maintain a Required Fund Deposit.

Pursuant to current Section 7(g) of GSD Rule 4 and MBSD Rule 4, if, as a result of the Division's application of the Required Fund Deposit of a member, a member's actual Clearing Fund deposit is less than its Required Fund Deposit, it will be required to eliminate such deficiency in order to satisfy its Required Fund Deposit amount. In addition to losses that may result from the closeout of the defaulting member's guaranteed positions, Tier One Netting Members or Tier One Members, as applicable, can also be assessed for non-default losses incident to each Division's clearance and settlement business, pursuant to current Section 7(f) of GSD Rule 4 and MBSD Rule.

The Rules of both Divisions currently provide that Tier Two Members are only subject to loss allocation to the extent they traded with the defaulting member and their trades resulted in a liquidation loss. FICC will assess Tier Two

[7] GSD is permitted to cease to act for (i) a GSD Member pursuant to GSD Rule 21 (Restrictions on Access to Services) and GSD Rule 22 (Insolvency of a Member), (ii) a Sponsoring Member pursuant to Section 14 and Section 16 of GSD Rule 3A (Sponsoring Members and Sponsored Members), and (iii) a Sponsored Member pursuant to Section 13 and Section 15 of GSD Rule 3A (Sponsoring Members and Sponsored Members). MBSD is permitted to cease to act for an MBSD Member pursuant to MBSD Rule 14 (Restrictions on Access to Services) and MBSD Rule 16 (Insolvency of a Member). GSD Rule 22A (Procedures for When the Corporation Ceases to Act) and MBSD Rule 17 (Procedures for When the Corporation Ceases to Act) set out the types of actions FICC may take when it ceases to act for a member. *Supra* note 5.

Members ratably based on their loss as a percentage of the entire remaining loss attributable to Tier Two Members.[8] Tier Two Members are required to pay their loss allocation obligations in full and replenish their Required Fund Deposits as needed and as applicable. The current Rule provisions which provide for loss allocation of non-default losses incident to each Division's clearance and settlement business (*i.e.,* Section 7(f) of GSD Rule 4 and MBSD Rule 4) do not apply to Tier Two Members.

Overview of the Proposed Rule Changes

A. Changes To Enhance Resiliency of GSD's and MBSD's Loss Allocation Processes

In order to enhance the resiliency of GSD's and MBSD's loss allocation processes, FICC proposes to change the manner in which each of the aspects of the loss allocation waterfall described above would be employed. GSD and MBSD would retain the current core loss allocation process following the application of the defaulting member's resources, *i.e.,* first, by applying FICC's corporate contribution, and second, by pro rata allocations to Tier One Netting Members or Tier One Members, as applicable, and Tier Two Members. However, GSD and MBSD would clarify or adjust certain elements and introduce certain new loss allocation concepts, as further discussed below. The proposal would also retain the types of losses that can be allocated to Tier One Netting Members or Tier One Members, as applicable, and Tier Two Members as stated above. In addition, the proposed rule change would address the loss allocation process as it relates to losses arising from or relating to multiple default or non-default events in a short period of time, also as described below.

Accordingly, FICC is proposing five (5) key changes to enhance each Division's loss allocation process:

(1) Changing the Calculation and Application of FICC's Corporate Contribution

As stated above, Section 7(b) of GSD Rule 4 and Section 7(c) of MBSD Rule 4 currently provide that FICC will contribute up to 25% of its retained earnings (or such higher amount as the Board of Directors shall determine) to a loss or liability that is not satisfied by the defaulting member's Clearing Fund deposit. Under the proposal, FICC would amend the calculation of its corporate contribution from a percentage of its retained earnings to a mandatory amount equal to 50% of the FICC General Business Risk Capital Requirement.[9] FICC's General Business Risk Capital Requirement, as defined in FICC's Clearing Agency Policy on Capital Requirements,[10] is, at a minimum, equal to the regulatory capital that FICC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[11] The proposed Corporate Contribution (as defined below and in the proposed rule change) would be held in addition to FICC's General Business Risk Capital Requirement.

Currently, the Rules do not require FICC to contribute its retained earnings to losses and liabilities other than those from member defaults. Under the proposal, FICC would apply its corporate contribution to non-default losses as well. The proposed Corporate Contribution would apply to losses arising from Defaulting Member Events and Declared Non-Default Loss Events (as such terms are defined below and in the proposed rule change), and would be a mandatory contribution by FICC prior to any allocation of the loss among the applicable Division's members.[12] As proposed, if the Corporate Contribution is fully or partially used against a loss or liability relating to an Event Period by one or both Divisions, the Corporate Contribution would be reduced to the remaining unused amount, if any, during the following two hundred fifty (250) Business Days in order to permit FICC to replenish the Corporate Contribution.[13] To ensure transparency, all GSD Members and MBSD Members would receive notice of any such reduction to the Corporate Contribution. There would be one FICC Corporate Contribution, the amount of which would be available to both Divisions and would be applied against a loss or liability in either Division in the order in which such loss or liability occurs, *i.e.,* FICC would not have two separate Corporate Contributions, one for each Division. In the event of a loss or liability relating to an Event Period, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, attributable to only one Division, the Corporate Contribution would be applied to that Division up to the amount then available. If a loss or liability relating to an Event Period, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, occurs simultaneously at both Divisions, the Corporate Contribution would be applied to the respective Divisions in the same proportion that the aggregate Average RFDs (as defined below and in the proposed rule change) of all members in that Division bear to the aggregate Average RFDs of all members in both Divisions.[14]

As compared to the current approach of applying ''up to'' a percentage of retained earnings to defaulting member losses, the proposed Corporate Contribution would be a fixed percentage of FICC's General Business Risk Capital Requirement, which would provide greater transparency and accessibility to members. The proposed Corporate Contribution would apply not only towards losses and liabilities arising out of or relating to Defaulting Member Events but also those arising out of or relating to Declared Non-Default Loss Events, which is consistent with the current industry guidance that ''a CCP should identify the amount of its own resources to be applied towards

[8] GSD Rule 3B, Section 7 (Loss Allocation Obligations of CCIT Members) provides that CCIT Members will be allocated losses as Tier Two Members and will be responsible for the total amount of loss allocated to them. With respect to CCIT Members with a Joint Account Submitter, loss allocation will be calculated at the Joint Account level and then applied pro rata to each CCIT Member within the Joint Account based on the trade settlement allocation instructions. *Supra* note 5.

[9] FICC calculates its General Business Risk Capital Requirement as the amount equal to the greatest of (i) an amount determined based on its general business profile, (ii) an amount determined based on the time estimated to execute a recovery or orderly wind-down of FICC's critical operations, and (iii) an amount determined based on an analysis of FICC's estimated operating expenses for a six (6) month period.

[10] *See* Securities Exchange Act Release No. 81105 (July 7, 2017), 82 FR 32399 (July 13, 2017) (SR–FICC–2017–007).

[11] 17 CFR 240.17Ad–22(e)(15).

[12] The proposed rule change would not require a Corporate Contribution with respect to the use of each Division's Clearing Fund as a liquidity resource; however, if FICC uses a Division's Clearing Fund as a liquidity resource for more than 30 calendar days, as set forth in proposed Section 5 of GSD Rule 4 and MBSD Rule 4, then FICC would have to consider the amount used as a loss to the respective Division's Clearing Fund incurred as a result of a Defaulting Member Event and allocate the loss pursuant to proposed Section 7 of Rule 4, which would then require the application of FICC's Corporate Contribution.

[13] FICC believes that two hundred and fifth (250) Business Days would be a reasonable estimate of the time frame that FICC would require to replenish the Corporate Contribution by equity in accordance with FICC's Clearing Agency Policy on Capital Requirements, including a conservative additional period to account for any potential delays and/or unknown exigencies in times of distress.

[14] FICC believes that if a loss or liability relating to an Event Period, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, occurs simultaneously at both Divisions, allocating the Corporate Contribution ratably between the two Divisions based on the aggregate Average RFDs of their respective members is appropriate because the aggregate Average RFDs of all members in a Division represent the amount of risks that those members bring to FICC over the look-back period of seventy (70) Business Days.

losses arising from custody and investment risk, to bolster confidence that participants' assets are prudently safeguarded.'' [15]

Under current Section 7(b) of GSD Rule 4 and Section 7(c) of MBSD Rule 4, FICC has the discretion to contribute amounts higher than the specified percentage of retained earnings, as determined by the Board of Directors, to any loss or liability incurred by FICC as result of the failure of a Defaulting Member to fulfill its obligations to FICC. This option would be retained and expanded under the proposal so that it would be clear that FICC can voluntarily apply amounts greater than the Corporate Contribution against any loss or liability (including non-default losses) of the Divisions, if the Board of Directors, in its sole discretion, believes such to be appropriate under the factual situation existing at the time.

The proposed rule changes relating to the calculation and application of Corporate Contribution are set forth in proposed Sections 7 and 7a of GSD Rule 4 and Sections 7 and 7a of MBSD Rule 4, as further described below.

(2) Introducing an Event Period

In order to clearly define the obligations of each Division and its respective Members regarding loss allocation and to balance the need to manage the risk of sequential loss events against members' need for certainty concerning their maximum loss allocation exposures, FICC is proposing to introduce the concept of an ''Event Period'' to the GSD Rules and the MBSD Rules to address the losses and liabilities that may arise from or relate to multiple Defaulting Member Events and/or Declared Non-Default Loss Events that arise in quick succession in a Division. Specifically, the proposal would group Defaulting Member Events and Declared Non-Default Loss Events occurring in a period of ten (10) Business Days (''Event Period'') for purposes of allocating losses to Members of the respective Divisions in one or more rounds (as described below), subject to the limitations of loss allocation set forth in the proposed rule change and as explained below.[16] In the case of a loss or liability arising from or relating to a Defaulting Member Event, an Event Period would begin on the day one or both Divisions notify their respective members that FICC has ceased to act [17] for the GSD Defaulting Member and/or the MBSD Defaulting Member (or the next Business Day, if such day is not a Business Day). In the case of a loss or liability arising from or relating to a Declared Non-Default Loss Event, an Event Period would begin on the day that FICC notifies members of the respective Divisions of the Declared Non-Default Loss Event (or the next Business Day, if such day is not a Business Day). If a subsequent Defaulting Member Event or Declared Non-Default Loss Event occurs during an Event Period, any losses or liabilities arising out of or relating to any such subsequent event would be resolved as losses or liabilities that are part of the same Event Period, without extending the duration of such Event Period. An Event Period may include both Defaulting Member Events and Declared Non-Default Loss Events, and there would not be separate Event Periods for Defaulting Member Events or Declared Non-Default Loss Events occurring during overlapping ten (10) Business Day periods.

The amount of losses that may be allocated by each Division, subject to the required Corporate Contribution, and to which a Loss Allocation Cap would apply for any member that elects to withdraw from membership in respect of a loss allocation round, would include any and all losses from any Defaulting Member Events and any Declared Non-Default Loss Events during the Event Period, regardless of the amount of time, during or after the Event Period, required for such losses to be crystallized and allocated.[18]

The proposed rule changes relating to the implementation of an Event Period are set forth in proposed Section 7 of GSD Rule 4 and Section 7 of MBSD Rule 4, as further described below.

(3) Introducing the Concept of ''Rounds'' and Loss Allocation Notice

Pursuant to the proposed rule change, a loss allocation ''round'' would mean a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Tier One Netting Members or Tier One Members, as applicable (a ''round cap''). When the aggregate amount of losses allocated in a round equals the round cap, any additional losses relating to the applicable Event Period would be allocated in one or more subsequent rounds, in each case subject to a round cap for that round. FICC may continue the loss allocation process in successive rounds until all losses from the Event Period are allocated among Tier One Netting Members or Tier One Members, as applicable, that have not submitted a Loss Allocation Withdrawal Notice (as defined below and in the proposed rule change) in accordance with proposed Section 7b of GSD Rule 4 or MBSD Rule 4.

Each loss allocation would be communicated to Tier One Netting Members or Tier One Members, as applicable, by the issuance of a notice that advises the Tier One Netting Members or Tier One Members, as applicable, of the amount being allocated to them (''Loss Allocation Notice''). Each Tier One Netting Member's or Tier One Member's, as applicable, pro rata share of losses and liabilities to be allocated in any round would be equal to (i) the average of its Required Fund Deposit for the seventy (70) business days preceding the first day of the applicable Event Period or such shorter period of time that the member has been a member (each member's ''Average RFD''), divided by (ii) the sum of Average RFD amounts of all members subject to loss allocation in such round.

Each Loss Allocation Notice would specify the relevant Event Period and the round to which it relates. The first Loss Allocation Notice in any first, second, or subsequent round would expressly state that such Loss Allocation Notice reflects the beginning of the first, second, or subsequent round, as the case may be, and that each Tier One Netting Member or Tier One Member, as applicable, in that round has five (5) Business Days from the issuance of such first Loss Allocation Notice for the round to notify FICC of its election to withdraw from membership with GSD or MBSD, as applicable, pursuant to proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, and thereby benefit from its Loss Allocation Cap.[19] The ''Loss Allocation Cap'' of a

[15] *See Resilience of central counterparties (CCPs): Further guidance on the PFMI,* issued by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions, at 42 (July 2017), *available at www.bis.org/cpmi/publ/d163.pdf.*

[16] FICC believes that having a ten (10) Business Day Event Period would provide a reasonable period of time to encompass potential sequential Defaulting Member Events or Declared Non-Default Loss Events that are likely to be closely linked to an initial event and/or a severe market dislocation episode, while still providing appropriate certainty for members concerning their maximum exposure to mutualized losses with respect to such events.

[17] *Supra* note 7.

[18] As discussed below, each Tier One Netting Member or Tier One Member, as applicable, that is a Tier One Netting Member or Tier One Member on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Defaulting Member Event (other than a Defaulting Member Event with respect to which it is the Defaulting Member) and each Declared Non-Default Loss Event occurring during the Event Period.

[19] Pursuant to current Section 7(g) of GSD Rule 4 and MBSD Rule 4, the time period for a member

Continued

Tier One Netting Member or Tier One Member, as applicable, would be equal to the greater of (x) its Required Fund Deposit on the first day of the applicable Event Period and (y) its Average RFD.

After a first round of loss allocations with respect to an Event Period, only Tier One Netting Members or Tier One Members, as applicable, that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, would be subject to further loss allocation with respect to that Event Period.

The amount of any second or subsequent round cap may differ from the first or preceding round cap because there may be fewer Tier One Netting Members or Tier One Members, as applicable, in a second or subsequent round if Tier One Netting Members or Tier One Members, as applicable, elect to withdraw from membership with GSD or MBSD, as applicable, as provided in proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, following the first Loss Allocation Notice in any round.

For example, for illustrative purposes only, after the required Corporate Contribution, if FICC has a $5 billion loss determined with respect to an Event Period and the sum of Loss Allocation Caps for all Tier One Netting Members or Tier One Members, as applicable, subject to the loss allocation is $4 billion, the first round would begin when FICC issues the first Loss Allocation Notice for that Event Period. FICC could issue one or more Loss Allocation Notices for the first round until the sum of losses allocated equals $4 billion. Once the $4 billion is allocated, the first round would end and FICC would need a second round in order to allocate the remaining $1 billion of loss. FICC would then issue a Loss Allocation Notice for the $1 billion and this notice would be the first Loss Allocation Notice for the second round. The issuance of the Loss Allocation Notice for the $1 billion would begin the second round.

The proposed rule change would link the Loss Allocation Cap to a round in order to provide Tier One Netting Members or Tier One Members, as applicable, the option to limit their loss allocation exposure at the beginning of each round. As proposed and as described further below, a Tier One Netting Member or Tier One Member, as applicable, could limit its loss allocation exposure to its Loss Allocation Cap by providing notice of its election to withdraw from membership within five (5) Business Days after the issuance of the first Loss Allocation Notice in any round.

The proposed rule changes relating to the implementation of ''rounds'' and Loss Allocation Notices are set forth in proposed Section 7 of GSD Rule 4 and Section 7 of MBSD Rule 4, as further described below.

(4) Implementing a Revised ''Look-Back'' Period To Calculate a Member's Loss Allocation Pro Rata Share and Its Loss Allocation Cap

Currently, the GSD Rules and the MBSD Rules calculate a Tier One Netting Member's or a Tier One Member's pro rata share for purposes of loss allocation based on the member's average daily Required Fund Deposit over the prior twelve (12) months (or such shorter period as may be available in the case of a member which has not maintained a deposit over such time period). The Rules currently do not anticipate the possibility of more than one Defaulting Member Event or Declared Non-Default Loss Event in quick succession.

GSD and MBSD are proposing to calculate each Tier One Netting Member's or Tier One Member's, as applicable, pro rata share of losses and liabilities to be allocated in any round (as described above and in the proposed rule change) to be equal to (i) the member's Average RFD divided by (ii) the sum of Average RFD amounts for all members that are subject to loss allocation in such round.

Additionally, as described above and in the proposed rule change, if a Tier One Netting Member or Tier One Member, as applicable, withdraws from membership pursuant to proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, GSD and MBSD are proposing that the member's Loss Allocation Cap be equal to the greater of (i) its Required Fund Deposit on the first day of the applicable Event Period or (ii) its Average RFD.

FICC believes that employing a revised look-back period of seventy (70) Business Days instead of twelve (12) months to calculate a Tier One Netting Member's or a Tier One Member's, as applicable, loss allocation pro rata share and Loss Allocation Cap is appropriate, because FICC recognizes that the current look-back period of twelve (12) months is a very long period during which a member's business strategy and outlook could have shifted significantly, resulting in material changes to the size of its portfolios. A look-back period of seventy (70) Business Days would minimize that issue yet still would be long enough to enable FICC to capture a full calendar quarter of such members' activities and smooth out the impact from any abnormalities and/or arbitrariness that may have occurred.

The proposed rule changes relating to the implementation of the revised look-back period are set forth in proposed Section 7 of GSD Rule 4 and Section 7 of MBSD Rule 4, as further described below.

(5) Capping Withdrawing Members' Loss Allocation Exposure and Related Changes

Currently, pursuant to Section 7(g) of GSD Rule 4 and MBSD Rule 4, a member can withdraw from membership in order to avail itself of a cap on loss allocation if the member notifies FICC via a written notice, in accordance with Section 13 of GSD Rule 3 or MBSD Rule 3, as applicable, of its election to terminate its membership. Such notice must be provided by the Close of Business on the Business Day on which the loss allocation payment is due to FICC and, if properly provided to FICC, would limit the member's liability for a loss allocation to its Required Fund Deposit for the Business Day on which the notification of allocation is provided to the member.[20] As discussed above, the proposed rule change would continue providing members the opportunity to limit their loss allocation exposure by offering withdrawal options; however, the cap on loss allocation would be calculated differently and the associated withdrawal process would also be modified as it relates to withdrawals associated with the loss allocation process. In particular, the proposed rule change would shorten the withdrawal

to give notice, pursuant to Section 13 of GSD Rule 3 and MBSD Rule 3, of its election to terminate its membership in GSD or MBSD, as applicable, in respect of an allocation arising from any Remaining Loss allocated by FICC pursuant to Section 7(d) of GSD Rule 4 or Section 7(e) of MBSD Rule 4, as applicable, and any Other Loss, is the Close of Business on the Business Day on which the loss allocation payment is due to FICC. Current Section 13 of GSD Rule 4 and MBSD Rule 4 requires a 10-day notice period. *Supra* note 5.

FICC believes that it is appropriate to shorten such time period from 10 days to five (5) Business Days because FICC needs timely notice of which Tier One Netting Members or Tier One Members, as applicable, would remain in its membership for purpose of calculating the loss allocation for any subsequent round. FICC believes that five (5) Business Days would provide Tier One Netting Members or Tier One Members, as applicable, with sufficient time to decide whether to cap their loss allocation obligations by withdrawing from their membership in GSD or MBSD, as applicable.

[20] Current Section 13 of GSD Rule 3 and MBSD Rule 3 requires a member to provide FICC with 10 days written notice of the member's termination; however, FICC, in its discretion, may accept such termination within a shorter notice period. *Supra* note 5.

notification period from 10 days to five (5) Business Days, as further described below.

As proposed, if a member timely provides notice of its withdrawal from membership in respect of a loss allocation round, the maximum amount of losses it would be responsible for would be its Loss Allocation Cap,[21] provided that the member complies with the requirements of the withdrawal process in proposed Section 7b of GSD Rule 4 and Section 7b of MBSD Rule 4.

Currently, pursuant to Section 7(g) of GSD Rule 4 and MBSD Rule 4, if notification is provided to a member that an allocation has been made against the member pursuant to GSD Rule 4 or MBSD Rule 4, as applicable, and that application of the member's Required Fund Deposit is not sufficient to satisfy such obligation to make payment to FICC, the member is required to deliver to FICC by the Close of Business on the next Business Day, or by the Close of Business on the Business Day of issuance of the notification if so determined by FICC, that amount which is necessary to eliminate any such deficiency, unless the member elects to terminate its membership in FICC. To increase transparency of the timeframe under which FICC would require funds from members to satisfy their loss allocation obligations, FICC is proposing that members would receive two (2) Business Days' notice of a loss allocation, and members would be required to pay the requisite amount no later than the second Business Day following issuance of such notice.[22] Members would have five (5) Business Days [23] from the issuance of the first Loss Allocation Notice in any round of an Event Period to decide whether to withdraw from membership.

Each round would allow a Tier One Netting Member or Tier One Member, as applicable, the opportunity to notify FICC of its election to withdraw from membership after satisfaction of the losses allocated in such round. Multiple Loss Allocation Notices may be issued with respect to each round to allocate losses up to the round cap.

Specifically, the first round and each subsequent round of loss allocation would allocate losses up to a round cap of the aggregate of all Loss Allocation Caps of those Tier One Netting Members or Tier One Members, as applicable, included in the round. If a Tier One Netting Member or Tier One Member, as applicable, provides notice of its election to withdraw from membership, it would be subject to loss allocation in that round, up to its Loss Allocation Cap. If the first round of loss allocation does not fully cover FICC's losses, a second round will be noticed to those members that did not elect to withdraw from membership in the previous round; however, as noted above, the amount of any second or subsequent round cap may differ from the first or preceding round cap because there may be fewer Tier One Netting Members or Tier One Members, as applicable, in a second or subsequent round if Tier One Netting Members or Tier One Members, as applicable, elect to withdraw from membership with GSD or MBSD, as applicable, as provided in proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, following the first Loss Allocation Notice in any round.

Pursuant to the proposed rule change, in order to avail itself of its Loss Allocation Cap, a Tier One Netting Member or Tier One Member, as applicable, would need to follow the requirements in proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, which would provide that the Tier One Netting Member or Tier One Member, as applicable, must: (i) Specify in its Loss Allocation Withdrawal Notice an effective date of withdrawal, which date shall not be prior to the scheduled final settlement date of any remaining obligations owed by the member to FICC, unless otherwise approved by FICC, and (ii) as of the time of such member's submission of the Loss Allocation Withdrawal Notice, cease submitting transactions to FICC for processing, clearance or settlement, unless otherwise approved by FICC.

As proposed, a Tier One Netting Member or a Tier One Member, as applicable, that withdraws in compliance with proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, would remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under GSD Rule 4 or MBSD Rule 4, as applicable; however, its aggregate obligation would be limited to the amount of its Loss Allocation Cap (as fixed in the round for which it withdrew).

The proposed rule changes are designed to enable FICC to continue the loss allocation process in successive rounds until all of FICC's losses are allocated. To the extent that the Loss Allocation Cap of a Tier One Netting Member or Tier One Member, as applicable, exceeds such member's Required Fund Deposit on the first day of an Event Period, FICC may in its discretion retain any excess amounts on deposit from the member, up to the Loss Allocation Cap of a Tier One Netting Member or Tier One Member, as applicable.

The proposed rule changes relating to capping withdrawing members' loss allocation exposure and related changes to the withdrawal process are set forth in proposed Sections 7 and 7b of GSD Rule 4 and Sections 7 and 7b of MBSD Rule 4, as further described below.

B. Changes To Align Loss Allocation Rules

The proposed rule changes would align the loss allocation rules, to the extent practicable and appropriate, of the three DTCC Clearing Agencies so as to provide consistent treatment, especially for firms that are participants of two or more DTCC Clearing Agencies. As proposed, the loss allocation waterfall and certain related provisions, *e.g.,* returning a former member's Clearing Fund, would be consistent across the DTCC Clearing Agencies to the extent practicable and appropriate. The proposed rule changes of FICC that would align loss allocation rules of the DTCC Clearing Agencies are set forth in proposed Sections 1, 5, 6, 10, and 11 of GSD Rule 4 and MBSD Rule 4, as further described below.

C. Clarifying Changes Relating to Loss Allocation

The proposed rule changes are intended to make the provisions in the Rules governing loss allocation more transparent and accessible to members. In particular, FICC is proposing the following changes relating to loss allocation to clarify members' obligations for Declared Non-Default Loss Events.

Aside from losses that FICC might face as a result of a Defaulting Member Event, FICC could incur non-default losses incident to each Division's clearance and settlement business.[24] The GSD Rules and the MBSD Rules currently permit FICC to apply Clearing Fund to non-default losses.[25] Section 5

[21] If a member's Loss Allocation Cap exceeds the member's then-current Required Fund Deposit, it must still cover the excess amount.

[22] FICC believes that allowing members two (2) Business Days to satisfy their loss allocation obligations would provide Members sufficient notice to arrange funding, if necessary, while allowing FICC to address losses in a timely manner.

[23] *Supra* note 19.

[24] Non-default losses may arise from events such as damage to physical assets, a cyber-attack, or custody and investment losses.

[25] Arguably there is an ambiguity created by the first paragraph of Section 7 in both GSD Rule 4 and MBSD Rule 4, which suggests that losses or liabilities may only be allocated in a member default scenario, while Section 5 in both GSD Rule 4 and MBSD Rule 4 makes it clear that the

Continued

of GSD Rule 4 and MBSD Rule 4 provides that the use of Clearing Fund deposits is limited to satisfaction of losses or liabilities of FICC, which includes losses or liabilities that are otherwise incident to the operation of the clearance and settlement business of FICC, although the application of Clearing Fund to such losses or liabilities is more limited under MBSD Rule 4 when compared to GSD Rule 4.[26] Section 7(f) of GSD Rule 4 and MBSD Rule 4 provides that any loss or liability incurred by the Corporation incident to its clearance and settlement business arising other than from a Remaining Loss shall be allocated among Tier One Netting Members or Tier One Members, as applicable, ratably, in accordance with their Average Required Clearing Fund Deposits.[27]

If there is a failure of FICC following a non-default loss, such occurrence would affect members in much the same way as a failure of FICC following a Defaulting Member Event. Accordingly, FICC is proposing rule changes to enhance the provisions relating to non-default losses by clarifying members' obligations for such losses and aligning the non-default loss provisions in the GSD Rules and the MBSD Rules.

Specifically, for both the GSD Rules and the MBSD Rules, FICC is proposing enhancement of the governance around non-default losses that would trigger loss allocation to Tier One Netting Members or Tier One Members, as applicable, by specifying that the Board of Directors would have to determine that there is a non-default loss that may be a significant and substantial loss or liability that may materially impair the ability of FICC to provide clearance and settlement services in an orderly manner and will potentially generate losses to be mutualized among the Tier One Netting Members or Tier One Members, as applicable, in order to ensure that FICC may continue to offer clearance and settlement services in an orderly manner. The proposed rule change would provide that FICC would then be required to promptly notify members of this determination (a ''Declared Non-Default Loss Event''). In addition, FICC is proposing to better align the interest of FICC with those of its members by stipulating a mandatory Corporate Contribution apply to a Declared Non-Default Loss Event prior to any allocation of the loss among members, as described above. Additionally, FICC is proposing language to clarify members' obligations for Declared Non-Default Loss Events.

Under the proposal, FICC would clarify the Rules of both Divisions to make clear that Tier One Netting Members or Tier One Members, as applicable, are subject to loss allocation for non-default losses (*i.e.,* Declared Non-Default Loss Events under the proposal) and Tier Two Members are not subject to loss allocation for non-default losses.

The proposed rule changes relating to Declared Non-Default Loss Events and members' obligations for such events are set forth in proposed Section 7 of GSD Rule 4 and Section 7 of MBSD Rule 4, as further described below.

D. Amending Language Regarding FICC's Use of MBSD Clearing Fund

The proposed rule change would delete language currently in Section 5 of MBSD Rule 4 that limits certain uses by FICC of the MBSD Clearing Fund to ''unexpected or unusual'' requirements for funds that represent a ''small percentage'' of the MBSD Clearing Fund. FICC believes that these limiting phrases (which appear in connection with FICC's use of MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside the context of an MBSD Defaulting Member Event as well as to cover certain liquidity needs) are vague and imprecise, and should be replaced in their entirety. Specifically, FICC is proposing to delete the limiting language with respect to FICC's use of MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside the context of an MBSD Defaulting Member Event so as to not have such language be interpreted as impairing FICC's ability to access the MBSD Clearing Fund in order to manage non-default losses. FICC is also proposing to delete the limiting language with respect to FICC's use of MBSD Clearing Fund to cover certain liquidity needs because the effect of the limitation in this context is confusing and unclear.

The proposed rule changes relating to FICC's use of MBSD Clearing Fund are set forth in proposed Section 5 of MBSD Rule 4, as further described below.

The foregoing changes as well as other changes (including a number of conforming and technical changes) that FICC is proposing in order to improve the transparency and accessibility of the Rules are described in detail below.

E. Loss Allocation Waterfall Comparison

The following example[28] illustrates the differences between the current and proposed loss allocation provisions:

Assumptions:

(i) Firms A, B, and X are each a GSD Netting Member and an MBSD Clearing Member and are referred to as Member A, Member B, and Member X, respectively.

(ii) Member A defaults on a Business Day (Day 1). On the same day, FICC ceases to act for Member A and notifies members of the cease to act. After liquidating Member A's portfolio and applying Member A's Clearing Fund deposit, FICC has a total loss of $350 million, with $200 million in GSD and $150 million in MBSD.

(iii) Member X voluntarily retires from membership five (5) Business Days after FICC ceases to act for Member A (Day 6).

(iv) Member B defaults seven (7) Business Days after FICC ceases to act for Member A (Day 8). On the same day, FICC ceases to act for Member B and notifies members of the cease to act. After liquidating Member B's portfolio and applying Member B's Clearing Fund deposit, FICC has a total loss of $350 million, with $200 million in GSD and $150 million in MBSD.

(v) The current FICC loss provisions require FICC to contribute up to 25% of its retained earnings as a corporate contribution. For the purposes of this example, it is assumed that FICC will contribute 25% of its retained earnings. The amount of FICC's retained earnings is $176 million.

(vi) FICC's General Business Risk Capital Requirement is $98 million.

applicable Division's Clearing Fund may be used to satisfy non-default losses.

[26] Section 5 of GSD Rule 4 provides that ''The use of the Clearing Fund deposits shall be limited to satisfaction of losses or liabilities of the Corporation . . . otherwise incident to the clearance and settlement business of the Corporation . . .'' *Supra* note 5.

Section 5 of MBSD Rule 4 provides that ''The use of the Clearing Fund deposits and assets and property on which the Corporation has a lien on shall be limited to satisfaction of losses or liabilities of the Corporation . . . otherwise incident to the clearance and settlement business of the Corporation with respect to losses and liabilities to meet unexpected or unusual requirements for funds that represent a small percentage of the Clearing Fund . . .'' *Supra* note 5.

[27] Section 7(f) of GSD Rule 4 provides that ''Any loss or liability incurred by the Corporation incident to its clearance and settlement business . . . arising other than from a Remaining Loss (hereinafter, an ''Other Loss'') shall be allocated among Tier One Netting Members, ratably, in accordance with the respective amounts of their Average Required FICC Clearing Fund Deposits. *Supra* note 5.

Section 7(f) of MBSD Rule 4 provides that ''Any loss or liability incurred by the Corporation incident to its clearance and settlement business. . .arising other than from a Remaining Loss (hereinafter, an ''Other Loss''), shall be allocated among Tier One Members, ratably, in accordance with the respective amounts of their Average Required Clearing Fund Deposits. *Supra* note 5.

[28] For purposes of this example, FICC has assumed that no losses have arisen that apply to Tier Two Netting Members, Tier Two Members, or CCIT Members.

Current Loss Allocation:

Under the current loss allocation provisions, with respect to the losses arising out of Member A's default, FICC will contribute a total of $44 million ($176 million * 25%) from retained earnings,[29] with approximately $25 million ($44 million * ($200 million/$350 million)) for GSD and approximately $19 million ($44 million * ($150 million/$350 million)) for MBSD. FICC will then allocate the remaining GSD loss of $175 million ($200 million − $25 million) to GSD Tier One Netting Members and the remaining MBSD loss of $131 million ($150 million − $19 million) to MBSD Tier One Members.

With respect to losses arising out of Member B's default, FICC will contribute a total of approximately $33 million (($176 million − $44 million) * 25%) from retained earnings, with approximately $19 million ($33 million * ($200 million/$350 million)) for GSD and approximately $14 million ($33 million * ($150 million/$350 million)) for MBSD. FICC will then allocate the remaining GSD loss of $181 million ($200 million − $19 million) to GSD Tier One Netting Members and the remaining MBSD loss of $136 million ($150 million − $14 million) to MBSD Tier One Members.

Altogether, with respect to losses arising out of defaults of Member A and Member B, FICC will contribute a total of approximately $77 million of retained earnings, with approximately $44 million for GSD and approximately $33 million for MBSD. FICC will allocate losses of $356 million to GSD Tier One Netting Members and $267 million to MBSD Tier One Members.

Proposed Loss Allocation:

Under the proposed loss allocation provisions, a Defaulting Member Event with respect to Member A's default would have occurred on Day One, and a Defaulting Member Event with respect to Member B's default would have occurred on Day 8. Because the Defaulting Member Events occurred during a 10-business day period, they would be grouped together into an Event Period for purposes of allocating losses to members. The Event Period would begin on the 1st business day and end on the 10th business day.

With respect to losses arising out of Member A's default, FICC would apply a Corporate Contribution of $49 million ($98 million * 50%),[30] with approximately $32 million ($49 million * ($10 billion/$15.2 billion)) for GSD and approximately $17 million ($49 million * ($5.2 billion/$15.2 billion)) for MBSD. FICC would then allocate the remaining GSD loss of $168 million ($200 million − $32 million) to GSD Tier One Netting Members and the remaining MBSD loss of $133 million ($150 million − $17 million) to MBSD Tier One Members. With respect to losses arising out of Member B's default, FICC would not apply a Corporate Contribution since it would have already contributed the maximum Corporate Contribution of 50% of its General Business Risk Capital Requirement. With respect to losses arising out of Member B's default, FICC would allocate the GSD loss of $200 million to GSD Tier One Netting Members and the MBSD loss of $150 million to MBSD Tier One Members. Because Member X was a member in both Divisions on the first day of the Event Period, Member X would be subject to loss allocation with respect to all events occurring during the Event Period, even if the event occurred after its retirement. Therefore, Member X would be subject to loss allocation with respect to Member B's default.

Altogether, with respect to losses arising out of defaults of Member A and Member B, FICC would apply a Corporate Contribution of $49 million, with approximately $32 million for GSD and approximately $17 million for MBSD. FICC would allocate losses of $368 million to GSD Tier One Netting Members and $283 million to MBSD Tier One Members.

The principal differences in the above example are due to (i) the proposed changes to the calculation and application of the Corporate Contribution and (ii) the proposed introduction of an Event Period.

(ii) Detailed Description of the Proposed Rule Changes Related to Loss Allocation

A. Proposed Changes to GSD Rule 4 (Clearing Fund and Loss Allocation) and MBSD Rule 4 (Clearing Fund and Loss Allocation)

Overview of GSD Rule 4 and MBSD Rule 4

GSD Rule 4 and MBSD Rule 4 currently address Clearing Fund requirements and loss allocation obligations, as well as permissible uses of the Clearing Fund. These Rules address the various Clearing Fund calculations for each Division's Clearing Fund and set forth rights, obligations and other aspects associated with each Division's Clearing Fund, as well as each Division's loss allocation process. GSD Rule 4 and MBSD Rule 4 are each currently organized into 12 sections. Sections of these Rules that FICC is proposing to change are described below.

Section 1 of GSD Rule 4 and MBSD Rule 4

Currently, Section 1 of GSD Rule 4 and MBSD Rule 4 set forth the requirement that each GSD Netting Member and each MBSD Clearing Member make and maintain a deposit to the Clearing Fund at the minimum level set forth in the respective Rule 4 and note that the timing of such payment is set forth in another section of the respective Rule 4. Current Section 1 of the respective rule also provides that the deposits to the Clearing Fund will be held by FICC or its designated agents. Current Section 1 of MBSD Rule 4 also defines the term ''Transaction'' for purposes of MBSD Rule 4 and references a Member's obligation to replenish the deficit in its Required Fund Deposit if it is charged by FICC under certain circumstances.

FICC is proposing to rename the subheading of Section 1 of Rule 4 in both the GSD Rules and MBSD Rules from ''General'' to ''Required Fund Deposits'' and to restructure the wording of the provisions for clarity and readability.

Under the proposed rule change, Section 1 of GSD Rule 4 and Section 1 of MBSD Rule 4 would continue to have the same provisions as they relate to Netting Members or Clearing Members, as applicable, except for the following: (i) the language throughout the sections would be reorganized, streamlined and clarified, and (ii) language would be added regarding additional deposits maintained by the Netting Members or Clearing Members, as applicable, at FICC, and highlight for members that such additional deposits would be deemed to be part of the Clearing Fund and the member's Actual Deposit (as discussed below and as defined in the proposed rule change) but would not be deemed to be part of the member's Required Fund Deposit.

The proposed language regarding maintenance of a member's Actual Deposit would also make it clear that FICC will not be required to segregate such deposit, but shall maintain books and records concerning the assets that

[29] The retained earnings are applied to the respective Divisions in the same proportion that the losses of that Division bear to the total losses of both Divisions.

[30] The Corporate Contribution would be applied to the respective Divisions in the same proportion that the aggregate Average RFDs of all members in that Division bear to the aggregate Average RFDs of all members in both Divisions. For the purposes of this example, FICC has assumed that the aggregate Average RFDs of all GSD members is $10 billion and the aggregate Average RFDs of all MBSD members is $5.2 billion.

constitute each member's Actual Deposit.

In addition, FICC proposes a technical change to update a cross reference in Section 1 of GSD Rule 4 and MBSD Rule 4.

Furthermore, in Section 1 of MBSD Rule 4, FICC is proposing to move the definition of ''Transactions'' to proposed Section 2(a) of MBSD Rule 4, where the first usage of ''Transactions'' in MBSD Rule 4 appears. FICC is also proposing to delete the last sentence in Section 1 of MBSD Rule 4, which references a Member's obligation to replenish the deficit in its Required Fund Deposit if it is charged by FICC under certain circumstances, because it would no longer be relevant under the proposed rule change to Section 7 of MBSD Rule 4, as FICC would require members to pay their loss allocation amounts instead of charging their Required Fund Deposits for Clearing Fund losses.

Section 2 of GSD Rule 4 and MBSD Rule 4

Current Section 2 of GSD Rule 4 and MBSD Rule 4 set forth more detailed requirements pertaining to members' Required Fund Deposits. FICC is proposing to rename the subheadings in these sections from ''Required Fund Deposit'' to ''Required Fund Deposit Requirements'' in order to better reflect the purpose of this section.

In addition, FICC is proposing to expand the definition of ''Legal Risk'' in both the GSD and MBSD provisions (current Section 2(e) of GSD Rule 4 and Section 2(f) of MBSD Rule 4) by revising the parameters of Legal Risk so that it would not be limited to laws applicable to a member's insolvency or bankruptcy, as FICC believes that Legal Risk may arise outside the context of an insolvency or bankruptcy event regarding a member, and FICC should be permitted to adequately protect itself in those non- insolvency/bankruptcy circumstances as well.

For better organization of Rule 4, FICC is also proposing to relocate the provision on minimum Clearing Fund cash requirements (current Section 2(b) of GSD Rule 4 and Section 2(d) of MBSD Rule 4) to the section in each of GSD Rule 4 and MBSD Rule 4 dealing specifically with the form of Clearing Fund deposits (proposed Section 3 of GSD Rule 4 and MBSD Rule 4). This would necessitate the re-lettering of the provisions in Section 2. In addition, as stated above, the provision regarding the definition of ''Transactions'' for purposes of MBSD Rule 4 would be moved to proposed Section 2(a) from current Section 1.

FICC is proposing technical changes to correct typographical errors in current Section 2 of GSD Rule 4.

Sections 3, 3a and 3b of GSD Rule 4 and MBSD Rule 4

Currently, Sections 3, 3a and 3b of GSD Rule 4 and MBSD Rule 4 address the permissible form of Clearing Fund deposits and contain detailed requirements regarding each form. FICC is proposing changes to improve the readability of these sections.

In addition, for better organization of the subject matter, FICC is proposing to move certain paragraphs from one section to another, including (i) moving clauses (b) and (d) in current Section 2 of GSD Rule 4 and MBSD Rule 4, respectively, to proposed Section 3 of GSD Rule 4 and MBSD Rule 4 and (ii) moving the last paragraph of current Section 3 in GSD Rule 4 and MBSD Rule 4 to proposed Section 3b of GSD Rule 4 and MBSD Rule 4.

Under the proposed rule change, FICC is also proposing to update the cash investment provision in Section 3a of GSD Rule 4 and MBSD Rule 4 to reflect the Clearing Agency Investment Policy adopted by FICC[31] and to define Clearing Fund Cash as (i) cash deposited by a Netting Member or Clearing Member, as applicable, as part of its Actual Deposit, (ii) the proceeds of (x) any loans made to FICC secured by the pledge by FICC of Eligible Clearing Fund Securities pledged to FICC or (y) any sales of Eligible Clearing Fund Securities pledged to FICC, (iii) cash receipts from any investment of, repurchase or reverse repurchase agreements relating to, or liquidation of, Clearing Fund assets, and (iv) cash payments on Eligible Letters of Credit. Lastly, FICC is proposing technical changes to correct typographical errors in current Section 3 of MBSD Rule 4 and current Section 3b of GSD Rule 4.

Section 4 of GSD Rule 4 and MBSD Rule 4

Currently, Section 4 of GSD Rule 4 and MBSD Rule 4 address the granting of a first priority perfected security interest by each Netting Member or Clearing Member, as applicable, in all assets and property placed by the member in the possession of FICC (or its agents acting on its behalf). FICC is not proposing any substantive changes to these sections except for streamlining the provisions for readability and clarity, and adding ''Actual Deposit'' as a defined term to refer to Eligible Clearing Fund Securities, funds and assets pledged to FICC to secure any and all obligations and liabilities of a Netting Member or a Clearing Member, as applicable, to FICC.

Section 5 of GSD Rule 4 and MBSD Rule 4

Currently, Section 5 of GSD Rule 4 and MBSD Rule 4 describe the use of each Division's Clearing Fund. FICC is proposing to rename the subheading of this section from ''Use of Deposits and Payments'' to ''Use of Clearing Fund'' to better reflect the purpose of the section.

Under the proposed rule change, FICC is also proposing changes to streamline this section for clarity and readability and to align the GSD Rules and MBSD Rules. Specifically, FICC is proposing to delete the first paragraph of current Section 5 of GSD Rule 4 and MBSD Rule 4 and replace it with clearer language that sets forth the permitted uses of each Division's Clearing Fund. Specifically, the proposed Section 5 of GSD Rule 4 and MBSD Rule 4 provides that each Division's Clearing Fund would only be used by FICC (i) to secure each member's performance of obligations to FICC, including, without limitation, each member's obligations with respect to any loss allocations as set forth in proposed Section 7 of GSD Rule 4 and MBSD Rule 4 and any obligations arising from a Cross-Guaranty Agreement pursuant to GSD Rule 41 or MBSD Rule 32, as applicable, or a Cross-Margining Agreement pursuant to GSD Rule 43, (ii) to provide liquidity to FICC to meet its settlement obligations, including, without limitation, through the direct use of cash in the GSD Clearing Fund or MBSD Clearing Fund, as applicable, or through the pledge or rehypothecation of pledged Eligible Clearing Fund Securities in order to secure liquidity, and (iii) for investment as set forth in proposed Section 3a of GSD Rule 4 and MBSD Rule 4.

[31] *See* Securities Exchange Act Release No. 79528 (December 12, 2016), 81 FR 91232 (December 16, 2016) (SR–FICC–2016–005). The Clearing Agency Investment Policy (the ''Policy'') governs the management, custody, and investment of cash deposited to the GSD and MBSD Clearing Funds, the proprietary liquid net assets (cash and cash equivalents) of FICC and other funds held by FICC. The Policy sets forth guiding principles for the investment of those funds, which include adherence to a conservative investment philosophy that places the highest priority on maximizing liquidity and avoiding risk, as well as mandating the segregation and separation of funds. The Policy also addresses the process for evaluating credit ratings of counterparties and identifies permitted investments within specified parameters. In general, assets are required to be held by regulated and creditworthy financial institution counterparties and invested in financial instruments that, with respect to the GSD and MBSD Clearing Funds, may include deposits with banks, including the Federal Reserve Bank of New York, collateralized reverse-repurchase agreements, direct obligations of the U.S. government and money-market mutual funds.

The current first paragraph of Section 5 of GSD Rule 4 and MBSD Rule 4 provides that if FICC pledges, hypothecates, encumbers, borrows, or applies any part of the respective Division's Clearing Fund deposits to satisfy any liability, obligation, or liquidity requirements for more than thirty (30) days, FICC, at the Close of Business on the 30th day (or on the first Business Day thereafter) will consider the amount used as an actual loss to the respective Division's Clearing Fund and immediately allocate such loss in accordance with Section 7 of GSD Rule 4 or MBSD Rule 4, as applicable. As proposed, FICC would retain this provision conceptually but replace it with clearer and streamlined language that provides that each time FICC uses any part of the respective Division's Clearing Fund for more than 30 calendar days to provide liquidity to FICC to meet its settlement obligations, including, without limitation, through the direct use of cash in the Clearing Fund or through the pledge or rehypothecation of pledged Eligible Clearing Fund Securities in order to secure liquidity, FICC, at the Close of Business on the 30th calendar day (or on the first Business Day thereafter) from the day of such use, would consider the amount used but not yet repaid as a loss to the Clearing Fund incurred as a result of a Defaulting Member Event and immediately allocate such loss in accordance with proposed Section 7 of GSD Rule 4 or MBSD Rule 4, as applicable.

The proposed rule change also includes deleting language currently in Section 5 of MBSD Rule 4 that limits certain uses by FICC of the MBSD Clearing Fund to ''unexpected or unusual'' requirements for funds that represent a ''small percentage'' of the MBSD Clearing Fund. FICC believes that these limiting phrases (which appear in connection with FICC's use of MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside the context of an MBSD Defaulting Member Event as well as to cover certain liquidity needs) are vague and imprecise, and should be replaced in their entirety. Specifically, FICC is proposing to delete the limiting language with respect to FICC's use of MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside of an MBSD Defaulting Member Event so as to not have such language be interpreted as impairing FICC's ability to access the MBSD Clearing Fund in order to manage non-default losses. FICC is also proposing to delete the limiting language with respect to FICC's use of MBSD Clearing Fund to cover certain liquidity needs because the effect of the limitation in this context is confusing and unclear.

In addition, FICC is proposing to delete the last paragraph in current Section 5 of GSD Rule 4 and MBSD Rule 4 because these paragraphs address the application of a member's deposits to the applicable Clearing Fund to cover the allocation of a loss or liability incurred by FICC. These paragraphs would no longer be relevant, because, under the proposed Section 7 of GSD Rule 4 and MBSD Rule 4 (discussed below), FICC would not apply the member's deposit to the Clearing Fund unless the member does not satisfy payment of its allocated loss amount within the required timeframe. These paragraphs also currently include provisions regarding other agreements, such as a Cross-Guaranty Agreement, that pertain to a Defaulting Member, and such provisions would now be covered by proposed Section 6 of GSD Rule 4 and MBSD Rule 4.

Section 6 of GSD Rule 4 and MBSD Rule 4

Currently, Section 6 of GSD Rule 4 and MBSD Rule 4 are reserved for future use. FICC is proposing to use this section for provisions relating to the application of deposits to the respective Division's Clearing Fund and other amounts held by FICC to a Defaulting Member's obligations.

FICC is proposing to add a subheading of ''Application of Clearing Fund Deposits and Other Amounts to Defaulting Members' Obligations'' to Section 6 of GSD Rule 4 and MBSD Rule 4. Under the proposed rule change, for better organization by subject matter, FICC is also proposing to relocate certain provisions to these sections from the respective current Section 7 of GSD Rule 4 and MBSD Rule 4, which addresses FICC's application of Clearing Fund deposits and other assets held by FICC securing a Defaulting Member's obligations to FICC.

For additional clarity and for consistency with the loss allocation rules of the other DTCC Clearing Agencies, FICC proposes to add a provision which makes it clear that, if FICC applies a Defaulting Member's Clearing Fund deposits, FICC may take any and all actions with respect to the Defaulting Member's Actual Deposits, including assignment, transfer, and sale of any Eligible Clearing Fund Securities, that FICC determines is appropriate.

Sections 7, 7a and 7b of GSD Rule 4 and MBSD Rule 4

Current Section 7 of GSD Rule 4 and MBSD Rule 4 contains FICC's current loss allocation waterfall for losses or liabilities incurred by FICC. With respect to any loss or liability incurred by FICC as the result of the failure of a Defaulting Member to fulfill its obligations to FICC, the loss allocation waterfall for each Division currently provides:

(i) Application of any Clearing Fund deposits and other collateral held by FICC securing a Defaulting Member's obligations to FICC and additional resources as are applicable to the Defaulting Member.

(ii) If a loss or liability remains after the application of the Defaulting Member's collateral and resources, FICC would apply up to 25% of FICC's existing retained earnings, or such higher amount as the Board of Directors determines.

(iii) If a loss or liability still remains after the application of the retained earnings, FICC would apply the loss or liability to members as follows:

(a) If the remaining loss or liability is attributable to Tier One Netting Members or Tier One Members, as applicable, then FICC will allocate such loss or liability to Tier One Netting Members or Tier One Members, as applicable, by assessing the Required Fund Deposit maintained by each such member an amount up to $50,000, in an equal basis per Tier One Netting Member or Tier One Member, as applicable.

(b) If the remaining loss or liability is attributable to Tier Two Members, then FICC will allocate such loss or liability to Tier Two Members based upon their trading activity with the Defaulting Member that resulted in a loss.

(iv) If there is any loss or liability that still remains after the application of (ii) and (iii) above that is attributable to Tier One Netting Members or Tier One Members, as applicable, then FICC will allocate such loss or liability among Tier One Netting Members or Tier One Members, as applicable, ratably based on the amount of each Tier One Netting Member's or Tier One Member's Required Fund Deposit and based on the average daily level of such deposit over the prior twelve (12) months (or such shorter period as may be available if the member has not maintained a deposit over such time period).

Current Section 7(f) of GSD Rule 4 and MBSD Rule 4 also provides that Other Losses shall be allocated among Tier One Netting Members or Tier One Members, as applicable, ratably in

accordance with the respective amounts of each Tier One Netting Member's or Tier One Member's Required Fund Deposit and based on the average daily level of such deposit over the prior twelve (12) months (or such shorter period as may be available if the member has not maintained a deposit over such time period).

Currently, pursuant to Section 7(e) of GSD Rule 4, an Inter-Dealer Broker Netting Member, or a Non-IDB Repo Broker with respect to activity in its Segregated Broker Account, will not be subject to an aggregate allocation loss for any single loss-allocation event that exceeds $5 million. FICC believes that it is appropriate for GSD to retain this cap under the proposed rule change because the Inter-Dealer Broker Netting Members are required to limit their business as provided in Section 8(e) of GSD Rule 3, which would in turn minimize the potential losses or liabilities that could be incurred by FICC from Inter-Dealer Broker Netting Members.[32] FICC believes that it is also appropriate for GSD to retain this cap under the proposed rule change for Non-IDB Repo Brokers because their activity in their respective Segregated Broker Accounts would be subject to similar limitations as the Inter-Dealer Broker Netting Members. However, the proposal would apply the cap to an Event Period instead of a single loss event in order to conform with the concept of the Event Period under the proposal. FICC believes applying the cap to an Event Period would continue to reasonably represent the risk profiles of the Inter-Dealer Broker Netting Members, and Non-IDB Repo Brokers with respect to their Segregated Broker Accounts, because they submit affirmed trades from their systems to GSD, with each trade already matched to the counterparty that will ultimately deliver or receive the securities. Therefore, Inter-Dealer Broker Netting Members, and Non-IDB Repo Brokers with respect to their Segregated Broker Accounts, do not generally maintain positions with FICC and present minimal risk to FICC. FICC is also proposing technical changes to replace (i) the term ''Segregated Broker Account'' with ''Segregated Repo Account'' and (ii) the term ''Non-IDB Broker'' with ''Non-IDB Repo Broker,'' both of which are the correct terms defined in GSD Rule 1.

Current Section 7(g) of GSD Rule 4 and MBSD Rule 4 further provides that if the Required Fund Deposit of the member being allocated the loss is not sufficient to satisfy its loss allocation obligation, the member is required to deliver to FICC an amount that is necessary to eliminate the deficiency by the Close of Business on the next Business Day, or by the Close of Business on the Business Day of issuance of the notification if so determined by FICC. Under the current Rules, a member may elect to terminate its membership, which would limit its loss allocation to the amount of its Required Fund Deposit for the Business Day on which the notification of such loss allocation is provided to the member. If the member does not elect to terminate its membership and fails to satisfy its Required Fund Deposit within the timeframe specified in the Rules, FICC will cease to act generally with regard to such member pursuant to GSD Rules 21 and 22A or MBSD Rules 14 and 17, as applicable, and may take disciplinary action against such member pursuant to GSD Rule 48 or MBSD Rule 38, as applicable.

Current Section 7(h) of GSD Rule 4 and MBSD Rule 4 requires FICC to promptly notify members and the Commission of the amount involved and the causes if a Remaining Loss or Other Loss occurs. In addition, current Section 7(i) of GSD Rule 4 and MBSD Rule 4 also provides that any increase in Clearing Fund deposit as required by subsection (f) of current Section 2 of GSD Rule 4 or provisions of MBSD Rule 4 regarding special charges or other premiums will not be taken into account when calculating loss allocation based on a GSD Member's Average Required FICC Clearing Fund Deposit amount or an MBSD Member's Average Required Fund Deposit amount, as applicable, under current Section 7 of GSD Rule 4 and MBSD Rule 4.

Under the proposed rule change, FICC is proposing to rename the subheading of Section 7 of GSD Rule 4 and MBSD Rule 4 to ''Loss Allocation Waterfall, Off-the-Market Transactions.'' In addition, FICC is proposing to restructure its loss allocation waterfall as described below.

For better organization of the subject matter, FICC is proposing to move certain paragraphs from one section to another, including (i) relocating the last sentence of current Section 7(h) of GSD Rule 4 and MBSD Rule 4 regarding recovery of allocated losses or liabilities by FICC to the fifth paragraph of proposed Section 7 of GSD Rule 4 and MBSD Rule 4, (ii) relocating from current Section 7(a) of GSD Rule 4 and MBSD Rule 4 provisions which address FICC's application of Clearing Fund deposits and other assets held by FICC securing a Defaulting Member's obligations to FICC to proposed Section 6 of GSD Rule 4 and MBSD Rule 4, (iii) relocating from current Section 7 of GSD Rule 4 to proposed Section 6 of GSD Rule 4 the provision regarding FICC's right to treat certain payments to an FCO under a Cross-Margining Guaranty as a loss to be allocated, (iv) relocating the provisions in current Section 7(i) of GSD Rule 4 and MBSD Rule 4 regarding certain increases in Clearing Fund deposits not being taken into account when calculating loss allocation so that such provisions would come right after the loss allocation calculation provision, with an updated reference to proposed renumbered Sections 2(d) and 2(e) in GSD Rule 4 and MBSD Rule 4, respectively, and (v) relocating the provision regarding withdrawing members reapplying to become members [33] in the second paragraph of current Section 7(g) of GSD Rule 4 and

[32] Pursuant to Section 8(e) of GSD Rule 3, an Inter-Dealer Broker Netting Member is required to (A) limit its business to acting exclusively as a broker, (B) conduct all of its business in Repo Transactions with Netting Members, and (C) conduct at least 90 percent of its business in transactions that are not Repo Transactions with Netting Members. If an Inter-Dealer Broker Netting Member fails to comply with these requirements, then the Inter-Dealer Broker Netting Member shall be considered by FICC as a Dealer Netting Member. *Supra* note 5.

[33] Current Section 7(g) of GSD Rule 4 provides that a Member that elects to terminate its membership pursuant to alternative (ii) in Section 7(g) of GSD Rule 4 in lieu of being liable to pay an additional assessment amount above its Required Fund Deposit shall not be eligible to re-apply to become a Comparison-Only Member or a Netting Member unless, prior to submitting such application, it makes the payment to FICC provided for in alternative (i) in Section 7(g) of GSD Rule 4, together with interest on that amount at the average of the Federal Funds Rate plus one percent, calculated from the date on which the Remaining Loss or Other Loss was incurred by FICC until the date of such payment. *Supra* note 5.

Current Section 7(g) of MBSD Rule 4 provides that a Member that elects to terminate its membership pursuant to alternative (ii) in Section 7(g) of MBSD Rule 4 in lieu of being liable to pay an additional assessment amount above its Required Fund Deposit shall not be eligible to re-apply to become a Clearing Member unless, prior to submitting such application, it makes the payment to FICC provided for in alternative (i) in Section 7(g) of MBSD Rule 4, together with interest on that amount at the average of the Federal Funds Rate plus one percent, calculated from the date on which the Remaining Loss or Other Loss was incurred by FICC until the date of such payment. *Supra* note 5.

The condition for re-application was historically in the rules of Government Securities Clearing Corporation (''GSCC'') (FICC's predecessor) to solidify GSCC's membership base and thereby discourage members from withdrawing from membership during a time of stress solely to avoid their loss allocation obligations. This condition was later incorporated into the GSD Rules and MBSD Rules. In the interest of continuing to encourage members to remain in FICC central clearing in order to preserve the robustness of the Treasury and mortgage-backed securities markets, FICC would like to retain this condition for re-application in the GSD and MBSD Rules as is. As the provision applies to a remote contingency and, without an immediate business need, NSCC and DTC would prefer not to add this provision at this time.

MBSD Rule 4 to come right after the paragraph regarding the election of a Tier One Netting Member or Tier One Member, as applicable, to withdraw from membership in proposed Section 7 of GSD Rule 4 and MBSD Rule 4. Furthermore, in order to enhance readability and clarity, FICC is proposing a number of changes to streamline the language in these provisions.

In Section 7 of GSD Rule 4 and MBSD Rule 4, as applicable, FICC is proposing to make it clear that no loss allocation under proposed GSD Rule 4 or proposed MBSD Rule 4, as applicable, would constitute a waiver of any claim FICC may have against a member for any losses or liabilities to which the member is subject under the Rules, including, without limitation, any loss or liability to which it may be subject under proposed GSD Rule 4 or proposed MBSD Rule 4, as applicable. FICC is proposing this change to preserve its legal rights and to make it clear to members that loss allocation under proposed GSD Rule 4 and proposed MBSD Rule 4 would not be deemed as FICC waiving any claims it may have against a member for any losses or liabilities to which the member is subject under the Rules.

Under the proposal, Section 7 of GSD Rule 4 and MBSD Rule 4 would make clear that the loss allocation waterfall applies to losses and liabilities (i) arising out of or relating to a default of a member or (ii) otherwise incident to the clearance and settlement business of FICC (*i.e.,* non-default losses). The loss allocation waterfall would be triggered if FICC incurs a loss or liability arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event.

As proposed, Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that, for the purposes of GSD Rule 4 or MBSD Rule 4, as applicable, the term ''Defaulting Member'' would mean a GSD Member or MBSD Member, as applicable, for which FICC has ceased to act pursuant to GSD Rule 21 or GSD Rule 22,[34] or MBSD Rule 14 or MBSD Rule 16,[35] as applicable, the term ''Defaulting Member Event'' would mean the determination by FICC to cease to act for a GSD Member or MBSD Member, as applicable, pursuant to GSD Rule 21 or GSD Rule 22, or MBSD Rule 14 or MBSD Rule 16, as applicable, and the term ''Declared Non-Default Loss Event'' would mean the determination by the Board of Directors that a loss or liability incident to the clearance and settlement business of FICC may be a significant and substantial loss or liability that may materially impair the ability of FICC to provide clearance and settlement services in an orderly manner and will potentially generate losses to be mutualized among members in order to ensure that FICC may continue to offer clearance and settlement services in an orderly manner.

As proposed, each member would be obligated to FICC for the entire amount of any loss or liability incurred by FICC arising out of or relating to any Defaulting Member Event with respect to such member. Under the proposal, to the extent that such loss or liability is not satisfied pursuant to proposed Section 6 of GSD Rule 4 or MBSD Rule 4, as applicable, FICC would apply a Corporate Contribution thereto and charge the remaining amount of such loss or liability ratably to other members, as provided in proposed Section 7 of GSD Rule 4 and MBSD Rule 4.

Under proposed Section 7 of GSD Rule 4 and MBSD Rule 4, the loss allocation waterfall would begin with a corporate contribution from FICC (''Corporate Contribution''), as is the case under the current Rules, but in a different form than under the current Section 7 of GSD Rule 4 and MBSD Rule 4 described above. Today, Section 7(b) of GSD Rule 4 and Section 7(c) of MBSD Rule 4 provide that, if FICC incurs any loss or liability as the result of the failure of a Defaulting Member to fulfill its obligations to FICC, FICC will contribute up to 25% of its existing retained earnings (or such higher amount as the Board of Directors shall determine), to such loss or liability; however, no corporate contribution from FICC is currently required for losses resulting other than those from Member impairments. Under the proposal, FICC would add a proposed new Section 7a to GSD Rule 4 and MBSD Rule 4 with a subheading of ''Corporate Contribution'' and define FICC's Corporate Contribution with respect to any loss allocation pursuant to proposed Section 7 of GSD Rule 4 or MBSD Rule 4, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, as an amount that is equal to fifty (50) percent of the amount calculated by FICC in respect of its General Business Risk Capital Requirement as of the end of the calendar quarter immediately preceding the Event Period.[36] The proposed rule change would specify that FICC's General Business Risk Capital Requirement, as defined in FICC's Clearing Agency Policy on Capital Requirements,[37] is, at a minimum, equal to the regulatory capital that FICC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[38]

As proposed, if FICC applies the Corporate Contribution to a loss or liability arising out of or relating to one or more Defaulting Member Events or Declared Non-Default Loss Events relating to an Event Period, then for any subsequent Event Periods that occur during the two hundred fifty (250) Business Days thereafter,[39] the Corporate Contribution would be reduced to the remaining unused portion of the Corporate Contribution amount that was applied for the first Event Period. Proposed Section 7a of both GSD Rule 4 and MBSD Rule 4 would require FICC to notify members of any such reduction to the Corporate Contribution.

Proposed Section 7a to GSD Rule 4 and MBSD Rule 4 would also make clear that there would be one FICC Corporate Contribution, the amount of which would be available to both Divisions and would be applied against a loss or liability in either Division in the order in which such loss or liability occurs, *i.e.,* FICC would not have two separate Corporate Contributions, one for each Division. As proposed, in the event of a loss or liability relating to an Event Period, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, attributable to only one Division, the Corporate Contribution would be applied to that Division up to the amount then available. Under the proposal, if a loss or liability relating to an Event Period, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, occurs simultaneously at both Divisions, the Corporate Contribution would be applied to the respective Divisions in the same proportion that the aggregate Average RFDs of all members in that Division bears to the aggregate Average RFDs of all members in both Divisions.[40]

Currently, the Rules do not require FICC to contribute its retained earnings

[34] FICC may cease to act for a GSD Member pursuant to any of the circumstances set forth under GSD Rule 21 (Restrictions on Access to Services) or GSD Rule 22 (Insolvency of a Member). *Supra* note 5.

[35] FICC may cease to act for an MBSD Member pursuant to any of the circumstances set forth under MBSD Rule 14 (Restrictions on Access to Services) or MBSD Rule 16 (Insolvency of a Member). *Supra* note 5.

[36] *Supra* note 9.

[37] *Supra* note 10.

[38] *Supra* note 11.

[39] *Supra* note 13.

[40] *Supra* note 14.

to losses and liabilities other than those from member defaults. Under the proposal, FICC would expand the application of its corporate contribution beyond losses and liabilities as the result of the failure of a Defaulting Member to fulfill its obligations to FICC. The proposed Corporate Contribution would apply to losses or liabilities relating to or arising out of Defaulting Member Events and Declared Non-Default Loss Events, and would be a mandatory loss contribution by FICC prior to any allocation of the loss among the applicable Division's members.

Current Section 7(b) of GSD Rule 4 and Section 7(c) of MBSD Rule 4 provide FICC the option to contribute amounts higher than the specified percentage of retained earnings as determined by the Board of Directors, to any loss or liability incurred by FICC as the result of the failure of a Defaulting Member to fulfill its obligations to FICC. This option would be retained and expanded under the proposal to also cover non-default losses. Proposed Section 7a of GSD Rule 4 and MBSD Rule 4 would provide that nothing in the Rules would prevent FICC from voluntarily applying amounts greater than the Corporate Contribution against any FICC loss or liability, whether arising out of or relating to a Defaulting Member Event or a Declared Non-Default Loss Event, if the Board of Directors, in its sole discretion, believes such to be appropriate under the factual situation existing at the time.

Proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that FICC shall apply the Corporate Contribution to losses and liabilities that arise out of or relate to one or more Defaulting Member Events and/or (ii) Declared Non-Default Loss Events that occur within an Event Period. The proposed rule change also provides that if losses and liabilities with respect to such Event Period remain unsatisfied following application of the Corporate Contribution, FICC would allocate such losses and liabilities to members, as described below.

As proposed, Section 7 of GSD Rule 4 and MBSD Rule 4 would retain the differentiation in allocating losses to Tier One Netting Members or Tier One Members, as applicable, and Tier Two Members. Specifically, as is the case today, losses or liabilities that arise out of or relate to one or more Defaulting Member Events would be attributable to Tier One Netting Members or Tier One Members, as applicable, and Tier Two Members, while losses or liabilities that arise out of or relate to one or more Declared Non-Default Loss Events would only be attributable to Tier One Netting Members or Tier One Members, as applicable. Tier Two Members would not be subject to loss allocation with respect to Declared Non-Default Loss Events.

Under the proposal, FICC would delete the provision in current Section 7(h) of GSD Rule 4 and MBSD Rule 4 that requires FICC to promptly notify members and the Commission of the amounts involved and the causes if a Remaining Loss or Other Loss occurs because such notification would no longer be necessary under the proposed rule change. Under the proposed rule change, FICC would notify members subject to loss allocation of the amounts being allocated to them in one or more Loss Allocation Notices for both Defaulting Member Events and Declared Non-Default Loss Events. As such, in order to conform to the proposed rule change, FICC is proposing to eliminate the notification to members regarding the amounts involved and the causes if a Remaining Loss or Other Loss occurs that is required under current Section 7(h) of GSD Rule 4 and MBSD Rule 4. FICC is also proposing to delete the notification to the Commission regarding the amounts involved and the causes if a Remaining Loss or Other Loss occurs as required in the same section. While as a practical matter, FICC would notify the Commission of a decision to loss allocate, FICC does not believe such notification needs to be specified in the Rules.

In addition, FICC is proposing to clarify the provision related to Off-the-Market Transactions so that it is clear that loss or liability of FICC in connection with the close-out or liquidation of an Off-the-Market Transaction in the portfolio of a Defaulting Member would be allocated to the Member that was the counterparty to such transaction.

Tier One Netting Members/Tier One Members

For Tier One Netting Members or Tier One Members, as applicable, proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would establish the concept of an ''Event Period'' to provide for a clear and transparent way of handling multiple loss events occurring in a period of ten (10) Business Days, which would be grouped into an Event Period.[41] As stated above, both Defaulting Member Events or Declared Non-Default Loss Events could occur within the same Event Period.

Under the proposal, an Event Period with respect to a Defaulting Member Event would begin on the day FICC notifies members that it has ceased to act for the Defaulting Member (or the next Business Day, if such day is not a Business Day). In the case of a Declared Non-Default Loss Event, an Event Period would begin on the day that FICC notifies members of the Declared Non-Default Loss Event (or the next Business Day, if such day is not a Business Day). If a subsequent Defaulting Member Event or Declared Non-Default Loss Event occurs during an Event Period, any losses or liabilities arising out of or relating to any such subsequent event would be resolved as losses or liabilities that are part of the same Event Period, without extending the duration of such Event Period.

Proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would also retain the requirement of loss allocation among Tier One Netting Members or Tier One Members, as applicable, if a loss or liability remains after the application of the Corporate Contribution, as described above. In contrast to the current Section 7 where FICC would assess the Required Fund Deposits of Tier One Netting Members or Tier One Members, as applicable, to allocate losses, under the proposal, FICC would require Tier One Netting Members or Tier One Members, as applicable, to pay their loss allocation amounts (leaving their Required Fund Deposits intact).[42] Loss allocation obligations would continue to be calculated based upon a Tier One Netting Member's or Tier One Member's, as applicable, pro rata share of losses and liabilities (although the pro rata share would be calculated differently than it is today), and Tier One Netting Members or Tier One Members, as applicable, would still

[41] *Supra* note 16.

[42] FICC believes that shifting from the two-step methodology of applying the respective Division's Clearing Fund and then requiring members to immediately replenish it to requiring direct payment would increase efficiency, while preserving the right to charge the member's Clearing Fund deposits in the event the member does not timely pay. Such a failure to pay would trigger recourse to the Clearing Fund deposits of the member under proposed Section 6 of GSD Rule 4 or MBSD Rule 4, as applicable. In addition, this change would provide greater stability for FICC in times of stress by allowing FICC to retain the respective Division's Clearing Fund, its critical prefunded resource, while charging loss allocations. FICC believes doing so would allow FICC to cover the respective Division's current credit exposures to its Members at all times. By retaining the GSD and MBSD Clearing Funds as proposed, FICC could use the Clearing Funds to secure the performance obligations of Members to their respective Division, including their payment obligation for any loss allocation, while maintaining access to prefunded resources. By being able to manage the respective Division's current credit exposures throughout the loss allocation process, FICC would be able to continue to provide its critical operations and services during what would be expected to be a stressful period.

retain the ability to voluntarily withdraw from membership and cap their loss allocation obligation (although the loss allocation obligation would also be calculated differently than it is today).

The proposed rule change to Section 7 of GSD Rule 4 and MBSD Rule 4 would clarify that each Tier One Netting Member or Tier One Member, as applicable, that is a Tier One Netting Member or Tier One Member on the first day of an Event Period would be obligated to pay its pro rata share of losses and liabilities arising out of or relating to each Defaulting Member Event (other than a Defaulting Member Event with respect to which it is the Defaulting Member) and each Declared Non-Default Loss Event occurring during the Event Period. The proposal would make it clear that any Tier One Netting Member or Tier One Member, as applicable, for which FICC ceases to act on a non-Business Day, triggering an Event Period that commences on the next Business Day, shall be deemed to be a Tier One Netting Member or Tier One Member, as applicable, on the first day of that Event Period.

Under the proposed rule change, a loss allocation ''round'' would mean a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the round cap. When the aggregate amount of losses allocated in a round equals the round cap, any additional losses relating to the applicable Event Period would be allocated in one or more subsequent rounds, in each case subject to a round cap for that round. FICC may continue the loss allocation process in successive rounds until all losses from the Event Period are allocated among Tier One Netting Members or Tier One Members, as applicable, that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 7b of GSD Rule 4 or MBSD Rule 4.

As proposed, each loss allocation would be communicated to the Tier One Netting Members or Tier One Members, as applicable, by the issuance of a Loss Allocation Notice. Under the proposal, each Tier One Netting Member's or Tier One Member's, as applicable, pro rata share of losses and liabilities to be allocated in any round would be equal to (i) the member's Average RFD divided by (ii) the sum of Average RFD amounts of all members subject to loss allocation in such round.

Each Loss Allocation Notice would specify the relevant Event Period and the round to which it relates. The first Loss Allocation Notice in any first, second, or subsequent round would expressly state that such Loss Allocation Notice reflects the beginning of the first, second, or subsequent round, as the case may be, and that each Tier One Netting Member or Tier One Member, as applicable, in that round has five (5) Business Days from the issuance of such first Loss Allocation Notice for the round to notify FICC of its election to withdraw from membership with GSD or MBSD, as applicable, pursuant to proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, and thereby benefit from its Loss Allocation Cap.[43] As proposed, the ''Loss Allocation Cap'' of a Tier One Netting Member or a Tier One Member, as applicable, would be equal to the greater of (x) its Required Fund Deposit on the first day of the applicable Event Period and (y) its Average RFD.

FICC is proposing to clarify that after a first round of loss allocation with respect to an Event Period, only Tier One Netting Members or Tier One Members, as applicable, that have not submitted a Loss Allocation Withdrawal Notice in accordance with proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, would be subject to further loss allocation with respect to that Event Period.

As proposed, each such member's pro rata share of losses and liabilities to be allocated in any round would be equal to (i) the member's Average RFD, divided by (ii) the sum of the Average RFD amounts of all members subject to loss allocation in such round. Each such member would have a maximum payment obligation with respect to any loss allocation round that would be equal to the greater of (x) its Required Fund Deposit on the first day of the applicable Event Period or (y) its Average RFD (such amount would be each member's ''Loss Allocation Cap''). Therefore, the sum of the Loss Allocation Caps of the members subject to loss allocation would constitute the maximum amount that FICC would be permitted to allocate in each round. FICC would retain the loss allocation limit of $5 million for Inter-Dealer Broker Netting Members, or Non-IDB Repo Brokers with respect to activities in their Segregated Broker Accounts, as discussed above.

As proposed, Section 7 of GSD Rule 4 and MBSD Rule 4, would also provide that, to the extent that a Tier One Netting Member's or Tier One Member's, as applicable, Loss Allocation Cap exceeds such member's Required Fund Deposit on the first day of the applicable Event Period, FICC may, in its discretion, retain any excess amounts on deposit from the member, up to the Loss Allocation Cap of the Tier One Netting Member or Tier One Member, as applicable.

As proposed, Tier One Netting Members or Tier One Members, as applicable, would have two (2) Business Days after FICC issues a first round Loss Allocation Notice to pay the amount specified in any such notice.[44] On a subsequent round (*i.e.,* if the first round did not cover the entire loss of the Event Period because FICC was only able to allocate up to the round cap), these members would also have two (2) Business Days after notice by FICC to pay their loss allocation amounts (again subject to their Loss Allocation Caps), unless the members have notified (or will timely notify) FICC of their election to withdraw from membership with respect to a prior loss allocation round.

Under the proposal, if a Tier One Netting Member or Tier One Member, as applicable, fails to make its required payment in respect of a Loss Allocation Notice by the time such payment is due, FICC would have the right to proceed against such member as a Defaulting Member that has failed to satisfy an obligation in accordance with proposed Section 6 of GSD Rule 4 or MBSD Rule 4 described above. Members who wish to withdraw from membership would be required to comply with the requirements in proposed Section 7b of GSD Rule 4 and MBSD Rule 4, described further below. Specifically, proposed Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that if, after notifying FICC of its election to withdraw from membership pursuant to proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, the Tier One Netting Member or Tier One Member, as applicable, fails to comply with the provisions of proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, its notice of withdrawal would be deemed void and any further losses resulting from the applicable Event Period may be allocated against it as if it had not given such notice.

FICC is proposing to delete the provisions in the current GSD Rule 4 and MBSD Rule 4 that require FICC to assess the Required Fund Deposit maintained by each Tier One Netting Member or Tier One Member, as applicable, an amount up to $50,000, in an equal basis per such member, before allocating losses to Tier One Netting Members or Tier One Members, as applicable, ratably, in accordance with each such member's Required Fund Deposit and Average Required FICC Clearing Fund Deposit or Average Required Clearing Fund Deposit, as

[43] *Supra* note 19.

[44] *Supra* note 22.

applicable. FICC believes that in the event of a loss or liability, this assessment is unlikely to alleviate the need for loss mutualization and creates an unnecessary administrative burden for each Division. FICC believes that moving straight to the loss mutualization described herein would be more practical. This proposed change would also streamline each Division's loss allocation waterfall processes and align such processes with those of the other DTCC Clearing Agencies.

Tier Two Members

FICC is not proposing any substantive change to the provisions regarding Tier Two Members in current Section 7 of GSD Rule 4 and MBSD Rule 4, except to (i) add a subheading of ''Tier Two Members'' in the beginning of these provisions for ease of identification and (ii) add a paragraph that makes it clear that if a Tier Two Member fails to make its required payment in respect of a Loss Allocation Notice by the time such payment is due, FICC would have the right to proceed against such member as a Defaulting Member that has failed to satisfy an obligation in accordance with proposed Section 6 of GSD Rule 4 or MBSD Rule 4 described above, consistent with the proposed change regarding Tier One Netting Members or Tier One Members, as applicable.

Withdrawal From Membership

Proposed Section 7b of GSD Rule 4 and MBSD Rule 4 would include the provisions regarding withdrawal from membership currently covered by Section 7(g) of GSD Rule 4 and MBSD Rule 4. FICC believes that relocating the provisions on withdrawal from membership as it pertains to loss allocation, so that it comes right after the section on the loss allocation waterfall, would provide for the better organization of GSD Rule 4 and MBSD Rule 4. As proposed, the subheading for Section 7b of GSD Rule 4 and MBSD Rule 4 would read ''Withdrawal Following Loss Allocation.''

Currently, Section 7(g) of GSD Rule 4 and MBSD Rule 4 provides that a member may, pursuant to current Section 13 of GSD Rule 3 or MBSD Rule 3, notify FICC by the Close of Business on the Business Day on which a payment in an amount necessary to cover losses allocated to such member after the application of its Required Fund Deposit is due, of its election to terminate its membership and thereby avail itself of a cap on loss allocation, which is currently its Required Fund Deposit as fixed on the Business Day the pro rata charge loss allocation notification is provided to such member.

As stated above, under the proposed rule change, Section 7 of GSD Rule 4 and MBSD Rule 4 would provide that a Tier One Netting Member or a Tier One Member, as applicable, who wishes to withdraw from membership in respect of a loss allocation round must provide notice of its election to withdraw (''Loss Allocation Withdrawal Notice'') within five (5) Business Days from the issuance of the first Loss Allocation Notice in any round.[45] In order to avail itself of its Loss Allocation Cap, such member would need to follow the requirements in proposed Section 7b of GSD Rule 4 and MBSD Rule 4, as applicable, which would provide that such member must: (i) Specify in its Loss Allocation Withdrawal Notice an effective date for withdrawal from membership, which date shall not be prior to the scheduled final settlement date of any remaining obligations owed by the member to FICC, unless otherwise approved by FICC, and (ii) as of the time of such member's submission of the Loss Allocation Withdrawal Notice, cease submitting transactions to FICC for processing, clearance or settlement, unless otherwise approved by FICC.

Proposed Section 7b of GSD Rule 4 and MBSD Rule 4 would provide that a Tier One Netting Member or a Tier One Member, as applicable, that withdraws in compliance with the requirements of proposed Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, would nevertheless remain obligated for its pro rata share of losses and liabilities with respect to any Event Period for which it is otherwise obligated under proposed GSD Rule 4 or MBSD Rule 4, as applicable; however, the Tier One Netting Member's or Tier One Member's, as applicable, aggregate obligation would be limited to the amount of its Loss Allocation Cap (as fixed in the round for which it withdrew).

FICC is proposing to include a sentence in proposed Section 7b of GSD Rule 4 and MBSD Rule 4 to make it clear that if the Tier One Netting Member or Tier One Member, as applicable, fails to comply with the requirements set forth in that section, its Loss Allocation Withdrawal Notice will be deemed void, and such member will remain subject to further loss allocations pursuant to proposed Section 7 of GSD Rule 4 and MBSD Rule 4 as if it had not given such notice.

For better organization of the subject matter, FICC is also proposing to move the provision that covers members' obligations to eliminate any deficiency in their Required Fund Deposits from the last sentence in the first paragraph of current Section 7(g) of GSD Rule 4 and MBSD Rule 4 to proposed Section 9 of GSD Rule 4 and MBSD Rule 4.

Section 8

As proposed, Section 8 of GSD Rule 4 and MBSD Rule 4 would cover the provisions on the return of a member's Clearing Fund deposit that are currently covered by Section 10 of GSD Rule 4 and MBSD Rule 4. Proposed Section 8's subheading would be ''Return of Members' Clearing Fund Deposits.''

FICC is proposing changes to streamline and enhance the clarity and readability of this section, including adding language to clarify that a member's obligations to FICC would include both matured as well as contingent obligations, but is otherwise retaining the substantive provisions of this section.

Section 9

FICC is proposing to renumber Section 8 of GSD Rule 4 and MBSD Rule 4, which addresses the timing of members' payment of the respective Division's Clearing Fund. Under the proposal, this section would be renumbered as Section 9 of GSD Rule 4 and MBSD Rule 4 and retitled to ''Initial Required Fund Deposit and Changes in Members' Required Fund Deposits'' to better reflect the subject matter of this section.

Currently, Section 8 of GSD Rule 4 and MBSD Rule 4 requires members to satisfy any increase in their Required Fund Deposit requirement within such time as FICC requires. FICC is proposing to clarify that at the time the increase becomes effective, the member's obligations to FICC will be determined in accordance with the increased Required Fund Deposit whether or not the member has satisfied such increased amount. FICC is also proposing to add language to clarify that (i) if FICC applies a GSD Netting Member's or an MBSD Clearing Member's Clearing Fund deposits as permitted pursuant to GSD Rule 4 or MBSD Rule 4, as applicable, FICC may take any and all actions with respect to the GSD Netting Member's or MBSD Clearing Member's Actual Deposit, including assignment, transfer, and sale of any Eligible Clearing Fund Securities, that FICC determines is appropriate, and (ii) if such application results in any deficiency in the GSD Netting Member's or MBSD Clearing Member's, as applicable, Required Fund Deposit, such member shall immediately replenish it. These clarifications are consistent with the

[45] *Supra* note 19.

Divisions' rights as set forth in current Sections 4 and 11 of GSD Rule 4 and current Sections 4 and 11 of MBSD Rule 4. In addition, the provisions in clause (ii) of the previous sentence is consistent with the requirements in current Section 1 of GSD Rule 4 and MBSD Rule 4 that a member must maintain its Required Fund Deposit.

As discussed above, for better organization of the subject matter, FICC is proposing to move the provision that covers members' obligations to eliminate any deficiency in their Required Fund Deposits from the last sentence in the first paragraph of current Section 7(g) of GSD Rule 4 and MBSD Rule 4 to proposed Section 9 of GSD Rule 4 and MBSD Rule 4.

Section 10

Currently, Section 9 of GSD Rule 4 and MBSD Rule 4 addresses situations where a member has excess on deposit in the Clearing Fund (*i.e.,* amounts above its Required Fund Deposit). The current provision provides that FICC will notify a member of any Excess Clearing Fund Deposit as FICC determines from time to time. Upon the request of a member, FICC will return an excess amount requested by a member that follows the formats and timeframe established by FICC for such request. The current provision makes clear that FICC may, in its discretion, withhold any or all of a member's Excess Clearing Fund Deposit (i) if the member has an outstanding payment obligation to FICC, (ii) if FICC determines that the member's anticipated activity over the next 90 calendar days may reasonably be expected to be materially different than the prior 90 calendar days, or (iii) if the member has been placed on the Watch List. Section 9 also makes clear that the return of an Excess Clearing Fund Deposit to any member is subject to (i) such return of Excess Clearing Fund Deposit not being done in a manner that would cause the member to violate any other section of the Rules, (ii) such return not reducing the amount of the member's Cross-Guaranty Repayment Deposit to the Clearing Fund below the amount required to be maintained by the member pursuant to GSD Rule 41 or MBSD Rule 32, as applicable, and (iii) with respect to GSD Members only, such return not reducing the amount of a GSD Member's Cross-Margining Repayment Deposit to the Clearing Fund below the amount required to be maintained by the GSD Member pursuant to GSD Rule 43.

FICC is proposing to renumber Section 9 as Section 10 for both GSD Rule 4 and MBSD Rule 4 and to retitle its subheading to ''Excess Clearing Fund Deposits'' to better reflect the subject matter of the provisions. FICC is not proposing any changes to this section except to streamline and clarify the provisions as well as to align GSD Rule 4 and MBSD Rule 4, including adding a sentence to clarify that nothing in this section limits FICC's rights under Section 7 of GSD Rule 3 or Section 6 of MBSD Rule 3, as applicable.

Section 11

Current Section 11 of GSD Rule 4 and MBSD Rule 4 provides that FICC has certain rights with respect to the Clearing Fund. FICC is proposing to add a sentence which would make it clear that GSD Rule 4 or MBSD Rule 4, as applicable, would govern in the event of any conflict or inconsistency between such rule and any agreement between FICC and any member. FICC believes that this proposed change would facilitate members' understanding of the Rules and their obligations thereunder. It would also align the Rules with the Rules and Procedures of NSCC so as to provide consistent treatment for firms that are members of both FICC and NSCC.[46] Furthermore, in order to enhance the readability and clarity, FICC is proposing a number of changes to streamline the language in this section.

(ii) Other Proposed Rule Changes

FICC is proposing changes to GSD Rule 1 (Definitions), GSD Rule 3 (Ongoing Membership Requirements), GSD Rule 3A (Sponsoring Members and Sponsored Members), GSD Rule 3B (Centrally Cleared Institutional Triparty Service), GSD Rule 13 (Funds-Only Settlement), GSD Rule 18 (Special Provisions for Repo Transactions), GSD Rule 21A (Wind-Down of a Netting Member), GSD Rule 22B (Corporation Default), GSD Rule 41 (Cross Guaranty Agreements), GSD Rule 43 (Cross-Margining Arrangements), GSD Board Interpretations and Statements of Policy, and GSD Interpretive Guidance with Respect to Watch List Consequences. FICC is also proposing changes to MBSD Rule 1 (Definitions), MBSD Rule 3 (Ongoing Membership Requirements), MBSD Rule 5 (Trade Comparison), MBSD Rule 11 (Cash Settlement), MBSD Rule 17A (Corporation Default), MBSD Rule 32 (Cross Guaranty Agreements), and MBSD Interpretive Guidance with Respect to Watch List Consequences. FICC is proposing changes to these Rules in order to conform them with the proposed changes to GSD Rule 4 and MBSD Rule 4, as applicable, as well as to make certain technical changes to these Rules, as further described below.

Adding Defined Terms

Specifically, FICC is proposing to add the following defined terms to GSD Rule 1, in alphabetical order: Actual Deposit, Average RFD, CCIT Member Termination Date, CCIT Member Voluntary Termination Notice, Clearing Fund Cash, Corporate Contribution, Declared Non-Default Loss Event, Defaulting Member Event, Event Period, Excess Clearing Fund Deposit, Former Sponsored Members, Lender, Loss Allocation Cap, Loss Allocation Notice, Loss Allocation Withdrawal Notice, Sponsored Member Termination Date, Sponsored Member Voluntary Termination Notice, Sponsoring Member Termination Date, Sponsoring Member Voluntary Termination Notice, Termination Date, and Voluntary Termination Notice.

FICC is also proposing to add the following defined terms to MBSD Rule 1, in alphabetical order: Actual Deposit, Average RFD, Clearing Fund Cash, Corporate Contribution, Declared Non-Default Loss Event, Defaulting Member Event, Event Period, Excess Clearing Fund Deposit, Lender, Loss Allocation Cap, Loss Allocation Notice, Loss Allocation Withdrawal Notice, Termination Date, and Voluntary Termination Notice.

Technical Changes

In addition, FICC is proposing technical changes (i) to delete the defined term ''The Corporation'' in GSD Rule 1 and replace it with ''Corporation'' in GSD Rule 1, (ii) to correct cross-references in Section 8 of MBSD Rule 5 and the definition of ''Legal Risk'' in GSD Rule 1, (iii) to update references to sections that would be changed under this proposal in Section 12 of GSD Rule 3, Sections 10 and 12(a) of GSD Rule 3A, Section 3(f) of GSD Rule 18, GSD Rule 21A, Sections 3(a), 3(b) and 4 of GSD Rule 41, Section 6 of GSD Rule 43, GSD Interpretive Guidance with Respect to Watch List Consequences, Sections 11, 14, and 15 of MBSD Rule 3, Section 3(b) of MBSD Rule 32, and MBSD Interpretive Guidance with Respect to Watch List Consequences, (iv) to update the reference to a subheading that would be changed under this proposal in Section 7 of GSD Rule 3B, and (v) to delete a reference to the Cross-Margining Agreement between FICC and NYPC that is no longer in effect. FICC believes that these proposed technical changes

[46] *See* Section 12 of Rule 4 in NSCC's Rules and Procedures, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

would ensure the Rules remain clear and accurate, which would in turn allow Members to readily understand their obligations under the Rules.

Voluntary Termination

FICC is also proposing changes to the voluntary termination provisions in GSD Rule 3, GSD Rule 3A, GSD Rule 3B, and MBSD Rule 3 in order to ensure that termination provisions in the GSD Rules and MBSD Rules, whether voluntary or in response to a loss allocation, are consistent with one another to the extent appropriate.

Currently, the voluntary termination provisions in GSD Rule 3, GSD Rule 3A, GSD Rule 3B, and MBSD Rule 3 generally provide that a member may elect to terminate its membership by providing FICC with 10 days written notice of such termination. Such termination will not be effective until accepted by FICC, which shall be no later than 10 Business Days after the receipt of the notice. FICC's acceptance shall be evidenced by a notice to FICC's members announcing the member's termination and the effective date of the termination (''Termination Date''), and that the terminating member will no longer be eligible to submit transactions to FICC as of the Termination Date.[47] This provision also provides that a member's voluntary termination of membership shall not affect its obligations to FICC.

Where appropriate, FICC is proposing changes to align the voluntary termination provisions in Section 13 of GSD Rule 3, Sections 2(i) and 3(e) of GSD Rule 3A, Section 6 of GSD Rule 3B, and Section 14 of MBSD Rule 3 with the proposed new Section 7b of GSD Rule 4 and MBSD Rule 4, given that they all address termination of membership. Specifically, in Section 13 of GSD Rule 3, FICC is proposing that when a GSD Member elects to voluntarily terminate its membership by providing FICC a written notice of such termination (''Voluntary Termination Notice''), the GSD Member must specify in its Voluntary Termination Notice a desired date for its withdrawal from membership; provided, however, if the GSD Member is terminating its membership in GSD (*i.e.,* not terminating its membership just in the Netting System), such date shall not be prior to the scheduled final settlement date of any remaining obligation owed by the GSD Member to FICC as of the time such Voluntary Termination Notice is submitted to FICC, unless otherwise approved by FICC. FICC is proposing to delete the provision that requires a member to provide FICC with 10 days written notice of the member's termination; however, FICC is retaining the provision that states termination will not be effective until accepted by FICC,[48] which shall be no later than 10 Business Days after the receipt of the notice. FICC is also retaining the provision that states FICC's acceptance shall be evidenced by a notice to FICC's members announcing the member's termination and the Termination Date, and that the terminating member will no longer be eligible to submit transactions to FICC as of the Termination Date.

As an example, Member A submits a Voluntary Termination Notice to GSD on April 1st indicating its desired termination date is June 15th. GSD would accept such termination request by issuing a notice to GSD Members within 10 Business Days from April 1st; such notice would provide that the effective date of Member A's GSD membership termination is June 15th. In contrast, if Member A submits a Voluntary Termination Notice on April 1st and indicates its desired termination date is April 5th, GSD would either (i) accept such termination notice by issuing a notice to GSD Members on or before April 5th, and such notice would provide that the effective date of Member A's GSD membership termination is April 5th or (ii) if GSD requires additional time to process the termination, GSD would accept such termination notice by issuing notice to GSD Members after April 5th but still within 10 Business Days from April 1st; and such notice would provide that the effective date of Member A's GSD membership termination as a date after April 5th.

The proposed change to Section 13 of GSD Rule 3 would also provide that if any trade is submitted to FICC either by the withdrawing GSD Member or its authorized submitter that is scheduled to settle on or after the Termination Date, the GSD Member's Voluntary Termination Notice would be deemed void and the GSD Member would remain subject to the GSD Rules as if it had not given such notice. Furthermore, FICC is proposing to add a sentence to Section 13 of GSD Rule 3 to refer GSD Members to Section 8 of GSD Rule 4 regarding provisions on the return of a GSD Member's Clearing Fund deposit and to specify that if an Event Period were to occur after a Tier One Netting Member has submitted its Voluntary Termination Notice but prior to the Termination Date, in order for such Tier One Netting Member to benefit from its Loss Allocation Cap pursuant to Section 7 of GSD Rule 4, the Tier One Netting Member would need to comply with the provisions of Section 7b of GSD Rule 4 and submit a Loss Allocation Withdrawal Notice, which notice, upon submission, would supersede and void any pending Voluntary Termination Notice previously submitted by the Tier One Netting Member.[49] As an example, if an Event Period occurs after submission of the Voluntary Termination Notice by a Tier One Netting Member or Tier One Member, as applicable, but prior to the Termination Date, and the Tier One Netting Member or Tier One Member, as applicable, does not subsequently submit a Loss Allocation Withdrawal Notice as proposed in Section 7b of GSD Rule 4 or MBSD Rule 4, as applicable, then the Tier One Netting Member or Tier One Member, as applicable, would not benefit from its Loss Allocation Cap, *i.e.,* the Tier One Netting Member or Tier One Member, as applicable, would remain obligated for its pro rata share of losses and liabilities with respect to any Event Period that commenced prior to the Termination Date.

Parallel changes are also being proposed to Section 2(i) of GSD Rule 3A and Section 14 of MBSD Rule 3 with additional language in Section 2(i) of GSD Rule 3A and Section 14 of MBSD Rule 3 making it clear that the acceptance by FICC of a member's Voluntary Termination Notice shall be no later than ten (10) Business Days after the receipt of such notice from the member, in order to provide certainty to members as well as to align these sections with the current Section 13 of GSD Rule 3.

With respect to Section 3(e) of GSD Rule 3A and Section 6 of GSD Rule 3B, changes similar to the ones described above in the previous paragraph are also being proposed for Sponsored Members and CCIT Members, except there would

[47] Account(s) of a terminating member would generally be deactivated before the open of business on the Termination Date.

[48] Unlike the Voluntary Termination Notice, the Loss Allocation Withdrawal Notice as proposed in Section 7b of GSD Rule 4 and MBSD Rule 4 does not require explicit acceptance by FICC to be effective. FICC believes that requiring explicit acceptance of the Loss Allocation Withdrawal Notice could complicate the loss allocation process and potentially result in membership withdrawal being delayed as well as detract from the objective to have FICC know on a timely basis which members would remain subject to the subsequent rounds of loss allocation.

[49] Loss Allocation Caps would not apply to Tier Two Netting Members and Tier Two Members because the loss allocation obligations of Tier Two Netting Members and Tier Two Members are already capped to the liquidation losses that resulted from their trading activity with the Defaulting Member. Tier Two Netting Members and Tier Two Members are required to pay their loss allocation obligations in full.

be no references to the return of a member's Clearing Fund deposits and to Loss Allocation Caps because they would not apply to these member types. In addition, FICC is proposing a technical change in Section 6 of GSD Rule 3B to reflect a defined term that would be changed under this proposal.

Other MBSD Proposed Rule Changes

FICC is proposing to delete Section 15 of MBSD Rule 3 because FICC believes that this section is akin to a loss allocation provision and therefore would no longer be necessary under the proposed rule change, as the scenarios envisioned by Section 15 of MBSD Rule 3 would be governed by the proposed loss allocation provisions in MBSD Rule 4.

Other GSD Proposed Rule Changes

Under the proposal, Section 12(c) of GSD Rule 3A would also be revised to incorporate the concept of the Loss Allocation Cap and to reference the applicable proposed sections in GSD Rule 4 that would apply when a Sponsoring Member elects to terminate its status as a Sponsoring Member.

FICC is also proposing to delete an Interpretation of the Board of Directors of the Government Securities Clearing Corporation (the predecessor to GSD), which currently clarifies certain provisions of GSD Rule 4 and the extent to which the GSD Clearing Fund and other required deposits of GSD Netting Members may be applied to a loss or liability incurred by FICC. FICC is proposing this deletion because this interpretation would no longer be necessary following the proposed rule change. This is because the proposed rule change to GSD Rule 4 would cover the extent to which the GSD Clearing Fund and other collateral or assets of GSD Netting Members would be applied to a loss or liability incurred by FICC.

Other GSD Proposed Rule Changes and MBSD Proposed Rule Changes

FICC is proposing changes to Section 11 of GSD Rule 4 and MBSD Rule 4. Specifically, FICC is proposing to replace ''letters of credit'' with ''Eligible Letters of Credit,'' which is already a defined term in the Rules. In addition, FICC is proposing to specify that a reference to 30 days means 30 calendar days.

FICC is proposing to delete ''Remaining Loss'' and ''Other Loss'' in Sections 12(a) and 12(b) of GSD Rule 3A, Section 5 of GSD Rule 13, Section 4 of GSD Rule 41, Section 6 of GSD Rule 43, Section 9(o) of MBSD Rule 11, and Section 4 of MBSD Rule 32 because these terms would no longer be used under the proposed GSD Rule 4 and MBSD Rule 4, and to add clarifying language that conforms to the proposed changes to GSD Rule 4 and MBSD Rule 4.

In addition, FICC is proposing changes to GSD Rule 22B (Corporation Default) and MBSD Rule 17A (Corporation Default). FICC is proposing to relocate the interpretational parenthetical in each rule to come right after the reference to GSD Rule 22A and MBSD Rule 17. FICC is proposing this change because, in the event of a Corporation Default, the portfolio of each GSD Member or MBSD Member, as applicable, would be closed out in the same way as the portfolio of a GSD Defaulting Member or MBSD Defaulting Member, *i.e.,* by applying the close out procedures of GSD Rule 22A (Procedures for When the Corporation Ceases to Act) or MBSD Rule 17 (Procedures for When the Corporation Ceases to Act), as applicable. In addition, in the proposed GSD Rule 22B and MBSD Rule 17A, FICC is proposing to add a reference to the loss allocation provisions of GSD Rule 4 and MBSD Rule 4 and delete references to specific sections of GSD Rule 4 and MBSD Rule 4, because those sections are being modified under the proposed rule change.

Member Outreach

Beginning in August 2017, FICC conducted outreach to Members in order to provide them with advance notice of the proposed changes. As of the date of this filing, no written comments relating to the proposed changes have been received in response to this outreach. The Commission will be notified of any written comments received.

Implementation Timeframe

Pending Commission approval, FICC expects to implement this proposal within two (2) Business Days after approval. Members would be advised of the implementation date of this proposal through issuance of a FICC Important Notice.

Expected Effect on Risks to the Clearing Agency, its Participants and the Market

FICC believes that the proposed rule changes to enhance the resiliency of each Division's loss allocation process and to delete certain limiting language regarding FICC's use of MBSD Clearing Fund would reduce the risk of uncertainty to FICC, each Division's members and the market overall. Specifically, by modifying the calculation of FICC's corporate contribution, FICC would apply a mandatory fixed percentage of its General Business Risk Capital Requirement (as compared to the current Rules which provide for ''up to'' a percentage of retained earnings), which would provide greater transparency and accessibility to members as to how much FICC would contribute in the event of a loss or liability. By modifying the application of FICC's corporate contribution to apply to Declared Non-Default Loss Events, in addition to Defaulting Member Events, on a mandatory basis, FICC would expand the application of its corporate contribution beyond losses and liabilities from member defaults, which would better align the interests of FICC with those of its respective Division's members by stipulating a mandatory application of the Corporate Contribution to a Declared Non-Default Loss Event prior to any allocation of the loss among Tier One Netting Members or Tier One Members, as applicable. Taken together, these proposed rule changes would enhance the overall resiliency of each Division's loss allocation process by enhancing the calculation and application of FICC's Corporate Contribution, which is one of the key elements of each Division's loss allocation process. Moreover, by providing greater transparency and accessibility to members, as stated above, the proposed rule changes regarding the Corporate Contribution, including the proposed replenishment period and proposed allocation of FICC Corporate Contribution between Divisions, would allow members to better assess the adequacy of each Division's loss allocation process.

By introducing the concept of an Event Period, FICC would be able to group Defaulting Member Events and Declared Non-Default Loss Events occurring in a period of ten (10) Business Days for purposes of allocating losses to members. FICC believes that the Event Period would provide a defined structure for the loss allocation process to encompass potential sequential Defaulting Member Events or Declared Non-Default Loss Events that are likely to be closely linked to an initial event and/or market dislocation episode. Having this structure would enhance the overall resiliency of FICC's loss allocation process because FICC would be better equipped to address losses that may arise from multiple Defaulting Member Events and/or Declared Non-Default Loss Events that arise in quick succession. Moreover, the proposed Event Period structure would provide certainty for members concerning their maximum exposure to

mutualized losses with respect to such events.

By introducing the concept of ''rounds'' (and accompanying Loss Allocation Notices) and applying this concept to the timing of loss allocation payments and the member withdrawal process in connection with the loss allocation process, FICC would (i) set forth a defined amount that it would allocate to members during each round (*i.e.,* the round cap), (ii) advise members of loss allocation obligation information as well as round information through the issuance of Loss Allocation Notices, and (iii) provide members with the option to limit their loss allocation exposure after the issuance of the first Loss Allocation Notice in each round. These proposed rule changes would enhance the overall resiliency of FICC's loss allocation process because they would enable FICC to continue the loss allocation process in successive rounds until all of FICC's losses are allocated and enable FICC to identify continuing members for purposes of calculating subsequent loss allocation obligations in successive rounds. Moreover, the proposed rule changes would define for members a clear manner and process in which they could cap their loss allocation exposure to FICC.

By implementing a revised ''look-back'' period to calculate a member's loss allocation obligations and its Loss Allocation Cap, FICC would be able to capture a full calendar quarter of the member's activities and smooth out the impact from any abnormalities and/or arbitrariness that may have occurred. By determining a member's loss allocation obligations based on the average of its Required Fund Deposit over a look-back period and its Loss Allocation Cap based on the greater of its Required Fund Deposit or the average thereof over a look-back period, FICC would be able to calculate a member's pro rata share of losses and liabilities based on the amount of risk that the member brings to FICC. These proposed rule changes would enhance the overall resiliency of each Division's loss allocation process because they would align a member's loss allocation obligation and its Loss Allocation Cap with the amount of risk that the member brings to FICC.

By deleting certain vague and imprecise limiting language that could be interpreted as impairing FICC's ability to access the MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside the context of an MBSD Defaulting Member Event, as well as to cover certain liquidity needs, the proposed rule change to amend FICC's permitted use of MBSD Clearing Fund would enhance FICC's ability to ensure that it can continue its operations and clearance and settlement services in an orderly manner in the event that it would be necessary or appropriate for FICC to access MBSD Clearing Fund deposits to address losses, liabilities or liquidity needs to meet its settlement obligations.

Management of Identified Risks

FICC is proposing the rule changes as described in detail above in order to enhance the resiliency of each Division's loss allocation process and provide transparency and accessibility to its respective members regarding each Division's loss allocation process.

Consistency With the Clearing Supervision Act

The proposed rule change would be consistent with Section 805(b) of the Clearing Supervision Act.[50] The objectives and principles of Section 805(b) of the Clearing Supervision Act are to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system.[51]

The proposed rule change would enhance the resiliency of each Division's loss allocation process by (1) modifying the calculation and application of FICC's corporate contribution, (2) introducing an Event Period, (3) introducing the concept of ''rounds'' (and accompanying Loss Allocation Notices) and applying this concept to the timing of loss allocation payments and the member withdrawal process in connection with the loss allocation process, and (4) implementing a revised ''look-back'' period to calculate a member's loss allocation obligation and its Loss Allocation Cap. Together, these proposed rule changes would (i) create greater certainty for members regarding each Division's obligation towards a loss, (ii) more clearly specify each Division's and its respective members' obligations toward a loss and balance the need to manage the risk of sequential defaults and other potential loss events against members' need for certainty concerning their maximum exposures, and (iii) provide members the opportunity to limit their exposure to FICC by capping their exposure to loss allocation. Reducing the risk of uncertainty to FICC, each Division's members and the market overall would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, FICC believes that the proposed rule change to enhance the resiliency of each Division's loss allocation process is consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

By deleting certain vague and imprecise limiting language that could be interpreted as impairing FICC's ability to access the MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside the context of an MBSD Defaulting Member Event, as well as to cover certain liquidity needs, the proposed rule change to amend FICC's permitted use of MBSD Clearing Fund would enhance FICC's ability to ensure that it can continue its operations and clearance and settlement services in an orderly manner in the event that it would be necessary or appropriate for FICC to access MBSD Clearing Fund deposits to address losses, liabilities or liquidity needs to meet its settlement obligations. Enabling FICC to continue its operations and clearance and settlement services in an orderly manner under such circumstances would promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. Therefore, FICC believes that this proposed rule change is consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

The proposed rule change is also consistent with Rules 17Ad–22(e)(13) and 17Ad–22(e)(23)(i), promulgated under the Act.[52] Rule 17Ad–22(e)(13) under the Act requires, in part, that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure each Division has the authority and operational capacity to take timely action to contain losses and continue to meet its obligations.[53] As described above, the proposed rule changes to (1) modify the calculation and application of FICC's corporate contribution, (2) introduce an Event Period, (3) introduce the concept of ''rounds'' (and accompanying Loss Allocation Notices) and apply this concept to the timing of loss allocation payments and the member withdrawal process in connection with the loss allocation process, and (4) implement a revised ''look-back'' period to calculate a member's loss allocation obligation and its Loss Allocation Cap, taken together,

[50] 12 U.S.C. 5464(b).

[51] *Id.*

[52] 17 CFR 240.17Ad–22(e)(13) and (e)(23)(i).

[53] 17 CFR 240.17Ad–22(e)(13).

are designed to enhance the resiliency of each Division's loss allocation process. Having a resilient loss allocation process would help ensure that each Division can effectively and timely address losses relating to or arising out of either the default of one or more members or one or more non-default loss events, which in turn would help each Division contain losses and continue to meet its clearance and settlement obligations. Therefore, FICC believes that the proposed rule changes to enhance the resiliency of each Division's loss allocation process are consistent with Rule 17Ad–22(e)(13) under the Act.

Rule 17Ad–22(e)(23)(i) under the Act requires FICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to publicly disclose all relevant rules and material procedures, including key aspects of each Division's default rules and procedures.[54] The proposed rule changes to (i) align the loss allocation rules of the DTCC Clearing Agencies, (ii) improve the overall transparency and accessibility of the provisions in the Rules governing loss allocation and (iii) make conforming and technical changes, would not only ensure that each Division's loss allocation rules are, to the extent practicable and appropriate, consistent with the loss allocation rules of other DTCC Clearing Agencies, but also would help to ensure that each Division's loss allocation rules are transparent and clear to members. Aligning the loss allocation rules of the DTCC Clearing Agencies would provide consistent treatment, to the extent practicable and appropriate, especially for firms that are participants of two or more DTCC Clearing Agencies. Having transparent and clear loss allocation rules would enable members to better understand the key aspects of each Division's default rules and procedures and provide members with increased predictability and certainty regarding their exposures and obligations. As such, FICC believes that the proposed rule changes to align the loss allocation rules of the DTCC Clearing Agencies as well as to improve the overall transparency and accessibility of each Division's loss allocation rules are consistent with Rule 17Ad–22(e)(23)(i) under the Act.

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 that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

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.

The clearing agency 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. 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–FICC–2017–806 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–FICC–2017–806. 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 FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–FICC–2017–806 and should be submitted on or before August 21, 2018.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16709 Filed 8–3–18; 8:45 am]

BILLING CODE 8011–01–P

[54] 17 CFR 240.17Ad–22(e)(23)(i).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83744; File No. SR–FICC–2017–805]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Amendment No. 1 to an Advance Notice To Adopt a Recovery & Wind-Down Plan and Related Rules

July 31, 2018.

On December 18, 2017, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–FICC–2017–805 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act'').[1] The

[1] 12 U.S.C. 5465(e)(1) and 17 CFR 240.19b–4(n)(1)(i), respectively. On December 18, 2017, FICC filed the Advance Notice as a proposed rule change (SR–FICC–2017–021) with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder (''Proposed Rule Change''). (17 CFR 240.19b–4 and 17 CFR 240.19b–4, respectively.) The Proposed Rule Change was published in the **Federal Register** on January 8, 2018. *See* Securities Exchange Act Release No. 82431 (January 2, 2018), 83 FR 871 (January 8, 2018) (SR–FICC–2017–021). On February 8, 2018, the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018)

Continued

notice of filing and extension of the review period of the Advance Notice was published for comment in the **Federal Register** on January 30, 2018.[2]

On April 10, 2018, the Commission required additional information from FICC pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice.[3] On June 28, 2018, FICC filed Amendment No. 1 to the Advance Notice to amend and replace in its entirety the Advance Notice as originally submitted on December 18, 2017.[4] On July 6, 2018, the Commission received a response to its request for additional information in consideration of the Advance Notice, which added a further 60-days to the review period pursuant to Section 806(e)(1)(E) and (G) of the Clearing Supervision Act.[5]

The Advance Notice, as amended by Amendment No. 1, is described in Items I and II below, which Items have been prepared by FICC. The Commission is publishing this notice to solicit comments on the Advance Notice, as amended by Amendment No. 1, from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

The Advance Notice of FICC proposes to adopt the Recovery & Wind-down Plan of FICC (''R&W Plan'' or ''Plan''). The R&W Plan would be maintained by FICC in compliance with Rule 17Ad–22(e)(3)(ii) under the Act by providing plans for the recovery and orderly wind-down of FICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, as described below.[6]

The Advance Notice would also propose to (1) amend FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') in order to (a) adopt Rule 22D (Wind-down of the Corporation) and Rule 50 (Market Disruption and Force Majeure), and (b) make conforming changes to Rule 3A (Sponsoring Members and Sponsored Members), Rule 3B (Centrally Cleared Institutional Triparty Service) and Rule 13 (Funds-Only Settlement) related to the adoption of these Proposed Rules to the GSD Rules; (2) amend FICC's Mortgage-Backed Securities Division (''MBSD,'' and, together with GSD, the ''Divisions'') Clearing Rules (''MBSD Rules'') in order to (a) adopt Rule 17B (Wind-down of the Corporation) and Rule 40 (Market Disruption and Force Majeure); and (b) make conforming changes to Rule 3A (Cash Settlement Bank Members) related to the adoption of these Proposed Rules to the MBSD Rules; and (3) amend Rule 1 of the Electronic Pool Netting (''EPN'') Rules of MBSD (''EPN Rules'') in order to provide that EPN Users, as defined therein, are bound by proposed Rule 17B (Wind-down of the Corporation) and proposed Rule 40 (Market Disruption and Force Majeure) to be adopted to the MBSD Rules.[7] Each of the proposed rules is referred to herein as a ''Proposed Rule,'' and are collectively referred to as the ''Proposed Rules.''

The Proposed Rules are designed to (1) facilitate the implementation of the R&W Plan when necessary and, in particular, allow FICC to effectuate its strategy for winding down and transferring its business; (2) provide Members and Limited Members with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities and obligations; [8] and (3) provide FICC with the legal basis to implement those provisions of the R&W Plan when necessary, as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency 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. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

While FICC has not solicited or received any written comments relating to this proposal, FICC has conducted outreach to Members in order to provide them with notice of the proposal. FICC will notify the Commission of any written comments received by FICC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Amendment No. 1

This filing constitutes Amendment No. 1 (''Amendment'') to the Advance Notice (also referred to below as the ''Original Filing'') previously filed by FICC.[9] FICC is amending the proposed R&W Plan and the Original Filing in order to clarify certain matters and make minor technical and conforming changes to the R&W Plan, as described below and as marked on Exhibit 4 hereto. To the extent such changes to the Plan require changes to the Original

(SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017). On March 20, 2018, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 82913 (March 20, 2018), 83 FR 12997 (March 26, 2018) (SR–FICC–2017–021). On June 25, 2018, the Commission designated a longer period for Commission action on the proceedings to determine whether to approve or disapprove the Proposed Rule Change. Therefore, September 5, 2018 is the date by which the Commission should either approve or disapprove the Proposed Rule Change. *See* Securities Exchange Act Release No. 83509 (June 25, 2018), 83 FR 30785 (June 29, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017). On June 28, 2018, FICC filed Amendment No. 1 to the Proposed Rule Change. *See* Securities Exchange Act Release No. 83630 (July 13, 2018), 83 FR 34213 (July 19, 2018) (SR–FICC–2017–021). As of the date of this release, the Commission has not received any comments on the Proposed Rule Change.

[2] Securities Exchange Act Release No. 82580 (January 24, 2018), 83 FR 4341 (January 30, 2018) (SR–FICC–2017–805). Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. 12 U.S.C. 5465(e)(1)(H). The Commission found that the Advance Notice raised novel and complex issues and, accordingly, extended the review period of the Advance Notice for an additional 60 days until April 17, 2018, pursuant to Section 806(e)(1)(H). *Id.*

[3] 12 U.S.C. 5465(e)(1)(D); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Commission's Request for Additional Information,'' *available at https://www.sec.gov/rules/sro/ficc-an.htm.*

[4] To promote the public availability and transparency of its post-notice amendment, FICC submitted a copy of Amendment No. 1 through the Commission's electronic public comment letter mechanism. Accordingly, Amendment No. 1 has been posted on the Commission's website at *https://www.sec.gov/rules/sro/ficc-an.htm* and thus been publicly available since June 29, 2018.

[5] 12 U.S.C. 5465(e)(1)(E) and (G); *see* Memorandum from the Office of Clearance and Settlement Supervision, Division of Trading and Markets, titled ''Response to the Commission's Request for Additional Information,'' *available at https://www.sec.gov/rules/sro/ficc-an.htm.*

[6] 17 CFR 240.17Ad–22(e)(3)(ii).

[7] The GSD Rules and the MBSD Rules are referred to collectively herein as the ''Rules.'' Capitalized terms not defined herein are defined in the Rules. The Rules and the EPN Rules are *available at http://www.dtcc.com/legal/rules-and-procedures.*

[8] References herein to ''Members'' refer to GSD Netting Members and MBSD Clearing Members. References herein to ''Limited Members'' refer to participants of GSD or MBSD other than GSD Netting Members and MBSD Clearing Members, including, for example, GSD Comparison-Only Members, GSD Sponsored Members, GSD CCIT Members, and MBSD EPN Users.

[9] *See* Securities Exchange Act Release No. 82580 (January 24, 2018), 83 FR 4341 (January 30, 2018) (SR–FICC–2017–805).

Filing, the information provided under ''*Description of Proposed Changes*'' in the Original Filing has been amended and is restated in its entirety below. Other sections of the Original Filing are unchanged and are restated in their entity for convenience.

First, this Amendment would clarify the meaning of the terms ''cease to act,'' ''Member default,'' ''Defaulting Member,'' and ''Member Default Losses'' as such terms are used in the Plan. This Amendment would also make conforming changes as necessary to reflect the uses of these terms.

Second, this Amendment would clarify that actions and tools described in the Plan that are available in one phase of the Crisis Continuum may be used in subsequent phases of the Crisis Continuum when appropriate to address the applicable situation. This Amendment would also clarify that the allocation of losses resulting from a Member default would be applied when provided for, and in accordance with, Rule 4 of the GSD Rules and the MBSD Rules, as applicable.

Third, this Amendment would clarify that the Recovery Corridor (as defined therein) is not a ''sub-phase'' of the recovery phase. Rather, the Recovery Corridor is a period of time that would occur toward the end of the Member default phase, when indicators are that FICC may transition into the recovery phase. Thus, the Recovery Corridor precedes the recovery phase within the Crisis Continuum.

Fourth, this Amendment would make revisions to address the allocation of losses resulting from a Member default in order to more closely conform such statements to the changes proposed by the Loss Allocation Filing, as defined below.

Fifth, this Amendment would clarify the notifications that FICC would be required to make under the proposed GSD Rule 50 and MBSD Rule 40 (Market Disruption and Force Majeure).

Finally, this Amendment would make minor, technical and conforming revisions to correct typographical errors and to simplify descriptions. For example, such revisions would use lower case for terms that are not defined therein, and would use upper case for terms that are defined. The Amendment would also simplify certain descriptions by removing extraneous words and statements that are repetitive. These minor, technical revisions would not alter the substance of the proposal.

Description of Proposed Changes

FICC is proposing to adopt the R&W Plan to be used by the Board and management of FICC in the event FICC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would identify (i) the recovery tools available to FICC to address the risks of (a) uncovered losses or liquidity shortfalls resulting from the default of one or more Members, and (b) losses arising from non-default events, such as damage to its physical assets, a cyber-attack, or custody and investment losses, and (ii) the strategy for implementation of such tools. The R&W Plan would also establish the strategy and framework for the orderly wind-down of FICC and the transfer of its business in the remote event the implementation of the available recovery tools does not successfully return FICC to financial viability.

As discussed in greater detail below, the R&W Plan would provide, among other matters, (i) an overview of the business of FICC and its parent, The Depository Trust & Clearing Corporation (''DTCC''); (ii) an analysis of FICC's intercompany arrangements and an existing link to another financial market infrastructures (''FMIs''); (iii) a description of FICC's services, and the criteria used to determine which services are considered critical; (iv) a description of the FICC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to FICC to mitigate credit/market and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a ''Crisis Continuum'' timeline; (vii) a discussion of potential non-default losses and the resources available to FICC to address such losses, including recovery triggers and tools to mitigate such losses; (viii) an analysis of the recovery tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Members to, among other things, control and monitor the risks they may present to FICC, and how FICC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of FICC's business, including an estimate of the time and costs to effect a recovery or orderly wind-down of FICC.

The R&W Plan would be structured as a roadmap, and would identify and describe the tools that FICC may use to effect a recovery from the events and scenarios described therein. Certain recovery tools that would be identified in the R&W Plan are based in the Rules (including the Proposed Rules) and, as such, descriptions of those tools would include descriptions of, and reference to, the applicable Rules and any related internal policies and procedures. Other recovery tools that would be identified in the R&W Plan are based in contractual arrangements to which FICC is a party, including, for example, existing committed or pre-arranged liquidity arrangements. Further, the R&W Plan would state that FICC may develop further supporting internal guidelines and materials that may provide operationally for matters described in the Plan, and that such documents would be supplemental and subordinate to the Plan.

Key factors considered in developing the R&W Plan and the types of tools available to FICC were its governance structure and the nature of the markets within which FICC operates. As a result of these considerations, many of the tools available to FICC that would be described in the R&W Plan are FICC's existing, business-as-usual risk management and Member default management tools, which would continue to be applied in scenarios of increasing stress. In addition to these existing, business-as-usual tools, the R&W Plan would describe FICC's other principal recovery tools, which include, for example, (i) identifying, monitoring and managing general business risk and holding sufficient liquid net assets funded by equity (''LNA'') to cover potential general business losses pursuant to the Clearing Agency Policy on Capital Requirements (''Capital Policy''),[10] (ii) maintaining the Clearing Agency Capital Replenishment Plan (''Replenishment Plan'') as a viable plan for the replenishment of capital should FICC's equity fall close to or below the amount being held pursuant to the Capital Policy,[11] and (iii) the process for the allocation of losses among Members, as provided in Rule 4 of the GSD Rules and Rule 4 of the MBSD Rules.[12] The

[10] *See* Securities Exchange Act Release No. 81105 (July 7, 2017), 82 FR 32399 (July 13, 2017) (SR–DTC–2017–003, SR–FICC–2017–007, SR–NSCC–2017–004).

[11] *See id.*

[12] *See* GSD Rule 4 (Clearing Fund and Loss Allocation) and MBSD Rule 4 (Clearing Fund and Loss Allocation), *supra* note 7. FICC is proposing changes to Rule 4 regarding allocation of losses in a separate filing submitted simultaneously with the Original Filing. See Securities Exchange Act Release Nos. 82431 (January 2, 2018), 83 FR 871 (January 8, 2018) (SR–FICC–2017–021) and 82580 (January 24, 2018), 83 FR 4341 (January 30, 2018) (SR–FICC–2017–805) (collectively referred to herein as the ''Loss Allocation Filing''). FICC has submitted an amendment to the Loss Allocation Filing. A copy of the amendment to the Loss Allocation Filing is available at *http://*

Continued

R&W Plan would provide governance around the selection and implementation of the recovery tool or tools most relevant to mitigate a stress scenario and any applicable loss or liquidity shortfall.

The development of the R&W Plan is facilitated by the Office of Recovery & Resolution Planning (''R&R Team'') of DTCC.[13] The R&R Team reports to the DTCC Management Committee (''Management Committee'') and is responsible for maintaining the R&W Plan and for the development and ongoing maintenance of the overall recovery and wind-down planning process. The Board, or such committees as may be delegated authority by the Board from time to time pursuant to its charter, would review and approve the R&W Plan biennially, and would also review and approve any changes that are proposed to the R&W Plan outside of the biennial review.

As discussed in greater detail below, the Proposed Rules would define the procedures that may be employed in the event of FICC's wind-down and would provide for FICC's authority to take certain actions on the occurrence of a ''Market Disruption Event,'' as defined therein. Significantly, the Proposed Rules would provide Members and Limited Members with transparency and certainty with respect to these matters. The Proposed Rules would facilitate the implementation of the R&W Plan, particularly FICC's strategy for winding down and transferring its business, and would provide FICC with the legal basis to implement those aspects of the R&W Plan.

FICC R&W Plan

The R&W Plan is intended to be used by the Board and FICC's management in the event FICC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would be structured to provide a roadmap, define the strategy, and identify the tools available to FICC to either (i) recover in the event it experiences losses that exceed its prefunded resources (such strategies and tools referred to herein as the ''Recovery Plan'') or (ii) wind-down its business in a manner designed to permit the continuation of its critical services in the event that such recovery efforts are not successful (such strategies and tools referred to herein as the ''Wind-down Plan''). The description of the R&W Plan below is intended to highlight the purpose and expected effects of the material aspects of the R&W Plan, and to provide Members and Limited Members with appropriate transparency into these features.

Business Overview, Critical Services, and Governance

The introduction to the R&W Plan would identify the document's purpose and its regulatory background, and would outline a summary of the Plan. The stated purpose of the R&W Plan is that it is to be used by the Board and FICC management in the event FICC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern. The R&W Plan would be maintained by FICC in compliance with Rule 17Ad–22(e)(3)(ii) under the Act[14] by providing plans for the recovery and orderly wind-down of FICC.

The R&W Plan would describe DTCC's business profile, provide a summary of the services of FICC as offered by each of the Divisions, and identify the intercompany arrangements and links between FICC and other entities, most notably a link between GSD and Chicago Mercantile Exchange Inc. (''CME''), which is also an FMI. This overview section would provide a context for the R&W Plan by describing FICC's business, organizational structure and critical links to other entities. By providing this context, this section would facilitate the analysis of the potential impact of utilizing the recovery tools set forth in later sections of the Recovery Plan, and the analysis of the factors that would be addressed in implementing the Wind-down Plan.

DTCC is a user-owned and user-governed holding company and is the parent company of FICC and its affiliates, The Depository Trust Company (''DTC'') and National Securities Clearing Corporation (''NSCC'', and, together with FICC and DTC, the ''Clearing Agencies''). The Plan would describe how corporate support services are provided to FICC from DTCC and DTCC's other subsidiaries through intercompany agreements under a shared services model.

The Plan would provide a description of the critical contractual and operational arrangements between FICC and other legal entities, including the cross-margining agreement between GSD and CME, which is also an FMI.[15] Pursuant to this arrangement, GSD offsets each cross-margining participant's residual margin amount (based on related positions) at GSD against the offsetting residual margin amounts of the participant (or its affiliate) at CME. GSD and CME may then reduce the amount of collateral that they collect to reflect the offsets between the cross-margining participant's positions at GSD and its (or its affiliate's) positions at CME. This section of the Plan, identifying and briefly describing FICC's established links, would provide a mapping of critical connections and dependencies that may need to be relied on or otherwise addressed in connection with the implementation of either the Recovery Plan or the Wind-down Plan.

The Plan would define the criteria for classifying certain of FICC's services as ''critical,'' and would identify those critical services and the rationale for their classification. This section would provide an analysis of the potential systemic impact from a service disruption, and is important for evaluating how the recovery tools and the wind-down strategy would facilitate and provide for the continuation of FICC's critical services to the markets it serves. The criteria that would be used to identify an FICC service or function as critical would include consideration as to (1) whether there is a lack of alternative providers or products; (2) whether failure of the service could impact FICC's ability to perform its central counterparty services through either Division; (3) whether failure of the service could impact FICC's ability to perform its multilateral netting services through either Division and, as such, could impact the volume of transactions; (4) whether failure of the service could impact FICC's ability to perform its book-entry delivery and settlement services through either Division and, as such, could impact transaction costs; (5) whether failure of the service could impact FICC's ability to perform its cash payment processing services through either Division and, as such, could impact the flow of liquidity in the U.S. financial markets; and (6) whether the service is interconnected with other participants and processes within the U.S. financial system, for example, with other FMIs, settlement

www.dtcc.com/legal/sec-rule-filings.aspx. FICC expects the Commission to review both proposals, as amended, together, and, as such, the proposal described in this filing anticipates the approval and implementation of those proposed changes to the Rules.

[13] DTCC operates on a shared services model with respect to FICC and its other subsidiaries. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a subsidiary, including FICC.

[14] 17 CFR 240.17Ad–22(e)(3)(ii).

[15] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_cme_crossmargin_agreement.pdf. See also* GSD Rule 43 (Cross-Margining Arrangements), *supra* note 7.

banks, and broker-dealers. The Plan would then list each of those services, functions or activities that FICC has identified as ''critical'' based on the applicability of these six criteria. GSD's critical services would include, for example, its Real-Time Trade Matching (''RTTM®'') service,[16] its services related to netting and settlement of submitted trades for Netting Members,[17] the Auction Takedown service,[18] and the Repurchase Agreement Netting Service.[19] MBSD's critical services would include, for example, its RTTM® service,[20] its netting service for to-be-announced (''TBA'') transactions,[21] its Electronic Pool Notification service,[22] and its pool netting and settlement.[23] The R&W Plan would also include a non-exhaustive list of FICC services that are not deemed critical.

The evaluation of which services provided by FICC are deemed critical is important for purposes of determining how the R&W Plan would facilitate the continuity of those services. As discussed further below, while FICC's Wind-down Plan would provide for the transfer of all critical services to a transferee in the event FICC's wind-down is implemented, it would anticipate that any non-critical services that are ancillary and beneficial to a critical service, or that otherwise have substantial user demand from the continuing membership, would also be transferred.

The Plan would describe the governance structure of both DTCC and FICC. This section of the Plan would identify the ownership and governance model of these entities at both the Board of Directors and management levels. The Plan would state that the stages of escalation required to manage recovery under the Recovery Plan or to invoke FICC's wind-down under the Wind-down Plan would range from relevant business line managers up to the Board through FICC's governance structure. The Plan would then identify the parties responsible for certain activities under both the Recovery Plan and the Wind-down Plan, and would describe their respective roles. The Plan would identify the Risk Committee of the Board (''Board Risk Committee'') as being responsible for oversight of risk management activities at FICC, which include focusing on both oversight of risk management systems and processes designed to identify and manage various risks faced by FICC, and, due to FICC's critical role in the markets in which it operates, oversight of FICC's efforts to mitigate systemic risks that could impact those markets and the broader financial system.[24] The Plan would identify the DTCC Management Risk Committee (''Management Risk Committee'') as primarily responsible for general, day-to-day risk management through delegated authority from the Board Risk Committee. The Plan would state that the Management Risk Committee has delegated specific day-to-day risk management, including management of risks addressed through margining systems and related activities, to the DTCC Group Chief Risk Office (''GCRO''), which works with staff within the DTCC Financial Risk Management group. Finally, the Plan would describe the role of the Management Committee, which provides overall direction for all aspects of FICC's business, technology, and operations and the functional areas that support these activities.

The Plan would describe the governance of recovery efforts in response to both default losses and non-default losses under the Recovery Plan, identifying the groups responsible for those recovery efforts. Specifically, the Plan would state that the Management Risk Committee provides oversight of actions relating to the default of a Member, which would be reported and escalated to it through the GCRO, and the Management Committee provides oversight of actions relating to non-default events that could result in a loss, which would be reported and escalated to it from the DTCC Chief Financial Officer (''CFO'') and the DTCC Treasury group that reports to the CFO, and from other relevant subject matter experts based on the nature and circumstances of the non-default event.[25] More generally, the Plan would state that the type of loss and the nature and circumstances of the events that lead to the loss would dictate the components of governance to address that loss, including the escalation path to authorize those actions. As described further below, both the Recovery Plan and the Wind-down Plan would describe the governance of escalations, decisions, and actions under each of those plans.

Finally, the Plan would describe the role of the R&R Team in managing the overall recovery and wind-down program and plans for each of the Clearing Agencies.

FICC Recovery Plan

The Recovery Plan is intended to be a roadmap of those actions that FICC may employ across both Divisions to monitor and, as needed, stabilize its financial condition. As each event that could lead to a financial loss could be unique in its circumstances, the Recovery Plan would not be prescriptive and would permit FICC to maintain flexibility in its use of identified tools and in the sequence in which such tools are used, subject to any conditions in the Rules or the contractual arrangement on which such tool is based. FICC's Recovery Plan would consist of (1) a description of the risk management surveillance, tools, and governance that FICC would employ across evolving stress scenarios that it may face as it transitions through a ''Crisis Continuum,'' described below; (2) a description of FICC's risk of losses that may result from non-default events, and the financial resources and recovery tools available to FICC to manage those risks and any resulting losses; and (3) an evaluation of the characteristics of the recovery tools that may be used in response to either default losses or non-default losses, as described in greater detail below. In all cases, FICC would act in accordance with the Rules, within the governance structure described in the R&W Plan, and in accordance with applicable regulatory oversight to address each situation in order to best protect FICC, the Members, and the markets in which it operates.

Managing Member Default Losses and Liquidity Needs Through the Crisis Continuum. The Recovery Plan would

[16] *See* GSD Rule 5 (Comparison System), GSD Rule 6A (Bilateral Comparison), GSD Rule 6B (Demand Comparison), and GSD Rule 6C (Locked-In Comparison), *supra* note 7.

[17] *See* GSD Rule 11 (Netting System), GSD Rule 12 (Securities Settlement), and GSD Rule 13 (Funds-Only Settlement), *supra* note 7.

[18] *See* GSD Rule 6C (Locked-In Comparison) and GSD Rule 17 (Netting and Settlement of Netting-Eligible Auction Purchases), *supra* note 7.

[19] *See* GSD Rule 7 (Repo Transactions), GSD Rule 11 (Netting System), GSD Rule 18 (Special Provisions for Repo Transactions), GSD Rule 19 (Special Provisions for Brokered Repo Transactions), and GSD Rule 20 (Special Provisions for GCF Repo Transactions), *supra* note 7.

[20] *See* MBSD Rule 5 (Trade Comparison), *supra* note 7.

[21] *See* MBSD Rule 6 (TBA Netting), *supra* note 7.

[22] *See* EPN Rules, *supra* note 7.

[23] *See* MBSD Rule 8 (Pool Netting System) and MBSD Rule 9 (Pool Settlement with the Corporation), *supra* note 7.

[24] The charter of the Board Risk Committee is *available at http://www.dtcc.com/~/media/Files/Downloads/legal/policy-and-compliance/DTCC-BOD-Risk-Committee-Charter.pdf.*

[25] The Plan would state that these groups would be involved to address how to mitigate the financial impact of non-default losses, and in recommending mitigating actions, the Management Committee would consider information and recommendations from relevant subject matter experts based on the nature and circumstances of the non-default event. Any necessary operational response to these events, however, would be managed in accordance with applicable incident response/business continuity process; for example, processes established by the DTCC Technology Risk Management group would be followed in response to a cyber event.

describe the risk management surveillance, tools, and governance that FICC may employ across an increasing stress environment, which is referred to as the ''Crisis Continuum.'' This description would identify those tools that can be employed to mitigate losses, and mitigate or minimize liquidity needs, as the market environment becomes increasingly stressed. The phases of the Crisis Continuum would include (1) a stable market phase, (2) a stress market phase, (3) a phase commencing with FICC's decision to cease to act for a Member or Affiliated Family of Members (referred to in the Plan as the ''Member default phase''),[26] and (4) a recovery phase. This section of the Recovery Plan would address conditions and circumstances relating to FICC's decision to cease to act for a Member pursuant to the applicable Rules.[27] In the Plan, the term ''cease to act'' and the actions that lead to such decision are used within the context of each Division's Rules, in particular Rules 21 and 22 of the GSD Rules and Rules 14 and 16 of the MBSD Rules.[28] Further, for ease of reference, the R&W Plan would, for purposes of the Plan, use the term ''Member default'' to refer to the event or events that precipitate FICC ceasing to act for a Member or an Affiliated Family, would use the term ''Defaulting Member'' to refer to a Member for which NSCC has ceased to act, and would use the term ''Member Default Losses'' to refer to losses that arise out of or relate to the Member default (including any losses that arise from liquidation of that Member's portfolio), and to distinguish such losses from those that arise out of the business or other events not related to a Member default, which are separately addressed in the Plan.

The Recovery Plan would provide context to its roadmap through this Crisis Continuum by describing FICC's ongoing management of credit, market and liquidity risk across the Divisions, and its existing process for measuring and reporting its risks as they align with established thresholds for its tolerance of those risks. The Recovery Plan would discuss the management of credit/market risk and liquidity exposures together, because the tools that address these risks can be deployed either separately or in a coordinated approach in order to address both exposures. FICC manages these risk exposures collectively to limit their overall impact on FICC and the memberships of the Divisions. As part of its market risk management strategy, FICC manages its credit exposure to Members by determining the appropriate required deposits to the GSD and MBSD Clearing Fund and monitoring its sufficiency, as provided for in the applicable Rules.[29] FICC manages its liquidity risks with an objective of maintaining sufficient resources to be able to fulfill obligations that have been guaranteed by FICC in the event of a Member default that presents the largest aggregate liquidity exposure to FICC over the settlement cycle.[30]

The Recovery Plan would outline the metrics and indicators that FICC has developed to evaluate a stress situation against established risk tolerance thresholds. Each risk mitigation tool identified in the Recovery Plan would include a description of the escalation thresholds that allow for effective and timely reporting to the appropriate internal management staff and committees, or to the Board. The Recovery Plan would make clear that these tools and escalation protocols would be calibrated across each phase of the Crisis Continuum. The Recovery Plan would also establish that FICC would retain the flexibility to deploy such tools either separately or in a coordinated approach, and to use other alternatives to these actions and tools as necessitated by the circumstances of a particular Member default in accordance with the applicable Rules. Therefore, the Recovery Plan would both provide FICC with a roadmap to follow within each phase of the Crisis Continuum, and would permit it to adjust its risk management measures to address the unique circumstances of each event.

The Recovery Plan would describe the conditions that mark each phase of the Crisis Continuum, and would identify actions that FICC could take as it transitions through each phase in order to both prevent losses from materializing through active risk management, and to restore the financial health of FICC during a period of stress.

The stable market phase of the Crisis Continuum would describe active risk management activities in the normal course of business. These activities would include (1) routine monitoring of margin adequacy through daily review of back testing and stress testing results that review the adequacy of the margin calculations for each of GSD and MBSD, and escalation of those results to internal and Board committees; [31] and (2) routine monitoring of liquidity adequacy through review of daily liquidity studies that measure sufficiency of available liquidity resources to meet cash settlement obligations of the Member that would generate the largest aggregate payment obligation.[32]

The Recovery Plan would describe some of the indicators of the stress market phase of the Crisis Continuum, which would include, for example, volatility in market prices of certain assets where there is increased uncertainty among market participants about the fundamental value of those assets. This phase would involve general market stresses, when no Member default would be imminent. Within the description of this phase, the Recovery Plan would provide that FICC may take targeted, routine risk management measures as necessary and as permitted by the Rules.

Within the Member default phase of the Crisis Continuum, the Recovery Plan would provide a roadmap for the existing procedures that FICC would follow in the event of a Member default and any decision by FICC to cease to act for that Member.[33] The Recovery Plan

[26] The Plan would define an ''Affiliated Family'' of Members as a number of affiliated entities that are all Members of either GSD or MBSD.

[27] *See* GSD Rule 21 (Restrictions on Access to Services) and MBSD Rule 14 (Restrictions on Access to Services), *supra* note 7.

[28] *See* GSD Rules 21 (Restrictions on Access to Services) and 22 (Insolvency of a Member), and MBSD Rules 14 (Restrictions on Access to Services) and 16 (Insolvency of a Member), *supra* note 7.

[29] *See* GSD Rule 4 (Clearing Fund and Loss Allocation) and MBSD Rule 4 (Clearing Fund and Loss Allocation), *supra* note 7. Because GSD and MBSD do not maintain a guaranty fund separate and apart from the Clearing Fund they collect from Members, FICC monitors its credit exposure to its Members by managing the market risks of each Member's unsettled portfolio through the collection of each Division's Clearing Fund. The aggregate of all Members' Required Clearing Fund deposits to each of GSD or MBSD comprises that Division's Clearing Fund that represents FICC's prefunded resources to address uncovered loss exposures as provided in each Division's proposed Rule 4. Therefore, FICC's market risk management strategy for both Divisions is designed to comply with Rule 17Ad–22(e)(4) under the Act, where these risks are referred to as ''credit risks.'' *See also* 17 CFR 240.17Ad–22(e)(4).

[30] FICC's liquidity risk management strategy, including the manner in which FICC utilizes its liquidity tools, is described in the Clearing Agency Liquidity Risk Management Framework. *See* Securities Exchange Act Release Nos. 80489 (April 19, 2017), 82 FR 19120 (April 25, 2017) (SR–DTC–2017–004, SR–NSCC–2017–005, SR–FICC–2017–008); 81194 (July 24, 2017), 82 FR 35241 (July 28, 2017) (SR–DTC–2017–004, SR–NSCC–2017–005, SR–FICC–2017–008).

[31] FICC's stress testing practices are described in the Clearing Agency Stress Testing Framework (Market Risk). *See* Securities Exchange Act Release Nos. 80485 (April 19, 2017), 82 FR 19131 (April 25, 2017) (SR–DTC–2017–005, SR–FICC–2017–009, SR–NSCC–2017–006); 81192 (July 24, 2017), 82 FR 35245 (July 28, 2017) (SR–DTC–2017–005, SR–FICC–2017–009, SR–NSCC–2017–006).

[32] *See supra* note 30.

[33] *See* GSD Rule 21 (Restrictions on Access to Services), GSD Rule 22A (Procedures for When the Corporation Ceases to Act), MBSD Rule 14

would provide that the objectives of FICC's actions upon a Member or Affiliated Family default are to (1) minimize losses and market exposure of the affected Members and the applicable Division's non-Defaulting Members; and (2), to the extent practicable, minimize disturbances to the affected markets. The Recovery Plan would describe tools, actions, and related governance for both market risk monitoring and liquidity risk monitoring through this phase. For example, in connection with managing its market risk during this phase, FICC would, pursuant to the applicable Division's Rules, (1) monitor and assess the adequacy of the GSD and MBSD Clearing Fund resources; (2), when necessary and appropriate pursuant to the applicable Division's Rules, assess and collect additional margin requirements; and (3) follow its operational procedures to liquidate the Defaulting Member's portfolio. Management of liquidity risk through this phase would involve ongoing monitoring of the adequacy of FICC's liquidity resources, and the Recovery Plan would identify certain actions FICC may deploy as it deems necessary to mitigate a potential liquidity shortfall, which would include, for example, adjusting its strategy for closing out the Defaulting Member's portfolio or seeking additional liquidity resources. The Recovery Plan would state that, throughout this phase, relevant information would be escalated and reported to both internal management committees and the Board Risk Committee.

The Recovery Plan would also identify financial resources available to FICC, pursuant to the Rules, to address losses arising out of a Member default. Specifically, GSD Rule 4 and MBSD Rule 4, as each are proposed to be amended by the Loss Allocation Filing, would provide that losses remaining after application of the Defaulting Member's resources be satisfied first by applying a ''Corporate Contribution,'' and then, if necessary, by allocating remaining losses among the membership in accordance with such GSD Rule 4 and MBSD Rule 4, as applicable.[34]

In order to provide for an effective and timely recovery, the Recovery Plan would describe the period of time that would occur near the end of the Member default phase, during which FICC may experience stress events or observe early warning indicators that allow it to evaluate its options and prepare for the recovery phase (referred to in the Plan as the ''Recovery Corridor''). The Recovery Plan would then describe the recovery phase of the Crisis Continuum, which would begin on the date that FICC issues the first Loss Allocation Notice of the second loss allocation round with respect to a given ''Event Period.'' [35] The recovery phase would describe actions that FICC may take to avoid entering into a wind-down of its business.

FICC expects that significant deterioration of liquidity resources would cause it to enter the Recovery Corridor. As such, the Plan would describe the actions FICC may take at this stage aimed at replenishing those resources. Recovery Corridor indicators may include, for example, a rapid and material change in market prices or substantial intraday activity volume by the Member that subsequently defaults, neither of which are mitigated by intraday margin calls, or subsequent defaults by other Members or Affiliated Families during a compressed time period. Throughout the Recovery Corridor, FICC would monitor the adequacy of the Divisions' respective resources and the expected timing of replenishment of those resources, and would do so through the monitoring of certain corridor indicator metrics.

The majority of the corridor indicators, as identified in the Recovery Plan, relate directly to conditions that may require either Division to adjust its strategy for hedging and liquidating a Defaulting Member's portfolio, and any such changes would include an assessment of the status of the corridor indicators. Corridor indicators would include, for example, effectiveness and speed of FICC's efforts to close out the portfolio of the Defaulting Member, and an impediment to the availability of its financial resources. For each corridor indicator, the Recovery Plan would identify (1) measures of the indicator, (2) evaluations of the status of the indicator, (3) metrics for determining the status of the deterioration or improvement of the indicator, and (4) ''Corridor Actions,'' which are steps that may be taken to improve the status of the indicator,[36] as well as management escalations required to authorize those steps. Because FICC has never experienced the default of multiple Members, it has not, historically, measured the deterioration or improvements metrics of the corridor indicators. As such, these metrics were chosen based on the business judgment of FICC management.

The Recovery Plan would also describe the reporting and escalation of the status of the corridor indicators throughout the Recovery Corridor. Significant deterioration of a corridor indicator, as measured by the metrics set out in the Recovery Plan, would be escalated to the Board. FICC management would review the corridor indicators and the related metrics at least annually, and would modify these metrics as necessary in light of observations from simulations of Member defaults and other analyses. Any proposed modifications would be reviewed by the Management Risk Committee and the Board Risk Committee. The Recovery Plan would estimate that FICC may remain in the Recovery Corridor between one day and two weeks. This estimate is based on historical data observed in past Member defaults, the results of simulations of Member defaults, and periodic liquidity analyses conducted by FICC. The actual length of a Recovery Corridor would vary based on actual market conditions observed at the time, and FICC would expect the Recovery Corridor to be shorter in market conditions of increased stress.

The Recovery Plan would outline steps by which FICC may allocate its losses, which would occur when and in

(Restrictions on Access to Services), and MBSD Rule 17 (Procedures for When the Corporation Ceases to Act), *supra* note 7.

[34] *See supra* note 12. The Loss Allocation Filing proposes to amend GSD Rule 4 and MBSD Rule 4 to define the amount FICC would contribute to address a loss resulting from either a Member default or a non-default event as the ''Corporate Contribution.'' This amount would be 50 percent (50%) of the ''General Business Risk Capital Requirement,'' which is calculated pursuant to the Capital Policy and is an amount sufficient to cover potential general business losses so that FICC can continue operations and services as a going concern if those losses materialize, in compliance with Rule 17Ad–22(e)(15) under the Act. *See also supra* note 10; 17 CFR 240.17Ad–22(e)(15).

[35] The Loss Allocation Filing proposes to amend Rule 4 to introduce the concept of an ''Event Period'' as the ten (10) Business Days beginning on (i) with respect to a Member default, the day on which NSCC notifies Members that it has ceased to act for a Member under the Rules, or (ii) with respect to a non-default loss, the day that NSCC notifies Members of the determination by the Board that there is a non-default loss event, as described in greater detail in that filing. The proposed GSD Rule 4 and MBSD Rule 4 would define a ''round'' as a series of loss allocations relating to an Event Period, and would provide that the first Loss Allocation Notice in a first, second, or subsequent round shall expressly state that such notice reflects the beginning of a first, second, or subsequent round. The maximum allocable loss amount of a round is equal to the sum of the ''Loss Allocation Caps'' (as defined in the proposed GSD Rule 4 and MBSD Rule 4) of those Members included in the round. *See supra* note 12.

[36] The Corridor Actions that would be identified in the Plan are indicative, but not prescriptive; therefore, if FICC needs to consider alternative actions due to the applicable facts and circumstances, the escalation of those alternative actions would follow the same escalation protocol identified in the Plan for the Corridor Indicator to which the action relates.

the order provided in the amended GSD Rule 4 and MBSD Rule 4, as applicable.[37] The Recovery Plan would also identify tools that may be used to address foreseeable shortfalls of FICC's liquidity resources following a Member default, and would provide that these tools may be used as appropriate during the Crisis Continuum to address liquidity shortfalls if they arise. The goal in managing FICC's qualified liquidity resources is to maximize resource availability in an evolving stress situation, to maintain flexibility in the order and use of sources of liquidity, and to repay any third party lenders of liquidity in a timely manner. Additional voluntary or uncommitted tools to address potential liquidity shortfalls, for example uncommitted bank loans, which may supplement FICC's other liquid resources described herein, would also be identified in the Recovery Plan. The Recovery Plan would state that, due to the extreme nature of a stress event that would cause FICC to consider the use of these liquidity tools, the availability and capacity of these liquidity tools, and the willingness of counterparties to lend, cannot be accurately predicted and are dependent on the circumstances of the applicable stress period, including market price volatility, actual or perceived disruptions in financial markets, the costs to FICC of utilizing these tools, and any potential impact on FICC's credit rating.

As stated above, the Recovery Plan would state that FICC will have entered the recovery phase on the date that it issues the first Loss Allocation Notice of the second loss allocation round with respect to a given Event Period. The Recovery Plan would provide that, during the recovery phase, FICC would continue and, as needed, enhance, the monitoring and remedial actions already described in connection with previous phases of the Crisis Continuum, and would remain in the recovery phase until its financial resources are expected to be or are fully replenished, or until the Wind-down Plan is triggered, as described below.

The Recovery Plan would describe governance for the actions and tools that may be employed within each phase of the Crisis Continuum, which would be dictated by the facts and circumstances applicable to the situation being addressed. Such facts and circumstances would be measured by the various indicators and metrics applicable to that phase of the Crisis Continuum, and would follow the relevant escalation protocol that would be described in the Recovery Plan. The Recovery Plan would also describe the governance procedures around a decision to cease to act for a Member, pursuant to the applicable Division's Rules, and around the management and oversight of the subsequent liquidation of the Defaulting Member's portfolio. The Recovery Plan would state that, overall, FICC would retain flexibility in accordance with each Division's Rules, its governance structure, and its regulatory oversight, to address a particular situation in order to best protect FICC and the Members, and to meet the primary objectives, throughout the Crisis Continuum, of minimizing losses and, where consistent and practicable, minimizing disturbance to affected markets.

Non-Default Losses. The Recovery Plan would outline how FICC may address losses that result from events other than a Member default. While these matters are addressed in greater detail in other documents, this section of the Plan would provide a roadmap to those documents and an outline for FICC's approach to monitoring and managing losses that could result from a non-default event. The Plan would first identify some of the risks FICC faces that could lead to these losses, which include, for example, the business and profit/loss risks of unexpected declines in revenue or growth of expenses; the operational risks of disruptions to systems or processes that could lead to large losses, including those resulting from, for example, a cyber-attack; and custody or investment risks that could lead to financial losses. The Recovery Plan would describe FICC's overall strategy for the management of these risks, which includes a ''three lines of defense'' approach to risk management that allows for comprehensive management of risk across the organization.[38] The Recovery Plan would also describe FICC's approach to financial risk and capital management. The Plan would identify key aspects of this approach, including, for example, an annual budget process, business line performance reviews with management, and regular review of capital requirements against LNA. These risk management strategies are collectively intended to allow FICC to effectively identify, monitor, and manage risks of non-default losses.

The Plan would identify the two categories of financial resources FICC maintains to cover losses and expenses arising from non-default risks or events as (1) LNA, maintained, monitored, and managed pursuant to the Capital Policy, which include (a) amounts held in satisfaction of the General Business Risk Capital Requirement,[39] (b) the Corporate Contribution,[40] and (c) other amounts held in excess of FICC's capital requirements pursuant to the Capital Policy; and (2) resources available pursuant to the loss allocation provisions of GSD Rule 4 and MBSD Rule 4.[41]

The Plan would address the process by which the CFO and the DTCC Treasury group would determine which available LNA resources are most appropriate to cover a loss that is caused by a non-default event. This determination involves an evaluation of a number of factors, including the current and expected size of the loss, the expected time horizon over when the loss or additional expenses would materialize, the current and projected available LNA, and the likelihood LNA could be successfully replenished pursuant to the Replenishment Plan, if triggered.[42] Finally the Plan would discuss how FICC would apply its resources to address losses resulting from a non-default event, including the order of resources it would apply if the loss or liability exceeds FICC's excess LNA amounts, or is large relative thereto, and the Board has declared the event a ''Declared Non-Default Loss Event'' pursuant to GSD Rule 4 and MBSD Rule 4.[43]

The Plan would also describe proposed GSD Rule 50 (Market

[37] As these matters are described in greater detail in the Loss Allocation Filing and in the proposed amendments to GSD Rule 4 and MBSD Rule 4, described therein, reference is made to that filing and the details are not repeated here. *See supra* note 12.

[38] This ''three lines of defense'' approach to risk management includes (1) a first line of defense comprised of the various business lines and functional units that support the products and services offered by FICC; (2) a second line of defense comprised of control functions that support FICC, including the risk management, legal and compliance areas; and (3) a third line of defense, which is performed by an internal audit group. The Clearing Agency Risk Management Framework includes a description of this ''three lines of defense'' approach to risk management, and addresses how FICC comprehensively manages various risks, including operational, general business, investment, custody, and other risks that arise in or are borne by it. *See* Securities Exchange Act Release No. 81635 (September 15, 2017), 82 FR 44224 (September 21, 2017) (SR–DTC–2017–013, SR–FICC–2017–016, SR–NSCC–2017–012). The Clearing Agency Operational Risk Management Framework describes the manner in which FICC manages operational risks, as defined therein. *See* Securities Exchange Act Release No. 81745 (September 28, 2017), 82 FR 46332 (October 4, 2017) (SR–DTC–2017–014, SR–FICC–2017–017, SR–NSCC–2017–013).

[39] *See supra* note 34.

[40] *See supra* note 34.

[41] *See supra* note 12.

[42] *See supra* note 10.

[43] *See supra* note 12.

Disruption and Force Majeure) and proposed MBSD Rule 40 (Market Disruption and Force Majeure), which FICC is proposing to adopt in the GSD Rule and MBSD Rules, respectively. This Proposed Rule would provide transparency around how FICC would address extraordinary events that may occur outside its control. Specifically, the Proposed Rule would define a ''Market Disruption Event'' and the governance around a determination that such an event has occurred. The Proposed Rule would also describe FICC's authority to take actions during the pendency of a Market Disruption Event that it deems appropriate to address such an event and facilitate the continuation of its services, if practicable, as described in greater detail below.

The Plan would describe the interaction between the Proposed Rule and FICC's existing processes and procedures addressing business continuity management and disaster recovery (generally, the ''BCM/DR procedures''), making clear that the Proposed Rule is designed to support those BCM/DR procedures and to address circumstances that may be exogenous to FICC and not necessarily addressed by the BCM/DR procedures. Finally, the Plan would describe that, because the operation of the Proposed Rule is specific to each applicable Market Disruption Event, the Proposed Rule does not define a time limit on its application. However, the Plan would note that actions authorized by the Proposed Rule would be limited to the pendency of the applicable Market Disruption Event, as made clear in the Proposed Rule. Overall, the Proposed Rule is designed to mitigate risks caused by Market Disruption Events and, thereby, minimize the risk of financial loss that may result from such events.

Recovery Tool Characteristics. The Recovery Plan would describe FICC's evaluation of the tools identified within the Recovery Plan, and its rationale for concluding that such tools are comprehensive, effective, and transparent, and that such tools provide appropriate incentives to Members and minimize negative impact on Members and the financial system, in compliance with guidance published by the Commission in connection with the adoption of Rule 17Ad–22(e)(3)(ii) under the Act.[44] FICC's analysis and the conclusions set forth in this section of the Recovery Plan are described in greater detail in Item 3(b) of this filing, below.

FICC Wind-Down Plan

The Wind-down Plan would provide the framework and strategy for the orderly wind-down of FICC if the use of the recovery tools described in the Recovery Plan do not successfully return FICC to financial viability. While FICC believes that, given the comprehensive nature of the recovery tools, such event is extremely unlikely, as described in greater detail below, FICC is proposing a wind-down strategy that provides for (1) the transfer of FICC's business, assets and memberships of both Divisions to another legal entity, (2) such transfer being effected in connection with proceedings under Chapter 11 of the U.S. Federal Bankruptcy Code,[45] and (3) after effectuating this transfer, FICC liquidating any remaining assets in an orderly manner in bankruptcy proceedings. FICC believes that the proposed transfer approach to a wind-down would meet its objectives of (1) assuring that FICC's critical services will be available to the market as long as there are Members in good standing, and (2) minimizing disruption to the operations of Members and financial markets generally that might be caused by FICC's failure.

In describing the transfer approach to FICC's Wind-down Plan, the Plan would identify the factors that FICC considered in developing this approach, including the fact that FICC does not own material assets that are unrelated to its clearance and settlement activities. As such, a business reorganization or ''bail-in'' of debt approach would be unlikely to mitigate significant losses. Additionally, FICC's approach was developed in consideration of its critical and unique position in the U.S. markets, which precludes any approach that would cause FICC's critical services to no longer be available.

First, the Wind-down Plan would describe the potential scenarios that could lead to the wind-down of FICC, and the likelihood of such scenarios. The Wind-down Plan would identify the time period leading up to a decision to wind-down FICC as the ''Runway Period.'' This period would follow the implementation of any recovery tools, as it may take a period of time, depending on the severity of the market stress at that time, for these tools to be effective or for FICC to realize a loss sufficient to cause it to be unable to effectuate settlements and repay its obligations.[46] The Wind-down Plan would identify some of the indicators that it has entered this Runway Period, which would include, for example, successive Member defaults, significant Member retirements thereafter, and FICC's inability to replenish its financial resources following the liquidation of the portfolio of the Defaulting Member(s).

The trigger for implementing the Wind-down Plan would be a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning FICC to viability as a going concern. As described in the Plan, FICC believes this is an appropriate trigger because it is both broad and flexible enough to cover a variety of scenarios, and would align incentives of FICC and the Members to avoid actions that might undermine FICC's recovery efforts. Additionally, this approach takes into account the characteristics of FICC's recovery tools and enables the Board to consider (1) the presence of indicators of a successful or unsuccessful recovery, and (2) potential for knock-on effects of continued iterative application of FICC's recovery tools.

The Wind-down Plan would describe the general objectives of the transfer strategy, and would address assumptions regarding the transfer of FICC's critical services, business, assets and membership, and the assignment of GSD's link with another FMI, to another legal entity that is legally, financially, and operationally able to provide FICC's critical services to entities that wish to continue their membership following the transfer (''Transferee''). The Wind-down Plan would provide that the Transferee would be either (1) a third party legal entity, which may be an existing or newly established legal entity or a bridge entity formed to operate the business on an interim basis to enable the business to be transferred subsequently (''Third Party Transferee''); or (2) an existing, debt-free failover legal entity established ex-ante by DTCC (''Failover Transferee'') to be used as an alternative Transferee in the event that no viable or preferable Third Party Transferee timely commits to acquire FICC's business. FICC would seek to identify the proposed Transferee, and negotiate and enter into

[44] Standards for Covered Clearing Agencies, Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14).

[45] 11 U.S.C. 1101 *et seq.*

[46] The Wind-down Plan would state that, given FICC's position as a user-governed financial market utility, it is possible that Members might voluntarily elect to provide additional support during the recovery phase leading up to a potential trigger of the Wind-down Plan, but would also make clear that FICC cannot predict the willingness of Members to do so.

transfer arrangements during the Runway Period and prior to making any filings under Chapter 11 of the U.S. Federal Bankruptcy Code.[47] As stated above, the Wind-down Plan would anticipate that the transfer to the Transferee be effected in connection with proceedings under Chapter 11 of the U.S. Federal Bankruptcy Code, and pursuant to a bankruptcy court order under Section 363 of the Bankruptcy Code, such that the transfer would be free and clear of claims against, and interests in, FICC, except to the extent expressly provided in the court's order.[48]

In order to effect a timely transfer of its services and minimize the market and operational disruption of such transfer, FICC would expect to transfer all of its critical services and any non-critical services that are ancillary and beneficial to a critical service, or that otherwise have substantial user demand from the continuing membership. Following the transfer, the Wind-down Plan would anticipate that the Transferee and its continuing membership would determine whether to continue to provide any transferred non-critical service on an ongoing basis, or terminate the non-critical service following some transition period. FICC's Wind-down Plan would anticipate that the Transferee would enter into a transition services agreement with DTCC so that DTCC would continue to provide the shared services it currently provides to FICC, including staffing, infrastructure and operational support. The Wind-down Plan would also anticipate the assignment of FICC's link arrangements, including its arrangements with clearing banks and GSD's cross-margining arrangement with CME, described above, to the Transferee.[49] The Wind-down Plan would provide that Members' open positions existing prior to the effective time of the transfer would be addressed by the provisions of the proposed Wind-down Rule, as defined and described below, and the existing GSD Rule 22B (Corporation Default) and MBSD Rule 17 (Corporation Default) (collectively, ''Corporation Default Rule''), as applicable, and that the Transferee would not acquire any pending or open transactions with the transfer of the business.[50] The Wind-down Plan would anticipate that the Transferee would accept transactions for processing with a trade date from and after the effective time of the transfer.

The Wind-down Plan would provide that, following the effectiveness of the transfer to the Transferee, the wind-down of FICC would involve addressing any residual claims against FICC through the bankruptcy process and liquidating the legal entity. As such, and as stated above, the Wind-down Plan does not contemplate FICC continuing to provide services in any capacity following the transfer time, and any services not transferred would be terminated.

The Wind-down Plan would also identify the key dependencies for the effectiveness of the transfer, which include regulatory approvals that would permit the Transferee to be legally qualified to provide the transferred services from and after the transfer, and approval by the applicable bankruptcy court of, among other things, the proposed sale, assignments, and transfers to the Transferee.

The Wind-down Plan would address governance matters related to the execution of the transfer of FICC's business and its wind-down. The Wind-down Plan would address the duties of the Board to execute the wind-down of FICC in conformity with (1) the Rules, (2) the Board's fiduciary duties, which mandate that it exercise reasonable business judgment in performing these duties, and (3) FICC's regulatory obligations under the Act as a registered clearing agency. The Wind-down Plan would also identify certain factors the Board may consider in making these decisions, which would include, for example, whether FICC could safely stabilize the business and protect its value without seeking bankruptcy protection, and FICC's ability to continue to meet its regulatory requirements.

The Wind-down Plan would describe (1) actions FICC or DTCC may take to prepare for wind-down in the period before FICC experiences any financial distress, (2) actions FICC would take both during the recovery phase and the Runway Period to prepare for the execution of the Wind-down Plan, and (3) actions FICC would take upon commencement of bankruptcy proceedings to effectuate the Wind-down Plan.

Finally, the Wind-down Plan would include an analysis of the estimated time and costs to effectuate the plan, and would provide that this estimate be reviewed and approved by the Board annually. In order to estimate the length of time it might take to achieve a recovery or orderly wind-down of FICC's critical operations, as contemplated by the R&W Plan, the Wind-down Plan would include an analysis of the possible sequencing and length of time it might take to complete an orderly wind-down and transfer of critical operations, as described in earlier sections of the R&W Plan. The Wind-down Plan would also include in this analysis consideration of other factors, including the time it might take to complete any further attempts at recovery under the Recovery Plan. The Wind-down Plan would then multiply this estimated length of time by FICC's average monthly operating expenses, including adjustments to account for changes to FICC's profit and expense profile during these circumstances, over the previous twelve months to determine the amount of LNA that it should hold to achieve a recovery or orderly wind-down of FICC's critical operations. The estimated wind-down costs would constitute the ''Recovery/Wind-down Capital Requirement'' under the Capital Policy.[51] Under that policy, the General Business Risk Capital Requirement is calculated as the greatest of three estimated amounts, one of which is this Recovery/Wind-down Capital Requirement.[52]

The R&W Plan is designed as a roadmap, and the types of actions that may be taken both leading up to and in connection with implementation of the Wind-down Plan would be primarily addressed in other supporting documentation referred to therein.

The Wind-down Plan would address proposed GSD Rule 22D and MBSD Rule 17B (Wind-down of the Corporation), which would be adopted to facilitate the implementation of the Wind-down Plan, and are discussed below.

Proposed Rules

In connection with the adoption of the R&W Plan, FICC is proposing to adopt the Proposed Rules, each described below. The Proposed Rules would facilitate the execution of the R&W Plan and would provide Members and Limited Members with transparency as to critical aspects of the Plan, particularly as they relate to the rights and responsibilities of both FICC

[47] *See* 11 U.S.C. *et seq.*

[48] *See id.* at 363.

[49] The proposed transfer arrangements outlined in the Wind-down Plan do not contemplate the transfer of any credit or funding agreements, which are generally not assignable by FICC. However, to the extent the Transferee adopts rules substantially identical to those FICC has in effect prior to the transfer, it would have the benefit of any rules-based liquidity funding. The Wind-down Plan contemplates that neither of the Divisions' respective Clearing Funds would be transferred to the Transferee, as they are not held in a bankruptcy remote manner and they are the primary prefunded liquidity resource to be accessed in the recovery phase.

[50] *See supra* note 7.

[51] *See supra* note 10.

[52] *See supra* note 10.

and Members. The Proposed Rules also provide a legal basis to these aspects of the Plan.

GSD Rule 22D and MBSD Rule 17B (Wind-Down of the Corporation)

The proposed GSD Rule 22D and MBSD Rule 17B (collectively, ''Wind-down Rule'') would be adopted by both Divisions to facilitate the execution of the Wind-down Plan. The Wind-down Rule would include a proposed set of defined terms that would be applicable only to the provisions of this Proposed Rule. The Wind-down Rule would make clear that a wind-down of FICC's business would occur (1) after a decision is made by the Board, and (2) in connection with the transfer of FICC's services to a Transferee, as described therein. Because GSD and MBSD are both divisions of FICC, the individual Wind-down Rules are designed to work together. A decision by the Board to initiate the Wind-down Plan would be pursuant to, and trigger the provisions of, the Wind-down Rule of each Division simultaneously. Generally, the proposed Wind-down Rule is designed to create clear mechanisms for the transfer of Eligible Members, Eligible Limited Members, and Settling Banks (as these terms would be defined in the Wind-down Rule), and FICC's business in order to provide for continued access to critical services and to minimize disruption to the markets in the event the Wind-down Plan is initiated.

Wind-down Trigger. First, the Proposed Rule would make clear that the Board is responsible for initiating the Wind-down Plan, and would identify the criteria the Board would consider when making this determination. As provided for in the Wind-down Plan and in the proposed Wind-down Rule, the Board would initiate the Plan if, in the exercise of its business judgment and subject to its fiduciary duties, it has determined that the execution of the Recovery Plan has not or is not likely to restore FICC to viability as a going concern, and the implementation of the Wind-down Plan, including the transfer of FICC's business, is in the best interests of FICC, Members and Limited Members of both Divisions, its shareholders and creditors, and the U.S. financial markets.

Identification of Critical Services; Designation of Dates and Times for Specific Actions. The Proposed Rule would provide that, upon making a determination to initiate the Wind-down Plan, the Board would identify the critical and non-critical services that would be transferred to the Transferee at the Transfer Time (as defined below and in the Proposed Rule), as well as any non-critical services that would not be transferred to the Transferee. The proposed Wind-down Rule would establish that any services transferred to the Transferee will only be provided by the Transferee as of the Transfer Time, and that any non-critical services that are not transferred to the Transferee would be terminated at the Transfer Time. The Proposed Rule would also provide that the Board would establish (1) an effective time for the transfer of FICC's business to a Transferee (''Transfer Time''), (2) the last day that transactions may be submitted to either Division for processing (''Last Transaction Acceptance Date''), and (3) the last day that transactions submitted to either Division will be settled (''Last Settlement Date'').

Treatment of Pending Transactions. The Wind-down Rule would also authorize the Board to provide for the settlement of pending transactions of either Division prior to the Transfer Time, so long as the applicable Division's Corporation Default Rule has not been triggered. For example, the Proposed Rule would provide the Board with the ability to, if it deems practicable, based on FICC's resources at that time, allow pending transactions of either Division to complete prior to the transfer of FICC's business to a Transferee. The Board would also have the ability to allow Members to only submit trades to the applicable Division that would effectively offset pending positions or provide that transactions will be processed in accordance with special or exception processing procedures. The Proposed Rule is designed to enable these actions in order to facilitate settlement of pending transactions of the applicable Division and reduce claims against FICC that would have to be satisfied after the transfer has been effected. If none of these actions are deemed practicable (or if the applicable Division's Corporation Default Rule has been triggered with respect to a Division), then the provisions of the proposed Corporation Default Rule would apply to the treatment of open, pending transactions of such Division.

The Proposed Rule would make clear, however, that neither Division would accept any transactions for processing after the Last Transaction Acceptance Date or which are designated to settle after the Last Settlement Date for such Division. Any transactions to be processed and/or settled after the Transfer Time would be required to be submitted to the Transferee, and would not be FICC's responsibility.

Notice Provisions. The proposed Wind-down Rule would provide that, upon a decision to implement the Wind-down Plan, FICC would provide its Members and Limited Members and its regulators with a notice that includes material information relating to the Wind-down Plan and the anticipated transfer of the membership of both Divisions and business, including, for example, (1) a brief statement of the reasons for the decision to implement the Wind-down Plan; (2) identification of the Transferee and information regarding the transaction by which the transfer of FICC's business would be effected; (3) the Transfer Time, Last Transaction Acceptance Date, and Last Settlement Date; and (4) identification of Eligible Members and Eligible Limited Members, and the critical and non-critical services that would be transferred to the Transferee at the Transfer Time, as well as those Non-Eligible Members and Non-Eligible Limited Members (as defined in the Proposed Rule), and any non-critical services that would not be included in the transfer. FICC would also make available the rules and procedures and membership agreements of the Transferee.

Transfer of Membership. The proposed Wind-down Rule would address the expected transfer of both Divisions' membership to the Transferee, which FICC would seek to effectuate by entering into an arrangement with a Failover Transferee, or by using commercially reasonable efforts to enter into such an arrangement with a Third Party Transferee. Therefore, the Wind-down Rule would provide Members, Limited Members and Settling Banks with notice that, in connection with the implementation of the Wind-down Plan and with no further action required by any party, (1) their membership with the applicable Division would transfer to the Transferee, (2) they would become party to a membership agreement with such Transferee, and (3) they would have all of the rights and be subject to all of the obligations applicable to their membership status under the rules of the Transferee. These provisions would not apply to any Member or Limited Member that is either in default of an obligation to FICC or has provided notice of its election to withdraw its membership from the applicable Division. Further, the proposed Wind-down Rule would make clear that it would not prohibit (1) Members and Limited Members that are not transferred by operation of the Wind-down Rule from applying for

membership with the Transferee, or (2) Members, Limited Members, and Settling Banks that would be transferred to the Transferee from withdrawing from membership with the Transferee.[53]

Comparability Period. The proposed automatic mechanism for the transfer of both Divisions' memberships is intended to provide the membership with continuous access to critical services in the event of FICC's wind-down, and to facilitate the continued prompt and accurate clearance and settlement of securities transactions. Further to this goal, the proposed Wind-down Rule would provide that FICC would enter into arrangements with a Failover Transferee, or would use commercially reasonable efforts to enter into arrangements with a Third Party Transferee, providing that, in either case, with respect to the critical services and any non-critical services that are transferred from FICC to the Transferee, for at least a period of time to be agreed upon (''Comparability Period''), the business transferred from FICC to the Transferee would be operated in a manner that is comparable to the manner in which the business was previously operated by FICC. Specifically, the proposed Wind-down Rule would provide that: (1) The rules of the Transferee and terms of membership agreements would be comparable in substance and effect to the analogous Rules and membership agreements of FICC; (2) the rights and obligations of any Members, Limited Members and Settling Banks that are transferred to the Transferee would be comparable in substance and effect to their rights and obligations as to FICC; and (3) the Transferee would operate the transferred business and provide any services that are transferred in a comparable manner to which such services were provided by FICC. The purpose of these provisions and the intended effect of the proposed Wind-down Rule is to facilitate a smooth transition of FICC's business to a Transferee and to provide that, for at least the Comparability Period, the Transferee (1) would operate the transferred business in a manner that is comparable in substance and effect to the manner in which the business was operated by FICC, and (2) would not require sudden and disruptive changes in the systems, operations and business practices of the new members of the Transferee.

Subordination of Claims Provisions and Miscellaneous Matters. The proposed Wind-down Rule would also include a provision addressing the subordination of unsecured claims against FICC of its Members and Limited Members who fail to participate in FICC's recovery efforts (*i.e.,* such firms are delinquent in their obligations to FICC or elect to retire from FICC in order to minimize their obligations with respect to the allocation of losses, pursuant to the Rules). This provision is designed to incentivize Members to participate in FICC's recovery efforts.[54]

The proposed Wind-down Rule would address other ex-ante matters, including provisions providing that its Members, Limited Members and Settling Banks (1) will assist and cooperate with FICC to effectuate the transfer of FICC's business to a Transferee, (2) consent to the provisions of the rule, and (3) grant FICC power of attorney to execute and deliver on their behalf documents and instruments that may be requested by the Transferee. Finally, the Proposed Rule would include a limitation of liability for any actions taken or omitted to be taken by FICC pursuant to the Proposed Rule. The purpose of the limitation of liability is to facilitate and protect FICC's ability to act expeditiously in response to extraordinary events. As noted, such limitation of liability would be available only following triggering of the Wind-down Plan. In addition, and as a separate matter, the limitation of liability provides Members with transparency for the unlikely situation when those extraordinary events could occur, as well supporting the legal framework within which FICC would take such actions. These provisions, collectively, are designed to enable FICC to take such acts as the Board determines necessary to effectuate an orderly transfer and wind-down of its business should recovery efforts prove unsuccessful.

GSD Rule 50 and MBSD Rule 40 (Market Disruption and Force Majeure)

The proposed GSD Rule 50 and MBSD Rule 40 (Market Disruption and Force Majeure) (collectively, ''Force Majeure Rule'') would address FICC's authority to take certain actions upon the occurrence, and during the pendency, of a ''Market Disruption Event,'' as defined therein. Because GSD and MBSD are both divisions of FICC, the individual Force Majeure Rules are designed to work together. A decision by the Board or management of FICC that a Market Disruption Event has occurred in accordance with the Force Majeure Rule would trigger the provisions of the Force Majeure Rule of each Division simultaneously. The Proposed Rule is designed to clarify FICC's ability to take actions to address extraordinary events outside of the control of FICC and of the memberships of the Divisions, and to mitigate the effect of such events by facilitating the continuity of services (or, if deemed necessary, the temporary suspension of services). To that end, under the proposed Force Majeure Rule, FICC would be entitled, during the pendency of a Market Disruption Event, to (1) suspend the provision of any or all services, and (2) take, or refrain from taking, or require its Members and Limited Members to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of FICC's services as may be practicable.

The proposed Force Majeure Rule would identify the events or circumstances that would be considered a ''Market Disruption Event,'' including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which FICC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. The proposed Force Majeure Rule would define the governance procedures for how FICC would determine whether, and how, to implement the provisions of the rule. A determination that a Market Disruption Event has occurred would generally be made by the Board, but the Proposed Rule would provide for limited, interim delegation of authority to a specified officer or management committee if the Board would not be able to take timely action. In the event such delegated authority is exercised, the proposed Force Majeure Rule would require that the Board be convened as promptly as practicable, no later than five Business Days after such determination has been made, to ratify, modify, or rescind the action. The proposed Force Majeure Rule would also provide for prompt notification to the Commission, and advance consultation with Commission staff, when practicable, including

[53] The Members and Limited Members whose membership is transferred to the Transferee pursuant to the proposed Wind-down Rule would submit transactions to be processed and settled subject to the rules and procedures of the Transferee, including any applicable margin charges or other financial obligations.

[54] Nothing in the proposed Wind-down Rule would seek to prevent a Member, Limited Member or Settling Bank that retired its membership at either of the Divisions from applying for membership with the Transferee. Once its FICC membership is terminated, however, such firm would not be able to benefit from the membership assignment that would be effected by this proposed Wind-down Rule, and it would have to apply for membership directly with the Transferee, subject to its membership application and review process.

notification when an event is no longer continuing and the relevant actions are terminated. The Proposed Rule would require Members and Limited Members to notify FICC immediately upon becoming aware of a Market Disruption Event, and, likewise, would require FICC to notify Members and Limited Members if it has triggered the Proposed Rule and of actions taken or intended to be taken thereunder.

Finally, the Proposed Rule would address other related matters, including a limitation of liability for any failure or delay in performance, in whole or in part, arising out of the Market Disruption Event. The purpose of the limitation of liability would be similar to the purpose of the analogous provision in the proposed Wind-down Rule, which is to facilitate and protect FICC's ability to act expeditiously in response to extraordinary events.

Proposed Changes to GSD Rules, MBSD Rules, and EPN Rules

In order to incorporate the Proposed Rules into the Rules and the EPN Rules, FICC is also proposing to amend (1) GSD Rule 3A (Sponsoring Members and Sponsored Members), GSD Rule 3B (Centrally Cleared Institutional Triparty Service) and GSD Rule 13 (Funds-Only Settlement); (2) MBSD Rule 3A (Cash Settlement Bank Members); and (3) Rule 1 of the EPN Rules. As shown on Exhibit 5b, these proposed changes would clarify that certain types of Limited Members, as identified in those rules, would be subject to the Proposed Rules.

Expected Effect on and Management of Risk

FICC believes the proposal to adopt the R&W Plan and the Proposed Rules would enable it to better manage its risks. As described above, the Recovery Plan would identify the recovery tools and the risk management activities that FICC may use to address risks of uncovered losses or shortfalls resulting from a Member default and losses arising from non-default events. By creating a framework for its management of risks across an evolving stress scenario and providing a roadmap for actions it may employ to monitor and, as needed, stabilize its financial condition, the Recovery Plan would strengthen FICC's ability to manage risk. The Wind-down Plan would also enable FICC to better manage its risks by establishing the strategy and framework for its orderly wind-down and the transfer of FICC's business when the Wind-down Plan is triggered. By creating clear mechanisms for the transfer of the Divisions' membership and business, the Wind-down Plan would facilitate continued access to FICC's critical services and minimize market impact of the transfer and enable FICC to better manage risks related to its wind-down.

FICC believes the Proposed Rules would enable it to better manage its risks by facilitating, and providing a legal basis for, the implementation of critical aspects of the R&W Plan. The Proposed Rules would provide Members and Limited Members with transparency around those provisions of the R&W Plan that relate to their and FICC's rights, responsibilities and obligations. Therefore, FICC believes the Proposed Rules would enable it to better manage its risks by providing this transparency and creating certainty, to the extent practicable, around the occurrence of a Market Disruption Event (as such term is defined in the proposed Force Majeure Rule), and around the implementation of the Wind-down Plan.

Consistency With the Clearing Supervision Act

The stated purpose of Title VIII 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.[55] Section 805(a)(2) of the Clearing Supervision Act[56] also authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities, like FICC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act[57] 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.

FICC believes that the proposal is consistent with Section 805(b) of the Clearing Supervision Act because it is designed to address each of these objectives. The Recovery Plan and the proposed Force Majeure Rule would promote robust risk management and would reduce systemic risks by providing FICC with a roadmap for actions it may employ to monitor and manage its risks, and, as needed, to stabilize its financial condition in the event those risks materialize. Further, the Recovery Plan would identify the triggers of recovery tools, but would not provide that those triggers necessitate the use of those tools. Instead, the Recovery Plan would provide that the triggers of these tools lead to escalation to an appropriate management body, which would have the authority and flexibility to respond appropriately to the situation. Essentially, the Recovery Plan and the proposed Force Majeure Rule are designed to minimize losses to both FICC and Members by giving FICC the ability to determine the most appropriate way to address each stress situation. This approach would allow for proper evaluation of the situation and the possible impacts of the use of the available recovery tools in order to minimize the negative effects of the stress situation, and would reduce systemic risks related to the implementation of the Recovery Plan and the underlying recovery tools.

The Wind-down Plan and the proposed Wind-down Rule, which would facilitate the implementation of the Wind-down Plan, would promote safety and soundness and would support the stability of the broader financial system, because they would establish a framework for the orderly wind-down of FICC's business and would set forth clear mechanics for the transfer of its critical services and the memberships of both Divisions. By designing the Wind-down Plan and this Proposed Rule to enable the continuity of FICC's critical services and membership, FICC believes they would promote safety and soundness and would support stability in the broader financial system in the event the Wind-down Plan is implemented.

By assisting FICC to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system, as described above, FICC believes the proposal is consistent with Section 805(b) of the Clearing Supervision Act.[58]

FICC also believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, FICC believes that the R&W Plan, each of the Proposed Rules and the other proposed changes to the Rules and the EPN Rules are consistent with Section 17A(b)(3)(F) of the Act,[59] the R&W Plan and each of the Proposed Rules are consistent with

[55] 12 U.S.C. 5461(b).

[56] *Id.* at 5464(a)(2).

[57] *Id.* at 5464(b).

[58] *Id.*

[59] 15 U.S.C. 78q–1(b)(3)(F).

Rule 17Ad–22(e)(3)(ii) under the Act,[60] and the R&W Plan is consistent with Rule 17Ad–22(e)(15)(ii) under the Act,[61] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of FICC be designed to promote the prompt and accurate clearance and settlement of securities transactions, and to assure the safeguarding of securities and funds which are in the custody or control of FICC or for which it is responsible.[62] The Recovery Plan and the proposed Force Majeure Rule would promote the prompt and accurate clearance and settlement of securities transactions by providing FICC with a roadmap for actions it may employ to mitigate losses, and monitor and, as needed, stabilize, its financial condition, which would allow it to continue its critical clearance and settlement services in stress situations. Further, as described above, the Recovery Plan is designed to identify the actions and tools FICC may use to address and minimize losses to both FICC and Members. The Recovery Plan and the proposed Force Majeure Rule would provide FICC's management and the Board with guidance in this regard by identifying the indicators and governance around the use and application of such tools to enable them to address stress situations in a manner most appropriate for the circumstances. Therefore, the Recovery Plan and the proposed Force Majeure Rule would also contribute to the safeguarding of securities and funds which are in the custody or control of FICC or for which it is responsible by enabling actions that would address and minimize losses.

The Wind-down Plan and the proposed Wind-down Rule, which would facilitate the implementation of the Wind-down Plan, would also promote the prompt and accurate clearance and settlement of securities transactions and assure the safeguarding of securities and funds which are in the custody or control of FICC or for which it is responsible. The Wind-down Plan and the proposed Wind-down Rule would collectively establish a framework for the transfer and orderly wind-down of FICC's business. These proposals would establish clear mechanisms for the transfer of FICC's critical services and membership. By doing so, the Wind-down Plan and this Proposed Rule are designed to facilitate the continuity of FICC's critical services and enable Members and Limited Members to maintain access to FICC's services through the transfer of its Divisions' memberships in the event the Wind-down Plan is triggered by the Board. Therefore, by facilitating the continuity of FICC's critical clearance and settlement services, FICC believes the proposals would promote the prompt and accurate clearance and settlement of securities transactions. Further, by creating a framework for the transfer and orderly wind-down of FICC's business, FICC believes the proposals would enhance the safeguarding of securities and funds which are in the custody or control of FICC or for which it is responsible.

Finally, the other proposed changes to the Rules and the EPN Rules would clarify the application of the Proposed Rules to certain types of Limited Members and would enable these Limited Members to readily understand their rights and obligations. As such, FICC believes these proposed changes would enable Limited Members that are governed by the applicable rules to have a better understanding of those rules and, thereby, would assist in promoting the prompt and accurate clearance and settlement of securities transactions.

Therefore, FICC believes the R&W Plan, each of the Proposed Rules, and the other proposed changes are consistent with the requirements of Section 17A(b)(3)(F) of the Act.[63]

Rule 17Ad–22(e)(3)(ii) under the Act requires FICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[64] The R&W Plan and each of the Proposed Rules are designed to meet the requirements of Rule 17Ad–22(e)(3)(ii).[65]

The R&W Plan would be maintained by FICC in compliance with Rule 17Ad–22(e)(3)(ii) in that it provides plans for the recovery and orderly wind-down of FICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, as described above.[66] Specifically, the Recovery Plan would define the risk management activities, stress conditions and indicators, and tools that FICC may use to address stress scenarios that could eventually prevent it from being able to provide its critical services as a going concern. Through the framework of the Crisis Continuum, the Recovery Plan would address measures that FICC may take to address risks of credit losses and liquidity shortfalls, and other losses that could arise from a Member default. The Recovery Plan would also address the management of general business risks and other non-default risks that could lead to losses.

The Wind-down Plan would be triggered by a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning FICC to viability as a going concern. Once triggered, the Wind-down Plan would set forth clear mechanisms for the transfer of the memberships of both Divisions and FICC's business, and would be designed to facilitate continued access to FICC's critical services and to minimize market impact of the transfer. By establishing the framework and strategy for the execution of the transfer and wind-down of FICC in order to facilitate continuous access to FICC's critical services, the Wind-down Plan establishes a plan for the orderly wind-down of FICC. Therefore, FICC believes the R&W Plan would provide plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, and, as such, meets the requirements of Rule 17Ad–22(e)(3)(ii).[67]

As described in greater detail above, the Proposed Rules are designed to facilitate the execution of the R&W Plan, provide Members and Limited Members with transparency regarding the material provisions of the Plan, and provide FICC with a legal basis for implementation of those provisions. As such, FICC also believes the Proposed Rules meet the requirements of Rule 17Ad–22(e)(3)(ii).[68]

FICC has evaluated the recovery tools that would be identified in the Recovery Plan and has determined that these tools are comprehensive, effective, and transparent, and that such tools provide appropriate incentives to Members to manage the risks they present. The recovery tools, as outlined in the Recovery Plan and in the proposed Force Majeure Rule, provide FICC with a comprehensive set of options to address its material risks and support the resiliency of its critical services under a range of stress scenarios. FICC

[60] 17 CFR 240.17Ad–22(e)(3)(ii).

[61] *Id.* at 240.17Ad–22(e)(15)(ii).

[62] 15 U.S.C. 78q–1(b)(3)(F).

[63] *Id.*

[64] 17 CFR 240.17Ad–22(e)(3)(ii).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

also believes the recovery tools are effective, as FICC has both legal basis and operational capability to execute these tools in a timely and reliable manner. Many of the recovery tools are provided for in the Rules; Members are bound by the Rules through their membership agreements with FICC, and the Rules are adopted pursuant to a framework established by Rule 19b–4 under the Act,[69] providing a legal basis for the recovery tools found therein. Other recovery tools have legal basis in contractual arrangements to which FICC is a party, as described above. Further, as many of the tools are embedded in FICC's ongoing risk management practices or are embedded into its predefined default-management procedures, FICC is able to execute these tools, in most cases, when needed and without material operational or organizational delay.

The majority of the recovery tools are also transparent, as they are, or are proposed to be, included in the Rules, which are publicly available. FICC believes the recovery tools also provide appropriate incentives to Members, as they are designed to control the amount of risk they present to FICC's clearance and settlement system. Members' financial obligations to FICC, particularly their required deposits to the applicable Division's Clearing Fund, are measured by the risk posed by the Members' activity in FICC's systems, which incentivizes them to manage that risk which would correspond to lower financial obligations. Finally, FICC's Recovery Plan provides for a continuous evaluation of the systemic consequences of executing its recovery tools, with the goal of minimizing their negative impact. The Recovery Plan would outline various indicators over a timeline of increasing stress, the Crisis Continuum, with escalation triggers to FICC management or the Board, as appropriate. This approach would allow for timely evaluation of the situation and the possible impacts of the use of a recovery tool in order to minimize the negative effects of the stress scenario. Therefore, FICC believes that the recovery tools that would be identified and described in its Recovery Plan, including the authority provided to it in the proposed Force Majeure Rule, would meet the criteria identified within guidance published by the Commission in connection with the adoption of Rule 17Ad–22(e)(3)(ii).[70]

Therefore, FICC believes the R&W Plan and each of the Proposed Rules are consistent with Rule 17Ad–22(e)(3)(ii).[71]

Rule 17Ad–22(e)(15)(ii) under the Act requires FICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage its general business risk and hold sufficient LNA to cover potential general business losses so that FICC can continue operations and services as a going concern if those losses materialize, including by holding LNA equal to the greater of either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency.[72] While the Capital Policy addresses how FICC holds LNA in compliance with these requirements, the Wind-down Plan would include an analysis that would estimate the amount of time and the costs to achieve a recovery or orderly wind-down of FICC's critical operations and services, and would provide that the Board review and approve this analysis and estimation annually. The Wind-down Plan would also provide that the estimate would be the ''Recovery/Wind-down Capital Requirement'' under the Capital Policy. Under that policy, the General Business Risk Capital Requirement, which is the sufficient amount of LNA that FICC should hold to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize, is calculated as the greatest of three estimated amounts, one of which is this Recovery/Wind-down Capital Requirement. Therefore, FICC believes the R&W Plan, as it interrelates with the Capital Policy, is consistent with Rule 17Ad–22(e)(15)(ii).[73]

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 that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

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.

The clearing agency 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. 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–FICC–2017–805 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–FICC–2017–805. 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 FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received

[69] *Id.* at 240.19b–4.

[70] *Supra* note 44.

[71] 17 CFR 240.17Ad–22(e)(3)(ii).

[72] *Id.* at 240.17Ad–22(e)(15)(ii).

[73] *Id.*

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–FICC–2017–805 and should be submitted on or before August 21, 2018.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16707 Filed 8–3–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83751; File No. SR–NASDAQ–2018–058]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower Fees and Administrative Costs for Distributors of Nasdaq Basic, Nasdaq Last Sale, NLS Plus and the Nasdaq Depth-of-Book Products Through a Consolidated Enterprise License

July 31, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 17, 2018, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''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 lower fees and administrative costs for Distributors of Nasdaq Basic, Nasdaq Last Sale (''NLS''), NLS Plus and the Nasdaq Depth-of-Book products (TotalView and Level 2) by introducing a consolidated enterprise license for the Display Usage of all five products. This market data enterprise license will allow Distributors who are broker-dealers or Investment Advisers to disseminate these products to a wide audience for a monthly fee of $600,000, with the opportunity to lower that fee further to $500,000 per month if the Distributor contracts for twelve months of the service in advance. The proposed enterprise license will be introduced through an amendment to Rule [3] 7032, which is currently reserved. The proposal is described in further detail below.

This amendment is immediately effective upon filing.[4]

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 lower fees and administrative costs for Distributors [5] of Nasdaq Basic, NLS, NLS Plus and the Nasdaq Depth-of-Book products (TotalView and Level 2) by introducing a consolidated enterprise license for the Display Usage [6] of all five products. This license will allow Distributors who are broker-dealers or Investment Advisers [7] to disseminate these products to a wide audience for a monthly fee of $600,000, with the opportunity to lower that fee further to $500,000 per month if they contract for twelve months of service in advance. No fees will increase as a result of this license. As discussed below, this fee reduction responds to competitive pressures exerted by other exchanges that sell market data.

Current Enterprise License Fees

The Exchange currently offers enterprise licenses for Depth-of-Book products and Nasdaq Basic. There is no enterprise license for the distribution of NLS to the general investing public, but there is a cap of $41,500 per month on such fees, and NLS may also be distributed under one of the enterprise licenses for Nasdaq Basic.[8]

Depth-of-Book Products

Nasdaq offers two Depth-of-Book products, TotalView and Level 2.[9] TotalView, Nasdaq's premier Depth-of-Book product, provides complete, real-time depth data for Nasdaq and non-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] References to rules are to Nasdaq rules, unless otherwise noted.

[4] This proposed change was initially filed on July 3, 2018, and became immediately effective on that date. *See* SR–NASDAQ–2018–055, available at *http://nasdaq.cchwallstreet.com/.* A firm eligible to purchase the proposed license may purchase it for the month of July, effective on July 3, 2018, and the monthly fee for the license will be prorated for the period July 3 through July 31, 2018. Any fees owed by the purchaser of the enterprise license for the use of Nasdaq Basic, NLS, NLS Plus and the Nasdaq Depth-of-Book products on July 1 and July 2, 2018, will also be prorated accordingly.

[5] ''Distributor'' will be defined in proposed Rule 7032(c)(3) by reference to Rules 7023(a)(4), 7039(f)(3), and 7047(d)(1) to reflect the current definitions of that term as set forth in each of these rules. Those definitions will continue to apply to each product, respectively. At a later date, Nasdaq will submit an additional proposed rule change to consolidate generally-applicable definitions and move these definitions to a new rule that will apply to all market data fee rules in the 7000 series.

[6] ''Display Usage'' will be defined in Rule 7032(c)(2) by reference to Rules 7023(a)(2), 7039(f)(2), and 7047(d)(2), to reflect the current definitions of that term as set forth in each of these rules. Those definitions will continue to apply to each product, respectively.

[7] ''Investment Adviser'' will be defined in proposed Rule 7032(c)(4) by reference to Section 202(a)(11) of the Investment Advisers Act of 1940, as ''any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .''

[8] *See* Rule 7048(b)(5) (providing that a broker-dealer that purchases this enterprise license will also have the right to distribute NLS data to an unlimited number of Professional and Non-Professional Subscribers who are natural persons and with whom the broker-dealer has a brokerage relationship). In addition, there is an enterprise license for specialized usage of NLS at Rule 7039(c)(3), but specialized usage is not relevant to this proposal, which focuses on distribution to the general investing public and the professionals servicing retail investors through brokerage or retail advisory accounts.

[9] *See* Rule 7023(a)(1). The Exchange proposes to incorporate the definition of Depth-of-Book data currently set forth at Rule 7023(a)(1) by reference at proposed Rule 7032(c)(1). Rule 7023(a)(1) defines Depth-of-Book as ''data feeds containing price quotations at more than one price level''; the Depth-of-Book data feeds are Nasdaq Level 2, which means ''with respect to stocks listed on Nasdaq, the best-priced orders or quotes from each Nasdaq member displayed in the Nasdaq Market Center,'' and Nasdaq TotalView, which means ''with respect to stocks listed on Nasdaq and on an exchange other than Nasdaq, all orders and quotes from all Nasdaq members displayed in the Nasdaq Market Center as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center.''

Nasdaq-listed securities, including all orders and quotes from all Nasdaq members displayed in the Nasdaq Market Center, the aggregate size of such orders and quotes, and Net Order Imbalance Information, which supplies data on the daily auctions that take place at the open and close of the market, as well as in the context of an IPO or after a halt.[10] Nasdaq Level 2, which will be retired as a separate product after transition to TotalView is complete for all Distributors,[11] provides the best-priced orders from each Nasdaq member on the Nasdaq Market Center for Nasdaq-listed securities.

The Exchange offers three enterprise licenses for its Depth-of-Book products. The first allows a Distributor that is also a broker-dealer to pay a monthly fee of $25,000, plus $9 per month for each Non-Professional Subscriber and $60 per month for each Professional Subscriber, for the right to distribute Nasdaq TotalView internally for Display Usage or externally to Non-Professional Subscribers with whom the firm has a brokerage relationship.[12]

The second allows a Distributor that is also a broker-dealer to pay a monthly fee of $100,000, plus $9 per month for each Non-Professional Subscriber and $60 per month for each Professional Subscriber, for the right to distribute TotalView for Display Usage internally, or externally to both Professional and Non-Professional Subscribers with whom the firm has a brokerage relationship.[13]

The third allows a Distributor that is also a broker-dealer to pay a monthly fee of $500,000 to provide Nasdaq Level 2 or Nasdaq TotalView for Display Usage by Non-Professional Subscribers with whom the firm has a brokerage relationship, with no additional per Subscriber fees, albeit with Distributor fees.[14]

Nasdaq Basic

Nasdaq Basic is a real-time market data product that offers best bid and offer and last sale information for all U.S. exchange-listed securities from the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility (''TRF'').[15] It is comprised of three components, which may be purchased individually or in combination: (i) Nasdaq Basic for Nasdaq, which contains the best bid and offer on the Nasdaq Market Center and last sale transaction reports for Nasdaq and the FINRA/Nasdaq TRF for Nasdaq-listed stocks; (ii) Nasdaq Basic for NYSE, which covers NYSE-listed stocks, and (iii) Nasdaq Basic for NYSE American (formerly NYSE MKT), which provides data on stocks listed on NYSE American and other listing venues whose quotes and trade reports are disseminated on Tape B. Nasdaq Basic provides customers with: (i) Nasdaq Basic Quotes (''QBBO''), the best bid and offer and associated size available in the Nasdaq Market Center, as well as last sale transaction reports; (ii) Nasdaq opening and closing prices, as well as IPO and trading halt cross prices; and (iii) general Exchange information, including systems status reports, trading halt information, and a stock directory.

The Exchange offers two enterprise licenses for Nasdaq Basic. The first is aimed primarily at internal distribution for professionals, allowing the dissemination of Nasdaq Basic or Derived Data therefrom for a fee of $365,000 per month, provided that if the broker-dealer obtains the license for usage of Nasdaq Basic provided by an External Distributor that controls display of the product, the fee will be $365,000 per month for up to 16,000 internal Professional Subscribers, plus $2 for each additional internal Professional Subscriber over 16,000.[16] This license includes access to NLS for the Distributor's own securities and those of up to ten of its competitors or peers for Display Usage on the broker-dealer's internal website.[17]

The second is directed primarily at external distribution to investors with brokerage relationships. Nasdaq Basic or Derived Data therefrom, as well as NLS, may be distributed to an unlimited number of Professional and Non-Professional Subscribers who are natural persons and who have a brokerage relationship with the broker-dealer for a monthly fee of $100,000.[18] Information also may be distributed to 4,500 internal Professional Subscribers, provided that the information may only be used to support brokerage services,[19] and any internal electronic system used to distribute such information must be approved by Nasdaq.[20] The license does not cover the Distributor fee for Nasdaq Basic,[21] and is subject to reporting requirements regarding the number of Professional and Non-Professional Subscribers.

NLS

NLS is composed of two proprietary data feeds containing real-time last sale information for trades executed on the Nasdaq exchange or reported to the FINRA/Nasdaq TRF: (i) NLS for Nasdaq, which contains transaction reports for Nasdaq-listed stocks, and (ii) NLS for NYSE/NYSE American, which contains transaction reports for NYSE-listed stocks and stocks listed on NYSE American and other Tape B listing venues.[22]

NLS is designed to enable market data Distributors to provide access to Exchange information to millions of individual investors through website

[10] *See* Securities Exchange Act Release No. 79863 (January 23, 2017), 82 FR 8632 (January 27, 2017) (SR–NASDAQ–2017–004). Net Order Imbalance Information refers to data relating to buy and sell interest at the open and close of the trading day, in the context of an Initial Public Offering, and after a trading halt. *See* Securities Exchange Act Release No. 80891 (June 8, 2017), 82 FR 27318 (June 14, 2017) (SR–NASDAQ–2017–054).

[11] *See* Securities Exchange Act Release No. 79863 (January 23, 2017) 82 FR 8632 (January 27, 2017) (SR–NASDAQ–2017–004) (explaining that Level 2 will be retired as a separate product).

[12] *See* Rule 7023(c)(1).

[13] *See* Rule 7023(c)(2). Note that the $100,000 license at paragraph (c)(2) allows for external distribution to both Professional and Non-Professional Subscribers with whom the firm has a brokerage relationship, while the $25,000 license at paragraph (c)(1) is limited to Non-Professional Subscribers.

[14] *See* Rule 7023(c)(3).

[15] The Exchange proposes to use the same definition for ''Nasdaq Basic'' currently set forth in Rule 7047(a), incorporated by reference in proposed Rule 7032(c)(5). Rule 7047(a) defines Nasdaq Basic as ''proprietary data feeds containing real-time market information from the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility ('TRF'). (1) 'Nasdaq Basic for Nasdaq' shall contain Nasdaq's best bid and offer and last sale for Nasdaq-listed stocks from Nasdaq and the FINRA/Nasdaq TRF; and (2) 'Nasdaq Basic for NYSE' shall contain Nasdaq's best bid and offer and last sale for NYSE-listed stocks from Nasdaq and the FINRA/Nasdaq TRF. (3) 'Nasdaq Basic for NYSE MKT' shall contain Nasdaq's best bid and offer and last sale for stocks listed on NYSE MKT and other Tape B listing venues from Nasdaq and the FINRA/Nasdaq TRF.''

[16] *See* Rule 7047(b)(4).

[17] Distributor fees at Rule 7047(c)(1) are excluded from this license.

[18] *See* Rule 7047(b)(5).

[19] Such information may not be used in support of proprietary trading, surveillance activities, or other functions solely for the benefit of the broker-dealer. Also, a Professional Subscriber who obtains Nasdaq Basic through his or her own brokerage relationship with the broker-dealer may not use that data within the scope of any professional engagement or registration. *See* Rule 7047(b)(5).

[20] A separate enterprise license is required for each discrete electronic system that is approved by Nasdaq and used by the broker-dealer. *See* Rule 7047(b)(5).

[21] *See* Rule 7047(c)(1).

[22] The Exchange proposes to use the definition for ''NLS'' currently set forth at Rule 7039(a), incorporated by reference in proposed Rule 7032(c)(6). Rule 7039(a) defines NLS as ''two proprietary data feeds containing real-time last sale information for trades executed on Nasdaq or reported to the FINRA/Nasdaq Trade Reporting Facility. 'Nasdaq Last Sale for Nasdaq' contains all such transaction reports for Nasdaq-listed stocks, and 'Nasdaq Last Sale for NYSE/NYSE American' contains all such transaction reports for NYSE-listed stocks and stocks listed on NYSE American and other Tape B listing venues.''

distribution.[23] This design is reflected in the pricing schedule, in which one set of prices is dedicated to distribution to the general investing public, and another for specialized usage by Professionals, or usage that otherwise does not fit within the models for distribution to the general investing public.[24]

There is no enterprise license for distribution to the general investing public, but such dissemination is subject to a fee cap of $41,500 per month.[25] Distributors under the specialized fee schedule, however, may purchase an enterprise license for a monthly fee of $365,000 per month,[26] which is patterned after a similar enterprise license for Nasdaq Basic.[27]

NLS Plus

NLS Plus provides last sale information and consolidated volume data for the Nasdaq Stock Market, Nasdaq BX, Nasdaq PSX and the FINRA/Nasdaq TRF, and cumulative volume for real-time trading activity across all U.S. exchanges.[28] It may be purchased by itself or in combination with Nasdaq Basic. NLS Plus provides customers with Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO information, Bloomberg ID, and regulatory information such as Market Wide Circuit Breaker, Regulation SHO Short Sale Price Test Restricted Indicator, Trading Action, and Symbol Directory.

Fees for NLS Plus are based on the fees for its underlying components, as well as a Distributor fee,[29] a data consolidation fee of $350 per month, and administrative fees for Nasdaq, BX, and PSX data feeds as set forth in their respective rule books.[30] There is no enterprise license for NLS Plus, but the distribution fees for the general investing public are capped at $41,500, under the same cap that applies to NLS.

Proposed Market Data Enterprise License

The Exchange proposes to introduce a market data enterprise license that will reduce Exchange fees and administrative costs for Distributors [31] that disseminate Nasdaq Basic, NLS, NLS Plus, TotalView and Level 2. Distributors that are broker-dealers or Investment Advisers [32] will be able to distribute information for Display Usage for all five products to an unlimited number of recipients for a monthly fee of $600,000, with an opportunity to lower that fee to $500,000 per month if they contract for twelve months of service in advance. Depth-of-Book information and Nasdaq Basic may be distributed pursuant to this market data enterprise license only for display usage and in the context of a brokerage relationship with a broker-dealer or an engagement with an Investment Adviser, and the Exchange must pre-approve any such platform to ensure that it is reasonably designed to meet this and other requirements identified in the text of the proposed rule. NLS and NLS Plus will be available for unlimited external distribution through one of the mechanisms available for distribution to the general investing public, which the Exchange expects to be the most efficient method for reaching the general investing public. Purchase of the enterprise license will eliminate per-Subscriber fees for Depth-of-Book data,[33] user fees for Nasdaq Basic,[34] distribution fees for the general investing public for NLS,[35] and incremental NLS Plus fees,[36] whether such fees are paid directly to the Exchange or indirectly through another Distributor.[37] This enterprise license will offer a new fee option for Distributors of multiple market data products. No fee will increase as a result of this proposal.

Distributors that intend to purchase the market data enterprise license for at least twelve months may elect to purchase this product in advance for a monthly fee of $500,000. This feature is intended to simplify cost projections and budgeting for both Distributors and the Exchange. Distributors that elect not to purchase this particular feature will nevertheless be able to obtain all of the market data information offered by the product by paying the standard fee of $600,000 per month. Distributors that elect to pay the monthly fee will be able to switch to the annual fee at any time, and those that elect to purchase the annual contract would be able to change to the monthly contract, with notice, at the end of the twelve month period.

The Exchange believes that the proposed market data enterprise license will reduce exchange fees, lower administrative costs for Distributors, and help expand the availability of market information to investors, and thereby increase participation in financial markets.

Reduce Exchange Fees: The proposed market data enterprise license will lower fees by consolidating the features of three existing enterprise licenses at a lower cost, and with an expanded scope. The three current enterprise licenses that offer some, but not all,[38] of the features of the proposed license are: (i) The $500,000 per month enterprise license for Depth-of-Book; [39] (ii) the

[23] *See* Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060) (approving SR–NASDAQ–2006–060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

[24] *See* Securities Exchange Act Release No. 82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR–NASDAQ–2018–010) (describing the NLS fee schedules).

[25] *See* Rule 7039(b)(4) (identifying the fee cap); Rule 7039(b)(1)–(3) (identifying fees for the Per User, Per Query and Per Device fee models).

[26] *See* Rule 7039(c)(3).

[27] *See* Rule 7047(b)(4) (setting forth an enterprise license for Nasdaq Basic for $365,000 per month).

[28] The Exchange proposes that ''NLS Plus'' in proposed Rule 7032 have the same meaning as currently set forth at Rule 7039(e), to be incorporated by reference in proposed Rule 7032(c)(7). Rule 7039(e) defines NLS Plus in part as ''a comprehensive data feed produced by Nasdaq Information LLC. It provides last sale data as well as consolidated volume of Nasdaq U.S. equity markets (The Nasdaq Stock Market ('Nasdaq'), Nasdaq BX ('BX'), and Nasdaq PSX ('PSX')) and the FINRA/Nasdaq Trade Reporting Facility ('TRF'). Nasdaq Last Sale Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities. . . . ''

[29] *See* Rule 7039(d).

[30] *See* Nasdaq Rule 7035; BX Rule 7035; and Phlx Pricing Schedule § VIII. All administrative fees are charged on a per Distributor, rather than a per product, basis. Currently, there are no user or Distributor fees applicable to BX Last Sale or PSX Last Sale. However, if BX or Phlx were to adopt user fees for these products in the future, the fees would also apply to persons receiving these products by means of NLS Plus.

[31] As noted above, ''Distributor'' will be defined in proposed Rule 7032(c)(3) by reference to Rules 7023(a)(4), 7039(f)(3), and 7047(d)(1) to reflect the current definitions of that term as set forth in each of these rules. Those definitions will continue to apply to each product, respectively. *See* n.5.

[32] ''Investment Adviser'' shall have the same meaning in proposed Rule 7032 as set forth in Section 202(a)(11) of the Investment Advisers Act of 1940, incorporated by reference at proposed Rule 7032(c)(4). *See* n.7.

[33] *See* Rule 7023(b).

[34] *See* Rule 7047(b).

[35] *See* Rule 7039(b).

[36] *See* Rule 7039(e).

[37] A Distributor may receive Information subject to the proposed enterprise license either directly from the Exchange or indirectly through another Distributor. To the degree that any Distributor pays to the Exchange Subscriber fees for Depth-of-Book data at Rule 7023(b), User Fees for Nasdaq Basic at Rule 7047(b), Distribution Model fees for the General Investing Public for NLS at Rule 7039(b), and NLS Plus fees at Rule 7039(e) on behalf of the purchaser of the proposed market data enterprise license, those fees paid to the Exchange shall reduce the applicable monthly enterprise license fee owed by the amount paid.

[38] While the scope of each of the three current enterprise licenses is not identical to the proposed license, the Exchange believes that this comparison is a good approximation for the cost reduction generated by the proposal.

[39] The two other enterprise licenses for Depth-of-Book, the $25,000 enterprise license for distribution of TotalView, *see* Rule 7023(c)(1), and the $100,000 license for the right to distribute TotalView for certain Subscribers internally and externally, *see* Rule 7023(c)(2), are not comparable to the proposed license in that these two current licenses include substantial per Subscriber fees, while the proposed license does not.

$365,000 per month license for internal distribution of Nasdaq Basic; and (iii) the $100,000 per month license for external distribution of Nasdaq Basic.

As explained above, the $500,000 enterprise license for Depth-of-Book products allows a Distributor that is also a broker-dealer to distribute Nasdaq Level 2 or TotalView for Display Usage by Non-Professional Subscribers with whom the firm has a brokerage relationship.[40] This Depth-of-Book fee is nearly equal to the proposed market data enterprise license fee without a twelve month commitment—and exactly the same as the proposed fee for Distributors that contract for twelve months of service—yet without the inclusion of Nasdaq Basic, NLS and NLS Plus.

To distribute Nasdaq Basic and NLS using currently available enterprise licenses, a Distributor would be required to purchase two enterprise licenses for Nasdaq Basic—the $365,000 per month license for internal distribution and the $100,000 per month license for external distribution—in addition to the $500,000 enterprise license for Depth-of-Book products.

The $365,000 per month enterprise license for Nasdaq Basic, aimed primarily at internal distribution for professionals, allows the dissemination of Nasdaq Basic for $365,000 per month, provided that if the broker-dealer obtains the license with respect to usage of Nasdaq Basic provided by an External Distributor that controls display of the product, the fee will be $365,000 per month for up to 16,000 internal Professional Subscribers plus $2 for each additional internal Professional Subscriber over 16,000.[41]

The $100,000 per month enterprise license allows the distribution of Nasdaq Basic and NLS to an unlimited number of Professional and Non-Professional Subscribers who are natural persons in the context of a brokerage relationship.[42] Nasdaq Basic may also be distributed to up to and including 4,500 internal Professional Subscribers employed by the broker-dealer in support of brokerage services to investors on an approved platform.[43] Even with the purchase of these two additional licenses, the Distributor would also be required to pay any additional fees for NLS Plus.[44] The proposed fees for the market data enterprise license, which would provide the same data[45] as the $365,000 per month enterprise license for Nasdaq Basic designed for internal use, the $100,000 per month enterprise license for Nasdaq Basic designed for external use, the $500,000 enterprise license for Depth-of-Book products, and applicable fees for NLS and NLS Plus, are substantially less than the sum of the currently available enterprise licenses. Savings for the Distributor could be over $4 million per year as a result.

Lower Administrative Costs: The proposed market data enterprise license reduces administrative costs for Distributors by eliminating monthly and yearly reporting of Professional and Non-Professional Subscribers, a requirement that may be costly to administer. The market data enterprise license will have no requirement that the Distributor count and report individual Professionals and Non-Professionals on a monthly basis, but rather would simply require the Distributor to obtain approval for the platform used to disseminate such information as reasonably designed to ensure consistency with the proposed Rule.

Increase Availability of Market Data for the Retail Investor: The proposed license is designed to make an array of market data products more easily accessible to the retail investor. Broker-dealers and Investment Advisers (which did not previously have access to any of the underlying enterprise licenses) would be able to share information from TotalView, Level 2, Nasdaq Basic, NLS and NLS Plus with their customers, without regard to current distinctions between fees for Professional and Non-Professional users, creating a seamless experience in which the firm and its customers can share market data information. Because the cost to the Distributor of adding another customer would be zero, the proposed enterprise license will create an incentive to distribute the data widely to investors.

In summary, the proposed market data enterprise license will: (i) Offer Distributors a new, lower-fee option for Distributors of TotalView, Level 2, Nasdaq Basic, NLS and NLS Plus; (ii) reduce administrative costs by lowering reporting requirements for Professional and Non-Professional Subscribers; and (iii) provide a mechanism to render market data more readily accessible to retail investors by reducing the cost of distribution to new investors.[46]

This proposal demonstrates the effectiveness of the competitive market in maintaining low costs, enhancing the customer experience, and encouraging the dissemination of market data to the general investing public. As set forth in greater detail below, the Commission granted Self-Regulatory Organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public when it adopted Regulation NMS. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition in the provision of market data. This market data enterprise license demonstrates the benefits of competition. A number of other SROs offer enterprise licenses for their market data products,[47] but this multi-product enterprise license is an innovation for the Exchange—and indeed all SROs—that demonstrates the power of the competitive market to spur innovation and change.

The proposed enterprise license is optional in that Nasdaq is not required to offer it and Distributors are not required to purchase it. Firms can discontinue its use at any time and for any reason, and may decide to purchase Nasdaq market data products individually or substitute Nasdaq products with competing products from other exchanges.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[48] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[49] 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

[40] *See* Rule 7023(c)(3).

[41] *See* Rule 7047(b)(4).

[42] *See* Rule 7047(b)(5). Note that Nasdaq Basic can be distributed to customers under this license on a password-protected website, but Nasdaq Basic would not be available for open distribution.

[43] A separate enterprise license is required for each discrete electronic system that is approved by Nasdaq and used by the broker-dealer. *See* Rule 7047(b)(5).

[44] *See* Nasdaq Rule 7035; BX Rule 7035; and Phlx Pricing Schedule § VIII. All administrative fees are charged on a per Distributor, rather than a per product, basis. Currently, there are no user or Distributor fees applicable to BX Last Sale or PSX Last Sale. However, if BX or Phlx were to adopt user fees for these products in the future, the fees would also apply to persons receiving these products by means of NLS Plus.

[45] The underlying content for each product (*i.e.,* Nasdaq Basic and Nasdaq Depth-of-Book data) is identical under each license, although the restrictions on each license are somewhat different, as described in the rule book.

[46] The proposed enterprise license will be introduced through an amendment to Rule 7032, which is currently reserved. Removal of the reserved Rule will have no impact on any market data fee or product.

[47] *See, e.g.,* Enterprise Fee for the Cboe Equities One Feed, available at *https://markets.cboe.com/us/equities/market_data_products/bats_one/.*

[48] 15 U.S.C. 78f(b).

[49] 15 U.S.C. 78f(b)(4) and (5).

discrimination between customers, issuers, brokers, or dealers.

As described above, the proposed market data enterprise license will lower fees, reduce administrative costs, and expand the availability of market data to retail investors, which may lead to increased participation in financial markets. Distributors that are broker-dealers or Investment Advisers will be able to disseminate TotalView, Level 2, Nasdaq Basic, NLS and NLS Plus to an unlimited audience for display in the context of the brokerage or advisory relationship for a monthly fee of $600,000, or $500,000 per month for Distributors that contract with the Exchange in advance for twelve months of service.

The proposal will lower fees for Distributors able to reach the largest audiences of retail investors. Discounts for broader dissemination of market data information have routinely been adopted by exchanges and permitted by the Commission as equitable allocations of reasonable dues, fees and other charges.[50] Moreover, the specific feature of the proposal that will allow Distributors to lower fees to $500,000 for a twelve month contract is also an equitable allocation because all Distributors will have the same option of choosing between the stability of a fixed, lower rate, and the more flexible option of maintaining the ability to change market data products after a month of service. Distributors will be free to move from the monthly to the annual rate at any time, or from the annual to a monthly fee, with notice, at the expiration of the twelve month period.

The existence of this proposal demonstrates the existence of an effective, competitive market because this proposal resulted from a need to generate innovative approaches in response to competition from other exchanges that offer enterprise licenses for market data.[51] As the Commission has recognized, ''[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior,'' [52] and ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [53] The proposed enterprise license will be subject to significant competition from other exchanges because each Distributor will have the ability to accept or reject the license depending on whether it will or will not lower its fees, and because other exchanges will be able to offer their own competitive responses. As the Commission has held in the past, the presence of competition provides a substantial basis for a finding that the proposal will be an equitable allocation of reasonable dues, fees and other charges.[54]

Furthermore, the proposed enterprise license will not unfairly discriminate between customers, issuers, brokers or dealers. The Act does not prohibit all distinctions among customers, but only discrimination that is unfair, and it is not unfair discrimination to charge those Distributors that are able to reach the largest audiences of retail investors a lower fee for incremental investors in order to encourage the widespread distribution of market data. This principle has been repeatedly endorsed by the Commission, as evidenced by the approval of enterprise licenses for Depth-of-Book products and Nasdaq Basic discussed above. Moreover, the proposed enterprise license will be subject to significant competition, and that competition will ensure that there is no unfair discrimination. Each Distributor will be able to accept or reject the license depending on whether it will or will not lower costs for that particular Distributor, and, if the license is not sufficiently competitive, the Exchange may lose market share.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[55]

The Commission was speaking to the question of whether broker-dealers should be subject to a regulatory requirement to purchase data, such as Depth-of-Book data, that is *in excess of* the data provided through the consolidated tape feeds, and the Commission concluded that the choice should be left to them. Accordingly, Regulation NMS removed unnecessary regulatory restrictions on the ability of exchanges to sell their own data, thereby advancing the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

The proposed enterprise license will compete with other enterprise licenses of the Exchange, underlying fee schedules promulgated by the Exchange, and enterprise licenses and fee structures implemented by other exchanges. As such, it is a voluntary product for which market participants can readily find substitutes. Accordingly, Nasdaq is constrained from introducing a fee that would be inequitable or unfairly discriminatory.

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. This proposal will: (i) Offer Distributors a new, lower fee option for TotalView, Level 2, Nasdaq Basic, NLS and NLS Plus; (ii) save administrative costs for Distributors by lowering reporting requirements for Professional and Non-Professional Subscribers; and (iii) establish a mechanism to render market data more readily accessible to retail investors, thereby encouraging broader dissemination of information. It will not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act, but rather will enhance competition by introducing an innovative fee structure for market data, lowering prices and enhancing competition.

The market for data products is extremely competitive and firms may freely choose alternative venues and

[50] For example, the Commission has permitted pricing discounts for market data under Nasdaq Rules 7023(c) and 7047(b). *See also* Securities Exchange Act Release No. 82182 (November 30, 2017), 82 FR 57627 (December 6, 2017) (SR–NYSE–2017–60) (changing an enterprise fee for NYSE BBO and NYSE Trades).

[51] *See* n. 47.

[52] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[53] *Id.*

[54] *Id.*

[55] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''Regulation NMS Adopting Release'').

data vendors based on the aggregate fees assessed, the data offered, and the value provided. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform, the cost of implementing cybersecurity to protect the data from external threats and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, the operation of the Exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[56]

In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and each are subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of trade reports from the TRF without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,[57] and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

An exchange's broker-dealer customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing more orders will become correspondingly more valuable.

Similarly, vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail broker-dealers offer their retail customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, Nasdaq believes that market data products can enhance order flow to Nasdaq by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to Distributors and investors decreases if order flow falls, because the products contain less content.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its

[56] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

[57] It should be noted that the costs of operating the FINRA/Nasdaq TRF borne by Nasdaq include regulatory charges paid by Nasdaq to FINRA.

sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.[58]

Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing broker-dealers and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for broker-dealers to further exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, broker-dealers, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and broker-dealer is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE American, NYSE Arca, IEX, and BATS/Direct Edge.

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.[59]

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–NASDAQ–2018–058 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–2018–058. 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–2018–058 and should be submitted on or before August 27, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[60]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16720 Filed 8–3–18; 8:45 am]

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[58] *Cf. Ohio* v. *American Express,* No. 16–1454 (S. Ct. June 25, 2018), *https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf* (recognizing the need to analyze both sides of a two sided platform market in order to determine its competitiveness).

[59] 15 U.S.C. 78s(b)(3)(A)(ii).

[60] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83753; File No. SR–FINRA–2018–015]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change To Amend FINRA Rule 6433 To Adopt the OTC Quotation Tier Pilot as Permanent

July 31, 2018.

I. Introduction

On April 20, 2018, 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 amend FINRA Rule 6433 to adopt as permanent the minimum quotation sizes that are applicable to quotations in over-the-counter (''OTC'') equity securities and that were implemented on a pilot basis. The proposed rule change was published for comment in the **Federal Register** on May 7, 2018.[3] The Commission received one comment letter on the proposed rule change.[4] On June 13, 2018, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] In a letter dated July 5, 2018, FINRA responded to the comment letter.[7]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 83129 (April 30, 2018), 83 FR 20131 (''Notice'').

[4] *See* Letter from Eugene P. Torpey, Chief Compliance Officer, Vandham Securities Corp., dated May 10, 2018. Comments on the proposed rule change are available at *https://www.sec.gov/comments/sr-finra-2018-015/finra2018015.htm.*

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 83422, 83 FR 28483 (June 19, 2018).

[7] *See* Letter from Racquel L. Russell, Associate General Counsel, FINRA, to Brent J. Fields, Secretary, Commission (''FINRA Letter''). The

This order approves the proposal.

II. FINRA's Description of the Proposed Rule Change

FINRA proposes to amend FINRA Rule 6433 (Minimum Quotation Size Requirements for OTC Equity Securities) to adopt as permanent the minimum quotation sizes applicable to quotations in OTC equity securities [8] that were proposed pursuant to File No. SR–FINRA–2011–058 [9] and implemented on a pilot basis on November 12, 2012 (''Tier Size Pilot'' or ''Pilot''). The Pilot initially was approved for a one-year term,[10] has been extended a number of times,[11] and currently is scheduled to expire on December 7, 2018.[12]

According to FINRA, the Pilot tiers are designed to: (1) Simplify the structure of the minimum quotation sizes for OTC equity securities; (2) facilitate the display of customer limit orders under FINRA Rule 6460 (Display of Customer Limit Orders) (''limit order display rule''); and (3) expand the scope of FINRA Rule 6433 to provide for uniform treatment of the types and sources of quotations that would be subject to FINRA Rule 6433.[13] FINRA believes that the Pilot has resulted in its intended objectives, and particularly notes that the Pilot has yielded a significant positive result with regard to increased display of customer limit orders. FINRA states that, at the same time, market quality measures have been neutral (*i.e.,* unchanged) or slightly positive (*i.e.,* slightly improved) overall during the Pilot, as compared to the pre-Pilot period, as discussed more fully below. Accordingly, FINRA believes that it is appropriate and consistent with the Act to adopt the Pilot tier sizes on a permanent basis.

Objectives of the Pilot

FINRA Rule 6433 sets forth the minimum quotation sizes applicable to the display of quotations in OTC equity securities on any inter-dealer quotation system that permits quotation updates on a real-time basis. FINRA Rule 6433 provides different minimum quotation sizes that apply depending upon the price level of the bid or offer in the security.

Prior to the Pilot, which has been in effect since November 12, 2012,[14] FINRA Rule 6433 provided for nine tier sizes that applied only to market makers' proprietary quotes. The pre-Pilot tiers ranged in price points from $0.00 through $2,500.01, and are shown below in Table 1.

TABLE 1

Price (bid or offer)	Minimum quote size (number of shares)
$0 to $0.50	5,000
$0.51 to $1.00	2,500
$1.01 to $10.00	500
$10.01 to $100.00	200
$100.01 to $200.00	100
$200.01 to $500.00	25
$500.01 to $1,000.00	10
$1,000.01 to $2,500.00	5
$2,500.01+	1

Under the Pilot, the number of tiers was reduced from nine to six tiers, and the tiers apply to all quotations displayed by market makers, whether representing proprietary or customer interest, as well as quotations displayed by non-market makers (*i.e.,* alternative trading systems or any other member firm).[15]

In addition, for price points between $1.00 and $174.99, the Pilot established a minimum quotation size of 100 shares, which is comparable to the minimums generally applicable to quotations in securities on equity exchanges. The Pilot also revised the smallest price point from $0.00 to $0.0001 to conform to the minimum quotation increments under FINRA Rule 6434 (Minimum Pricing Increment for OTC Equity Securities).[16] The Pilot tiers that ultimately were adopted are shown below in Table 2.

TABLE 2

Price (bid or offer)	Minimum quote size (number of shares)
$0.0001 to $0.0999	10,000
$0.10 to $0.1999	5,000
$0.20 to $0.5099	2,500

FINRA Letter is available at *https://www.sec.gov/comments/sr-finra-2018-015/finra2018015-4002848-167246.pdf.*

[8] An OTC equity security is an equity security that is not an ''NMS Stock'' as defined in Rule 600(b)(47) of Regulation NMS; provided, however, that the term ''OTC equity security'' shall not include any Restricted Equity Security. *See* FINRA Rule 6420(f).

[9] *See* Securities Exchange Act Release No. 65568 (October 14, 2011), 76 FR 65307 (October 20, 2011) (Notice of Filing of File No. SR–FINRA–2011–058) (''Original Proposal''). Comments on the Original Proposal are available at *https://www.sec.gov/comments/sr-finra-2011-058/finra2011058.shtml.*

[10] *See* Securities Exchange Act Release No. 67208 (June 15, 2012), 77 FR 37458 (June 21, 2012) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To Amend FINRA Rule 6433 (Minimum Quotation Size Requirements for OTC Equity Securities)) (''Order Approving Tier Size Pilot'').

[11] *See* Securities Exchange Act Release No. 70839 (November 8, 2013), 78 FR 68893 (November 15, 2013) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to November 14, 2014; File No. SR–FINRA–2013–049); Securities Exchange Act Release No. 73299 (October 3, 2014), 79 FR 61120 (October 9, 2014) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to February 13, 2015; File No. SR–FINRA–2014–041); Securities Exchange Act Release No. 74251 (February 11, 2015), 80 FR 8741 (February 18, 2015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to May 15, 2015; File No. SR–FINRA–2015–002); Securities Exchange Act Release No. 74927 (May 12, 2015), 80 FR 28327 (May 18, 2015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to August 14, 2015; File No. SR–FINRA–2015–010); Securities Exchange Act Release No. 75639 (August 7, 2015), 80 FR 48615 (August 13, 2015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to December 11, 2015; File No. SR–FINRA–2015–028); Securities Exchange Act Release No. 76519 (November 24, 2015), 80 FR 75155 (December 1, 2015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to June 10, 2016; File No. SR–FINRA–2015–051); Securities Exchange Act Release No. 77923 (May 26, 2016), 81 FR 35432 (June 2, 2016) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to December 9, 2016; File No. SR–FINRA–2016–016); Securities Exchange Act Release No. 79401 (November 25, 2016), 81 FR 86762 (December 1, 2016) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to June 9, 2017; File No. SR–FINRA–2016–044); Securities Exchange Act Release No. 80727 (May 18, 2017), 82 FR 23953 (May 24, 2017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to December 8, 2017; File No. SR–FINRA–2017–014); and Securities Exchange Act Release No. 82153 (November 22, 2017), 82 FR 56300 (November 28, 2017) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to June 7, 2018; File No. SR–FINRA–2017–035)

[12] *See* Securities Exchange Act Release No. 83392 (June 7, 2018), 83 FR 27638 (June 13, 2018) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Tier Size Pilot to December 7, 2018; File No. SR–FINRA–2018–022).

[13] *See* Order Approving Tier Size Pilot, *supra* note 10, 77 FR at 37458.

[14] *See* FINRA Regulatory Notice 12–51 (November 2012), available at: *http://www.finra.org/industry/notices/12-51; see also* FINRA Regulatory Notice 12–37 (August 2012), available at: *http://www.finra.org/industry/notices/12-37.*

[15] FINRA initially proposed six tiers, some of which differed from those tiers that ultimately were adopted. However, in response to comments received, FINRA amended its original filing to increase the minimum quotation size for most price points between $0.02 and $1.00. FINRA stated that the amended tiers were intended to facilitate the display of additional liquidity by market makers. *See* Securities Exchange Act Release No. 66819 (April 17, 2012), 77 FR 23770 (April 20, 2012) (Amendment No. 1 to File No. SR–FINRA–2011–058); *see also* Original Proposal, *supra* note 9.

[16] FINRA Rule 6434, among other things, prohibits members from displaying a bid or offer in an OTC equity security in an increment smaller than $0.01 if the bid or offer is priced $1.00 or greater per share, or in an increment smaller than $0.0001 if the bid or offer is priced below $1.00.

TABLE 2—Continued

Price (bid or offer)	Minimum quote size (number of shares)
$0.51 to $0.9999	1,000
$1.00 to $174.99	100
$175.00+	1

FINRA states that the Pilot was designed to facilitate the display of customer limit orders under FINRA's limit order display rule, which generally requires that OTC market makers fully display better-priced customer limit orders (or same-priced customer limit orders that are at the best bid or offer and that increase the OTC market maker's size by more than a *de minimis* amount).[17] Pursuant to FINRA's limit order display rule, OTC market makers are not required to display a customer limit order on an inter-dealer quotation system unless doing so would comply with the minimum quotation size applicable to the price of the quotation under FINRA Rule 6433. Therefore, although a customer limit order otherwise would have been required to be displayed under the limit order display rule—for example, because it improved price or the size (more than a *de minimis* amount)—if the size of the order were less than the minimum quotation size prescribed by FINRA Rule 6433, the member would not be required to display the order. Thus, FINRA believed that the revisions implemented by the Pilot would improve the overall display of customer limit orders.

For example, because the Pilot would reduce the minimum quotation size from 2,500 to 100 shares for securities priced at or above $1.00, FINRA believed that competitively priced customer limit orders, which tend to be smaller-sized orders, would more likely be displayed and potentially yield a variety of benefits, including improved price transparency, enhanced execution of customer limit orders, and narrower spreads. In addition, in a memorandum on the potential effects of the Pilot, Commission staff of the Division of Risk, Strategy and Financial Innovation (n/k/a the Division of Economic Research and Analysis (''DERA'')) noted that enhanced visibility of customer limit orders could reduce customers' execution costs.[18]

An additional objective of the Pilot was to expand the scope of FINRA Rule 6433 to apply to all member quotations on an inter-dealer quotation system. Prior to the Pilot, FINRA Rule 6433 applied only to market makers' proprietary quotes in OTC equity securities on an inter-dealer quotation system. Under the Pilot, the minimum tier sizes apply to any member quotations entered on an inter-dealer quotation system (including quotes representing customer interest and quotations entered by non-market makers).

Concerns Raised Regarding FINRA's Original Proposal

The Commission received several comments in response to FINRA's Original Proposal.[19] Commenters generally were supportive of the goal of increased customer limit order display.[20] However, commenters also raised concerns regarding the impact of the proposed revisions to the tiers in FINRA Rule 6433. Specifically, some commenters questioned whether the proposed Pilot might harm market quality by permitting market makers to post quotes representing minimum dollar value commitments that would not be financially meaningful, or otherwise would erode market maker liquidity in OTC equity securities.[21] In addition, some commenters believed that there was not sufficient data analysis to support the proposed changes to the then existing tier sizes.[22]

In response to commenters' concerns, FINRA filed Amendment No. 1 to the Original Proposal to increase the minimum quotation sizes for most price points between $0.02 and $1.00, and proposed that the revised tiers operate as a one-year pilot program instead of on a permanent basis. FINRA also submitted Amendment No. 2 to the Original Proposal, which, among other things, specified the items of data that FINRA would collect and provide to the Commission during the duration of the Pilot. These data items were:

1. The price of the first trade of each trading day executed at or after 9:30:00 a.m., based on execution time.

2. The price of the last trade of each trading day executed at or before 4:00:00 p.m., based on execution time.

3. Daily share volume.

4. Daily dollar volume.

5. Number of limit orders from customers and in total.

6. Percentage of the day that the size of the Best Bid or Offer (''BBO'') equals the minimum quote size.

7. Number of market makers actively quoting.

8. Number of executions from a limit order and number of limit orders at the BBO or better by tier size from a customer and in total.

9. Liquidity/BBO metrics

a. Time-weighted quoted spread.

b. Effective spread.

c. Time-weighted quoted depth (number of shares) at the inside.

d. Time-weighted quoted depth (dollar value of shares) at the inside.

FINRA also committed to submitting an assessment, at least 60 days before the end of the Pilot, that would address the impact of the proposed Pilot, the concerns raised by commenters during the rule filing process, and whether the proposed Pilot resulted in its desired effects.[23]

Pilot Assessment

FINRA submitted an assessment on the operation of the Tier Size Pilot on September 13, 2013, which utilized pilot data covering the period from November 12, 2012 through June 30, 2013.[24] The 2013 Assessment, discussed in greater detail below, included a recommendation, based on the analysis conducted, that the Pilot tiers be adopted as permanent. Nonetheless, FINRA submitted proposed rule changes to extend the Pilot's duration to allow the effects of the Pilot to be more thoroughly reviewed.[25] During this extension period, DERA conducted a study, dated July 28, 2017, that assessed the impact of the Pilot on the liquidity of OTC equity securities.[26] Although the two studies covered different time periods and employed different methods, FINRA notes that the DERA Memo to File reported findings consistent with those of the 2013 Assessment. In light of the 2013

[17] *See* FINRA Rule 6460 (Display of Customer Limit Orders).

[18] *See* Memorandum to File No. SR–FINRA–2011–058 re: FINRA Proposal to Reduce Minimum Quotation Size in OTC Market Tiers from Division of Risk, Strategy, and Financial Innovation, dated June 1, 2012, available at: *http://www.sec.gov/comments/sr-finra-2011-058/finra2011058-13.pdf* (''Memorandum from Division of Risk, Strategy, and Financial Innovation'').

[19] *See supra* note 9.

[20] *See* Order Approving Tier Size Pilot, *supra* note 10.

[21] *See id.*

[22] *See id.* at 37461–62.

[23] *See* Order Approving Tier Size Pilot, *supra* note 10.

[24] FINRA engaged a third-party, Cornerstone Research, to conduct an analysis of the impact of the Pilot on OTC market quality. The ''OTC Tier Size Analysis'' prepared by Cornerstone Research and the accompanying FINRA Executive Summary were submitted as Exhibit 3a of the instant proposed rule change and are available at *https://www.sec.gov/rules/sro/finra/2018/34-83129-ex3a.pdf* (''2013 Assessment'').

[25] *See supra* notes 11 and 12.

[26] *See* DERA Staff Memorandum regarding FINRA's Pilot Program Amending Minimum Quotation Size Requirements for OTC Equity Securities (SR–FINRA–2011–058), dated July 28, 2017, available at: *https://www.sec.gov/files/otc_tiersizepilot_memo.pdf* (''DERA Memo to File'').

Assessment, FINRA's further observations, and the DERA Memo to File, FINRA continues to believe that it is appropriate for the Commission to approve permanently the tier sizes that have been in operation since November 12, 2012.

According to FINRA, the 2013 Assessment demonstrates that the Pilot has accomplished its objectives, including increased customer limit order display, and that key market quality indicators have been unchanged or have slightly improved overall. FINRA continued to collect and provide Pilot data to the Commission after the issuance of the 2013 Assessment. In addition, FINRA continued to monitor the impact of the operation of the Pilot on market quality metrics for the over-the-counter marketplace, which FINRA generally believes indicate positive trends overall, thus providing continued support for permanent adoption of the Pilot tiers.[27] Moreover, FINRA states that the DERA Memo to File provides further evidence, in a regression framework, to support the conclusion that the Pilot had a neutral to positive impact on market quality.

FINRA further believes that the 2013 Assessment demonstrates that the Pilot has resulted in a meaningful increase in the display of customer limit orders. Moreover, FINRA believes that the data collected during the Pilot also supports that market quality has not been harmed, as suggested by the analysis of market quality measures such as spreads and market depth.

(A) Enhanced Customer Limit Order Display

According to FINRA, when the Commission approved the Pilot, it recognized the potential benefits of enhancing customer limit order display. Notably, the Commission stated that ''[i]n the Commission's view, FINRA's proposed revisions are designed to protect investors by revising the . . . tier thresholds [in FINRA Rule 6433] such that a larger percentage of customer limit orders are reflected in quotations for OTC equity securities, thereby potentially improving the prices at which customer limit orders will be executed, consistent with the protection of investors and the public interest.'' [28] FINRA believes that the Pilot has achieved the objective of increased customer limit order display.

As noted in the 2013 Assessment, FINRA analyzed the number of customer limit orders that would be eligible under both the Pilot and the pre-Pilot tier sizes and observed that between November 1, 2012 and June 30, 2013, for all tier sizes combined, there was a 13% increase in the number of customer limit orders that met the minimum quotation sizes to be eligible for display under the Pilot tiers.[29] For that same period, FINRA also observed a significant increase in the number of customer limit orders in securities priced between $0.20 and $100.00 that became eligible for display. According to FINRA, this trend continued through July 31, 2014. Specifically, for the period between July 1, 2013 and July 31, 2014, FINRA indicates that it observed, for all tier sizes combined, an 18.45% increase in the number of customer limit orders that met the minimum quotation sizes and, therefore, were eligible for display, with the most significant increase observed for securities priced between $0.20 and $100.00.[30]

Tables 3 [31] and 4 [32] below show the percentage of customer limit orders that were equal to or greater than the minimum quotation size under both the Pilot and pre-Pilot tier sizes for the specified price ranges for the periods of November 1, 2012 through June 30, 2013, and from July 1, 2013 through July 31, 2014, respectively.

TABLE 3

[November 1, 2012 through June 30, 2013]

Price range	Pilot tier size	Customer limit orders ≥ tier size (%)	Pre-pilot tier size	Customer limit orders ≥ tier size (%)
0.0001–0.0999	10,000	78.29	5,000	86.30
0.10–0.1999	5,000	56.89	5,000	56.89
0.20–0.5099	2,500	57.35	5,000	43.30
0.51–0.9999	1,000	72.81	2,500	46.05
1.00–10.00	100	97.86	500	74.73
10.01–100.00	100	98.24	200	87.93
100.01–174.99	100	90.49	100	90.49
175.00–200.00	1	100	100	96.71
200.01–500.00	1	100	25	90.74
500.01–1,000.00	1	100	10	64.62
1,000.00–2,500.00	1	100	5	61.38
2,500.00+	1	100	1	100.00

TABLE 4

[July 1, 2013 through July 31, 2014]

Price range	Pilot tier size	Customer limit orders ≥ tier size (%)	Pre-pilot tier size	Customer limit orders ≥ tier size (%)
0.0001–0.0999	10,000	78.29	5,000	88.70

[27] FINRA engaged in outreach with member firms that are active in the market for OTC equity securities regarding the operation of the Tier Size Pilot, and the majority of those firms did not oppose the permanent adoption of the Pilot.

[28] *See* Order Approving Tier Size Pilot, *supra* note 10, 77 FR at 37466. *See also* Memorandum from Division of Risk, Strategy, and Financial Innovation, *supra* note 18.

[29] *See* Notice, *supra* note 3.

[30] *See* Notice, *supra* note 3.

[31] Table 3 originally was included in FINRA's Executive Summary, dated September 13, 2013, which is part of the 2013 Assessment. *See supra* note 24. *See also* Notice, *supra* note 3.

[32] Table 4 was included in the Notice, *supra* note 3.

TABLE 4—Continued

[July 1, 2013 through July 31, 2014]

Price range	Pilot tier size	Customer limit orders ≥ tier size (%)	Pre-pilot tier size	Customer limit orders ≥ tier size (%)
0.10–0.1999	5,000	56.89	5,000	57.78
0.20–0.5099	2,500	57.35	5,000	42.31
0.51–0.9999	1,000	72.81	2,500	42.10
1.00–10.00	100	97.86	500	68.36
10.01–100.00	100	98.24	200	78.03
100.01–174.99	100	90.49	100	90.60
175.00–200.00	1	100	100	91.94
200.01–500.00	1	100	25	89.41
500.01–1,000.00	1	100	10	66.65
1,000.00–2,500.00	1	100	5	65.58
2,500.00+	1	100	1	100.00

FINRA states that, as was noted in the 2013 Assessment, of the 301,628,686 customer limit orders in OTC equity securities reported to FINRA's Order Audit Trail System (''OATS'') between November 1, 2012 and June 30, 2013, over 86.6% were priced between $0.20 and $100.00. FINRA further notes that 58.7 million customer limit orders, or almost 20% of all customer limit orders, were priced between $1.00 and $10.00. According to FINRA, this price range experienced an increase of almost 24% in the number of customer limit orders that met the minimum quotation size to be eligible for display under the Pilot. Further, 181.6 million customer limit orders, or over 60% of all customer limit orders, were priced between $10.01 and $100.00. FINRA observes that this price range experienced an increase of over 10% in the number of customer limit orders that met the Pilot tier sizes and were eligible for display under the Pilot tier sizes. FINRA points out that the 2013 Assessment found that an additional 32 million customer limit orders priced between $1.00 and $100.00 became eligible for display during the Pilot that otherwise would not have been eligible for display.

According to FINRA, the trends during the period since the 2013 Assessment are similar. FINRA states that of the 573,973,197 customer limit orders in OTC equity securities reported to OATS between July 1, 2013 and July 31, 2014, 81.4% were priced between $0.20 and $100.00. FINRA notes that 114.5 million customer limit orders, or almost 20% of all customer limit orders, were priced between $1.00 and $10.00. From July 1, 2013 through July 31, 2014, this price range experienced an increase of over 29% in the number of customer limit orders that met the minimum quotation size to be eligible for display under the Pilot than would have been eligible in the absence of the Pilot. Further, 312.1 million customer limit orders, or over 54% of all customer limit orders, were priced between $10.01 and $100.00. FINRA remarks that this price range experienced an increase of over 19% in the number of customer limit orders that met the Pilot tier sizes and were eligible for display under the Pilot tier sizes. Consequently, an additional 94.9 million customer limit orders priced between $1.00 and $100.00 became eligible for display during the Pilot between June 30, 2013 and July 31, 2014 than otherwise would have been eligible for display.

FINRA states that there was an aggregate overall increase in displayed customer limit orders in OTC equity securities over the period from November 12, 2012 through July 31, 2014 of 16.24%, representing approximately 142 million additional orders than otherwise would have been eligible for display As a result, FINRA believes that the impact of the Pilot on limit order display has been positive, with stronger than average results concentrated in the price points ranging from $10.01 and $100.00 (the range in which the majority of all customer limit orders fell (approximately 57%)).

(B) Impact on Market Quality

FINRA explains that when the Commission approved the Pilot, it acknowledged that the Pilot may raise issues of ''potentially competing forces''—enhanced customer limit order display on the one hand and potential harm to OTC equity market quality (liquidity, efficiency, and volatility) on the other.[33] FINRA notes that the Commission, however, expressed the view that ''as well as increasing the number of customer limit orders eligible for display and the potential for better executions, arguments can be made that FINRA's proposal will benefit the OTC market by facilitating market making activity, narrowing spreads and increasing liquidity.'' [34]

FINRA believes that analysis of the Pilot and pre-Pilot data generally shows that the market quality measures that the Commission had identified—*i.e.,* market maker activity, spreads and liquidity—were unchanged to slightly improved, and that therefore there has been an overall neutral to positive impact on OTC market quality for the majority of Pilot tiers as compared to the pre-Pilot data.[35]

As noted in the 2013 Assessment, where the minimum quotation size decreased under the Pilot, effective spreads generally remained the same or narrowed, quoted spreads narrowed, and price impact generally decreased. The 2013 Assessment also stated that some of the market quality metrics provided inconclusive results, specifically for Tier 1 securities, where the minimum quote size requirement had increased under the Pilot. FINRA remarks that the 2013 Assessment documented that effective spreads had widened, but with no significant reduction in quoted depth.[36]

In the post-2013 Assessment period of July 1, 2013 through July 31, 2014,

[33] *See* Order Approving Tier Size Pilot, *supra* note 10, 77 FR at 37467.

[34] *Id.*

[35] FINRA notes that, from an analytical perspective, changes in market quality measures may not be attributable solely as a result of the Pilot, since they also may be impacted by other contemporaneous market factors.

[36] FINRA points out that for Tier 1 securities, the DERA Memo to File finds that both quoted and effective spreads increased between the pre-Pilot period (November 14, 2011 through October 31, 2012) and the Pilot period (November 12, 2012 through November 28, 2014) covered by the analysis. However, the DERA Memo to File does not find sufficient evidence that these increases in spreads were caused by the Pilot, because spreads had started to widen at least six months prior to the implementation of the Pilot.

FINRA observes that the number of stocks quoted in the OTC market has remained relatively constant [37] and market makers continued to provide liquidity.[38] The number of BBO quotes also significantly increased throughout 2014, which was the second year of the Pilot, as the number of quotes generally hovered around 2 million per day during the Pre-Pilot period, but steadily increased, reaching a high of approximately 6 million per day in early 2014 and leveling off to an average of 5 million per day during the month of July 2014. The average number of trades per day was higher during the first two years of the Pilot compared to the pre-Pilot level, and more than tripled by March 2014.[39] FINRA states, however, that trading activity appears to have leveled-off in mid-2014, albeit still at levels above the pre-Pilot trading.[40] Liquidity continued to be provided at levels greater than the minimum required depth, evidenced by executions at sizes greater than the required minimums, which enabled the execution of large trades in the OTC market. For example, for Tier 1 securities where the minimum quotation size increased, the number of trades executed above the minimum size increased by approximately 75%. Although there was virtually no change in the frequency of trades above the minimum size for Tiers 2 and 3, FINRA notes that all the other tiers experienced a positive change. Trading in sizes greater than the minimum quotation size occurred infrequently in these tiers both prior to and during the Pilot.

FINRA further notes that the analysis of data from the second year of the Pilot also confirms its position that the impact of the change in the minimum quotation size on the market quality metrics generally is positive. FINRA staff analyzed the change in five measures to evaluate the impact of the Pilot on market quality—time-weighted quoted spreads, volume-weighted spreads, time-weighted quoted depth at the BBO, time-weighted quoted depth around the BBO, and price impact. Based on FINRA's analysis, time-weighted quoted spreads continued to narrow during the first two years of the Pilot and these positive changes in time-weighted quoted spreads between the pre-Pilot and the first two years of the Pilot were statistically significant for all tiers.[41] Similarly, volume-weighted spreads were unchanged (or slightly narrowed) for all tiers between the pre-Pilot period and the first two years of the Pilot when accounting for the longer Pilot period.

FINRA observes that the displayed depth decreased slightly for most tiers, but a consideration of depth beyond the BBO demonstrated that any declines were mostly statistically insignificant across tiers in the first two years of the Pilot. FINRA believes that consideration of depth beyond the BBO is a useful additional measure for assessing market depth.

In addition, based on a data review using the same methodology as was employed for the 2013 Assessment, subsequent to the completion of the 2013 Assessment, FINRA observed that the price impact of hypothetical market orders continued to remain lower during the second year of the Pilot period than during the pre-Pilot period.[42] For example, the following two tables prepared by FINRA present the price impact for hypothetical market buy and sell orders with sizes five times larger than the minimum size requirement for each tier. The price impact associated with the hypothetical orders is estimated to have declined for all tiers, which is an indication of improved market quality. The decline is significant for all levels except for Tiers 5b and 5c (for buy trades) and Tier 1 (for sell trades).

According to FINRA, the t-statistic in the charts below is designed to measure whether the price impact associated with a trade of a given (relative) size is different between the pre-Pilot and Pilot sample periods. The difference is tested for significance by calculating the two-sample un-pooled Student's t-statistic,

$$t = \frac{\bar{X}_1 - \bar{X}_2}{s_{\bar{X}_1 - \bar{X}_2}}, \text{ where } s_{\bar{X}_1 - \bar{X}_2} = \sqrt{\frac{s_1^2}{n_1} + \frac{s_2^2}{n_2}}.$$

The null hypothesis (*i.e.,* that price impact is unchanged between the two sample periods) is rejected at the 90% and 95% confidence levels, if the t-statistics are greater than 1.65 and 1.96, respectively.

TABLE 5

[Price impact for hypothetical large market buy orders]

Tier	Minimum quotation size change	Number of stocks	Pre-pilot (10/2011–10/2012)	Pilot (11/2012–7/2014)	Difference	t-statistic
1	Increased	3,586	0.0055	0.0050	−0.0005	(2.60)
2	Maintained	1,254	0.0235	0.0197	−0.0038	(5.03)
3	Decreased	1,752	0.0506	0.0420	−0.0086	(6.41)
4	Decreased	1,537	0.0969	0.0810	−0.0159	(5.00)

[37] The number of stocks quoted on the OTC market remained stable at around 10,000 throughout the pre-Pilot period and during the period covered in the 2013 Assessment, as well as during FINRA's subsequent observations (November 1, 2012 through July 31, 2014).

[38] There was an average of nine market-makers for each symbol with no significant change in the number of market makers between the pre-Pilot period and during the period covered in the 2013 Assessment and during FINRA's subsequent observations (November 1, 2012 through July 31, 2014).

[39] The daily number of trades executed during the year prior to the Pilot is estimated at approximately 75,000, and reached around 250,000 trades by the end of the first quarter in 2014.

[40] The daily average number of trades was approximately 100,000 by July 2014.

[41] For stocks in price tiers where the minimum quotation size requirement had decreased, the DERA Memo to File also finds that both quoted and effective spreads had decreased between the pre-Pilot period (from November 14, 2011 to October 31, 2012) and the Pilot period (November 12, 2012 to November 28, 2014) covered by the analysis. Furthermore, the DERA Memo to File's analysis suggests that these decreases in spreads may reflect causal effects of the Pilot. In contrast, for stocks in price tiers where the minimum quotation size requirement increased or remained the same, the DERA Memo to File does not find sufficient evidence that the Pilot had a causal impact on spreads.

[42] As FINRA discussed in the 2013 Assessment, the price impact of hypothetical market orders is the effective half spread for a hypothetical market ''sweep'' order of a particular size. In other words, it is an estimate of what the volume-weighted average effective half spread would have been had a market order been broken up and routed to the market makers based on price priority.

TABLE 5—Continued

[Price impact for hypothetical large market buy orders]

Tier	Minimum quotation size change	Number of stocks	Pre-pilot (10/2011–10/2012)	Pilot (11/2012–7/2014)	Difference	t-statistic
5a	Decreased	3,038	0.3295	0.2530	−0.0765	(7.79)
5b	Decreased	2,026	1.1630	1.0661	−0.0969	(1.55)
5c	Maintained	177	4.8322	4.7906	−0.0416	(0.06)

TABLE 6

Price impact for hypothetical large market sell orders

Tier	Minimum quotation size change	Number of stocks	Pre-pilot (10/2011–10/2012)	Pilot (11/2012–7/2014)	Difference	t-statistic
1	Increased	3,931	0.0062	0.0059	−0.0003	(1.60)
2	Maintained	1,483	0.0233	0.0169	−0.0064	(3.41)
3	Decreased	1,787	0.0540	0.0311	−0.0229	(4.87)
4	Decreased	1,676	0.1214	0.0656	−0.0558	(4.95)
5a	Decreased	3,059	0.4170	0.1500	−0.2670	(6.01)
5b	Decreased	2,145	2.3563	0.4214	−1.9349	(6.79)
5c	Maintained	288	14.8135	4.2683	−10.5452	(3.13)

As noted above, FINRA states that the 2013 Assessment was not conclusive as to the impact of the Pilot on market quality for Tier 1 securities, the only tier where the minimum quotation size had increased. For example, the 2013 Assessment indicated that the time-weighted quoted spread was unchanged for Tier 1 securities in the Pilot period. However, FINRA explains that from June 30, 2013 to July 2014, there was a statistically significant narrowing of time-weighted quoted spreads in this tier. Evidence from the second year of the Pilot suggests that volume-weighted effective spreads and depth beyond the BBO were unchanged from pre-Pilot levels, but there was a statistically significant increase in depth at the BBO. FINRA therefore concludes that the updated analysis provides reliable evidence that market quality for Tier 1 securities also has improved during the Pilot.[43] The data for other tiers, however, continue to provide reliable evidence that market quality has been unchanged or slightly improved under the Pilot. Thus, because the Pilot had a demonstrable positive impact on customer limit order display, and appears to have had an overall neutral to positive impact on market quality, FINRA believes that it is appropriate and in the best interest of investors to adopt the Pilot tiers as permanent.

FINRA notes that, if the Commission approves the proposed rule change, the implementation date of the proposed rule change shall be the date of approval by the Commission.

III. Comment Summary and FINRA's Response

As noted above, the Commission received one comment letter on the proposed rule change and a response letter from FINRA.[44] The commenter generally supports making the proposed tier sizes permanent.[45] However, the commenter believes that there should be no tier sizes for unsolicited customer orders.[46] The commenter is concerned that when a broker-dealer is quoting on an unsolicited basis in certain securities, the tier sizes work to restrict customers from being able to trade their positions because the unsolicited customer order does not meet the revised tier size requirements.[47]

In its response letter, FINRA states that one of its goals in revising FINRA Rule 6433 was to achieve a reasonable balance between customer limit order display and facilitating a meaningful minimum dollar-value commitment to the market for all displayed quotations.[48] FINRA believes that the Pilot tiers achieve an appropriate balance of these objectives.[49] FINRA further explains that the Pilot tiers have resulted in a positive impact on the level of customer limit orders eligible for display under FINRA Rule 6460 and does not believe that an exception for any subset of customer orders should be adopted at this time.[50]

IV. Discussion of Commission Findings

After careful review of the proposed rule change, the comment letter, and FINRA's response to the comment letter, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities association.[51] Specifically, the Commission finds that the rule change is consistent with Section 15A(b)(6) of the Exchange Act,[52] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission also finds that the proposed rule change is consistent with the provisions of Section 15A(b)(11) of the Act,[53] which requires that FINRA rules include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any

[43] As noted in note 36, *supra,* FINRA points out that the DERA Memo to File finds that quoted and effective spreads for Tier 1 securities increased between the pre-Pilot period of November 14, 2011 to October 31, 2012 and the Pilot period of November 12, 2012 to November 28, 2014 covered by the analysis, but it does not find sufficient evidence that these increases in spreads were caused by the Pilot.

[44] *See supra* note 4.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* FINRA Letter, *supra* note 7.

[49] *Id.* at 2.

[50] *Id.*

[51] In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[52] 15 U.S.C. 78*o*–3(b)(6).

[53] 15 U.S.C. 78*o*–3(b)(11).

member or person associated with a member, and the persons to whom such quotations may be supplied.

As stated in the Notice, FINRA believes that making the Pilot tiers permanent would promote just and equitable principles of trade and protect investors and the public interest. FINRA believes that the 2013 Assessment and subsequent observations demonstrate that the Pilot has resulted in an increased display of customer limit orders. FINRA notes that the 2013 Assessment found a 13% increase in the number of customer limit orders that met the minimum quotation sizes eligible for display across all Pilot tiers, and FINRA's updated data through July 2014 shows an even greater increase of 18.45% than otherwise would have been eligible for display. The increase in customer limit orders eligible for display was significant in tiers that make up substantial percentages of the overall volume transacted in OTC equity securities.

In the Notice, FINRA further states its belief that any concerns about market quality raised by public commenters prior to the Commission's approval of the Pilot have not materialized. In fact, FINRA states that it believes that the Pilot has had a positive impact on OTC market quality for the majority of OTC equity securities and the tiers set forth in the Pilot. FINRA believes that the Pilot data shows overall a slight reduction in spreads for most OTC equity securities with no negative (and perhaps a positive) impact on liquidity.

When the Commission approved the Pilot, it emphasized the potential benefit of increasing customer limit order display. For instance, the Commission noted that increased limit order display potentially could improve the prices at which customer limit orders would be executed, consistent with the protection of investors and the public interest.[54] The Commission also stated its belief that greater customer limit order display could increase quote competition, narrow spreads, and increase the likelihood of price improvement for OTC equity securities.[55] The Commission has maintained a longstanding view that there are benefits to promoting customer limit order display.[56]

As noted above, the sole commenter on the proposed rule change is concerned that when a firm is quoting on an unsolicited basis in certain securities, the Pilot tier sizes work to restrict customers from being able to trade their positions if the unsolicited customer order does not meet FINRA's minimum tier size requirements.[57] The Commission notes that FINRA's 2013 Assessment and its subsequent assessment for the period covering July 1, 2013 through July 31, 2014 indicate that there was a meaningful increase in the number of customer limit orders eligible for display. The Commission agrees with FINRA that the minimum tier size requirements of FINRA Rule 6433, which have been in place on a Pilot basis, achieve a reasonable balance between fostering customer limit order display and facilitating a meaningful minimum dollar-value commitment to the market for all displayed quotations.

The Commission believes that the Pilot has accomplished its intended objectives and has realized its anticipated benefits, including greater customer limit order display. At the same time, market quality indicators during the Pilot suggest that the revised tiers and evidence of greater customer limit order display did not result in a harmful reduction in liquidity for OTC equity securities. The Commission believes that these results are consistent with FINRA's assessment that the Pilot has had a neutral to positive impact on liquidity for the majority of OTC equity securities and price tiers.[58] At the same time, the Commission notes that there is inconclusive evidence regarding the effects of the Pilot on liquidity for the price tier for which the minimum quotation size requirement was increased.[59] In light of the foregoing, the Commission believes that it is consistent with the Act to adopt the Pilot tiers, which have been in effect for nearly six years, on a permanent basis.

IV. Conclusion

It is therefore ordered pursuant to Section 19(b)(2)[60] of the Exchange Act that the proposal (SR–FINRA–2018–015) be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[61]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2018–16724 Filed 8–3–18; 8:45 am]

BILLING CODE 8011–01–P

[54] *See* Order Approving Tier Size Pilot, *supra* note 10, 77 FR at 37466.

[55] *See id.* at 37469.

[56] *See id.* at 37469 n.168 (citing, among other things, the Commission's 1996 Order Handling Rules Release).

[57] *See supra* note 4.

[58] *See id.* at 2.

[59] *Id.* The minimum quotation size requirement increased for those securities prices between $0.0001 and $0.0999. These securities are included in the lowest tier which requires a minimum quotation size of 10,000 shares.

[60] 15 U.S.C. 78s(b)(2).

[61] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2018–0044]

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a new information collection, extensions and revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov*

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2018–0044].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than October 5, 2018. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Certificate of Support—20 CFR 404.370, 404.750, 404.408a—0960–0001. A parent of a deceased, fully insured worker may be entitled to Social Security Old-Age, Survivors, and Disability Insurance (OASDI) benefits based on the earnings record of the deceased worker under certain conditions. One of the conditions is the parent receives at least one-half support from the deceased worker. The one-half support requirement also applies to a spousal applicant in determining

whether OASDI benefits are subject to Government Pension Offset (GPO). SSA uses Form SSA–760–F4 to determine if the parent of a deceased worker or a spouse applicant meets the one-half support requirement. Respondents are parents of deceased workers, and spouses who may meet the GPO exception.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–760–F4	18,000	1	15	4,500

2. Application for Supplemental Security Income—20 CFR 416.207 and 416.305–416.335, Subpart C—0960–0229. The Supplemental Security Income (SSI) program provides aged, blind, and disabled individuals who have little or no income, with funds for food, clothing, and shelter. Individuals complete Form SSA–8000–BK to apply for SSI. SSA uses the information from Form SSA–8000–BK, and its electronic Intranet counterpart, the SSI Claims System, to: (1) Determine whether SSI claimants meet all statutory and regulatory eligibility requirements; and (2) calculate SSI payment amounts. The respondents are applicants for SSI or their representative payees.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSI Claims System	1,212,512	1	35	707,299
SSA–8000 (Paper Form)	20,941	1	41	14,310
Totals	1,233,453	.....	.....	721,609

3. Statement of Household Expenses and Contributions—20 CFR 416.1130–416.1148—0960–0456. SSA bases eligibility for SSI on the needs of the recipient. In part, we assess need by determining the amount of income a recipient receives. This income includes in-kind support and maintenance in the form of food and shelter owners provide. SSA uses Form SSA–8011–F3 to determine whether the claimant or recipient receives in-kind support and maintenance. This is necessary to determine: (1) The claimant's or recipient's eligibility for SSI, and (2) the SSI payment amount. SSA only uses this form in cases where SSA needs the householder's (head of household) corroboration of in-kind support and maintenance. The SSA–8011–F3 provides information, which could affect SSI eligibility and payment amount. The claim specialist collects the information on Form SSA–8011–F3 through telephone contact with the respondent, or through face-to-face interviews. The claims specialist records the information in our electronic SSI Claims System. When we use this procedure we do not use a paper Form SSA–8011–F3, and we do not need a wet signature, rather we require verbal attestation. However, when we use a paper form, we ensure the appropriate person, *i.e.,* the householder signs the form, and then the claims specialist documents the information in the SSI Claims System; faxes the form into the appropriate electronic folder; and shreds form. Respondents are householders of homes in which an SSI applicant or recipient resides.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–8011–F3 (Paper Version)	8,233	1	15	2,058
SSA–8011–F3 (SSI Claims System)	417,025	1	15	104,256
Total	425,258	.....	.....	106,314

4. Integrated Registration Services (IRES) System—20 CFR 401.45—0960–0626. The IRES System verifies the identity of individuals, businesses, organizations, entities, and government agencies seeking to use SSA's secured internet and telephone applications. Individuals need this verification to electronically request and exchange business data with SSA. Requestors provide SSA with the information needed to establish their identities. Once SSA verifies identity, the IRES system issues the requestor a user identification number and a password to conduct business with SSA. Respondents are employers; employees; third party submitters of wage data business entities providing taxpayer identification information; appointed representatives; representative payees; and data exchange partners conducting business in support of SSA programs.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
IRES Internet Registrations	611,296	1	5	50,941
IRES Internet Requestors	15,692,525	1	2	523,084
IRES CS (CSA) Registrations	20,621	1	11	3,781
Totals	16,324,442			577,806

5. Request for Reinstatement (Title II)—20 CFR 404.1592b–404.1592f—0960–0742. SSA allows certain previously entitled disability beneficiaries to request expedited reinstatement (EXR) of benefits under Title II of the Social Security Act (Act) when their medical condition no longer permits them to perform substantial gainful activity. SSA uses Form SSA–371 to obtain: (1) A signed statement from individuals requesting an EXR of their Title II disability benefits; and (2) proof the requestors meet the EXR requirements. SSA maintains the form in the disability folder of the applicant to demonstrate the requestors' awareness of the EXR requirements, and their choice to request EXR. Respondents are applicants for EXR of Title II disability benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–371	10,000	1	2	333

6. Important Information About Your Appeal, Waiver Rights, and Repayment Options—20 CFR 404.502–521—0960–0779. When SSA accidentally overpays beneficiaries, the agency informs them of the following rights: (1) The right to reconsideration of the overpayment determination; (2) the right to request a waiver of recovery and the automatic scheduling of a personal conference if SSA cannot approve a request for waiver; and (3) the availability of a different rate of withholding when SSA proposes the full withholding rate. SSA uses Form SSA–3105, Important Information About Your Appeal, Waiver Rights, and Repayment Options, to explain these rights to overpaid individuals and allow them to notify SSA of their decision(s) regarding these rights. The respondents are overpaid current, or former, beneficiaries requesting a waiver of recovery for the overpayment; reconsideration of the fact of the overpayment; or a lesser rate of withholding of the overpayment.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–3105 Paper form	500,000	1	15	125,000
Debt Management System	200,000	1	15	50,000
Totals	700,000			175,000

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding these information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than September 5, 2018. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Fee Agreement for Representation before the Social Security Administration—0960–NEW. Under the Act, SSA requires individuals who represent a claimant before the agency and want to receive a fee for their services to obtain SSA's authorization of the fee. One way to obtain the authorization is to submit the fee agreement. To facilitate this process, individuals can use Form SSA–1693. SSA uses the information from the SSA–1693 to review the request and authorize any fee to representatives who seek to charge and collect a fee from a claimant. The respondents are the representatives who help claimants through the application process.

Type of Request: Request for a new information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1693	600,000	1	12	120,000

2. Request for Waiver of Overpayment Recovery and Request for Change in Overpayment Recovery Rate—20 CFR 404.502, 404.506–404.512, 416.550–416.558, and 416.570–416.571—0960–0037. When Social Security beneficiaries and SSI recipients receive an overpayment, they must return the extra money. These beneficiaries and recipients can use Form SSA–632–BK to request a waiver from repaying their overpayment. Beneficiaries and recipients can also use Form SSA–634 to request a change to the monthly recovery rate of their overpayment. The respondents must provide financial information to help the agency determine how much the overpaid person can afford to repay each month. Respondents are overpaid Social Security beneficiaries or SSI recipients who are requesting: (1) A waiver of recovery of an overpayment, or (2) a lesser rate of withholding.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–632—Waiver of Overpayment (If completing entire paper form, including the AFI authorization)	400,000	1	120	800,000
Regional Application (New York Debt Management)	30,000	1	120	60,000
Internet Instructions	430,000	1	5	35,833
SSA–634—Requesting change in repayment rate (completing paper form)	100,000	1	45	75,000
Internet Instructions	100,000	1	5	8,333
Totals	1,060,000			979,166

3. Employment Relationship Questionnaire—20 CFR 404.1007—0960–0040. When SSA needs information to determine a worker's employment status for the purpose of maintaining a worker's earning records, the agency uses Form SSA–7160–F4 to determine the existence of an employer-employee relationship. We use the information to develop the employment relationship; specifically, to determine whether a beneficiary is self-employed or an employee. The respondents are individuals seeking to establish their status as employees, and their alleged employers.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Individuals	8,000	1	25	3,333
Businesses	7,200	1	25	3,000
State/Local Government	800	1	25	333
Totals	16,000			6,666

4. State Supplementation Provisions: Agreement; Payments—20 CFR 416.2095–416.2098, and 20 CFR 416.2099—0960–0240. Section 1618 of the Act requires those states administering their own supplementary income payment program(s) to demonstrate compliance with the Act by passing Federal cost-of-living increases on to individuals who are eligible for state supplementary payments, and informing SSA of their compliance. In general, states report their supplementary payment information annually by the maintenance-of-payment levels method. However, SSA may ask them to report up to four times in a year by the total-expenditures method. Regardless of the method, the states confirm their compliance with the requirements, and provide any changes to their optional supplementary payment rates. SSA uses the information to determine each state's compliance or noncompliance with the pass-along requirements of the Act to determine eligibility for Medicaid reimbursement. If a state fails to keep payments at the required level, it becomes ineligible for Medicaid reimbursement under Title XIX of the Act. Respondents are state agencies administering supplemental programs.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)
Total Expenditures	7	4	28	60	28
Maintenance of Payment Levels	26	1	26	60	26
Total	33				54

5. Substitution of Party Upon Death of Claimant—20 CFR 404.957(c)(4) and 416.1457(c)(4)—0960–0288. An administrative law judge (ALJ) may dismiss a request for a hearing on a pending claim of a deceased individual for Social Security benefits or SSI payments. Individuals who believe the dismissal may adversely affect them may complete Form HA–539, which allows them to request to become a substitute party for the deceased

claimant. The ALJs and the hearing office support staff use the information from the HA–539 to: (1) Maintain a written record of request; (2) establish the relationship of the requester to the deceased claimant; (3) determine the substituted individual's wishes regarding an oral hearing or decision on the record; and (4) admit the data into the claimant's official record as an exhibit. The respondents are individuals requesting to be substitute parties for a deceased claimant.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
HA–539	4,000	1	5	333

6. Claimant Statement about Loan of Food or Shelter; Statement about Food or Shelter Provided to Another—20 CFR 416.1130–416.1148—0960–0529. SSA bases an SSI claimant or recipient's eligibility on need, as measured by the amount of income an individual receives. Per our calculations, income includes other people providing in-kind support and maintenance in the form of food and shelter to SSI applicants or recipients. SSA uses Forms SSA–5062 and SSA–L5063 to obtain statements about food or shelter provided to SSI claimants or recipients. SSA uses this information to determine whether food or shelters are bona fide loans or income for SSI purposes. This determination may affect claimants' or recipients' eligibility for SSI as well as the amounts of their SSI payments. The respondents are claimants and recipients for SSI payments, and individuals who provide loans of food or shelter to them.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–5062 Paper Form	30,632	1	10	5,105
SSA–L5063 Paper Form	30,632	1	10	5,105
SSA–5062 SSI Claims System	30,632	1	10	5,105
SSA–L5063 SSI Claims System	30,632	1	10	5,105
Total	122,528	.....	.....	20,420

7. Application for Circuit Court Law—20 CFR 404.985 & 416.1458—0960–0581. People claiming an acquiescence ruling (AR) would change SSA's prior determination or decision must submit a written readjudication request with specific information. SSA reviews the information in the requests to determine if the issues stated in the AR pertain to the claimant's case, and if the claimant is entitled to readjudication. If readjudication is appropriate, SSA considers the issues the AR covers. Any new determination or decision is subject to administrative or judicial review as specified in the regulations, and the claimants must provide information to request readjudication. Respondents are claimants for Social Security benefits and SSI payments who request readjudication.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
AR-based Readjudication Requests	10,000	1	17	2,833

8. Testimony by Employees and the Production of Records and Information in Legal Proceedings—20 CFR 403.100–403.155—0960–0619. Regulations at 20 CFR 403.100–403.155 of the Code of Federal Regulations establish SSA's policies and procedures for an individual; organization; or government entity to request official agency information, records, or testimony of an agency employee in a legal proceeding when the agency is not a party. The request, which respondents submit in writing to SSA, must: (1) Fully set out the nature and relevance of the sought testimony; (2) explain why the information is not available by other means; (3) explain why it is in SSA's interest to provide the testimony; and (4) provide the date, time, and place for the testimony. Respondents are individuals or entities who request testimony from SSA employees in connection with a legal proceeding.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
20 CFR 403.100–403.155	100	1	60	100

9. Function Report Adult-Third Party—20 CFR 404.1512 & 416.912—0960–0635. Individuals receiving or applying for Social Security Disability Insurance (SSDI) or SSI provide SSA with medical evidence and other proof SSA requires to prove their disability. SSA, and Disability Determination Services (DDS) on our behalf, collect this information using Form SSA–3380–BK. We use the information to document how claimant's disabilities affect their ability to function, and to determine eligibility for SSI and SSDI claims. The respondents are third parties familiar with the functional limitations (or lack thereof) of claimants who apply for SSI and SSDI benefits.

Type of Request: Revision of an OMB approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–3380–BK	709,700	1	61	721,528

10. Request for Deceased Individual's Social Security Record—20 CFR 402.130—0960–0665. When a member of the public requests an individual's Social Security record, SSA needs the name and address of the requestor as well as a description of the requested record to process the request. SSA uses the information the respondent provides on Form SSA–711, or via an internet request through SSA's electronic Freedom of Information Act (eFOIA) website, to (1) verify the wage earner is deceased and (2) access the correct Social Security record. Respondents are members of the public requesting deceased individuals' Social Security records.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Internet Request through eFOIA	49,800	1	7	5,810
SSA–711 (paper)	200	1	7	23
Total	50,000			5,833

11. Certification of Prisoner Identity Information—20 CFR 422.107—0960–0688. Inmates of Federal, State, or local prisons may need a Social Security card as verification of their Social Security number for school or work programs, or as proof of employment eligibility upon release from incarceration. Before SSA can issue a replacement Social Security card, applicants must show SSA proof of their identity. People who are in prison for an extended period typically do not have current identity documents. Therefore, under formal written agreement with the correctional institution, SSA allows prison officials to verify the identity of certain incarcerated U.S. citizens who need replacement Social Security cards. Information prison officials provide comes from the official prison files, sent on correctional facility letterhead. SSA uses this information to establish the applicant's identity in the replacement Social Security card process. The respondents are prison officials who certify the identity of prisoners applying for replacement Social Security cards.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)
Verification of Prisoner Identity Statements	1,000	200	200,000	3	10,000

12. Request to Pay Civil Monetary by Installment Agreement—20 CFR 498—0960–0776. When SSA imposes a civil monetary penalty (CMP) on individuals for various fraudulent conduct related to SSA-administrated programs, those individuals may request to pay the CMP through benefit withholding, or an installment agreement. To negotiate a monthly payment amount, fair to both the individual and the agency, SSA needs financial information from the individual. SSA uses Form SSA–640, Financial Disclosure for CMP Debt, to obtain the information necessary to determine a monthly installment repayment rate for individuals owing a CMP. The respondents are recipients of Social Security benefits and non-entitled individuals who must repay a CMP to the agency and choose to do so using an installment plan.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–640	10	1	120	20

13. Notification of a Social Security Number (SSN) To An Employer for Wage Reporting—20 CFR 422.103(a)—0960–0778. Individuals applying for employment must provide a Social Security Number, or indicate they have applied for one. However, when an individual applies for an initial SSN, there is a delay between the assignment of the number and the delivery of the SSN card. At an individual's request, SSA uses Form SSA–132 to send the individual's SSN to an employer. Mailing this information to the employer: (1) Ensures the employer has the correct SSN for the individual; (2) allows SSA to receive correct earnings information for wage reporting purposes; and (3) reduces the delay in the initial SSN assignment and delivery of the SSN information directly to the employer. It also enables SSA to verify the employer as a safeguard for the applicant's personally identifiable information. The majority of individuals who take advantage of this option are in the United States with exchange visitor and student visas; however, we allow any applicant for an SSN to use the SSA–132. The respondents are individuals applying for an initial SSN who ask SSA to mail confirmation of their application or the SSN to their employers.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–132	326,000	1	2	10,867

14. Social Security Administration Health IT Partner Program Assessment—Participating Facilities and Available Content Form—20 CFR 404.1614 and 416.1014—0960–0798. The Health Information Technology for Economic and Clinical Health (HITECH) Act promotes the adoption and meaningful use of health information technology (IT), particularly in the context of working with government agencies. Similarly, section 3004 of the Public Health Service Act requires health care providers or health insurance issuers with government contracts to implement, acquire, or upgrade their health IT systems and products to meet adopted standards and implementation specifications. To support expansion of SSA's health IT initiative as defined under HITECH, SSA developed Form SSA–680, the Health IT Partner Program Assessment—participating Facilities and Available Content Form. The SSA–680 allows healthcare providers to provide the information SSA needs to determine their ability to exchange health information with us electronically. We evaluate potential partners (*i.e.,* healthcare providers and organizations) on: (1) The accessibility of health information they possess; and (2) the content value of their electronic health records' systems for our disability adjudication processes. SSA reviews the completeness of organizations' SSA–680 responses as one part of our careful analysis of their readiness to enter into a health IT partnership with us. The respondents are healthcare providers and organizations exchanging information with the agency.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–680	30	1	5	150

Date: August 1, 2018.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2018–16727 Filed 8–3–18; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2018–0046]

Privacy Act of 1974; System of Records

AGENCY: Office of the General Counsel, Social Security Administration (SSA).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act, we are issuing public notice of our intent to establish a new system of records entitled, General Law Litigation Files (60–0272). This notice publishes details of the new system as set forth under the caption, **SUPPLEMENTARY INFORMATION**.

DATES: The system of records notice (SORN) is applicable upon its publication in today's **Federal Register**, with the exception of the routine uses, which are effective September 5, 2018. We invite public comment on the routine uses or other aspects of this SORN. In accordance with 5 U.S.C. 552a(e)(4) and (e)(11), the public is given a 30-day period in which to submit comments. Therefore, please submit any comments by September 5, 2018.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress may comment on this publication by writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, or through the Federal e-Rulemaking Portal at *http://www.regulations.gov,* please reference docket number SSA–2018–0046. All comments we receive will be available for public inspection at the above address and we will post them to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Navdeep Sarai, Government Information Specialist, Privacy Implementation Division, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 965–2997, email: *Navdeep.Sarai@ssa.gov.*

SUPPLEMENTARY INFORMATION: We are establishing the General Law Litigation Files to cover information we collect about individuals (including but not

limited to SSA employees, attorneys, witnesses, plaintiffs, defendants, or third parties) who are or who SSA reasonably anticipates may be involved in civil and criminal litigation or administrative proceedings that involve SSA, the United States, or SSA records. This collection will allow us to represent SSA in litigation, prepare for reasonably anticipated litigation, or respond to litigation requests from SSA employee testimony or records.

In accordance with 5 U.S.C. 552a(r), we have provided a report to OMB and Congress on this new system of records.

Dated: May 30, 2018.

Mary Ann Zimmerman,

Acting Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

SYSTEM NAME AND NUMBER

General Law Litigation Files, 60–0272.

SEURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Social Security Administration, Office of the General Counsel, 6401 Security Boulevard, Room 617 Altmeyer Building, Baltimore, Maryland 21235; or Regional Chief Counsel offices in receipt of original requests (See Appendix C—Regional Offices Addresses, 5. Regional Chief Counsel Addresses at *https://www.ssa.gov/privacy/sorn/app_c.htm* for address information).

SYSTEM MANAGER(S):

Social Security Administration, Office of the General Counsel, 6401 Security Boulevard, Room 617 Altmeyer Building, Baltimore, MD 21235, *OGC.OGL.Correspondence@ssa.gov*.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 702 of the Social Security Act; 5 U.S.C. 552a; 5 U.S.C. 552; 20 CFR part 403; and various other statutes providing for a right of action by or against SSA or the United States.

PURPOSE(S) OF THE SYSTEM:

We will use the information in this system to represent SSA in litigation, prepare for reasonably anticipated litigation, or respond to litigation requests for SSA employee testimony or records.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are or who SSA reasonably anticipates may be involved in civil and criminal litigation, or administrative proceedings, that involve SSA, its employees, the United States, or SSA records, including but not limited to SSA employees, attorneys, witnesses, plaintiffs, defendants, or third parties involved in such litigation.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system maintains information collected or generated in response to, or in anticipation of, civil and criminal litigation, or administrative proceedings, which may include: Social Security number (SSN), if applicable; contact information; information pertaining to the subject matter of litigation, complaints, answers, motions, briefs, orders, decisions, correspondence, exhibits, discovery, legal research, hearing and deposition transcripts, communications with the Department of Justice (DOJ), and medical records, such as evaluations by physicians in cases where personal injury or alleged disabling conditions are involved.

RECORD SOURCE CATEGORIES:

We obtain information in this system from existing SSA records; legal pleadings, discovery, and other records exchanged between parties and their attorneys in litigation and pre-litigation; courts; State and local governments; other Federal agencies; and other individuals and entities with information relevant to cases involving SSA, its employees, the United States, or SSA records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

We will disclose records pursuant to the following routine uses, however, we will not disclose any information defined as ''return or return information'' under 26 U.S.C. 6103 of the Internal Revenue Service Code, unless authorized by statute, the Internal Revenue Service (IRS), or IRS regulations.

1. To a congressional office in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or third party acting on the subject's behalf.

2. To the Office of the President in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or a third party acting on the subject's behalf.

3. To the DOJ, a court or other tribunal, or another party before such court or tribunal, when:

(a) SSA, or any component thereof; or

(b) any SSA employee in his/her official capacity; or:

(c) any SSA employee in his/her individual capacity where DOJ (or SSA where it is authorized to do so) has agreed to represent the employee; or

(d) the United States or any agency thereof where SSA determines the litigation is likely to affect SSA or any of its components, is a party to the litigation or has an interest in such litigation, and SSA determines that the use of such records by DOJ, a court or other tribunal, or another party before the tribunal is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to DOJ, court or other tribunal, or another party is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

4. To contractors and other Federal agencies, as necessary, for the purpose of assisting SSA in the efficient administration of its programs. We will disclose information under this routine use only in situations in which SSA may enter into a contractual or similar agreement with a third party to assist in accomplishing an agency function relating to this system of records.

5. To Federal, State and local government agencies, private individuals, private attorneys, individual law enforcement officers, and other persons or entities with relevant information for the purpose of investigating, settling, or adjudicating claims of violation of law by SSA or its employees and assisting with subsequent litigation.

6. To private attorneys or union representatives, prior to formal litigation proceedings, when SSA determines that due process requires disclosure.

7. To disclose information to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

8. To student volunteers, individuals working under a personal services contract, and other workers who technically do not have the status of Federal employees, when they are performing work for SSA, as authorized by law, and they need access to personally identifiable information (PII) in SSA records in order to perform their assigned agency functions.

9. To Federal, State and local law enforcement agencies and private security contractors, as appropriate, information necessary:

(a) To enable them to protect the safety of SSA employees and customers, the security of the SSA workplace, and the operation of SSA facilities, or

(b) to assist in investigations or prosecutions with respect to activities that affect such safety and security or activities that disrupt the operation of SSA facilities.

10. To the National Archives and Records Administration (NARA) under 44 U.S.C. 2904 and 2906.

11. To appropriate agencies, entities, and persons when:

(a) SSA suspects or has confirmed that there has been a breach of the system of records;

(b) SSA has determined that as a result of the suspected or confirmed breach, there is a risk of harm to individuals, SSA (including its information systems, programs, and operations), the Federal Government, or national security; and

(c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connections with SSA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

12. To another Federal agency or Federal entity, when SSA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(a) Responding to a suspected or confirmed breach; or

(b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

13. To an appropriate licensing organization or Bar association responsible for investigating, prosecuting, enforcing or implementing standards for maintaining a professional licensing or Bar membership, if SSA becomes aware of a violation or potential violation of professional licensing or Bar association standards or to respond to inquiries or actions from such association about SSA employee conduct.

14. To the Office of Personnel Management, Merit Systems Protection Board, or the Office of Special Counsel in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigations of alleged or possible prohibited personnel practices, and other such functions promulgated in 5 U.S.C. Chapter 12, or as may be required by law.

15. To the Equal Employment Opportunity Commission when requested in connection with investigations into alleged or possible discriminatory practices in the Federal sector, examination of Federal affirmative employment programs, compliance by Federal agencies with Uniformed Guidelines on Employee Selection Procedures, or other functions vested in the Commission.

16. To disclose information to the Federal Labor Relations Authority (including its General Counsel) when requested in connection with investigation and resolution of allegations of unfair labor practices, in connection with the resolution of exceptions to arbitrator's awards when a question of material fact is raised, to investigate representation petitions and to conduct or supervise representation elections, and in connection with matters before the Federal Services Impasses Panel.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

We will maintain records in this system in paper and electronic form.

POLICIES AND PRACTICES FOR RETRIEVABILITY OF RECORDS:

We will retrieve records by the case name, party names, case number, or names of individuals reasonably anticipated to be involved in litigation.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

In accordance with NARA rules codified at 36 CFR 1225.16, we maintain the general law litigation records in accordance with the approved NARA Agency-Specific Records Schedule N1–047–10–004. Periods of retention vary depending on the type of litigation record. See *http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0047/n1-047-10-004_sf115.pdf.* The Office of the General Counsel reserves the right to retain for an indefinite period certain records that, in the judgment of that office are of precedential value.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

We retain electronic and paper files with personal identifiers in secure storage areas accessible only by our authorized employees and contractors who have a need for the information when performing their official duties. Security measures include, but are not limited to, the use of codes and profiles, personal identification number and password, and personal identification verification cards. We keep paper records in locked cabinets within secure areas, with access limited to only those employees who have an official need for access in order to perform their duties.

We annually provide our employees and contractors with appropriate security awareness training that includes reminders about the need to protect PII and the criminal penalties that apply to unauthorized access to, or disclosure of, PII (5 U.S.C. 552a(i)(1)). Furthermore, employees and contractors with access to databases maintaining PII must sign a sanctions document annually, acknowledging their accountability for inappropriately accessing or disclosing such information.

RECORD ACCESS PROCEDURES:

Individuals may submit requests for information about whether this system contains a record about them by submitting a written request to the system manager at the above address, which includes their name, SSN, or other information that may be in this system of records that will identify them. Individuals requesting notification of, or access to, a record by mail must include (1) a notarized statement to us to verify their identity or (2) must certify in the request that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

Individuals requesting notification of, or access to, records in person must provide their name, SSN, or other information that may be in this system of records that will identify them, as well as provide an identity document, preferably with a photograph, such as a driver's license. Individuals lacking identification documents sufficient to establish their identity must certify in writing that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

CONTESTING RECORD PROCEDURES:

Same as record access procedures. Individuals should also reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is incomplete, untimely, inaccurate, or irrelevant. These procedures are in accordance with our regulations at 20 CFR 401.65(a).

NOTIFICATION PROCEDURES:

Same as record access procedures. These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2018–16692 Filed 8–3–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice: 10488]

E.O. 13224 Designation of Abdul Rehman al-Dakhil, aka Dilshad Ahmad, aka Danish Dilshad, aka Amantullah Ali, aka Amanatullah Ali, aka Amanat Ali, aka Imanat Ullah Iqbal, aka 'Abd al-Rahman al-Dakhil as a Specially Designated Global Terrorist

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the person known as Abdul Rehman al-Dakhil, also known as Dilshad Ahmad, also known as Danish Dilshad, also known as Amantullah Ali, also known as Amanatullah Ali, also known as Amanat Ali, also known as Imanat Ullah Iqbal, also known as 'Abd al-Rahman al-Dakhil, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: June 20, 2018.

Michael R. Pompeo,

Secretary of State.

[FR Doc. 2018–16781 Filed 8–3–18; 8:45 am]

BILLING CODE 4710–AD–P

DEPARTMENT OF STATE

[Delegation of Authority No. 448]

Delegation of Authority To Concur With Department of Defense Humanitarian and Civic Assistance Activities

By virtue of the authority vested in the Secretary of State by the laws of the United States, including section 1 of the State Department Basic Authorities Act, I hereby delegate to the Under Secretary for Arms Control and International Security, to the extent authorized by law, the authority to concur with the Secretary of Defense on humanitarian and civic assistance activities.

Notwithstanding this delegation of authority, any function or authority delegated herein may be exercised by the Secretary and the Deputy Secretary. The authority delegated herein may be re-delegated, to the extent authorized by law. Any reference in this delegation of authority to any statute or delegation of authority shall be deemed to be a reference to such statute or delegation of authority as amended from time to time.

This delegation of authority shall be published in the **Federal Register**.

Dated: June 29, 2018.

Michael R. Pompeo,

Secretary of State, Department of State.

[FR Doc. 2018–16782 Filed 8–3–18; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0182]

Hours of Service of Drivers: Allied Beverage Group L.L.C. (Allied); Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from Allied Beverage Group L.L.C. (Allied) for an exemption from the requirement that short-haul drivers utilizing the records of duty status (RODS) exception return to their normal work-reporting location within 12 hours of coming on duty. Allied requests that their company drivers be allowed to use the short-haul exception but return to their work-reporting location within 14 hours instead of the usual 12 hours. The requested exemption would apply to all of Allied's drivers who operate commercial motor vehicle (CMV) beverage trucks. FMCSA requests public comment on Allied's application for exemption.

DATES: Comments must be received on or before September 5, 2018.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2018–0182 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the *Public Participation and Request for Comments* section below for further information.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202–366–2722. Email: *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2018–0182), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2018–0182'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemption

Allied seeks an exemption from the restriction of the record of duty status (RODS) exception for short-haul operations to drivers who return to their normal work reporting location within 12 hours [49 CFR 395.1(e)(1)(ii)(A)]. Specifically, Allied requests that their beverage truck delivery drivers be treated the same as drivers operating ready-mixed concrete delivery vehicles as provided in 49 CFR 395.1(e)(1)(ii)(B). Section 395.1(e)(1)(ii)(B) states that the driver of a ready-mixed concrete delivery vehicle may return to the work-reporting location and be released from work within 14 consecutive hours without losing the short-haul exception. The requested exemption would apply to all of Allied's beverage trucks and drivers.

Allied is an interstate private carrier headquartered in New Jersey consisting of 186 vehicles and 198 drivers. The exemption is requested to simplify and eliminate the need for paper RODS or the cost of installing electronic logging devices needed for the recording of duty status between the 12th and 14th hour of duty when utilizing the short-haul exception for operations within a 100 air-mile radius. Their drivers work on a 4-day work week and on occasion and at times during peak holiday seasons work past the 12th hour of duty. They are in the same town doing multiple stops often crossing town lines only to return to complete a stop that was not open or required a specific time delivery. To log every event change is a difficult if not impossible task. At times the CMV is in a particular area for at most several minutes. Employee's total driving time for the day is minimal, with 25–35 stops—the majority of their time—spent hand unloading their products. Allied operates two warehouses in New Jersey, dispatching so as to avoid traveling long distances.

Allied asserts that this exemption would have no impact on the safety of its fleet or of the general public, as this is primarily about a recording requirement. Its drivers' hours are recorded and retained by an automated data processing system and in addition all of their vehicles are under a global positioning system tracking system provided by Fleetmatics and Roadnet dispatching. Allied continues to strive for a safer fleet and the increased safety of the general public. Allied is also exploring the possibility of installing an onboard event camera system to help the company better monitor its vehicles.

A copy of the Allied's application for exemption is available for review in the docket for this notice.

Issued on: July 27, 2018.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2018–16762 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2018–0050]

Petition for Waiver of Compliance

Under part 211 of Title 49 of the Code of Federal Regulations (CFR), this provides the public notice that by a letter dated May 1, 2018, the County of Sonoma (County), California, has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 222. FRA assigned the petition docket number FRA–2018–0050.

The County seeks a waiver from 49 CFR 222.9, definition of ''quiet zone,'' meaning ''a segment of rail line, within which is situated one or a number of consecutive public highway-rail crossings at which locomotive horns are not routinely sounded.'' The County wishes to establish a quiet zone consisting of ten *private* highway-rail grade crossings, without a *public* highway-rail grade crossing in the quiet zone. The County states it believes ''safety will not be negatively impacted since [Sonoma Marin Area Rapid Transit (SMART)] provided input on concerns and safety measures during the diagnostic review.'' The County explains the private crossings are either in remote areas, are rarely used, and monitored by SMART, or are equipped with active warning devices.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations

Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 20, 2018 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of *regulations.gov.*

Robert C. Lauby,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2018–16755 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Funding Opportunity (NOFO): Solicitation of Project Proposals for the National Center for Mobility Management

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: The Federal Transit Administration (FTA) is soliciting proposals under FTA's Technical Assistance and Workforce Development Program to select an entity to administer the National Center for Mobility Management (NCMM) and provide funding for the entity's activities through the NCMM. The NCMM will carry out activities to improve and enhance the coordination of Federal resources for human service transportation, especially transportation for people with disabilities, older adults, and people with low incomes. Primary activities will include supporting partners in adopting proven, sustainable, replicable, customer-centered mobility strategies that promote good health, economic vitality, self-sufficiency, and community unity.

The FTA intends to fund the NCMM at up to $1,900,000 for the first year. The FTA may extend funding for this center for up to five (5) years; however, subsequent funding will depend upon: (1) Future authorization and appropriations; (2) decisions and program priorities established by the Secretary of Transportation related to the implementation of provisions set forth in 49 U.S.C. 5314; and (3) annual performance reviews.

DATES: Complete proposals for funding opportunity FTA–2018–005–TPM–NCMM must be submitted electronically through *GRANTS.GOV*. All applications must be received by 11:59 p.m. Eastern time on October 5, 2018.

FOR FURTHER INFORMATION CONTACT: Carl Ringgold, FTA Office of Program Management, (202) 366–6508 or *Carl.Ringgold@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

A. Program Description

Federal Transit Administration funding for the NCMM is authorized by 49 U.S.C. 5314, Technical Assistance and Workforce Development. Subsequent funding from FTA will depend upon program priorities established by the Secretary of Transportation, future appropriations, and annual performance reviews. In recognition of the fundamental importance of human service transportation and the continuing need to enhance coordination, Executive Order 13330 (February 24, 2004) on Human Service Transportation Coordination, establishing the Coordinating Council on Access and Mobility (CCAM), directed multiple federal departments and agencies to work together to ensure that transportation services are seamless, comprehensive, and accessible. The members of the CCAM are: The Secretaries from the Departments of Transportation (DOT), Health and Human Services, Labor, Education, Interior, Housing and Urban Development, Agriculture, and Veterans Affairs; the Commissioner of the Social Security Administration; the Attorney General; and the Chairperson of the National Council on Disability.

The CCAM is tasked with seeking ways to simplify access to transportation services for persons with disabilities, persons with lower incomes, older adults, and other transportation disadvantaged populations.

Federal transit law as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) first authorized funding for the management of a program to improve and enhance the coordination of Federal resources for human services transportation with those of the Department of Transportation. The major goal of the program was to assist states and local communities in the provision and expansion of coordinated human service transportation for older adults, people with disabilities, and individuals with lower incomes.

Federal transit law as amended by the Fixing America's Surface Transportation (FAST) Act continues to authorize funding for technical assistance under 49 U.S.C 5314(a)(2)(B) to help providers of public transportation comply with human services transportation coordination requirements and to enhance the coordination of Federal resources for human services transportation with those of the Department of Transportation through technical assistance, training, and support services related to complying with such requirements.

Further, the FAST Act requires the CCAM to develop a strategic plan to strengthen interagency collaboration, address outstanding recommendations, and eliminate burdensome regulatory barriers to human services transportation coordination.

The FTA has carried out such activities through a cooperative agreement that establishes and provides financial assistance for the NCMM. FTA selected the current recipients to administer the NCMM in May 2013. Consistent with the Uniform Administrative Requirements (2 CFR 200), FTA periodically recompetes the administration of its technical assistance centers.

Building upon past efforts, FTA seeks to expand the use of mobility management strategies and to improve human service transportation coordination through the National Center for Mobility Management by implementing the goal and objectives below:

Goal: Enhance Transportation Coordination and Mobility Management in Federal, State, and Local Transportation Programs.

- Objective 1: Support and improve local- and state-coordinated transportation planning processes to improve coordination of federally funded human service transportation.
- Objective 2: Encourage the implementation of mobility management infrastructure and strategies in relevant industries, including but not limited to the transit, workforce, medical, veteran, and human service industries.
- Objective 3: Promote and assist in the development of accessible one call/one click strategies that conveniently connect customers to transportation services and funding options.
- Objective 4: Support the activities and initiatives of the CCAM, its workgroups, and member agencies that improve Federal coordination.
- Objective 5: Conduct targeted technical assistance, research, or demonstration, including demonstration grant programs, as requested by CCAM and its members and supported by requisite funding availability.

B. Federal Award Information

The FTA expects to award the administration of the NCMM as a cooperative agreement The FTA will fund the cooperative agreement over a period of up to five (5) years, with up to $1,900,000 available for the first year of activities with a start date to be determined in 2019. Additional funding may be provided by other CCAM members to support their mobility management and coordinated transportation priorities. Subsequent funding from FTA will depend upon decisions and program priorities established by the Secretary of Transportation, future authorization and appropriations, and annual performance reviews.

The FTA, and any additional CCAM funding agencies, will participate in activities by negotiating the final statement of work, attending review meetings, commenting on technical reports, maintaining frequent contact with the project manager, approving key decisions and activities, and redirecting project activities, as needed.

C. Eligibility Information

Only national non-profit organizations are eligible to submit a proposal in response to this notice. Organizations must have transportation and/or mobility management experience, the capacity to provide public transportation-related technical assistance, expertise regarding accessible and equitable transportation options and needs, and the ability to deliver a national technical assistance and training program. A single lead organization must be designated in the proposal. Other organizations may participate as subcontractors or subrecipients.

D. Application and Submission Information

1. Address To Request Application Package

Applications must be submitted electronically through *GRANTS.GOV*, as described above. General information for registering and submitting applications through *Grants.gov* can be found at *https://www.grants.gov/web/grants/applicants.html* along with specific instructions for the forms and attachments required for submission. Mail and fax submissions will not be accepted. A complete proposal submission will consist of at least two files: (1) The SF–424 Mandatory form (downloaded from *GRANTS.GOV*), and (2) a narrative application document in Microsoft Word, Adobe Acrobat, or compatible file format. The narrative application should be in the format outlined in section 2 below. Once completed, the narrative application must be placed in the attachments section of the SF–424 Mandatory form. Proposers must attach the narrative application file to their submission in *GRANTS.GOV* to successfully complete the proposal process. A proposal submission may contain additional supporting documentation as attachments.

2. Content and Form of Application Submission

Proposals shall be submitted in a Microsoft Word, Adobe Acrobat, or compatible file format, double-spaced using Times New Roman, 12-point font. The proposal must contain the following components and adhere to the specified maximum lengths:

a. Cover sheet (1 page): The cover sheet must include: The name of the entity submitting the proposal, the principal's name, title, and contact information (*e.g.,* address, phone, fax, and email), and the name and contact information for the key point of contact for all five activities (if different from principal).

b. Abstract (not to exceed 4 pages): The abstract must include the following sections: Background, purpose, methodology, intended outcomes, and plan for evaluation.

c. Detailed budget proposal and budget narrative (not to exceed 3 pages).

d. Project narrative (not to exceed 25 pages): The project narrative must include the following information:

i. The methodology for addressing the goals and objectives.

ii. Objectives, activities, deliverables, milestones, timeline and intended outcomes for achieving the goals outlined in the scope for the first year;

iii. The existing and future capacity of the organization to address the issues outlined in the proposal and the organization's ability to implement goals and objectives;

iv. A detailed plan for communication, technical assistance, and outreach at the State and local levels;

v. A plan to work with stakeholders and build partnerships at the national level; and

vi. Staff qualifications, including: (1) Prior experience providing technical assistance, especially related to mobility management, (2) prior experience implementing the other tasks outlined in this solicitation, (3) staff members' knowledge of issues related to human service transportation, and (4) a one-page biographical sketch for each staff member.

e. Plan for evaluation of NCMM activities and performance measures (not to exceed 5 pages).

f. Supplemental materials, such as bios and letters of support, can be included in an appendices section that is beyond the page limit above but are not to exceed 15 additional pages.

3. Unique Entity Identifier and System for Award Management (SAM)

Each applicant is required to: (1) Register in SAM before applying; (2) provide a valid unique SAM entity identifier in its application; and (3) continue to maintain an active SAM registration with current information at all times during which the applicant has an active Federal award or an application or plan under consideration by FTA. These requirements do not apply if the applicant: (1) Is excepted from the requirements under 2 CFR 25.110(b) or (c); or (2) has an exception approved by FTA under 2 CFR 25.110(d). The FTA may not make an award until the applicant has complied with all applicable unique entity identifier and SAM requirements. If an applicant has not fully complied with the requirements by the time FTA is ready to make an award, FTA may determine that the applicant is not qualified to receive an award and use that determination as a basis for making a Federal award to another applicant. SAM registration takes approximately 3–5 business days, but FTA recommends allowing ample time, up to several weeks, for completion of all steps. For additional information on obtaining a unique entity identifier, please visit *www.sam.gov.*

4. Submission Dates and Times

Project proposals must be submitted electronically through *GRANTS.GOV* and must be received by 11:59 p.m. Eastern time on *October 5, 2018. GRANTS.GOV* attaches a time stamp to each application at the time of submission. Proposals submitted after the deadline will only be considered under extraordinary circumstances not under the applicant's control. Mail and fax submissions will not be accepted.

Within 48 hours after submitting an electronic application, the applicant should receive two email messages from *GRANTS.GOV*: (1) Confirmation of successful transmission to *GRANTS.GOV*, and (2) confirmation of successful validation by *GRANTS.GOV*. If confirmations of successful validation are not received or a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the email notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

The FTA urges applicants to submit proposals at least 72 hours prior to the due date to allow time to receive the validation messages and to correct any problems that may have caused a rejection notification. *GRANTS.GOV* scheduled maintenance and outage times are announced on the *GRANTS.GOV* website. Deadlines will not be extended due to scheduled website maintenance.

Applicants are encouraged to begin the process of registration on the *GRANTS.GOV* site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. Registered applicants may still be required to take steps to keep their registration up to date before submissions can be made successfully: (1) Registration in the System for Award Management (SAM) is renewed annually; and (2) persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in *GRANTS.GOV* by the AOR to make submissions.

5. How To Register To Apply Through Grants.gov.

To register and for detailed instructions, please see the ''APPLICANTS'' tab in *Grants.gov* (*https://www.grants.gov/web/grants/applicants.html*). To be eligible to apply for this opportunity, organizations must have a Data Universal Numbering System (DUNS) Number, active System for Award Management (SAM) registration, and an established *Grants.gov* account.

Creating a *Grants.gov* account can be completed online in minutes, but DUNS and SAM registrations may take several weeks. Therefore, an organization's registration should be done in sufficient time to ensure it does not impact the entity's ability to meet required application submission deadlines.

Complete organization instructions can be found on *Grants.gov*: *https://www.grants.gov/web/grants/applicants/organization-registration.html*.

E. Application Review Information

Proposals will be evaluated by a review team based on the proposal's: (1) Ability to meet the goals of the NCMM; (2) qualifications of key personnel, experience, and knowledge; (3) communication, technical assistance, and outreach strategy; (4) research and demonstration capacity; and (5) management approach. The criteria are detailed below:

1. Ability To Meet the Goals of the NCMM

Proposals will be evaluated based on the planned approach and activities identified that will assist the industry in making progress towards improved human service transportation coordination and mobility management as set forth in the goal and objectives. The FTA is seeking innovative and effective approaches and strategies to accomplish the project objectives.

2. Qualifications of Key Personnel, Experience, and Knowledge

The proposal should demonstrate that key personnel have the appropriate skills and experience to carry out the activities. The FTA will evaluate the qualifications and experience of the key staff detailed in the proposal for their:

a. Knowledge and experience with a variety of transportation services (transit, paratransit, taxi, non-profit social service, volunteer, etc.);

b. Knowledge and experience with mobility management; and

c. Knowledge and experience with human service, workforce, veterans, and health care systems.

3. Communication, Technical Assistance, and Outreach Strategy

The proposal should demonstrate the ability to execute a technical assistance program with a national scope, as well as strategies for delivering targeted assistance to State, regional, and local stakeholders. Proposing organizations are encouraged to think innovatively about this technical assistance delivery.

The proposal should also demonstrate the ability to carry out outreach, dissemination, and information management activities. These activities will include capturing and sharing useful and best practices in mobility management and human service transportation coordination, as well as supporting activities related to the CCAM. The proposal should demonstrate innovative approaches, such as the use of communication that is accessible through social media and other information technologies, to accomplish effective stakeholder strategies that both manage and plan the engagement. These communities—people with disabilities, older adults, and people with low incomes—have unique needs, and the proposal should reflect engagement touchpoints and the ability to meaningfully engage with these communities in other to produce successful transportation outcomes for these targeted communities.

4. Research and Demonstration Capacity

The proposal should demonstrate the applicant's capability and capacity (either internally or through external sources) to conduct research, analysis, and demonstration projects related to mobility management and transportation coordination in support of the CCAM and its members.

5. Management Approach

The proposal must include an effective project management plan to administer and manage the NCMM and must demonstrate that the applicant has the technical capacity to carry out the plan. FTA will evaluate the applicant's:

a. Technical capacity to administer and manage the services proposed;

b. Total budget and staffing;

c. Evidence of understanding of the NCMM mission and comprehensive technical approach to delivering the NCMM;

d. Plan for evaluation and data collection;

e. Plan for effective and meaningful stakeholder engagement; and

f. Plan for coordinating with FTA and other CCAM member staff.

F. Federal Award Administration

1. Federal Award Notices

Final award decisions will be made by the Administrator of the Federal Transit Administration. In making these decisions, the Administrator will take into consideration:

a. Recommendations of the review panel;

b. past performance of the applicant regarding programmatic and grants management compliance;

c. the reasonableness of the estimated cost to the government considering the available funding and anticipated results; and

d. the likelihood that the proposed project will result in the transportation outcomes expected.

The FTA will notify the successful organization and may announce the selection on its website *https://www.transit.dot.gov.* Following notification, the successful entity will be required to submit its application through the FTA Transit Award Management System (TrAMS). The FTA will work with the successful applicant to develop a detailed cooperative agreement. The FTA will award and manage a cooperative agreement through TrAMS.

2. Award Administration

a. Grant Requirements: The successful applicant will apply for a cooperative agreement through TrAMS and adhere to the customary FTA grant requirements of Section 5314, Technical Assistance and Workforce Development. There is no pre-award authority for this project. Discretionary grants and cooperative agreements greater than $500,000 will go through the Congressional notification and release process. Assistance regarding these requirements is available from FTA.

b. Standard Assurances: The applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the cooperative agreement issued for its project with FTA. The applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and that modifications may affect the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The applicant must submit the Certifications and Assurances before receiving a cooperative agreement if it does not have current certifications on file.

3. Reporting

Post-award reporting requirements include submission of Federal Financial Reports and Milestone Progress Reports in TrAMS on a monthly or quarterly basis, as determined by the FTA Project Manager. Documentation is required for payment. Additional reporting may be required specific to the National Center for Mobility Management and the recipient may be expected to participate in events or peer networks related to mobility management and coordinated transportation. The Federal Financial Accountability and Transparency Act (FFATA) requires data entry at the FFATA Sub Award Reporting System (*http://www.FSRS.gov*) for all sub-awards and sub-contracts issued for $25,000 or more, as well as addressing executive compensation for both grantee and sub-award organizations.

Additionally, FTA is required to report to Congress every year on the value of Section 5314 investments. Applicants will be required to provide details indicating the need, problem, or opportunity addressed by activities of the program. The national significance and relevance to the public transportation industry must also be clearly detailed.

4. Legal Capacity

Applicants must certify that there are no legal issues which would impact their eligibility and authority to apply for FTA funds, or prevent their acceptance of FTA funds.

G. Federal Awarding Agency Contacts

For further information concerning this notice, please contact the Technical Assistance program manager Carl Ringgold by phone at 202–366–6508, or by email at *carl.ringgold@dot.gov.* A TDD is available for individuals who are deaf or hard of hearing at 800–877–8339.

K. Jane Williams,

Acting Administrator.

[FR Doc. 2018–16689 Filed 8–3–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2018–0114]

Deepwater Port License Application: Texas Gulf Terminals, Inc.

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of application.

SUMMARY: The Maritime Administration (MARAD) and the U.S. Coast Guard (USCG) announce they have received an application for the licensing of a deepwater port and that the application contains all required information. This notice summarizes the applicant's plans and the procedures that will be followed in considering the application.

DATES: The Deepwater Port Act of 1974, as amended, requires any public hearing(s) on this application to be held not later than 240 days after publication of this notice, and a decision on the application not later than 90 days after the final public hearing.

ADDRESSES: The public docket for MARAD–2018–0114 is maintained by the U.S. Department of Transportation, Docket Management Facility, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

The license application is available for viewing at the *Regulations.gov* website: *http://www.regulations.gov* under docket number MARAD–2018–0114.

We encourage you to submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* If you submit your comments electronically, it is not necessary to also submit a hard copy. If

you cannot submit material using *http://www.regulations.gov,* please contact either Mr. Roddy Bachman, USCG or Mr. Wade Morefield, MARAD, as listed in the following **FOR FURTHER INFORMATION CONTACT** section of this document. This section provides alternate instructions for submitting written comments. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted. Anonymous comments will be accepted. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. The Federal Docket Management Facility's telephone number is 202–366–9329, the fax number is 202–493–2251.

FOR FURTHER INFORMATION CONTACT: Mr. Roddy Bachman, U.S. Coast Guard, telephone: 202–372–1451, email: *Roddy.C.Bachman@uscg.mil* or Mr. Wade Morefield, Maritime Administration, telephone: 202–366–7026, email: *Wade.Morefield@dot.gov.* For questions regarding viewing the Docket, call Docket Operations, telephone: 202–366–9826.

SUPPLEMENTARY INFORMATION:

Receipt of Application

On July 9, 2018, MARAD and USCG received an application from Texas Gulf Terminals, Inc. (TGTI) for all Federal authorizations required for a license to own, construct, and operate a deepwater port for the export of oil authorized under the Deepwater Port Act of 1974, as amended, 33 U.S.C. 1501 *et seq.* (the Act), and implemented under 33 Code of Federal Regulations (CFR) parts 148, 149, and 150. After a coordinated completeness review by MARAD, the USCG, and other cooperating Federal agencies, it was determined that the application was complete and contains all information necessary to initiate processing of the application.

Background

The Act defines a deepwater port as any fixed or floating manmade structure other than a vessel, or any group of such structures, that are located beyond State seaward boundaries and used or intended for use as a port or terminal for the transportation, storage, and further handling of oil or natural gas for transportation to, or from, any State. A deepwater port includes all components and equipment, including pipelines, pumping or compressor stations, service platforms, buoys, mooring lines, and similar facilities that are proposed as part of a deepwater port to the extent they are located seaward of the high water mark.

The Secretary of Transportation delegated to the Maritime Administrator authorities related to licensing deepwater ports (49 CFR 1.93(h)). Statutory and regulatory requirements for processing applications and licensing appear in 33 U.S.C. 1501 *et seq.* and 33 CFR part 148. Under delegations from, and agreements between, the Secretary of Transportation and the Secretary of Homeland Security, applications are jointly processed by MARAD and USCG. Each application is considered on its merits.

In accordance with 33 U.S.C. 1504(f) for all applications, MARAD and the USCG, working in cooperation with other Federal agencies and departments considering a deepwater port application shall comply with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). The U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (USACE), the National Oceanic and Atmospheric Administration (NOAA), the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Pipeline and Hazardous Materials Safety Administration (PHMSA), among others, are cooperating agencies and will assist in the NEPA process as described in 40 CFR 1501.6; may participate in scoping meeting(s); and will incorporate the Environmental Impact Statement (EIS) into their permitting processes. Comments addressed to the EPA, USACE, or other federal cooperating agencies will be incorporated into the Department of Transportation (DOT) docket and considered as the EIS is developed to ensure consistency with the NEPA process.

All connected actions, permits, approvals and authorizations will be considered in the deepwater port license application review.

MARAD, in issuing this Notice of Application pursuant to section 1504(c) of the Act, must designate as an ''Adjacent Coastal State'' any coastal state which (A) would be directly connected by pipeline to a deepwater port as proposed in an application, or (B) would be located within 15 miles of any such proposed deepwater port (see 33 U.S.C. 1508(a)(1)). Pursuant to the criteria provided in the Act, Texas is the designated Adjacent Coastal State for this application. Other states may apply for Adjacent Coastal State status in accordance with 33 U.S.C. 1508(a)(2).

The Act directs that at least one public hearing take place in each Adjacent Coastal State, in this case, Texas. Additional public meetings may be conducted to solicit comments for the environmental analysis to include public scoping meetings, or meetings to discuss the Draft EIS and the Final EIS.

MARAD, in coordination with the USCG, will publish additional **Federal Register** notices with information regarding these public meeting(s) and hearing(s) and other procedural milestones, including the NEPA environmental review. The Maritime Administrator's decision, and other key documents, will be filed in the public docket.

The Deepwater Port Act imposes a strict timeline for processing an application. When MARAD and USCG determine that an application is complete (*i.e.,* contains information sufficient to commence processing), the Act directs that all public hearings on the application be concluded within 240 days from the date the Notice of Application is published.

Within 45 days after the final hearing, the Governor of the Adjacent Costal State, in this case the Governor of Texas, may notify MARAD of their approval, approval with conditions, or disapproval of the application. MARAD may not issue a license without the explicit or presumptive approval of the Governor of the Adjacent Coastal State. During this 45-day period, the Governor may also notify MARAD of inconsistencies between the application and State programs relating to environmental protection, land and water use, and coastal zone management. In this case, MARAD may condition the license to make it consistent with such state programs (33 U.S.C. 1508(b)(1)). MARAD will not consider written approvals or disapprovals of the application from the Governor of the Adjacent Coastal State until after the final public hearing is complete and the 45-day period commences.

The Maritime Administrator must render a decision on the application within 90 days after the final hearing.

In accordance with section 1504(d) of the Act, MARAD designates an application area encompassing the TGTI deepwater port that is a circle having a 12.7 nautical mile radius centered at latitude 27°28′42.60″ N and longitude 97°00′48.43″ W. Any person interested in applying for the ownership, construction, and operation of a deepwater port within this designated application area must file with MARAD (see **FOR FURTHER INFORMATION CONTACT**) a notice of intent to file an application not later than 60 days after the date of publication of this notice.

Should a favorable record of decision be rendered and license be issued, MARAD may include specific conditions related to design, construction, operations, environmental permitting, monitoring and mitigations, and financial responsibilities. If a license is issued, USCG in coordination with other agencies as appropriate, would oversee the review and approval of engineering, design, and construction; operations/security procedures; waterways management and regulated navigation areas; maritime safety and security requirements; risk assessment; and compliance with domestic and international laws and regulations for vessels that may call on the port. The deepwater port would be designed, constructed and operated in accordance with applicable codes and standards.

In addition, installation of pipelines and other structures may require permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, which are administered by the USACE.

Permits from the EPA may also be required pursuant to the provisions of the Clean Air Act, as amended, and the Clean Water Act, as amended.

Summary of the Application

TGTI is proposing to construct, own, and operate a deepwater port terminal in the Gulf of Mexico to export domestically produced crude oil. Use of the DWP would include the loading of various grades of crude oil at flow rates of up to 60,000 barrels per hour (bph). Approximately eight Very Large Crude Carrier (VLCC) vessels (or equivalent volumes) would be loaded per month from the proposed deepwater port. Loading of one VLCC vessel is expected to take 48 hours, including vessel approach, mooring, cargo transfer, and vessel departure.

The overall project would consist of three distinct, but interrelated components: (1) The ''offshore'' component; (2) the ''inshore'' component; and (3) the ''onshore'' component.

The proposed deepwater port (offshore component) would be located approximately 12.7 nautical miles off the coast of North Padre Island (Kleberg County, TX) and consists of 14.71 miles of two new parallel 30-inch diameter crude oil pipelines, which terminate at a single point mooring (SPM) buoy. The SPM buoy system would be positioned in water depths of approximately 93 feet and consist of a pipeline end manifold, catenary anchor leg mooring system, and other associated equipment. The SPM would be located in BOEM lease block number 823 at latitude 27°28′42.60″ N and longitude 97°00′48.43″ W.

The inshore components associated with the proposed project include 5.74 miles of two new parallel 30-inch diameter pipelines and onshore valve stations used to connect the onshore project components to offshore project components. The inshore portions of the proposed pipeline infrastructure cross the Laguna Madre Bay complex, the Gulf Intracoastal Waterway, and extend across North Padre Island to the mean high tide line located at the interface of North Padre Island and the Gulf of Mexico. The inshore project components include the installation of an onshore valve station on North Padre Island to allow for the isolation of portions of the proposed pipeline infrastructure for servicing, maintenance, and inspection operations.

Onshore components associated with the proposed project include the construction and operation of an onshore storage terminal facility (OSTF), booster station, and approximately 6.36 miles of two new parallel 30-inch diameter pipelines located within Nueces and Kleberg Counties, TX. The OSTF would occupy approximately 150 acres in Nueces County, TX and would consist of all necessary infrastructure to receive, store, measure and transport crude oil through the proposed inshore and deepwater port pipeline infrastructure. The proposed booster station would occupy approximately 8.25 acres in Kleberg County, TX and would consist of the necessary pumping infrastructure to support the transport of crude oil from the OSTF to the deepwater port. Onshore pipeline infrastructure would extend from the OSTF to the landward side of the mean high tide line located at the interface of the western shoreline of the Laguna Madre.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its administrative and rulemaking processes. DOT posts comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 33 U.S.C. 1501, *et seq.;* 49 CFR 1.93(h))

Dated: July 31, 2018.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2018–16673 Filed 8–3–18; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF VETERANS AFFAIRS

Disciplinary Appeals Board Panel

AGENCY: Department of Veterans Affairs

ACTION: Notice with request for comments.

SUMMARY: Section 203 of the Department of Veterans Affairs Health Care Personnel Act of 1991 (Pub. L. 102–40), dated May 7, 1991, revised the disciplinary grievance and appeal procedures for employees. It also required the periodic designation of employees of the Department who are qualified to serve on Disciplinary Appeals Boards. These employees constitute the Disciplinary Appeals Board Panel from which Board members in a case are appointed. This notice announces that the roster of employees on the Panel is available for review and comment. Employees, employee organizations, and other interested parties shall be provided, without charge, a list of the names of employees on the Panel upon request and may submit comments concerning the suitability for service on the Panel of any employee whose name is on the list.

DATES: Names that appear on the Panel may be selected to serve on a Board or as a grievance examiner after September 5, 2018.

ADDRESSES: Requests for the list of names of employees on the Panel and written comments may be directed to: Secretary of Veterans Affairs, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Requests and comments may also be faxed to (202) 495–5200.

FOR FURTHER INFORMATION CONTACT: Jennifer Hayek, Employee Relations & Performance Management Service, Office of Human Resources Management, Department of Veterans Affairs, 810 Vermont Avenue NW, Mailstop 051, Washington, DC 20420. Ms. Hayek may be reached at (440) 525–5493.

SUPPLEMENTARY INFORMATION: Public Law 102–40 requires that the

availability of the roster be posted in the **Federal Register** periodically and not less than annually.

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. Jacquelyn Hayes-Byrd, Acting Chief of Staff, Department of Veterans Affairs, approved this document on July 30, 2018, for publication.

Dated: August 1, 2018.

Luvenia Potts,

Program Specialist, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2018–16759 Filed 8–3–18; 8:45 am]

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FEDERAL REGISTER

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Part II

Federal Reserve System

12 CFR Part 252
Single-Counterparty Credit Limits for Bank Holding Companies and Foreign Banking Organizations; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 252

[Regulation YY; Docket No. R–1534]

RIN 7100–AE 48

Single-Counterparty Credit Limits for Bank Holding Companies and Foreign Banking Organizations

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule.

SUMMARY: The Board is adopting a final rule (final rule) to establish single-counterparty credit limits for bank holding companies and foreign banking organizations with $250 billion or more in total consolidated assets, including any U.S. intermediate holding company of such a foreign banking organization with $50 billion or more in total consolidated assets, and any bank holding company identified as a global systemically important bank holding company under the Board's capital rules. The final rule implements section 165(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires the Board to impose limits on the amount of credit exposure that such a bank holding company or foreign banking organization can have to an unaffiliated company in order to reduce the risks arising from the company's failure.

DATES: The final rule is effective October 5, 2018.

FOR FURTHER INFORMATION CONTACT: Laurie S. Schaffer, Associate General Counsel, (202) 452–2272, Benjamin W. McDonough, Assistant General Counsel, (202) 452–2036, Pamela G. Nardolilli, Special Counsel, (202) 452–3289, Christopher G. Callanan, Senior Attorney, (202) 452–3594, or Lucy O. Chang, Senior Attorney, (202) 475–6331, Legal Division; or Arthur Lindo, Deputy Director, (202) 452–2695, or Jeffery Zhang, Economist, (202) 736–1968, Division of Supervision and Regulation; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For the hearing impaired only, Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Background

In March 2016, the Board invited public comment on a notice of proposed rulemaking (''proposal'' or ''proposed rule'') to establish single-counterparty credit limits for domestic and foreign bank holding companies with $50 billion or more in total consolidated assets.[1] The proposed rule would have implemented section 165(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which requires the Board to establish limits on the amount of credit exposure that such a U.S. or foreign holding company can have to an unaffiliated company in order to reduce the risks arising from the company's failure. The March 2016 notice of proposed rulemaking followed earlier proposals to implement section 165(e) for U.S. and foreign banking organizations (FBOs).[2]

During the 2007–2009 financial crisis, some of the largest financial firms in the world collapsed or experienced material financial distress. Counterparties of failing firms were placed under severe strain when the failing firm could not meet its financial obligations, in some cases resulting in the counterparties' inability to meet their own financial obligations. Similarly, weakened financial firms came under increased stress when counterparties with large exposures to the firms suddenly attempted to reduce those exposures.

As demonstrated in the crisis, interconnectivity among major financial companies poses risks to the financial stability of the global financial system. The effect of a large financial institution's failure or near collapse is transmitted and amplified by the interconnectedness of large, systemically important firms—that is, the degree to which they extend each other credit and serve as counterparties to one another. Financial distress at a banking organization may materially raise the likelihood of distress at other firms, given the network of bilateral credit exposures between large, systemically important firms throughout the financial system. Accordingly, a large financial firm's systemic risk is likely to be related directly to its interconnectedness vis-à-vis other financial institutions and the financial sector as a whole. This interconnectedness of financial firms also creates the potential for an increase in the likelihood of distress at non-financial firms that are dependent upon financial firms for funding.

The financial crisis also revealed shortcomings in the U.S. regulatory approach to credit exposure limits, which limited only a portion of the interconnectedness among large financial companies. For example, certain commercial banks and U.S. branches and agencies of foreign banking organizations were subject to single-borrower lending and investment limits. However, these limits often excluded credit exposures generated by derivatives and some securities financing transactions, and the limits did not apply at the consolidated holding company level.[3]

As noted, section 165(e) of the Dodd-Frank Act (section 165(e)) requires the Board to establish single-counterparty credit limits (SCCL) for large U.S. and foreign bank holding companies and nonbank financial companies, in order to limit the risks that the failure of any

[1] *See* 81 FR 14328 (Mar. 16, 2016).

[2] 77 FR 594 (Jan. 5, 2012); 77 FR 76628 (Dec. 28, 2012).

[3] Section 610 of the Dodd-Frank Act amended the term ''loans and extensions of credit'' for purposes of the lending limits applicable to national banks to include any credit exposure arising from a derivative transaction, repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction. *See* Dodd-Frank Act, Pub. L. 111–203, section 610, 124 Stat. 1376, 1611 (2010), codified at 12 U.S.C. 84(b). As discussed in more detail below, these types of transactions also are subject to the single-counterparty credit limits of section 165(e). 12 U.S.C. 5365(e)(3).

individual firm could pose to these firms.[4] In particular, section 165(e) prohibits such firms from having credit exposure to any unaffiliated company that exceeds 25 percent of the capital stock and surplus of the firm.[5] The Board is authorized to establish a lower amount to mitigate the risks to the financial stability of the United States.[6]

Credit exposure to a company is defined in section 165(e) to mean all extensions of credit to the company, including loans, deposits, and lines of credit; all repurchase agreements, reverse repurchase agreements, and securities borrowing and lending transactions with the company (to the extent that such transactions create credit exposure for the company); all guarantees, acceptances, and letters of credit (including endorsement or standby letters of credit) issued on behalf of the company; all purchases of, or investments in, securities issued by the company; counterparty credit exposure to the company in connection with derivative transactions between the covered company and the company; and any other similar transaction that the Board, by regulation, determines to be a credit exposure for purposes of section 165(e).[7]

Section 165(e) authorizes the Board to issue such regulations and orders, including definitions consistent with section 165(e), as may be necessary to administer and carry out the section.[8] In addition, it authorizes the Board to exempt transactions, in whole or in part, from the definition of the term ''credit exposure,'' if the Board finds that the exemption is in the public interest and consistent with the purposes of section 165(e).[9]

The framework of SCCL established by the final rule is similar to and builds upon existing credit exposure limits for depository institutions, including the investment securities limits and the lending limits imposed on certain depository institutions by the National Bank Act and Federal Reserve Act.[10] A national bank generally is limited, subject to certain exceptions, in the total amount of investment securities of any one obligor that it may purchase for its own account to no more than 10 percent of its capital stock and surplus.[11] In addition, a national bank's total outstanding loans and extensions of credit to any one borrower may not exceed 15 percent of the bank's capital stock and surplus, plus an additional 10 percent of the bank's capital stock and surplus, if the amount that exceeds the bank's 15 percent general limit is fully secured by readily-marketable collateral.[12] U.S. branches of foreign banks are subject to similar limits, albeit measured against the capital stock and surplus of the top-tier parent foreign banking organization.[13]

The SCCL in section 165(e) operate separately and independently from the investment securities limits and lending limits in the National Bank Act and other statutes, and a covered company or covered foreign entity must comply with all of the limits that are applicable to it and its subsidiaries. Under the final rule, a covered company would be required to ensure that it meets the SCCL on a consolidated basis. Because of this, the final rule could affect the amount of a subsidiary depository institution's loans and extensions of credit, regardless of the subsidiary depository institution's applicable lending limits.

B. Notices of Proposed Rulemakings, General Summary of Comments, and Enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act

The Board received 48 comments, representing approximately 60 parties, on the 2011 proposal on section 165(e) relating to U.S. bank holding companies and 35 comments, representing over 45 organizations, on the 2012 proposed rule relating to FBOs.[14]

In March 2016, the Board re-proposed a rule to implement section 165(e)[15] in order to take account of (1) the large volume of comments received on the earlier proposed rules; (2) the revised lending limits rules applicable to national banks;[16] (3) the introduction by the Basel Committee on Banking Supervision (BCBS) of a large exposures standard (large exposure standard), which establishes an international standard for the maximum amount of credit exposure that an internationally active bank is permitted to have to a single counterparty;[17] and (4) the results of quantitative impact studies and related analysis conducted by Board staff to assess the impact of section 165(e).

The Board received approximately 30 comments in response to the 2016 proposed rule. Comments were received from a wide range of individuals, banking organizations, industry and trade groups representing banking, insurance, and the broader financial services industry, and public interest groups. Board staff also met with a number of commenters to discuss issues relating to the proposed rule, and summaries of these meetings may be found on the Board's public website.

Certain commenters expressed support for the broader goals of the proposed rule to limit single-counterparty concentrations at large financial companies. A number of commenters expressed concerns with particular aspects of the proposed rules.

The Board received a large number of comments on the scope of application of the proposal: How to define a ''covered company'' and a ''counterparty,'' terms that form the basis for the application of the credit exposure limits under the proposed rules. The proposal would have defined a covered company to include all of its subsidiaries. ''Subsidiary'' would have been defined to mean a company that is directly or indirectly controlled by that company for purposes of the Bank Holding Company Act of 1956 (BHC Act).[18] The proposal defined a counterparty to include a company and all entities with respect to which the company (1) owns or controls 25 percent or more of a class of voting securities; (2) owns or controls 25 percent or more of the total equity; or (3) consolidates for financial reporting purposes. Commenters urged the Board to adopt a financial consolidation standard to define a ''covered company'' and

[4] *See* 12 U.S.C. 5365(e)(1).

[5] 12 U.S.C. 5365(e)(2).

[6] *See id.*

[7] *See* 12 U.S.C. 5365(e)(3).

[8] *See* 12 U.S.C. 5365(e)(5).

[9] *See* 12 U.S.C. 5365(e)(6). Section 165(e) also authorizes the Board to establish single-counterparty credit limits for nonbank financial companies designated by the Financial Stability Oversight Council (FSOC) for supervision by the Board. The final rule does not at this time apply to any such nonbank financial company. The Board intends to consider whether to apply similar requirements to these companies separately by rule or order at a later time.

[10] *See, e.g.,* 12 U.S.C. 24(Seventh); 12 U.S.C. 84; 12 CFR 1 and 32; *see also* 12 U.S.C. 335 (applying the provisions of 12 U.S.C. 24(Seventh) to state member banks).

[11] *See* 12 U.S.C. 24(Seventh); 12 CFR 1.3.

[12] *See* 12 U.S.C. 84; 12 CFR 32.3. State-chartered banks, as well as state- and federally-chartered savings associations, also are subject to lending limits imposed by relevant state and federal law.

[13] *See* 12 CFR 211.28.

[14] All of the comments are available on the Board's public website. A summary of comments received on the 2011 and 2012 proposal appears in the March 2016 re-proposal. *See* 81 FR at 14329–30.

[15] *See* 81 FR at 14328.

[16] *See* 78 FR 37930 (June 25, 2013).

[17] Basel Committee on Banking Supervision, Supervisory framework for measuring and controlling large exposures (April 2014), *http://www.bis.org/press/p140415.htm.*

[18] *See* proposed rule § 252.71(cc). ''Control'' is defined in the Board's Regulation YY by reference to the BHC Act. *See* 12 CFR 252.2(g); *see also* 12 U.S.C. 1841 *et seq.* The BHC Act generally defines control to mean ownership or control of 25 percent or more of any class of voting securities; control in any manner over the election of a majority of the directors; or exercise of a controlling influence over management or policies. 12 U.S.C. 1841(a)(2).

''counterparty.'' Commenters contended that moving to a financial consolidation standard would capture true exposure risks and reduce the complexity and compliance costs of the final rule.

In addition, the proposal would have required a covered company to aggregate one or more counterparties that were economically interdependent with or tied to the counterparty through certain control relationships. A few commenters expressed support for this aspect of the proposal. The large majority of commenters, however, contended that these tests were highly subjective and could be costly and burdensome to implement in practice because the tests relied on information that might be difficult for a covered company to acquire from its counterparty. To mitigate these concerns, commenters requested that the Board adopt a threshold for counterparty exposures (for example, the control relationship test should only apply if a counterparty exposure exceeds 5 percent of the covered company's tier 1 capital). Certain commenters urged the Board to use a financial consolidation standard to define a counterparty and not to include any additional tests to aggregate one or more counterparties under the final rule.

Commenters also objected to the inclusion of a natural person together with members of the person's immediate family as a counterparty under the proposed rule. Commenters argued that the Board should exclude natural persons from the final rule's definition of counterparty, suggesting that it is unlikely that a natural person aggregated with members of its immediate family would ever approach the applicable SCCL and that collecting information for this test would be burdensome and unjustified on a cost-benefit basis. Commenters recommended that, at a minimum, the Board include a materiality threshold for exposures to a natural person to be subject to the requirements of the final rule and that the final rule provide a longer transition period for compliance with the requirements if natural persons are included in the final rule.

Certain commenters questioned whether the limit of 25 percent of tier 1 capital that would have applied to a large covered company (with $250 billion or more in total consolidated assets or $10 billion or more in on-balance-sheet foreign exposures) was authorized under the statute. Commenters also questioned the basis for the 15 percent of tier 1 capital limit for major covered companies' exposures to major counterparties. In particular, commenters expressed the view that this lower limit may not be necessary in light of other post-crisis financial regulatory reforms adopted by the Board. By contrast, some commenters argued that the proposal would continue to permit an excessively high level of exposure. These commenters argued the proposed limit of 15 percent of a major covered company's tier 1 capital for exposures of the largest financial institutions was too low and did not take into account the greater social costs of the failure of a systemically important institution as compared to a smaller institution.

A number of commenters expressed concern with the Board's approach to measuring exposures resulting from securities financing transactions, including securities lending transactions, securities borrowing transactions, repurchase agreements, and reverse repurchase agreements. Under the proposal, a covered company would have been required to measure credit exposure to a counterparty in a securities financing transaction as the value of any cash and securities transferred to that counterparty (adjusted upwards by a risk-based add-on) minus the value of any cash and securities received from that counterparty as collateral (adjusted downwards by a risk-based haircut). Commenters contended that the proposed rule's application of collateral volatility haircuts on both sides of the transaction did not recognize the risk-mitigating value of positive correlations between securities on loan and securities received as collateral. Commenters urged the Board to adopt a more risk-sensitive standardized approach to measuring securities financing transactions that has recently been finalized by the BCBS or afford securities financing transactions treatment similar to that provided for derivative transactions in the proposal (that is, use of any methodology permitted under the Board's capital rules), consistent with the large exposure standard.[19] Commenters noted that the significantly more risk-sensitive treatment of derivative transactions in the proposed rule would create an incentive for covered companies and their counterparties to engage in derivative transactions that replicate the economics of a securities financing transaction.

The proposal contained a section addressing how investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles would be treated. This section of the proposal specified the circumstances under which a covered company would be required to look through the vehicle to the underlying exposures. A number of commenters raised concerns about the breadth and scope of the look-through approach and requested additional clarity around these provisions. The commenters recommended that the Board limit the application of these provisions to only certain types of exposures (for example, investments in the securitization vehicle). Certain commenters also requested that the Board not require aggregation of any exposure to a third party connected to a securitization vehicle, investment fund, or other special purpose vehicle.

Commenters generally expressed support for certain of the exemptions and exclusions contained in the proposal, such as the exemption for trade exposures to qualifying central counterparties, the exclusion of certain sovereign issuers from the ''counterparty'' definition, and the exemption for intraday exposures. Some commenters requested additional exemptions in the final rule, including exemptions for short-dated exposures arising from traditional custody services. A few commenters requested that the Board maintain flexibility in the final rule to provide additional exemptions. The Federal Home Loan Banks urged the Board to exempt credit exposures to the Federal Home Loan Banks. Commenters also requested a longer initial compliance period.

A number of commenters asked the Board to consider the costs and benefits of the proposed rule. Commenters argued that certain aspects of the proposed rule would make it difficult to implement and that the Board should evaluate these aspects of the proposal on a cost-benefit basis.

As required under the Dodd-Frank Act at the time, the proposed rule would have applied the SCCL to any U.S. BHC or FBO with $50 billion or more in total consolidated assets. The narrower scope of application of the final rule reflects the passage of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA).[20] Subject to an eighteen-month transition period, EGRRCPA recently amended section 165 of the Dodd-Frank Act to restrict the scope of application of most enhanced prudential standards (including SCCL) to U.S. global systemically important banking organizations (GSIBs) and to

[19] *See* Basel Committee on Banking Supervision, Basel III: Finalising post-crisis reforms (Dec. 2017), *https://www.bis.org/bcbs/publ/d424.pdf.*

[20] Public Law 115–174, section 401, 132 Stat. 1296 (2018).

U.S. bank holding companies (BHCs) and FBOs with $250 billion or more in total consolidated assets.[21] Under EGRRCPA, however, the Board may apply an SCCL or any other enhanced prudential standard to U.S. BHCs or FBOs with between $100 billion and $250 billion in total consolidated assets, if the Board makes certain safety and soundness or financial stability findings.

As described below in detail, the Board has modified the proposed rule in response to comments and in light of the enactment of EGRRCPA, while taking into account the need to limit the credit exposure of large financial firms.

C. Overview of the SCCL

Under the final rule, the aggregate net credit exposure of a U.S. GSIB (major covered company) and any bank holding company with total consolidated assets of $250 billion or more (collectively, covered companies) to a single counterparty is subject to one of two credit exposure limits that are tailored to the size and systemic footprint of the firm. As discussed below in more detail, the final rule does not apply to U.S. bank holding companies or FBOs with less than $250 billion in total consolidated assets.[22]

The first limit under the final rule prohibits any covered company that is not a major covered company from having aggregate net credit exposure to an unaffiliated counterparty in excess of 25 percent of its tier 1 capital.

The second limit prohibits any major covered company from having aggregate net credit exposure in excess of 15 percent of its tier 1 capital to a major counterparty and in excess of 25 percent of its tier 1 capital to any other counterparty. A ''major counterparty'' is defined as a global systemically important banking organization or a nonbank financial company supervised by the Board. This framework is consistent with the requirement in section 165(a)(1)(B) of the Dodd-Frank Act that the enhanced standards established by the Board under section 165 increase in stringency based on factors such as the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company.[23] The framework also is consistent with the authorization provided to the Board under section 165(e) to apply a lower limit to the extent necessary to mitigate risks to financial stability.[24] The SCCL applicable to covered companies in the final rule are summarized in Table 1.

TABLE 1—SINGLE-COUNTERPARTY CREDIT LIMITS APPLICABLE TO COVERED COMPANIES

Category of covered company	Applicable credit exposure limit
Covered companies that are not major covered companies.	Aggregate net credit exposure to a counterparty cannot exceed 25 percent of a covered company's tier 1 capital.
Major covered companies (U.S. GSIBs)	Aggregate net credit exposure to a *major counterparty* cannot exceed 15 percent of a major covered company's tier 1 capital. Aggregate net credit exposure to any *other counterparty* cannot exceed 25 percent of a major covered company's tier 1 capital.

As discussed below, tier 1 capital provides a superior capital base relative to capital stock and surplus as it has greater loss-absorbing capacity. In addition, the 15 percent of tier 1 capital limit is based on the heightened systemic risk presented by exposures between GSIBs.

In contrast to the proposal, the final rule applies only to FBOs with $250 billion or more in total global consolidated assets, and their subsidiary U.S. intermediate holding companies (IHCs) with total assets of $50 billion or more (together, ''covered foreign entities''). The proposal would have applied the SCCL to the combined U.S. operations of any FBO with $50 billion or more in total global consolidated assets and separately to any FBO's U.S. IHC with $50 billion or more in total consolidated assets. Unlike in the proposal, an FBO subject to the final rule can comply with the combined U.S. operations SCCL by certifying to the Board that it meets, on a consolidated basis, an SCCL established by its home country supervisor that is consistent with the large exposure standard. The SCCL for U.S. IHCs that are covered foreign entities are largely unchanged from the proposal and fall into three tailored tiers. These limits are summarized in Table 2 below.

TABLE 2—SINGLE-COUNTERPARTY CREDIT LIMITS APPLICABLE TO U.S. IHCS

Category of U.S. IHC	Applicable credit exposure limit
U.S. IHCs that have total consolidated assets of at least $50 billion but less than $250 billion.	Aggregate net credit exposure of the U.S. IHC to a counterparty cannot exceed 25 percent of the IHC's total regulatory capital plus the balance of its allowance for loan and lease losses (ALLL) not included in tier 2 capital under the capital adequacy guidelines in 12 CFR part 252.
U.S. IHCs that have $250 billion or more in total consolidated assets but are not major U.S. IHCs.	Aggregate net credit exposure of the U.S. IHC to a counterparty cannot exceed 25 percent of the IHC's tier 1 capital.

[21] EGRRCPA raised the asset thresholds for application of enhanced prudential standards under section 165 of the Dodd-Frank Act in two stages. Immediately on the date of enactment of EGRRCPA, bank holding companies with total consolidated assets less than $100 billion (other than any bank holding company that is a U.S. GSIB under the Board's capital rules) were no longer subject to section 165. Eighteen months after the date of enactment of EGRRCPA, bank holding companies with total consolidated assets less than $250 billion (other than any U.S. GSIB) will no longer be subject to section 165 of the Dodd-Frank Act, unless the Board determines, by order or regulation, to apply any enhanced prudential standard to such firms after making certain statutory findings. *See* section 401 of EGRRCPA.

[22] The final rule applies to a U.S. intermediate holding company (IHC) subsidiary of such an FBO that has $50 billion or more in total consolidated assets. In some cases, these U.S. intermediate holding companies also may be bank holding companies.

[23] 12 U.S.C. 5365(a)(1)(B); *see also* 12 U.S.C. 5365(a)(2)(A).

[24] 12 U.S.C. 5365(e); *see* Board of Governors of the Federal Reserve System, Calibrating the Single-Counterparty Credit Limit between Systemically Important Financial Institutions (Mar. 4, 2016), *https://www.federalreserve.gov/aboutthefed/boardmeetings/sccl-paper-20160304.pdf.*

TABLE 2—SINGLE-COUNTERPARTY CREDIT LIMITS APPLICABLE TO U.S. IHCS—Continued

Category of U.S. IHC	Applicable credit exposure limit
U.S. IHCs that have $500 billion or more in total consolidated assets (major U.S. IHCs).	Aggregate net credit exposure of a major U.S. IHC to a *major counterparty* cannot exceed 15 percent of the IHC's tier 1 capital. Aggregate net credit exposure of a major U.S. IHC to any *other counterparty* cannot exceed 25 percent of the IHC's tier 1 capital.

The SCCL in the final rule apply to the credit exposures of a covered company on a consolidated basis, including any subsidiaries, to any unaffiliated counterparty. As discussed below, subsidiary of a covered company under the final rule is defined to mean a company that is consolidated on the financial statements of the covered company.[25] A counterparty includes a company (including any consolidated affiliates of the company, as discussed below); a natural person (including the person's immediate family) where the exposure to the natural person exceeds 5 percent of the covered company's tier 1 capital; a U.S. state (including all of its agencies, instrumentalities, and political subdivisions); certain foreign sovereign entities (including their agencies and instrumentalities); and political subdivisions of foreign sovereign entities (including their agencies and instrumentalities).

As noted, the SCCL in the final rule apply to a covered company's aggregate net credit exposure, rather than aggregate gross credit exposure, to a counterparty. The key difference between gross credit exposure and net credit exposure is that a company's net credit exposure takes into account any available credit risk mitigants—for example, collateral, guarantees, credit or equity derivatives, and other hedges—provided the credit risk mitigants meet certain requirements in the rule, as discussed more fully below. To illustrate, if a covered company had $100 in gross credit exposure to a counterparty with respect to a particular credit transaction, and the counterparty pledged collateral with an adjusted market value of $50, the full amount of which qualified as ''eligible collateral'' under the final rule, the covered company's net credit exposure to the counterparty on the transaction would be $50, provided that the other $50 would be ''risk-shifted'' to the eligible collateral issuer, as described below.

In order to calculate its aggregate net credit exposure to a counterparty, a covered company first must calculate its gross credit exposure to the counterparty on each credit transaction in accordance with certain valuation and other requirements under the final rule. Second, the covered company must reduce its gross credit exposure amount based on eligible credit risk mitigants to determine its net credit exposure for each credit transaction with the counterparty. Third and finally, the covered company must sum all of its net credit exposures to the counterparty to calculate the covered company's aggregate net credit exposure to the counterparty. It is this final amount, the aggregate net credit exposure, that is subject to the SCCL under the final rule.

The final rule applies a ''risk-shifting'' approach with respect to a credit exposure involving eligible collateral or an eligible guarantor. In general, any reduction in the exposure amount to the original counterparty relating to the eligible collateral or eligible guarantor would result in a dollar-for-dollar increase in exposure to the eligible collateral issuer or eligible guarantor (as applicable). For example, in the case discussed above where a covered company had $100 in gross credit exposure to a counterparty and the counterparty pledged collateral with an adjusted market value of $50, the covered company would have net credit exposure to the counterparty on the transaction of $50 and net credit exposure to the issuer of the collateral of $50. In no case, however, would risk-shifting result in credit exposure to a counterparty that is any larger than the credit exposure being mitigated. As a specific example, in the foregoing example, if the exposure was overcollateralized with $150 in collateral, the exposure to the issuer of the collateral would be capped at $100 while the exposure to the counterparty would be reduced to $0.

In cases where a covered company hedges its exposure to an entity that is not a ''financial entity'' (a non-financial entity) using an eligible credit or equity derivative, and the underlying exposure is subject to the Board's market risk capital rule (12 CFR part 217, subpart F), the covered company must calculate its exposure to the eligible guarantor using a methodology that it is permitted to use under the Board's risk-based capital rules. For these purposes, a ''financial entity'' includes regulated U.S. financial institutions, such as holding companies, insurance companies, broker-dealers, banks, thrifts, and futures commission merchants, as well as foreign banking organizations and non-U.S.-based securities firms and non-U.S.-based insurance companies subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies.[26]

II. SCCL for Covered Companies

A. Key Terminology and Concepts

The terms ''covered company'' and ''counterparty'' form the basis for application of the SCCL in the final rule. The final rule contains modifications from the proposal to these and other definitions in response to concerns raised by commenters.

1. Covered Company and Counterparty

Under the proposal, ''covered company'' would have been defined to mean any bank holding company (other than a foreign banking organization that is subject to subpart Q of the Board's Regulation YY) that has $50 billion or more in total consolidated assets and all of its subsidiaries.[27] The term ''subsidiary'' of a specified company would have been defined under the proposal to mean a company that is directly or indirectly controlled by the specified company.[28] The applicable definition of ''control'' was defined by reference to section 2(a) of the BHC Act.[29]

In addition, the proposal would have defined ''counterparty'' to mean a natural person and members of the

[25] *See* final rule § 252.71(gg).

[26] *See* final rule § 252.71(r).

[27] *See* proposed rule § 252.71(f).

[28] *See* proposed rule § 252.71(cc).

[29] *See* section 252.2(g) of the Board's Regulation YY (12 CFR 252.2(g)). Control under the BHC Act is defined to mean a company (1) owns, controls, or has the power to vote 25 percent or more of any class of voting securities of another company; (2) controls in any manner the election of a majority of trustees of the other company; or (3) the Board determines, after notice and opportunity for hearing, that the company indirectly exercises a controlling influence over the management or policies of the other company. 12 U.S.C. 1841(a)(2).

person's immediate family; a state [30] including all of its agencies, instrumentalities, and political subdivisions (including municipalities); certain foreign sovereign entities and all of their agencies and instrumentalities; and political subdivisions of a foreign sovereign entity such as states, provinces, and municipalities.[31] Under the proposal, a counterparty also would have included any company and all persons that the counterparty (1) owns, controls, or holds with the power to vote 25 percent or more of a class of voting securities; (2) owns, controls, or holds 25 percent or more of the total equity; or (3) consolidates for financial reporting purposes.[32]

The definitions of ''covered company'' and ''counterparty'' were two of the most commented upon aspects of the proposal. A large number of commenters urged the Board to use financial consolidation for aggregating a covered company and its subsidiaries instead of BHC Act control. These commenters argued that a standard based on financial consolidation would bring within the scope of the final rule those exposures that actually put a covered company's capital at risk. Commenters contended that the financial reporting consolidation approach would more accurately capture true economic exposures of covered companies to their counterparties.

Commenters contended that basing the definition of ''covered company'' on control, as defined under the BHC Act, would introduce significant complexity into a covered company's management of its credit limits. This approach also would capture exposures that are not likely to be material to a covered company, including exposures of subsidiaries for which a covered company does not have operational control to actually monitor, measure, and conform credit exposures to the limits of the final rule. Commenters indicated that opportunities to use such a subsidiary to evade the final rule would be limited because a covered company would not exercise operational control of the subsidiary. Some commenters suggested that, to the extent evasion remains a concern, the final rule could include an explicit reservation of authority for the Board to address such concerns, and one commenter suggested the Board could use its supervisory authority to address any potential evasion of the final rule. Commenters also contended that using BHC Act control would impose significant compliance costs to capture risks that are not likely to be material to a covered company (*i.e.,* that compliance costs would exceed the limited incremental risk mitigation benefits).

Commenters also argued that using the BHC Act to define a ''covered company'' could result in some entities being included as part of both the covered company and the counterparty at the same time (*i.e.,* in the case of certain joint venture subsidiaries). Commenters argued that if financial consolidation is not used to define ''covered company,'' the final rule must clarify the treatment of joint ventures that could fall within the scope of being both a covered company and counterparty using BHC Act control. In the alternative to financial consolidation, these commenters suggested certain targeted modifications to the definition of covered company and counterparty to ensure that a joint venture that is controlled due to BHC Act control (for example, where the covered company owns 51 percent and the counterparty owns 49 percent) would not be considered both part of a covered company and of a counterparty under the final rule.

Commenters urged that, if the final rule does not adopt a financial consolidation standard to define subsidiaries of a covered company, the final rule should define subsidiaries of covered companies based on a simple percentage ownership test like the 2011 proposal and the counterparty definition (*i.e.,* ownership of 25 percent or more of the voting securities and ownership of 25 percent or more of the total equity). Under either this alternative or reference to BHC Act control, commenters requested categorical exemptions for funds or investments that are not consolidated for financial reporting purposes. In particular, commenters urged the Board to provide exemptions for registered investment companies and foreign public funds including during the seeding period; certain covered funds as defined in section 13 of the BHC Act, also known as the Volcker Rule, and implementing regulations, including during the seeding period; certain merchant banking portfolio companies; companies acquired in the ordinary course of collecting a debt previously contracted; small business investment companies and community development investments; and bank collective investment trusts.

Similar to the comments on the definition of covered company, a number of commenters urged the Board to define ''counterparty'' with respect to a company based on financial reporting consolidation and to eliminate the additional tests based on percentage ownership.[33] These commenters asserted that the 25 percent ownership tests added additional and unnecessary complexity to aggregating counterparty exposure and would be inconsistent with the large exposure standard. As with the definition of ''covered company,'' commenters argued that aggregation of connected counterparties based on financial consolidation would capture true connected exposure risks consistent with the purposes of section 165(e) of the Dodd-Frank Act. A few commenters also indicated that financial consolidation would address joint venture issues. Other commenters requested that particular entities not be treated as part of a counterparty for purposes of the final rule even if they would be consolidated with the counterparty, including a sponsored or advised registered fund (*e.g.,* during the seeding period) and special purpose vehicles.

To address the concerns raised by commenters and to reduce the burden of complying with the final rule, the Board has modified the definitions of ''covered company,'' ''counterparty,'' and ''subsidiary,'' and has added a new term ''affiliate.'' The purpose of these modifications is to apply a financial consolidation standard to define both the bank holding companies that are subject to the final rule and to define the counterparty exposures that are subject to the SCCL in the final rule. Under the final rule, a ''subsidiary'' is defined to include a company that is consolidated with the covered company under applicable accounting standards, and an ''affiliate'' is defined to include any subsidiary of the company and any other company that is consolidated with the company under applicable accounting standards.[34] For example, a subsidiary of a covered company under the final rule includes an insured depository institution that the covered

[30] ''State'' would have been defined by reference to the enhanced prudential standards to mean any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands. *See* 12 CFR 252.2(r).

[31] *See* proposed rule § 252.71(e).

[32] *See* proposed rule § 252.71(e)(2). The preamble to the proposal explained that, to the extent that one or more of these conditions are met with respect to a company's relationship to an investment fund or vehicle, exposures to such fund or vehicle would need to be aggregated with that counterparty. *See* 81 FR at 14,332.

[33] These commenters also contended that the economic interdependence and control tests to aggregate counterparty exposures should be eliminated as described further below.

[34] *See* final rule § 252.71(b) & (gg).

company consolidates for financial reporting purposes. Similarly, an affiliate of a counterparty under the final rule includes a parent company of the counterparty, as well as any other firm that is consolidated with the counterparty under applicable accounting standards. Applicable accounting standards can include U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards. ''Subsidiary'' and ''affiliate'' would also include a company that is not subject to such principles or standards, if consolidation would have occurred if such principles or standards had applied.[35]

Using financial accounting standards for purposes of the final rule, rather than the control test in the BHC Act, should address many of the concerns raised by commenters and serve to reduce burden and complexity and mitigate costs of complying with the requirements of the final rule, without allowing evasion of the SCCL. Although consolidation tests under relevant accounting standards must also be applied on a case-by-case basis, like the proposed rule's control tests, the analysis already has been performed for companies that prepare their financial statements in accordance with relevant accounting standards. For companies that do not prepare these statements, industry participants should be more familiar with the relevant accounting standards and tests, and they will be less burdensome to apply. Additionally, the accounting consolidation standard typically results in consolidation at a higher level of ownership than the 25 percent voting interest standard that applies under the BHC Act control test, which is responsive to commenters' concerns that the proposed definitions were overly inclusive.

This change in the final rule should also address the concerns raised by commenters with respect to investment funds. Investment funds generally are not consolidated with the asset manager other than during the seeding period or other periods in which the manager holds an outsize portion of the fund's interest, although this may depend on the facts and circumstances. During these periods, when a covered company may own up to 100 percent of the ownership interest of an investment fund, the investment fund should be treated as a subsidiary. Similarly, merchant banking portfolio companies and companies held pursuant to debt previously contracted authorities would be treated as part of the covered company if consolidated with the covered company.

Joint ventures that are consolidated with the covered company are treated as part of a covered company even if a counterparty also has an investment in such joint venture. If a covered company invests in a minority-owned joint venture that is not consolidated, the final rule requires the covered company to treat that joint venture as a counterparty and recognize exposures to the joint venture.

The final rule also has adjusted the asset threshold for covered companies. As noted, EGRRCPA raised the threshold, from $50 billion to $250 billion in total consolidated assets, for the application of the SCCL and other enhanced prudential standards to a bank holding company in two stages.[36] EGRRCPA also provides the Board with 18 months to determine whether to apply the SCCL or other enhanced prudential standards to BHCs with between $100 billion and $250 billion in total consolidated assets. Accordingly, the final rule defines a ''covered company'' to mean any U.S. GSIB and any BHC (other than an FBO that is subject to the SCCL under subpart Q of Regulation YY) that has $250 billion or more in total consolidated assets. The Board is developing a comprehensive proposal on application of enhanced prudential standards to U.S. BHCs and FBOs with total consolidated assets of $100 billion but less than $250 billion. In connection with this proposal and other tailoring and implementation efforts related to EGRRCPA, the Board may make amendments to the SCCL framework in this final rule.

Additionally, the final rule maintains the economic interdependence and aggregation due to control relationships for covered companies as described below.[37] These additional tests require a covered company to aggregate counterparties in certain cases and further allow the Board to aggregate counterparties. Specifically, these tests provide for the aggregation of counterparties where the failure, default, insolvency, or material financial distress of one counterparty would cause the failure, default, insolvency, or material financial distress of the other counterparty or due to the presence of significant control relationships.

The final rule retains individuals and certain governmental entities within the definition of a ''counterparty,'' because credit exposures to such entities can create risks to the covered company that are similar to those created by large exposures to companies.[38] The severe distress or failure of an individual, U.S. state or municipality, sovereign entity, or political subdivision of a sovereign entity, could have effects on a covered company that are comparable to those caused by the failure of a financial firm or nonfinancial corporation to which the covered company has a large credit exposure. With respect to sovereign entities, these risks are most acute in the case of sovereigns that present greater credit risk. Therefore, the Board believes that it is appropriate to extend the SCCL to foreign sovereign entities that do not receive a zero percent risk weight under the standardized approach of the Board's risk-based capital rule in the same manner as credit exposures to companies.[39]

The Board is extending the SCCL to individuals, U.S. states and municipalities, and certain foreign sovereigns using two legal authorities. First, under section 165(b)(1)(B) of the Dodd-Frank Act, the Board may impose such additional enhanced prudential standards as the Board of Governors determines are appropriate.[40] Second, under section 5(b) of the BHC Act, the Board may issue such regulations as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.[41] Such purposes include examining the financial, operational, and other risks within the bank holding company system that may pose a threat to (1) the safety and soundness of the bank holding company or of any depository institution subsidiary of the bank holding company; or (2) the stability of the financial system of the United States.[42] The final rule would

[35] *Id.*

[36] This change took effect on the date of enactment of EGRRCPA for U.S. BHCs with total consolidated assets of less than $100 billion, and will take effect 18 months after enactment for all other firms. *See* section 401(d)(1) of EGRRCPA. Notwithstanding this change, the enhanced prudential standards required under section 165, including the SCCL, continue to apply to U.S. GSIBs, regardless of asset size. *See* section 401(f) of EGRRCPA. In addition and as noted, the Board may determine to apply the SCCL, or any other enhanced prudential standard, to U.S. BHCs or FBOs with between $100 billion and $250 billion in total consolidated assets, if the Board makes certain safety and soundness or financial stability findings.

[37] *See* final rule § 252.76.

[38] *See* final rule § 252.71(e); 12 U.S.C. 5365(b)(1)(B)(iv).

[39] *See* final rule § 252.71(e); 12 CFR part 217, subpart D. The final rule would not apply to exposures of a U.S. IHC or of the combined U.S. operations of an FBO to the FBO's home country sovereign entity, regardless of the risk weight assigned to that sovereign entity under the Board's capital rules (12 CFR part 217). *See* section III.D.4 infra.

[40] 12 U.S.C. 5365(b)(1)(B).

[41] 12 U.S.C. 1844.

[42] 12 U.S.C. 1844(c)(2).

help to promote the safety and soundness of a covered company and mitigate risks to financial stability by limiting a covered company's maximum credit exposure to an individual, U.S. state, foreign sovereign entity, or political subdivision of a foreign sovereign entity, and thereby reduce the risk that the failure of such individual or entity could cause the failure or material financial distress of a covered company.

i. Companies as Counterparties

To address the concerns raised by commenters and reduce burden on covered companies, the Board has modified the definition of ''counterparty'' with respect to a company. Under the final rule, a counterparty that is a company includes the company and all its affiliates.[43] As noted, the final rule applies a financial consolidation test with respect to the definition of counterparty to address concerns raised by commenters and to reduce the cost of complying with the final rule for the same reasons as described above with respect to covered company.

ii. Natural Persons as Counterparties

As noted, the proposal would have included in the definition of ''counterparty'' a natural person and members of the person's immediate family as a counterparty. Commenters urged the Board to exclude natural persons from the credit exposure limits of the final rule. These commenters argued that a natural person, even when aggregated with the person's immediate family, would be unlikely to approach 25 percent of a covered company's eligible capital base. Commenters argued that it would be impossible for such exposures to pose the types of systemic interconnectivity risks that the Dodd-Frank Act was meant to address and that section 165(e) prohibits a covered company from having credit exposure to an ''unaffiliated company,'' which indicates that Congress did not intend to cover exposures to natural persons. Further, commenters contended that collecting information that would be required to monitor exposures to natural persons aggregated with their immediate family and developing systems to monitor and track these relationships across millions of individual customers may not be possible and could not be justified on a cost-benefit basis. Commenters suggested that if exposure to a natural person is included in the final rule and required to be aggregated with immediate family members for purposes of the exposure limits under the final rule, a threshold of 5 percent of a covered company's eligible capital base should apply. Commenters pointed out that such a threshold would mitigate the need to engage in an analysis of every individual that might require aggregation and thereby reduce the burden of complying with the final rule.

The final rule continues to cover exposures to natural persons, together with members of the person's immediate family, as counterparties, subject to a threshold discussed below.[44] ''Immediate family'' is defined under the final rule in the same manner as under the proposal to mean the spouse of an individual, the individual's minor children, and any of the individual's children (including adults) residing in the individual's home.[45] To address concerns raised by commenters, the final rule only requires a covered company to aggregate a natural person with members of the person's immediate family if the exposure of the covered company to the natural person exceeds 5 percent of the company's tier 1 capital. This modification should reduce burden and address concerns raised by commenters.

iii. Governmental Entities as Counterparties

a. States

As noted, the proposal would have included a State, collectively with all of its agencies, instrumentalities and political subdivisions (including municipalities) as a counterparty.[46] Commenters argued that the proposal provided no basis for the aggregation of states and political subdivisions, ignored the different credit profiles that exist among a State and its subdivisions, and is at odds with historical default experience. As a result, certain commenters urged the Board to use the economic interdependence and control aggregation tests to determine if a covered company must aggregate its exposures to a State with exposures to its political subdivisions subject to a threshold of 5 percent or 10 percent of eligible capital.[47] These commenters argued that at a minimum, municipal revenue bonds, which are generally issued to finance public projects, should not be aggregated together with a State and its agencies, instrumentalities, and political subdivisions as these bonds are contractually supported by a specific stream of revenue derived from the relevant project, which is expressly recognized in Chapter 9 of the U.S. Bankruptcy Code.

The events that would render a State incapable of repaying a loan or bond would likely be highly correlated to the economic performance of the State and would have similar effects on the revenue streams underlying municipal revenue bonds. Accordingly, the final rule, like the proposal, treats a State and all of its agencies, instrumentalities, and political subdivisions (including any municipalities), collectively, as a counterparty.[48] In addition, the final rule requires that a covered company aggregate municipal revenue bonds with other types of municipal bonds, as well as exposures of the State and its agencies, instrumentalities, and other political subdivisions. Similarly, the Board has declined to adopt a 5 percent threshold for aggregating States with their agencies, instrumentalities, and political subdivisions. The Board believes that a covered company should limits its exposure to such entities to no more than 25 percent of its tier 1 capital given the high likelihood of correlation in the economic performance of these entities.

b. Foreign Sovereigns

The proposal would have included as a counterparty, a foreign sovereign entity and all of its agencies and instrumentalities (not including any political subdivision) that is not assigned a zero percent risk weight under the standardized approach in the Board's capital rules (12 CFR part 217, subpart D).[49] In addition, under the proposal, a covered company would have been required to treat a political subdivision of a foreign sovereign entity, together with its agencies and instrumentalities, as a single counterparty.[50]

A few commenters opposed the exemption for zero risk-weight sovereign exposures on the basis that such exposures can be risky. Other commenters urged that the carve-out for exposures to zero risk-weight foreign sovereign entities should be extended to their zero risk-weight public sector entities (PSEs), because they similarly pose little risk of default, and this

[43] *See* final rule § 252.71(e)(2).

[44] *See* final rule § 252.71(e).

[45] *See* final rule § 252.71(u).

[46] *See* 12 CFR 252.2(r).

[47] The economic interdependence and control aggregation tests are described further in Section II.F *infra.*

[48] *See* final rule § 252.71(e)(3).

[49] *See* proposed rule § 252.71(e)(4). ''Sovereign entity'' would have been defined under the proposal to mean a central national government or an agency, department, ministry, or central bank, but not including any political governmental subdivision such as a state, province or municipality. *See* proposed rule § 252.71(bb).

[50] *See* proposed rule § 252.71(e)(5).

treatment would align the treatment of such PSEs with the determination of risk weights under the risk-based capital rules.

Some commenters urged the Board not to aggregate foreign sovereign entities with their agencies and instrumentalities. These commenters recommended an approach that foreign sovereign entities only be aggregated with their agencies and instrumentalities if the entities meet the economic interdependence test, including the 5 percent of a covered company's eligible capital base threshold.

One commenter argued that the final rule should exempt exposures of foreign subsidiaries of covered companies to the respective sovereign entity of the jurisdiction in which such subsidiary is incorporated, regardless of the risk weight assigned to the sovereign entity. This commenter argued that foreign subsidiaries of covered companies need to retain these exposures as part of the transactions in a host country in order to manage their liquidity risk, to have access to intra-day liquidity facilities provided by central banks, and to have collateral to pledge at local central counterparties. Finally, this commenter urged the Board to treat each political subdivision of a foreign sovereign entity as a separate counterparty from any other political subdivision, as is the case for U.S. states, and urged that entities owned by a foreign government with their own revenue sources and without government guarantees should be treated as different counterparties since each poses its own credit risk characteristics.

The final rule retains the proposed approach to sovereign entities without modification. The final rule continues to include certain governmental entities within the definition of a ''counterparty'' because credit exposures to such entities create risks to the covered company that are similar to those created by large exposures to companies. The severe distress or failure of a sovereign entity could have effects on a covered company that are comparable to those caused by the failure of a financial firm or nonfinancial corporation to which the covered company has a large credit exposure. These risks are most acute in the case of sovereign entities that present greater credit risk, as evidenced by the risk weight that applies to the sovereign entity under the Board's capital rules.

In response to commenters who requested that the Board treat each political subdivision of a foreign sovereign entity as a separate counterparty from any other political subdivision, as is the case for the states of the U.S., the Board is confirming that each political subdivision of a foreign sovereign entity (together with any agencies and instrumentalities of the political subdivision, collectively) would be treated as a separate counterparty.[51] This treatment is appropriate because the events that would render a political subdivision incapable of repaying a loan or bond would likely be highly correlated to the economic performance of the agencies and instrumentalities within the political subdivision.

2. Major Company and Major Counterparty

The requirements of the proposal would have provided that no ''major covered company,'' defined as a covered company that is a U.S. global systemically important banking organization and all of its subsidiaries, could have aggregate net credit exposure to a major counterparty in excess of 15 percent of the major covered company's tier 1 capital.[52] A ''major counterparty'' was defined as (1) any major covered company and all of its subsidiaries, collectively; (2) any foreign banking organization and all of its subsidiaries, collectively, that would be considered a global systemically important foreign banking organization; and (3) any nonbank financial company supervised by the Board.[53]

Under the proposal, a foreign banking organization would have been considered to be a global systemically important foreign banking organization if (1) the foreign banking organization has the characteristics of a global systemically important banking organization under the global methodology; or (2) the Board, using any relevant information determines that the foreign banking organization would be a GSIB under the global methodology; that the top-tier foreign banking organization, if it were subject to the Board's capital rules would be identified as a GSIB; or that the U.S. IHC, if it were subject to the Board's capital rules, would be identified as a GSIB.

No comments were received on the definition of ''major covered company'' under the proposal. In terms of the identification of a ''major counterparty,'' commenters urged the Board to make this determination by reference to the annual FSB Report listing GSIBs identified by the BCBS.[54] Commenters indicated this approach to identifying major counterparties would harmonize with the BCBS approach and allow reliance upon and integration with pre-existing data sources.

The methodology in the Board's GSIB surcharge rule identifies the most systemically important U.S. banking organizations.[55] This methodology evaluates a banking organization's systemic importance on the basis of its size, interconnectedness, cross-jurisdictional activity, substitutability, and complexity. The firms that score highest on these attributes are classified as GSIBs. While the GSIB surcharge rule itself applies only to U.S bank holding companies, its methodology is equally well suited to evaluating the systemic importance of foreign banking organizations. Moreover, the method 1 methodology in the GSIB surcharge rule for identifying GSIBs is consistent with the methodology developed by the BCBS to identify GSIBs; foreign jurisdictions collect information from banking organizations in connection with that framework that parallels the information collected by the Board for purposes of the Board's GSIB surcharge rule.

Given that the global methodology and the method 1 methodology in the GSIB surcharge rule to identify GSIBs are virtually identical, the two methodologies should lead to the same outcomes, and the requirements in the final rule to identify whether a foreign banking organization is a GSIB should entail minimal additional burden for foreign banking organizations. Accordingly, the final rule generally adopts the same methodology as the proposal for determining whether a foreign banking organization and all of its subsidiaries, collectively, would be considered a global systemically important foreign banking organization, with minor changes to clarify that this determination applies at the top-tier foreign banking organization.[56]

The final rule applies certain notice requirements to foreign banking organizations subject to the final rule. First, each top-tier foreign banking organization that controls a U.S. IHC is required to submit to the Board by

[51] *See* final rule § 252.71(e)(5).

[52] *See* proposed rule § 252.72(c).

[53] *See* proposed rule § 252.71(v).

[54] The Financial Stability Board maintains and periodically publishes a list of entities that have the characteristics of a global systemically important banking organization on its website, *http://www.fsb.org.*

[55] *See* 12 CFR part 217, subpart H.

[56] ''Top-tier foreign banking organization,'' with respect to a foreign banking organization, means the top-tier foreign banking organization or, alternatively, a subsidiary of the top-tier foreign banking organization designated by the Board. 12 CFR 252.2(aa).

January 1 of each calendar year notice of whether the home country supervisor (or other appropriate home country regulatory authority) of the top-tier foreign banking organization of the U.S. IHC has adopted standards consistent with the global methodology. In addition, these firms are required to provide notice of whether the top-tier foreign banking organization prepares the indicators used by the global methodology to identify a banking organization as a global systemically important banking organization and, if it does, whether the top-tier foreign banking organization has determined that it has the characteristics of a global systemically important banking organization under the global methodology. This section also provides that a top-tier foreign banking organization, which controls a U.S. IHC and prepares or reports for any purpose the indicator amounts necessary to determine whether the top-tier foreign banking organization is a global systemically important banking organization under the global methodology, must use the data to determine whether the top-tier foreign banking organization has the characteristics of a global systemically important banking organization under the global methodology. These requirements mirror requirements in other Board regulations to identify foreign GSIBs, and an FBO is not expected to provide separate notice to the Board for purposes of the final rule if the FBO has already provided notice related to other regulatory requirements.[57]

3. Aggregate Net Credit Exposure

As noted, aggregate net credit exposure is the credit exposure amount to which the SCCL apply. The proposal would have defined aggregate net credit exposure to mean the sum of all net credit exposures of a covered company to a single counterparty. Under the proposal, ''covered company'' would have been defined to include all of the company's subsidiaries (that is, companies that were under common control of the covered company for purposes of section 2 of the BHC Act).[58] As noted, the definitions of ''covered company'' and ''subsidiary'' in the final rule have been revised to incorporate financial consolidation principles, and ''subsidiary'' is no longer part of the definition of ''covered company.''

Under the final rule, ''aggregate net credit exposure'' is defined to mean the sum of all net credit exposures of a covered company and its subsidiaries to a single counterparty as calculated under the final rule.[59] The purpose of this modification is to make clear that, notwithstanding the changes to the definition of ''covered company'' and ''subsidiary'' from the proposal to the final rule, a covered company must still aggregate exposures of its subsidiaries for purposes of the final rule.

4. Financial Entity

Under the proposal, a covered company would not have been required to include the notional amount of an eligible credit or equity derivative for a hedged transaction where the counterparty is not a financial entity. A ''financial entity'' would have included regulated U.S. financial institutions, such as insurance companies, broker-dealers, bank holding companies, banks, thrifts, and futures commission merchants, as well as foreign banking organizations and certain non-U.S.-based securities firms or non-U.S.-based insurance companies.[60] A ''financial entity'' also would have included a company whose primary business includes the management of financial assets, lending, factoring, leasing, provision of credit enhancements, securitization, investments, financial custody, central counterparty services, proprietary trading, insurance, and other financial services.[61]

In order to achieve additional clarity, the definition of ''financial entity'' in the final rule has been modified from the proposal to provide a list of discrete entities that would constitute financial entities for purposes of the final rule.[62] In developing this definition of ''financial entity,'' the Board sought to provide certainty and clarity to covered companies regarding the types of financial firms that would require notional amount treatment of eligible credit and equity derivatives and those that would not (that is, where the counterparty on the underlying hedged transaction is not a financial entity). The approach in the final rule is intended to strike a balance between the desire to capture all financial entities, without being overly broad and capturing commercial firms and sovereign entities.

5. Eligible Collateral

Under the proposal, ''eligible collateral'' would have been defined to include cash on deposit with a covered company (including cash held for the covered company by a third-party custodian or trustee); debt securities (other than mortgage- or asset-backed securities) that are bank-eligible investments and that have an investment grade rating; equity securities that are publicly traded; or convertible bonds that are publicly traded.[63] Section 252.74 of the proposal explained how eligible collateral would have been taken into account in the calculation of net credit exposure.[64]

A number of commenters argued that the list of ''eligible collateral'' should be consistent with the definition of ''financial collateral'' under the Board's regulatory capital rules and with the large exposure standard. In particular, these commenters requested that the final rule should include as ''eligible collateral'' gold, any long- or short-term debt securities that are not resecuritization exposures and that are investment grade (including mortgage- or asset-backed securities), and money market fund shares and other mutual fund shares if a price of such shares is publicly quoted daily.

As requested by certain commenters, the final rule makes clear that cash in a foreign currency or U.S. dollars is an acceptable form of eligible collateral and that cash held by a third-party custodian or trustee may be held inside or outside the United States. For any asset to count as eligible collateral under the final rule, as under the proposal, the covered company generally is required to have a perfected, first priority security interest in the collateral or the legal equivalent thereof, if outside of the United States.

In response to comments, the Board has added gold bullion to the list of eligible collateral. The Board has declined to add certain other types of collateral such as mortgage-backed securities (MBS) and shares in money market mutual funds (MMMF) as requested by commenters even though these collateral types are recognized as eligible collateral in the Board's capital rules. The Board has decided to limit the scope of eligible collateral to restrict those collateral types that would be likely to suffer from a bout of illiquidity and general market dislocation in a period of financial stress when a

[57] *See, e.g.,* 12 CFR 252.153(b)(4).

[58] *See* proposed rule § 252.71(f) & (cc); *see also* § 252.2(g) of the Board's Regulation YY, 12 CFR 252.2(g).

[59] *See* final rule § 252.71(c). ''Net credit exposure'' also is a defined term under the final rule. ''Net credit exposure'' is defined to mean, with respect to any credit transaction, the gross credit exposure of a covered company and all its subsidiaries calculated under § 252.73, as adjusted in accordance with § 252.74. *See* final rule § 252.71(aa).

[60] *See* proposed rule § 252.71(q).

[61] *Id.*

[62] 12 CFR 252.71(r).

[63] *See* proposed rule § 252.71(k); *see also* 12 CFR 252.2(p) (defining ''publicly traded'').

[64] *See* proposed rule § 252.74.

covered company may need to monetize collateral quickly in the face of a large counterparty default. This stands in contrast to the purpose of collateral for capital purposes, which serves to offset losses that may arise in a variety of circumstances, not all of which coincide with the default of a significant counterparty or a period of financial distress. Unlike gold bullion, both MMMF and MBS have previously been subject to bouts of illiquidity and dislocation during periods of financial stress due to their complexity and lack of transparency. In light of these structural features of both MBS and MMMF, the final rule does not to recognize these collateral types as eligible collateral.

Accordingly, under the final rule, ''eligible collateral'' generally is defined in a similar manner as in the proposal to include cash in foreign currency or U.S. dollars on deposit with a covered company (including cash held for the covered company by a custodian or trustee that is not an affiliate of the covered company whether inside or outside the United States); debt securities (other than mortgage- or asset-backed securities) that are bank-eligible investments and that have an investment grade rating; equity securities that are publicly traded; convertible bonds that are publicly traded; or gold.[65] Like the proposal, the final rule generally excludes mortgage-backed securities and other asset-backed securities from the definition of ''eligible collateral'' because of concerns that those securities may be more likely than other securities to become illiquid and lose value during periods of financial instability. However, asset-backed securities guaranteed by a U.S. government-sponsored entity, such as Ginnie Mae, Fannie Mae, or Freddie Mac, qualify as eligible collateral under the final rule so long as the entity remains under U.S. government conservatorship. The final rule clarifies that eligible collateral does not include debt securities or equity securities issued by the covered company or its affiliate.

6. Credit Transaction

Consistent with the statutory definition of credit exposure, the proposed rule would have defined ''credit transaction'' to mean, with respect to a counterparty, any (i) extension of credit to the counterparty, including loans, deposits, and lines of credit, but excluding advised or other uncommitted lines of credit; (ii) repurchase or reverse repurchase agreement with the counterparty; (iii) securities lending or securities borrowing transaction with the counterparty; (iv) guarantee, acceptance, or letter of credit (including any confirmed letter of credit or standby letter of credit) issued on behalf of the counterparty; (v) purchase of, or investment in, securities issued by the counterparty; (vi) credit exposure to the counterparty in connection with a derivative transaction between the covered company and the counterparty; (vii) credit exposure to the counterparty in connection with a credit derivative or equity derivative transaction between the covered company and a third party, the reference asset of which is an obligation or equity security issued by the counterparty; [66] and (viii) any transaction that is the functional equivalent of the above, and any similar transaction that the Board determines to be a credit transaction for purposes of this subpart.[67]

One commenter urged the Board to exclude foreign demand deposits associated with custody services from the credit exposure calculation under the final rule. This commenter argued that cash deposits denominated in a foreign currency are often received from custody clients as a result of securities ownership and held in a demand deposit account with sub-custodian banks in jurisdictions where it does not self-custody.

The final rule retains the proposed definition of ''credit transaction'' without modification. The final rule does not exclude foreign demand deposits associated with custody services as requested by certain commenters. Section 165(e) explicitly provides that ''credit exposure'' means all extensions of credit including loans, deposits, and lines of credit. The Board may only grant exemptions that are in the public interest and consistent with the purposes of section 165(e) of the Dodd-Frank Act. In light of the plain language of the statute, the Board believes that if a covered company holds deposits at a counterparty, those deposits should be subject to the limits of the final rule and that an exclusion would not be appropriate in these circumstances. The final rule exempts intra-day exposures to minimize the impact of the proposal on payment and settlement transactions.

7. Other Terms

The final rule also defines a number of other terms, which are defined largely in the same manner as under the proposal. Additionally, there are certain newly defined terms that were not defined in the proposal but which should provide additional clarity regarding the application of the SCCL. These terms are discussed throughout the remainder of this preamble.

B. Credit Exposure Limits

Section 252.72 of the proposed rule would have contained the key SCCL.[68] As noted, a number of commenters argued that the use of tier 1 capital as the eligible capital base for covered companies was inconsistent with the statute, because section 165(e) defines the general SCCL limit by reference to a firm's ''capital stock and surplus.'' In addition, some commenters urged the Board to eliminate the 15 percent limit for major covered companies to major counterparties. These commenters expressed the view that before proceeding with the application of the lower 15 percent limit, the Federal Reserve should properly account for the probability of the default of a major covered company or major counterparty taking into account the impact of key components of regulatory reforms aimed specifically at addressing both the probability and impact of such a default. One commenter argued the more stringent limit could negatively impact job creation and the economy and was unnecessary in light of increased capital levels.

By contrast, other commenters expressed the view that the Board should use the flexibility granted by Congress under the statute to lower the credit exposure limits relative to the proposal. For instance, one commenter noted that a 25 percent limit would mean that a bank could expose 100 percent of its entire capital to four borrowers. These commenters expressed the view that the 15 percent limit between major covered companies and major counterparties was too high and did not take into account the greater costs of a failure of a global systemically importantant banking organization. These commenters argued that the economic damage created by multiple defaults of the largest firms would be catastrophic and that the credit exposure limit between such firms should be much lower than the 15 percent level proposed. One commenter,

[65] *See* proposed rule § 252.71(k) and final rule § 252.71(k); *see also* 12 CFR 252.2(p) (defining ''publicly traded'').

[66] ''Credit derivative'' and ''equity derivative'' are defined in § 252.71(g) and (p) of the proposed rule, respectively.

[67] *See* proposed rule § 252.71(h). The definition of ''credit transaction'' in the proposed rule is similar to the definition of ''credit exposure'' in section 165(e) of the Dodd-Frank Act. *See* 12 U.S.C. 5365(e)(3).

[68] *See* proposed rule § 252.72.

for example, recommended a credit exposure limit of 5 percent of tier 1 capital. A few commenters expressed the view that the final rule should use gross credit exposure rather than net credit exposure to establish the SCCL.

The Board has considered the comments received as well as changes to the final rule made in response to EGRRCPA. Section 252.72 of the final rule now contains two credit exposure limits that are tailored to the size and systemic footprint of the firm. No covered company may have an aggregate net credit exposure to any counterparty that exceeds 25 percent of the tier 1 capital of the covered company. In addition, no major covered company may have aggregate net credit exposure to any major counterparty that exceeds 15 percent of the tier 1 capital of the major covered company.

1. 25 Percent of Tier 1 Capital Limit

The Board continues to believe that the use of tier 1 capital is the appropriate measurement for the SCCL applicable to covered companies. Notwithstanding the arguments that the standard in SCCL established under section 165(e) is based on a company's ''capital stock and surplus,'' section 165(e) expressly authorizes the Board to establish a lower amount as necessary to mitigate the risks to the financial stability of the United States. Further, section 165 requires the Board to tailor enhanced prudential standards to increase in stringency based on certain factors (capital structure, riskiness, complexity, financial activities (including the financial activities of their subsidiaries), size, and other risk-related factors that the Board deems appropriate).[69]

As indicated, the SCCL in the final rule for covered companies are calculated by reference to tier 1 capital as defined under the Board's capital rules, rather than total regulatory capital plus ALLL.[70] A key financial stability benefit of the SCCL is that such limits help reduce the likelihood that the failure of one financial institution will lead to the failure of other financial institutions. By reducing the likelihood of multiple simultaneous failures arising from interconnectedness, the SCCL reduce the probability of future financial crises and the social costs that would be associated with such crises. For this benefit to be realized, SCCL for firms whose failure is more likely to have an adverse impact on financial stability should be based on a measure of capital that is available to absorb losses on a going-concern basis.

Total regulatory capital plus ALLL includes capital elements that do not absorb losses on a going-concern basis. For example, total regulatory capital includes a covered company's subordinated debt, which is senior in the creditor hierarchy to equity and therefore only takes losses once a company's equity has been wiped out. In contrast, a company's tier 1 capital consists only of equity claims on the company, such as common equity and certain preferred shares. By definition, these equity claims are available to absorb losses on a going-concern basis. Therefore, in order to limit the aggregate net credit exposure that a covered company can have to a single counterparty, the SCCL applicable to such companies should be based on their tier 1 capital. Basing single-counterparty credit limits for such companies on tier 1 capital also is consistent with the mandate in section 165(a)(1)(B) of the Dodd-Frank Act to tailor enhanced prudential standards such that they increase in stringency based on the systemic footprint of the firms to which they apply.[71]

Moreover, this approach would be consistent with lessons learned during the financial crisis of 2007–2009. During the crisis, counterparties and other creditors of distressed financial institutions discounted lower-quality regulatory capital instruments issued by such institutions, such as trust preferred shares, hybrid capital instruments, and other term instruments. Instead, market participants focused on a financial institution's common equity capital and other simple, perpetual-maturity instruments that now qualify as tier 1 regulatory capital. For this reason, the Board's revised capital framework introduced a new definition of common equity tier 1 capital, restricted the set of instruments that qualify as additional tier 1 capital, and raised the tier 1 capital regulatory minimum from four to six percent.[72] In contrast, the Board's revised capital framework left the total regulatory capital minimum requirement unchanged from its pre-crisis calibration of 8 percent.

Thus, basing single-counterparty credit limits for such covered companies on tier 1 capital would be consistent with the post-crisis focus on higher-quality forms of capital and would provide a more reliable capital base for the credit limits. In addition, the analysis that follows suggests that using a narrower definition of capital for covered companies should mitigate risks to U.S. financial stability.

The marginal impact of basing single-counterparty credit limits on tier 1 capital for firms with $250 billion or more in total assets appears to be limited. As of December 31, 2016, tier 1 capital represented approximately 84 percent of the total regulatory capital plus ALLL for these firms. Further, the quantitative impact study Board staff conducted to help gauge the likely effects of the proposed requirements suggests that using tier 1 capital as the eligible capital base for bank holding companies with $250 billion or more in total consolidated assets or $10 billion or more in total on-balance-sheet foreign exposures likely would increase the total amount of excess exposure among U.S. bank holding companies by approximately $30 billion. This incremental amount of excess credit exposure could be largely eliminated by firms through compression of derivatives, collection of additional collateral from counterparties, greater use of central clearing, and modest rebalancing of portfolios among counterparties. The revised treatment for calculating net credit exposure from securities financing transactions should also reduce this exposure. For all these reasons, the Board has determined that it is appropriate to apply a more stringent SCCL of 25 percent of tier 1 capital to covered companies to mitigate risks to the financial stability of the United States.[73]

2. 15 Percent of Tier 1 Capital Limit

The 15 percent of tier 1 capital limit that applies to credit exposures of a major covered company to a major counterparty reflects the financial stability consequences associated with such credit extensions. A credit extension between a major covered company and a major counterparty is expected to result in a heightened degree of credit risk to the major covered company relative to the case in which a major covered company extends credit to a counterparty that is not a major counterparty. The heightened credit risk arises because major covered companies and major counterparties are often engaged in common business lines and often have common counterparties and common funding sources. This creates a significant degree of commonality in their economic performance. In

[69] 12 U.S.C. 5365(a)(1)(B); 12 U.S.C. 5365(a)(2)(A).

[70] *See* 12 CFR 217.2; 12 CFR 217.20.

[71] 12 U.S.C. 5365(a)(1)(B); 12 U.S.C. 5365(a)(2)(A).

[72] *See* 12 CFR part 217.

[73] *See* 12 U.S.C. 5365(e)(2). In contrast, the SCCL for a U.S. IHC with $50 billion or more in total consolidated assets but less than $250 billion in total consolidated assets are based on the U.S. IHC's total regulatory capital plus ALLL. *See* final rule § 252.172.

particular, factors that would likely cause the distress of a major counterparty would also likely be expected simultaneously to adversely affect a major covered company that has extended credit to the major counterparty. As a result, such credit extensions would be expected to present more credit risk and greater potential for financial instability than a credit extension made by a major covered company to a counterparty that is not a major counterparty.

In the white paper that was released in conjunction with the proposal, Board staff analyzed data on the default correlation between systemically important financial institutions (SIFIs) as well as data on the default correlation between SIFIs and a sample of non-SIFI companies.[74] The analysis supports the view that the correlation between SIFIs, and hence the correlation between major covered companies and major counterparties, is measurably higher than the correlation between SIFIs and other companies. This finding further supports the view that credit extensions between SIFIs, and hence by a major covered company to a major counterparty, present a higher degree of risk and the potential for greater financial instability than credit extensions of a major covered company to a non-major counterparty.

Some commenters contended that the credit limit on exposures to major counterparties should reflect a reduced probability of default of such major counterparties resulting from a range of post-crisis reforms. The Board disagrees with this approach. SCCL are, by their nature, simple and transparent limits that do not depend on the probability of default of any individual counterparty. As a specific example, the general 25 percent limit does not recognize any difference in the probability of default between counterparties. Moreover, the SCCL are designed to protect against counterparty default and hence explicitly assume the default of the counterparty in question regardless of the likelihood of such an event. Accordingly, it would be inconsistent with the general motivation for counterparty credit limits to differentiate based on perceived differences in credit quality.

Because credit extensions of a major covered company to a major counterparty present a heightened degree of credit risk and a greater potential for heightened financial instability and to mitigate risks to the financial stability of the United States, the Board has determined that it is appropriate to apply a more stringent SCCL for credit extensions between a major covered company and a major counterparty of 15 percent of tier 1 capital.[75] The more stringent credit limit of 15 percent of tier 1 capital is informed by the results of a credit risk model that is described in detail in the white paper. More specifically, data on correlations, as described above, is used to calibrate a credit risk model. The credit risk model is then used to set the single-counterparty credit limit between SIFIs such that the amount of credit risk that a SIFI is permitted to incur through extensions of credit to another SIFI is no greater than the amount of credit risk that the SIFI would be permitted to incur through extensions of credit to a non-SIFI under the 25 percent limit applicable to such exposures. The resulting calibrated model produces inter-SIFI single-counterparty credit limits that are in line with the proposed limit of 15 percent.

An additional factor that is not considered explicitly in the context of the white paper's credit risk model, but which should influence the calibration of the credit limit between major covered companies and major counterparties, is the relative difference in adverse consequences arising from multiple SIFI defaults relative to the default of a SIFI and non-SIFI counterparty. The financial stability consequences of multiple SIFI defaults caused by the default of a SIFI borrower and the resulting default of a SIFI lender are likely substantially greater than the adverse consequences that would result from the default of a single SIFI lender and a single non-SIFI borrower. As a result, there is a compelling rationale to require that credit risk posed by inter-SIFI credit extensions be materially smaller than that posed by credit extensions between a SIFI lender and non-SIFI borrower. This consideration suggests that an appropriate inter-SIFI single-counterparty credit limit would be even lower than the 15 percent limit suggested by the calibrated credit risk model that is presented in the white paper. The Board has considered the case for an even more stringent credit limit on such inter-SIFI exposures and has decided not to lower the limit so as not to unduly constrain the ability of large banking organizations to engage in transactions that are a necessary part of their business and banking models. Accordingly, the 15 percent of tier 1 capital single-counterparty credit limit on credit exposures of a major covered company to a major counterparty should help to mitigate risks to U.S. financial stability while also allowing large banking organizations to continue to transact with each other as needed on a commercial basis.

C. Gross Credit Exposure

Under the proposal, gross credit exposure would have been defined to mean, with respect to any credit transaction, the credit exposure of the covered company to the counterparty before adjusting for the effect of any qualifying master netting agreements, eligible collateral, eligible guarantees, eligible credit derivatives and eligible equity derivatives, other eligible hedges (*i.e.,* a short position in the counterparty's debt or equity securities), and any unused portion of certain extensions of credit.[76] No comments were received on the definition of ''gross credit exposure'' or ''credit transaction,'' and the final rule continues to define these terms in the same manner as the proposal.[77]

Section 252.73 of the proposal described how the gross credit exposure of a covered company to a counterparty would have been calculated for each type of credit transaction described above.[78] In general, the methodologies contained in the proposed rule are similar to those used to calculate credit exposure under the standardized risk-based capital rules for bank holding companies.[79]

Section 252.73 of the final rule describes how the gross credit exposure of a covered company to a counterparty should be calculated for each type of credit transaction. In general, the methodologies contained in the final rule are the same as those under the proposal, other than the calculation methodologies for certain derivative transactions and securities financing transactions, which have been modified to address comments received and are similar to those used to calculate credit exposure under the standardized risk-based capital rules for bank holding companies.[80]

[74] *See,* ''*Calibrating the Single-Counterparty Credit Limit between Systemically Important Financial Institutions,*'' May 4, 2016, *https://www.federalreserve.gov/aboutthefed/boardmeetings/sccl-paper-20160304.pdf.* For purposes of the white paper, SIFIs include global systemically important banking organizations and nonbank financial companies designated by FSOC for supervision by the Board.

[75] 12 U.S.C. 5365(e)(2).

[76] *See* proposed rule § 252.71(r). Section 252.74 of the proposed rule explains how these adjustments are made.

[77] *See* final rule § 252.71(t) & (h).

[78] *See* proposed rule § 252.73(a)(1)–(12).

[79] 12 CFR part 217, subpart D.

[80] *Id.*

1. Loans, Deposits, and Lines of Credit

Section 165(e) provides that credit exposure includes all extension of credit to a company, including loans, deposits, and lines of credit.[81] Consistent with the statutory definition of credit exposure, the proposed rule would have defined ''credit transaction'' to mean, with respect to a counterparty, any extension of credit to the counterparty, including loans, deposits, and lines of credit, but excluding advised or other uncommitted lines of credit. As noted, the proposal provided that the gross credit exposure for loans by a covered company to the counterparty and leases in which the covered company is the lessor and the counterparty is the lessee, would have been equal to the amount owed by the counterparty to the covered company under the transaction. The final rule retains this treatment.[82]

2. Debt and Equity Securities

Similar to the proposal, under the final rule, trading and available-for-sale debt securities held by the covered company, as well as equity securities, are valued for purposes of single-counterparty credit limits based on their market value. This approach requires a covered company to revalue upwards the amount of an investment in such securities when the market value of the securities increases. In these circumstances, the revaluation would reflect the covered company's greater financial exposure to the counterparty and would reduce the covered company's ability to engage in additional transactions with the counterparty. In circumstances where the market value of the securities falls, however, a covered company would revalue downwards its exposure to the issuer of the securities. This reflects the fact that, just as an increase in the value of a security results in greater exposure to the issuer of that security, a decrease in the value of the security leaves a firm with less exposure to that issuer.[83]

3. Securities Financing Transactions

The proposal addressed the valuation of a securities financing transaction that is subject to a bilateral netting agreement and meets the definition of a ''repo-style'' transaction in the section dealing with calculation of net credit exposure. To enhance clarity, the Board now addresses the valuation of securities financing transactions, including those subject to a bilateral netting agreement that meet the definition of ''repo-style'' transaction, in the gross credit exposure section of the final rule.

Under the proposal, exposure from such a transaction generally would have been equal to an exposure at default amount as modified based on certain standardized collateral haircuts.[84] A covered company would not have been permitted to apply its own internal estimates for haircuts. Further, in calculating its net credit exposure to a counterparty due to such transactions, a covered company would have been required to disregard any collateral received from that counterparty that is not eligible collateral.

The proposal also would have required a covered company to recognize a credit exposure to any issuer of eligible collateral provided in connection with the securities financing transaction. The amount of credit exposure to the issuer would have been equal to the market value of the collateral minus standardized supervisory haircuts. However, the amount of the credit exposure to the issuer of the collateral would have been capped at the gross credit exposure to the counterparty on the original credit transaction.

As noted, commenters objected to the proposed methodology for netting securities financing transactions as overly conservative and highly risk-insensitive. The commenters generally argued that the proposed approach implied unrealistic assumptions about correlations among securities that a covered company transfers to its counterparty and receives from that counterparty. For example, if a covered company loans equity securities to a counterparty and receives equity securities from the counterparty as collateral, the proposed methodology implied that, upon the counterparty's default, the value of the equities transferred to the counterparty would increase in value while the value of the equities received would decrease in value. These commenters urged the Board to permit a covered company to use any methodology permitted under the risk-based capital rules, consistent with the proposal's approach for measuring derivative exposures, including any revisions to the risk-based capital rules. Commenters argued that securities lending plays a critical role in the broader U.S. securities markets and flaws in the securities financing transaction measurement methodology that have the potential to cause covered companies to pull back from this activity as a result of a significant overstatement of risk could have real market consequences.

In response to comments, the final rule includes a modified approach to securities financing transactions. The methodology that would have applied to securities financing transactions under the proposal could have overstated exposure from some transactions. In addition, the more risk-sensitive treatment of derivatives relative to securities financing transactions under the proposal could have artificially incentivized firms to engage in derivatives that are economically equivalent to securities financing transactions. Accordingly, the final rule allows covered companies to use any method that the company is authorized to use under the Board's capital rules, including, in certain circumstances, internal models to measure exposure to securities financing transactions.[85]

4. Derivatives

The proposed SCCL rule drew a distinction between derivative transactions that were subject to a qualifying master netting agreement (QMNA) and derivatives that were not subject to such an agreement.[86] Derivative transactions between the covered company and the counterparty that were not subject to a QMNA would have been valued based on the current exposure of the derivatives contract and its potential future exposure.[87] Derivative transactions between the covered company and the counterparty subject to a QMNA would have been valued based on the exposure at default amount calculated using methodologies the covered company is permitted to use under subparts D and E of the Board's capital rules (12 CFR part 217).[88] This approach would have allowed certain covered companies to calculate counterparty exposures for certain derivatives transactions subject to a QMNA using internal models.

With respect to credit derivative transactions between a covered company and a third party, where the covered company is the protection provider and the reference asset is a debt investment in the counterparty, the credit exposure of the covered company to the counterparty is equal to the

[81] 12 U.S.C. 5365(e)(3)(A).

[82] *See* final rule § 252.73(a)(1).

[83] *See* final rule § 252.73(a)(2) and (3).

[84] *See* proposed rule § 252.73(a)(4)–(7) & 252.74(b).

[85] *See* § 252.73(a)(4) of the final rule. The Board may revisit the approach to securities financing transactions permitted under the capital rules in the future. *See, e.g.,* Basel Committee on Banking Supervision, Basel III: Finalising post-crisis reforms (Dec. 2017), *https://www.bis.org/bcbs/publ/d424.pdf.*

[86] ''Qualifying master netting agreement'' is defined in § 252.71(cc) of the final rule by reference to the Board's capital rules.

[87] *See* proposed rule § 252.73(a)(10).

[88] *See* proposed rule § 252.73(a)(11).

maximum potential loss to the covered company on the transaction.[89]

While commenters generally supported the valuation of derivative transactions under the proposal, certain commenters recommended that the final rule measure the credit exposure amount for derivatives that are not subject to a QMNA in a manner consistent with the proposed rule's measurement of the credit exposure amount for derivatives that are subject to a QMNA—that is, by permitting measurement using internal model methodologies for measuring credit exposure amounts (IMM). These commenters argued that requiring a different approach would introduce unnecessary operational complexity by subjecting the same set of derivative transactions to two different credit exposure calculations depending on whether the derivatives are subject to a QMNA without any apparent prudential benefit. These commenters also expressed the view that allowing IMM with respect to derivatives that are not subject to a QMNA would maintain internal consistency within the final rule and be consistent with the risk-based capital rules more generally.

In response to comments, the Board has modified the proposed rule to allow a covered company to use any methodology that the covered company is authorized to use under the capital rules to value a derivatives transaction. Thus, to the extent that a covered company is authorized to use a particular approach, including an internal model, to value a derivatives transaction under the capital rules, the covered company is authorized to use the same approach to value the transaction under the final rule.

5. Collateral in Custody

The proposal explained that, with respect to cleared and uncleared derivatives, the amount of initial margin and excess variation margin (that is, variation margin in excess of that needed to secure the mark-to-market value of a derivative) posted to a bilateral or central counterparty would have been treated as credit exposure to the counterparty unless the margin is held in a segregated account at a third-party custodian. Certain commenters urged the Board to make clear that all collateral posted to counterparties and held in segregated accounts at third-party custodians would not be treated as credit exposure to the counterparty (*i.e.,* the custodian) and that this treatment be codified in the final rule. The Board notes that initial margin and excess variation margin that is posted to a bilateral or central counterparty and held in a segregated account by a third-party custodian are not subject to counterparty risk with respect to the third-party custodian. Therefore, a covered company is not required under the final rule to calculate gross credit exposure to a third party acting solely as a custodian with respect to collateral held in a segregated account with that custodian.

6. Investments in and Exposures to Securitization Vehicles, Investment Funds, and Other Special Purpose Vehicles That Are Not Subsidiaries

Under the proposal, a covered company with $250 billion in total consolidated assets or $10 billion in total on-balance-sheet foreign exposures would have calculated its gross credit exposure arising from investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not subsidiaries of the covered company pursuant to § 252.75 of the proposed rule. The final rule, like the proposal, directs a covered company to calculate its gross credit exposure to such entities pursuant to § 252.75 of the final rule. A discussion of this valuation methodology, including comments received on the proposal's valuation methodology, follows in section II.E. *infra.*

7. Attribution Rule

Just as in the proposal, § 252.73(c) of the final rule includes the statutory attribution rule, which provides that a covered company must treat a transaction with any person as a credit exposure to a counterparty to the extent the proceeds of the transaction are used for the benefit of, or transferred to, that party.[90] This attribution rule seeks to prevent firms from evading the single-counterparty credit limits by using intermediaries and thereby avoiding a direct credit transaction with a particular counterparty. The attribution rule in the final rule is similar to that of the proposed rule, except that the final rule refers to a ''party'' rather than a ''counterparty'' to follow more closely the terms of section 165(e).

It is the Board's intention to avoid interpreting the attribution rule in a manner that would impose undue burden on covered companies by requiring firms to monitor and trace the proceeds of transactions made in the ordinary course of business. In general, credit exposures resulting from transactions made in the ordinary course of business will not be subject to the attribution rule.

D. Net Credit Exposure

Section 252.74 of the proposed rule explained how a covered company would have converted gross credit exposure amounts to net credit exposure amounts by taking into account eligible collateral, eligible guarantees, eligible credit and equity derivatives, other eligible hedges (for example, a short position in the counterparty's debt or equity securities), and for securities financing transactions, the effect also of bilateral netting agreements.[91] The key difference between these two amounts is that a company's net credit exposure would take into account any available credit risk mitigants, such as collateral, guarantees, credit or equity derivatives, and other hedges, provided the credit risk mitigants meet certain requirements in the rule, as discussed more fully below. For example, if a covered company had $100 in gross credit exposure to a counterparty with respect to a particular credit transaction, and the counterparty pledged collateral with an adjusted market value of $50, the full amount of which qualified as ''eligible collateral'' under the rule, the covered company's net credit exposure to the counterparty on the transaction would be $50.

In order to calculate its aggregate net credit exposure to a counterparty under the proposed rule, a covered company first would have calculated its gross credit exposure to a counterparty on each credit transaction in accordance with certain valuation and other requirements under the rule. Second, the covered company would have reduced its gross credit exposure amount, based on eligible credit risk mitigants, to determine its net credit exposure for each credit transaction with the counterparty. Third and finally, the covered company would have summed all of its net credit exposures to the counterparty to calculate the covered company's aggregate net credit exposure to the counterparty. It is this final amount, the

[89] Under the proposal, this treatment would have applied to both equity derivatives and credit derivatives. *See* proposed rule § 252.73(a)(12). Under the final rule, a covered company that is the protection provider on an equity derivative will apply the same treatment as under the Board's capital rules. *See* final rule § 252.73(7)–(8). ''Credit derivative'' is defined in § 252.71(g) of the final rule, and ''equity derivative'' is defined in § 252.71(p) of the final rule. ''Derivative transaction'' is defined in § 252.71(j) of the final rule in the same manner as it is defined in the National Bank Act, as amended by section 610 of the Dodd-Frank Act. *See* 12 U.S.C. 84(b)(3).

[90] *See* final rule § 252.73(c); *see also* 12 U.S.C. 5365(e)(4).

[91] *See* proposed rule § 252.74.

aggregate net credit exposure, that would have been subject to the SCCL.

With respect to a credit exposure involving eligible collateral or an eligible guarantor,[92] the proposed rule would have applied a ''risk-shifting'' approach. In general, any reduction in the exposure amount to the original counterparty relating to the eligible collateral or eligible guarantor would result in a dollar-for-dollar increase in exposure to the eligible collateral issuer or eligible guarantor (as applicable). For example, in the case discussed above where a covered company had $100 in gross credit exposure to a counterparty and the counterparty pledged collateral with an adjusted market value of $50, the covered company would have net credit exposure to the counterparty on the transaction of $50 and net credit exposure to the issuer of the collateral of $50.

However, in cases where a covered company hedged its exposure to an entity that is not a ''financial entity'' (a non-financial entity) using an eligible credit or equity derivative, and the underlying exposure is subject to the Board's market risk capital rule (12 CFR part 217, subpart F), the covered company would have calculated its exposure to the eligible guarantor using methodologies that it is permitted to use under the Board's risk-based capital rules.[93] The final rule follows the same general approach to the calculation of net credit exposure as the proposal, with modifications as discussed below.

1. Collateral

Section 252.74(c) of the proposed rule describes how eligible collateral would have been taken into account in the calculation of net credit exposure.[94] Under the proposal, the net credit exposure of a covered company to a counterparty on a credit transaction would have been the gross credit exposure of the covered company on the transaction minus the adjusted market value of any eligible collateral related to the transaction. In addition, under the proposal, a covered company generally would have been required to recognize a credit exposure to the collateral issuer in an amount equal to the adjusted market value of the collateral.

Certain commenters argued that eligible margin loans should not be subject to the risk-shifting requirement under the final rule. These commenters contended that ''risk-shifting'' to the eligible collateral issuer in the case of margin lending accounts would introduce a significant and unnecessary operational burden as it would require a covered company to identify each collateral issuer and shift individually relatively small dollar amounts of such exposures to each collateral issuer for each of these small exposures.

The final rule does not exclude margin loans from the risk-shifting requirements. The final rule contains no *de minimis* risk-shifting exception for any specific loan type, and margin loans do not have any special characteristics that would justify special treatment for margin loans relative to other credit transactions.

In computing its net credit exposure to a counterparty with respect to a credit transaction under the proposed rule, a covered company would have been required to reduce its gross credit exposure on the transaction by the adjusted market value of any eligible collateral.[95] Other than in the context of repo-style transactions, the ''adjusted market value'' of eligible collateral would have been defined to mean the fair market value of the eligible collateral after the application of certain haircuts.[96]

The final rule follows the same general approach. The net credit exposure of a covered company to a counterparty on a credit transaction under the final rule is the gross credit exposure of the covered company on the transaction minus the adjusted market value of any eligible collateral related to the transaction.[97] In addition, under the final rule, a covered company generally must recognize a credit exposure to the collateral issuer in an amount equal to the adjusted market value of the collateral.

The final rule treats eligible collateral as a gross credit exposure to the collateral issuer under the Board's authority under section 165(e) to determine that any other similar transaction is a credit exposure.[98] This approach will help to promote a covered company's careful monitoring of its direct and indirect credit exposures. In order not to discourage overcollateralization, however, a covered company's maximum credit exposure to the collateral issuer is limited to the credit exposure to the original counterparty (unless the counterparty is exempt or excluded from the rule).[99] A covered company would continue to have credit exposure to the original counterparty to the extent that the adjusted market value of the eligible collateral does not equal the full amount of the credit exposure to the original counterparty.

The amount of credit exposure to the original counterparty and the issuer of the eligible collateral would fluctuate over time based on the adjusted market value of the eligible collateral. Collateral that previously met the definition of eligible collateral under the rule but over time ceases to do so would no longer be eligible to reduce gross credit exposure to the original counterparty. Covered companies will need to monitor the adjusted market value and eligibility of all collateral under the final rule. To the extent the adjusted market value of collateral has increased or declined, the covered company would need to adjust its exposures to the original counterparty and issuer of collateral as appropriate. To the extent that collateral no longer meets the definition of eligible collateral, the covered company would need to recognize an exposure to the original counterparty.

Example: A covered company (Company A) makes a $1,000 loan to a counterparty (Company B), creating $1,000 of gross credit exposure to that counterparty, and the counterparty provides eligible collateral issued by a third party (Company C) that has an adjusted market value of $700 on day 1. Company A is required to reduce its credit exposure to Company B by the adjusted market value of the eligible collateral. As a result, on day 1, Company A has gross credit exposure of $700 to Company C and $300 net credit exposure to Company B.

As noted, the amount of credit exposure to the original counterparty and the issuer of the eligible collateral will fluctuate over time based on movements in the adjusted market value of the eligible collateral. If the adjusted market value of the eligible collateral decreased to $400 on day 2 in the previous example, on day 2 Company A's net credit exposure to Company B would increase to $600, and its gross

[92] The proposal referred to an ''eligible protection provider'' instead of an ''eligible guarantor.'' For simplicity, the final rule refers to ''eligible guarantor,'' which is the term used in the Board's capital rules. The definition of ''eligible guarantor'' in the final rule is unchanged from the proposal. *See* final rule § 252.71(o).

[93] *See* proposed rule § 252.74(e)(2)(ii).

[94] *See* proposed rule §§ 252.71(k) & 252.74(c).

[95] *See* proposed rule § 252.74(c).

[96] Table 1 to section 217.132 of the Board's capital rules (12 CFR 217.132, tbl. 1) provides haircuts for multiple collateral types, including some types that do not meet the proposed definition of ''eligible collateral.'' Notwithstanding the inclusion of those collateral types in the reference table, a company cannot reduce its gross credit exposure for a transaction with a counterparty based on the adjusted market value of collateral that does not meet the definition of ''eligible collateral.''

[97] As discussed below, the final rule treats eligible collateral as a gross credit exposure to the collateral issuer under the Board's authority under 12 U.S.C. 5365(e)(3)(F).

[98] *See* 12 U.S.C. 5365(e)(3)(F).

[99] *See* final rule § 252.74(b)(3).

credit exposure to Company C would decrease to $400. By contrast, if on day 3 the adjusted market value of the eligible collateral increased to $800, on day 3 Company A's net credit exposure to Company B would decrease to $200, and its gross credit exposure to Company C would increase to $800. In each case, the covered company's total credit exposure would be capped at the original amount of the exposure created by the loan or $1,000—even if the adjusted market value of the eligible collateral exceeded $1,000.

Finally, in cases where eligible collateral is issued by an issuer covered by one of the exemptions in § 252.77 of the final rule or that is excluded from the definition of ''counterparty,'' the requirement to recognize an exposure to the collateral issuer does not apply.[100]

Example: A covered company makes a $1,000 loan to a counterparty and that counterparty has pledged as collateral U.S. government bonds with an adjusted market value of $1,000. In this case, the covered company does not have any net credit exposure to the original counterparty because the value of the loan and the adjusted market value of the U.S. government bonds are equal. Although the covered company has $1,000 of exposure to the U.S. government, single-counterparty credit limits do not apply to that exposure because U.S. government bonds are excluded from the single-counterparty credit limits of the final rule.

2. Eligible Guarantees

Section 252.74(d) of the proposed rule described how to reflect eligible guarantees in calculations of net credit exposure to a counterparty.[101] Eligible guarantees would have been defined as guarantees that meet certain conditions, including having been written by an eligible protection provider.[102] The proposal would have defined ''eligible protection provider'' in the same way as ''eligible guarantor'' in § 217.2 of the Board's capital rules. As such, an eligible protection provider would have included a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation (Farmer Mac), a multilateral development bank (MDB), a depository institution, a bank holding company, a savings and loan holding company, a credit union, a foreign bank, or a qualifying central counterparty. An eligible protection provider also would have included any entity, other than a special purpose entity, (i) that at the time the guarantee is issued or anytime thereafter, has issued and maintains outstanding an unsecured debt security without credit enhancement that is investment grade, (ii) whose creditworthiness is not positively correlated with the credit risk of the exposures for which it has provided guarantees, and (iii) that is not an insurance company engaged predominantly in the business of providing credit protection (such as a monoline bond insurer or re-insurer). No comments were received on this aspect of the proposal, and the final rule is substantively the same as the proposal with respect to the treatment of eligible guarantees. However, for simplicity, the final rule refers to ''eligible guarantor'' instead of ''eligible protection provider,'' as that is the term used in the Board's capital rules. The definition of ''eligible guarantor'' in the final rule is unchanged from the proposal.[103]

In calculating its net credit exposure to the counterparty under the final rule, as in the proposal, a covered company is required to reduce its gross credit exposure to the counterparty by the amount of any eligible guarantee from an eligible guarantor.[104] As with other types of eligible collateral, the covered company would then include the amount of the eligible guarantee when calculating its gross credit exposure to the eligible guarantor.[105] In addition, as with eligible collateral, a covered company's gross credit exposure to an eligible guarantor (with respect to an eligible guarantee) could not exceed its gross credit exposure to the original counterparty on the credit transaction prior to recognition of the eligible guarantee.[106] Accordingly, the exposure to the eligible guarantor would be capped at the amount of the credit exposure to the original counterparty, even if the amount of the eligible guarantee is larger than the original exposure. A covered company would continue to have credit exposure to the original counterparty to the extent that the eligible guarantee is for an amount less than the full amount of the credit exposure to the original counterparty.

Example: A covered company makes a $1,000 loan to an unaffiliated counterparty and obtains a $700 eligible guarantee on the loan from an eligible guarantor. The covered company has gross credit exposure of $700 to the protection provider as a result of the eligible guarantee and $300 net credit exposure to the original counterparty.

Example: A covered company makes a $1,000 loan to an unaffiliated counterparty and obtains a $1,500 eligible guarantee from an eligible guarantor. The covered company has $1,000 gross credit exposure to the protection provider (capped at the amount of the exposure to the unaffiliated counterparty), but the covered company has no net credit exposure to the original counterparty as a result of the eligible guarantee.

As with eligible collateral, a covered company is required to reduce its gross exposure to a counterparty by the amount of an eligible guarantee in order to ensure that concentrations in exposures to guarantors are captured by the risk-shifting approach. This requirement was meant to limit the ability of a covered company to extend loans or other forms of credit to a large number of high-risk borrowers that are guaranteed by a single guarantor.

3. Eligible Credit and Equity Derivative Hedges

Under the proposal, a covered company would have been required to reduce its gross credit exposure to a counterparty by the notional amount of any eligible credit or equity derivative that references the counterparty if the covered company obtains the derivative from an eligible protection provider.[107] In these circumstances, the covered company generally would have been required to include the notional amount of the eligible credit or equity derivative hedge in calculating its gross credit exposure to the eligible protection provider.[108] However, in cases where the eligible credit or equity derivative was used to hedge covered positions subject to the Board's market risk rule (12 CFR part 217, subpart F) [109] and the counterparty on the hedged transaction was not a financial entity, the covered company would only have been required to recognize a credit exposure to the eligible protection provider using methodologies that the covered company is authorized to use under the Board's capital rules (12 CFR part 217, subparts D and E), rather than the notional amount. Under the proposal, an eligible protection provider would have been defined to have the same

[100] *See* final rule § 252.74(g)(1).

[101] *See* proposed rule § 252.74(d).

[102] *See* proposed rule § 252.71(n) for the definition of ''eligible guarantee,'' including a description of the requirements of an eligible guarantee.

[103] *See* final rule § 252.71(o).

[104] *See* final rule § 252.74(c).

[105] *See id.*

[106] *See id.*

[107] *See* proposed rule § 252.74(e).

[108] *Id.*

[109] ''Covered position'' is defined in 12 CFR 217.202.

meaning as the definition of ''eligible guarantor'' in the Board's capital rules.[110]

One commenter expressed support for the notional amount transfer of exposure to the protection provider. This commenter, however, objected to the transfer of exposure to the protection provider using the Board's risk-based capital rules in the case where the hedged transaction is a non-financial entity. This commenter argued that this approach was effectively a loophole in the exposure calculation that would create incentives for a bank to transfer risks to third parties rather than developing a solid underwriting analysis of their counterparties.

Certain commenters objected to the treatment of equity derivatives under the proposal. These commenters argued that equity derivatives that are covered positions under the market risk rule should be calculated as part of a covered company's net long or net short position with respect to a given issuer in a manner more generally aligned with how exposure amounts are calculated for such positions under the market risk rule. Commenters contended that this approach, rather than the approach under the proposal to treat equity derivatives in a manner equivalent to instruments designed to offer credit protection, would be consistent with the applicable risk-based capital rules and the large exposure standard.

Some commenters argued that purchased credit and equity derivatives when calculating net exposure for covered positions in the trading book should not be subject to the requirement to be purchased from an eligible protection provider. These commenters argued that permitting only credit and equity derivatives purchased from eligible protection providers to reduce a gross exposure conflicts with the nature of trading book positions and impacts the utility of derivatives purchased from protection providers that do not meet the eligibility criteria. As such, these commenters requested that the rule allow risk-shifting to a protection provider that is not an ''eligible protection provider.''

More broadly, a few commenters expressed the view that credit default swaps should not be used to reduce the calculation of exposure, noting that the experience of American International Group during the crisis demonstrates how the credit default swap itself can be worthless and argued this could be a potential loophole in the final rule. For example, one commenter requested that any obligations of a counterparty to a covered company be recognized directly, regardless of whether the covered company has taken an offsetting position. This commenter generally opposed the netting of derivative positions. Another commenter urged that dollar-for-dollar risk shifting is appropriate but calculation of exposure based upon any method permitted in the risk-based capital rules where the reference asset obligor is not a financial entity would result in much less than dollar-for-dollar risk shifting since the risk-based capital rules do not require derivatives to be measured at their full notional value.

After considering the comments on the proposal, the Board has determined not to modify the treatment of eligible credit and equity derivatives in the manner suggested by commenters. The Board believes that the treatment in the final rule is reflective of the nature of credit and equity derivatives. Equity derivatives shift risk from underlying equities in the same manner as credit derivatives shift risk from underlying credit instruments. Moreover, there is no basis for a distinction between trading book and banking book products under a credit exposure regime.

Section 252.74(d) of the final rule sets forth the treatment of eligible credit and equity derivatives, in the case where the covered company is the protection purchaser.[111] In the case where a covered company is a protection purchaser, such derivatives can be used to mitigate gross credit exposure. A covered company may only recognize eligible credit and equity derivative hedges for purposes of calculating net credit exposure under the final rule. These derivatives are required to meet certain criteria, including having been written by an eligible guarantor.[112] An eligible credit derivative hedge is required to be simple in form, meaning a single-name or standard, non-tranched index credit derivative.

Where protection is obtained, a covered company must recognize exposure to an eligible guarantor.[113] Accordingly, under the final rule, a covered company is required to reduce its gross credit exposure to a counterparty by the notional amount of any eligible credit derivative hedge that references the counterparty if the covered company obtains the derivative from an eligible guarantor.[114] In these circumstances, the covered company generally will be required to include the notional amount of the eligible credit derivative hedge in calculating its gross credit exposure to the eligible guarantor.[115] Similarly, a covered company is required to shift its gross credit exposure from a counterparty to an eligible guarantor in any case where the covered company obtains an eligible equity derivative hedge that references the counterparty from such eligible guarantor. As is the case for eligible collateral and eligible guarantees, the gross exposure to the eligible guarantor would in no event be greater than it was to the original counterparty prior to recognition of the eligible credit or equity derivative.[116] In cases where a covered company is required to shift its credit exposure from the counterparty to an eligible guarantor under the final rule, the covered company is permitted to exclude the relevant equity or credit derivative when calculating its gross exposure to the eligible guarantor. This is to avoid requiring covered companies to double count the same exposures.

The Board also has determined not to make the changes requested by commenters to allow requiring risk-shifting to protection providers that do not meet the definition of ''eligible guarantor.'' Limiting exposures to a large protection provider is an important feature of the final rule. As with eligible collateral and eligible guarantees, a covered company is required to reduce its gross exposure to a counterparty by the amount of an eligible equity or credit derivative, and to recognize an exposure to an eligible guarantor, in order to ensure that concentrations in exposures to eligible guarantors are captured in the regime.

The Board believes that the quality and creditworthiness of the protection provider is an important consideration when assessing the likelihood that the purchased protection would be provided in the event of a large counterparty default. Moreover, the Board notes that many positions subject to the Board's market risk rule represent mark-to-market positions that are intended to hedge market movement on a day-to-day basis and are not always intended to hedge against extreme default events. Accordingly, there is no inconsistency in the final rule's

[110] *See* proposed rule § 252.71(o).

[111] *See* final rule § 252.74(d).

[112] *See* final rule §§ 252.71(*l*) and (m) defining ''eligible credit derivative'' and ''eligible equity derivative,'' respectively. ''Eligible guarantor'' is defined in § 252.71(o) of the final rule. The same types of organizations that are eligible guarantors for the purposes of eligible guarantees are eligible guarantors for purposes of eligible credit and equity derivatives.

[113] As noted, the final rule replaces the term ''eligible protection provider'' with ''eligible guarantor,'' as that is the term used in the Board's capital rules. The definition of the term in the final rule is unchanged from the proposal.

[114] *See* final rule § 252.74(d).

[115] *See* final rule §§ 252.74(d)(1)–(2).

[116] *See* final rule § 252.74(d).

requirement that protection be purchased from an eligible guarantor.

For eligible credit and equity derivatives that are used to hedge covered positions subject to the Board's market risk rule (12 CFR part 217, subpart F),[117] the approach is the same as that explained above, except in the case of credit derivatives where the counterparty on the hedged transaction is not a financial entity.[118] In this case, a covered company is required to reduce its gross credit exposure to the counterparty on the hedged transaction by the notional amount of the eligible credit derivative that references the counterparty if the covered company obtains the derivative from an eligible guarantor. In addition, the covered company is required to recognize a credit exposure to the eligible guarantor that is measured using methodologies that the covered company is authorized to use under the Board's risk-based capital rules (12 CFR part 217, subparts D and E), rather than the notional amount.

The final rule includes this treatment for credit and equity derivatives that are used to hedge covered positions subject to the market risk rule, where the credit or equity derivative is used to hedge an exposure to an entity that is not a financial entity. The final rule requires full notional risk-shifting for credit derivatives used to hedge exposures to financial entities because most protection providers are financial entities, and when both the protection provider and the reference entity are financial entities, the probability of correlated defaults generally is substantially greater than when protection is sold on non-financial reference entities.

Example: A covered company holds a $1,000 bond issued by a non-financial entity (for example, a commercial firm or non-excluded sovereign) that is a covered position subject to the Board's market risk rule, and the covered company purchases an eligible credit derivative in a notional amount of $800 from Protection Provider X, which is an eligible guarantor, to hedge its exposure to the non-financial entity. The covered company continues to have $200 in net credit exposure to the non-financial entity. In addition, the covered company would treat Protection Provider X as a counterparty, and would measure its exposure to Protection Provider X using any methodology that the covered company is permitted to use under the Board's capital rules to calculate its risk-based capital requirements.

Example: A covered company holds as a covered position subject to the Board's market risk rule a $1,000 bond issued by a financial entity (for example, a banking organization), and the covered company purchases an eligible credit derivative in a notional amount of $800 from Protection Provider X, which is an eligible guarantor, to hedge its exposure to the financial entity. The covered company continues to have credit exposure of $200 to the underlying financial entity. In addition, the covered company now treats Protection Provider X as a counterparty, and has an $800 credit exposure to Protection Provider X.

4. Treatment of Maturity Mismatches

Under the proposal, if the residual maturity of a credit risk mitigant was less than that of the underlying exposure, the credit risk mitigant would only have been recognized if the credit risk mitigant's original maturity were equal to or greater than one year and its residual maturity were not less than three months from the current date.[119] In that case, the reduction in the underlying exposure would have been adjusted based on the same approach that is used in the Board's capital rules (12 CFR part 217) to address a maturity mismatch.

Commenters argued that credit and equity derivatives that are covered positions under the Board's market risk rule should not be subject to the maturity mismatch adjustments. These commenters argued that, in the trading book, maturity of purchased protection is less important as positions change frequently, are often not held to maturity, and additional extending protection can and would be purchased if necessary. Other commenters argued that no maturity mismatch should exist for securities financing transactions, consistent with the Board's capital rules.

The Board has determined not to make the changes to the proposal recommended by commenters. The SCCL are point-in-time measures of exposure and generally are not designed to respond to anticipated future actions but to reflect actual credit exposure at the time the exposure amount is measured. If the residual maturity of a credit risk mitigant is less than that of the underlying exposure, the credit risk mitigant is only recognized under the final rule if the credit risk mitigant's original maturity is equal to or greater than one year and its residual maturity is not less than three months from the current date.[120] In that case, the reduction in the underlying exposure would be adjusted based on the same approach that is used in the Board's capital rules (12 CFR part 217) to address a maturity mismatch.[121]

With respect to the amount of exposure that a covered company is required to recognize to the issuer of eligible collateral or to an eligible guarantor in cases of maturity mismatch, such amount generally is equal to the amount by which the relevant form of credit risk mitigation has reduced the exposure to the original counterparty. However, in the case of credit and equity derivatives used to hedge exposures subject to the Board's market risk rule (12 CFR 217, subpart F) that are to counterparties that are non-financial entities, the covered company is permitted to recognize a credit exposure with regard to the eligible guarantor measured using methodologies that the covered company is authorized to use under the Board's capital rules (12 CFR 217, subparts D and E).

Example: A covered company makes a loan to a counterparty and hedges the resulting exposure by obtaining an eligible guarantee from an eligible guarantor. If the residual maturity of the guarantee were less than that of the loan, the covered company would adjust the value assigned to the guarantee using the formula in the Board's capital rules (12 CFR part 217). The covered company would then reduce its gross credit exposure to the underlying counterparty by the adjusted value of the guarantee and would set its exposure to the eligible guarantor equal to the adjusted value of the guarantee.

Example: A covered company holds bonds issued by a non-financial entity that are subject to the Board's market risk rule, and hedges the exposure using an eligible credit derivative obtained from an eligible guarantor. If the residual maturity of the eligible credit derivative were less than that of the bonds, the covered company would reduce its exposure to the issuer of the bonds by the adjusted value of the credit derivative using the formula in the Board's capital rules. The covered

[117] ''Covered position'' is defined in 12 CFR 217.202.

[118] The revised definition of ''financial entity'' is explained above.

[119] *See* proposed rule § 252.74(b)–(e).

[120] *See* final rule § 252.74(i).

[121] A credit risk mitigant would be adjusted using the formula Pa = P x (t − 0.25)/(T − 0.25), where Pa is the value of the credit protection adjusted for maturity mismatch; P is the credit protection adjusted for any haircuts; t is the lesser of (1) T or (2) the residual maturity of the credit protection, expressed in years; and T is the lesser of (1) 5 or (2) the residual maturity of the exposure, expressed in years. *See* 12 CFR 217.36(d).

company would measure its exposure to the eligible guarantor using methodologies that the covered company is permitted to use under the Board's capital rules (12 CFR part 217, subparts D and E), without any specific adjustment to reflect the maturity mismatch between the bonds and the credit derivative.

5. Treatment of Currency Mismatch

To provide additional clarity, the final rule includes a section regarding application of currency mismatch adjustments to certain credit risk mitigants—namely, eligible collateral, eligible guarantees, eligible equity derivatives, and eligible credit derivatives—in cases where the collateral or hedge is denominated in a different currency than the hedged exposure. As with several other aspects of the final rule, this treatment is consistent with the Board's capital rules. This section clarifies that a covered company that reduces its credit exposure to a counterparty under the final rule as a result of eligible collateral, an eligible guarantee, an eligible equity derivative, or an eligible credit derivative must apply the currency mismatch adjustment approach in the Board's capital rules, if applicable, when calculating the covered company's gross credit exposure to the issuer of eligible collateral or an eligible guarantor.[122] As noted, a covered company that reduces its credit exposure to a counterparty as a result of such credit risk mitigants must calculate its gross credit exposure to an issuer of eligible collateral or an eligible guarantor even in cases where the underlying credit transaction would not be subject the credit limits of the final rule.[123]

To provide additional clarity, the final rule includes a section regarding application of cross-currency haircuts to certain credit risk mitigants, including eligible credit and equity derivatives. This section clarifies that a covered company that reduces its credit exposure to a counterparty under the final rule must apply the currency mismatch adjustment approach in the Board's capital rules (12 CFR 217.36(f)), if applicable, when calculating the covered company's gross credit exposure to the eligible guarantor, including in instances where the underlying credit transaction would not be subject the credit limits of the final rule.[124]

6. Other Eligible Hedges

Under the proposal, a covered company would have been allowed to reduce its credit exposure to a counterparty by the face amount of a short sale of the counterparty's debt or equity securities, provided that the instrument in which the covered company has a short position was junior to, or *pari passu* with, the instrument in which the covered company has the long position.[125] This restriction on the set of short positions permitted to offset long positions would have helped to reduce the risk that any loss arising from the covered company's long exposure were not offset by a gain in the covered company's short exposure. No comments were received on this aspect of the proposal, and the final rule retains the approach from the proposal.[126]

Example: A covered company holds $100 of bonds issued by Company X. If the covered company sells short $100 of equity shares issued by Company X, the covered company would not have any net credit exposure to Company X. Similarly, the covered company would not have any net credit exposure to Company X if it sells short $100 of Company X's debt obligations, provided that those obligations are junior to, or *pari passu* with, the Company X bonds that the covered company holds.

7. Unused Credit Lines

Section 252.74(g) of the proposed rule addressed the calculation of the net credit exposure for any unused portion of certain extensions of credit. In computing its net credit exposure to a counterparty for a credit line or revolving credit facility, a covered company would have been permitted to reduce its gross credit exposure by the amount of the unused portion of the credit extension to the extent that the covered company did not have any legal obligation to advance additional funds under the facility until the counterparty provided the amount of adjusted market value of collateral that qualifies under the credit line or revolving credit facility with respect to the entire used portion of the facility.[127] To qualify for this reduction, the credit contract governing the extension of credit would have been required to specify that any used portion of the credit extension must be fully secured at all times by collateral that is either (i) cash; (ii) obligations of the United States or its agencies; (iii) obligations directly and fully guaranteed as to principal and interest by, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, but only while operating under the conservatorship or receivership of the Federal Housing Finance Agency, or any additional obligations issued by a U.S. government-sponsored entity, as determined by the Board.[128]

Commenters urged the Board to permit the full list of eligible collateral to qualify for this provision. Commenters also requested that the Board allow covered companies to apply the same credit conversion factors (CCF) to unfunded, off-balance sheet commitments as under the Board's capital rules rather than the proposed uniform 100 percent CCF to all such commitments regardless of contractual provisions, to better reflect actual economic exposure.

Under the final rule, in calculating net credit exposure to a counterparty for a credit line or revolving credit facility, a covered company is permitted to reduce its gross credit exposure by the amount of the unused portion of the credit extension, to the extent that the covered company does not have any legal obligation to advance additional funds under the facility until the counterparty provides the amount of adjusted market value of eligible collateral that qualifies under the credit line or revolving credit facility with respect to the entire used portion of the facility.[129] In response to comments, this provision has been modified to make clear that any form of eligible collateral as defined in the final rule (and described above) can be used as collateral for this purpose. To ensure that the methodology is simple and transparent and reflects the true value of the exposure, the final rule does not, however, include credit conversion factors similar to the Board's capital rules.

8. Credit Transactions Involving Exempt and Excluded Persons

Under the proposed rule, if a covered company obtained eligible collateral from an entity that would have been exempt or excluded from the SCCL (*e.g.,* the U.S. government or a foreign sovereign entity that receives a zero percent risk weight under the Board's capital rules), or obtained an eligible guarantee or an eligible credit or equity derivative from an eligible protection provider on an exposure to an exempt

[122] *See* final rule § 252.74(h); *see also* 12 CFR 217.37(c)(3)(ii) (providing the currency mismatch adjustments relevant to eligible collateral); 12 CFR 217.36(f) (providing the currency mismatch adjustments relevant to eligible guarantees, eligible credit deriatives, and eligible equity derivatives).

[123] *See* final rule § 252.74(b)–(d).

[124] *See* final rule § 252.74(d) & (h).

[125] *See* proposed rule § 252.74(f).

[126] *See* final rule § 252.74(e).

[127] *See* proposed rule § 252.74(g).

[128] *Id.*

[129] *See* final rule § 252.74(f).

or excluded entity, the covered company would have been required to recognize an exposure to the collateral issuer or eligible protection provider to the same extent as if the underlying exposure were to an entity that is not exempt.[130] The Board did not receive comments on this aspect of the proposal, and the final rule follows the same approach to exempt and excluded entities as the proposal.[131]

Example: A covered company has purchased a credit derivative from an eligible guarantor to hedge the credit risk on a portfolio of U.S. government bonds. The covered company needs to recognize an exposure to the credit protection provider equal to the full notional of the credit derivative (if the bonds are subject to the Board's risk-based capital rules in 12 CFR part 217, subparts D and E) or to the counterparty credit risk measurements obtained by using methodologies that the covered company is permitted to use under the market risk capital rules (if the bonds are subject to the Board's market risk rule in 12 CFR part 217, subpart F).

E. Exposures to Securitization Funds, Investment Funds, or Other Special Purpose Vehicles

1. Look-Through Approach

Special considerations arise in connection with measuring credit exposures of a covered company to a securitization fund, investment fund, or other special purpose vehicle (collectively, ''SPVs''). Under the proposed rule, large covered companies would have been required to analyze their credit exposure to the issuers of the underlying assets in an SPV in which the large covered company invests or to which the large covered company otherwise has credit exposure.[132] If such company was able to demonstrate that its exposure to each underlying asset in an SPV were less than 0.25 percent of its tier 1 capital (considering only exposures that arise from the SPV), then the covered company would have been allowed to recognize an exposure solely to the SPV and not to the underlying assets.[133] Conversely, if a large covered company was not able to demonstrate that its exposure to the issuer of each underlying asset held by an SPV were less than 0.25 percent of the covered company's tier 1 capital, then the company would have been required to apply a ''look-through approach'' and recognize an exposure to each issuer of the assets held by the SPV that exceeded 0.25 percent of its tier 1 capital.[134] In the latter case, if a large covered company were required to apply the look-through approach, but was unable to identify an issuer of assets underlying an SPV, the covered company would have been required to attribute the exposure to a single ''unknown counterparty'' and aggregate all exposures to such unknown counterparties to a single counterparty.[135]

The application of the look-through approach would have depended on the nature of the investment of the covered company in the SPV. Where all investors in an SPV are *pari passu,* the covered company would have calculated its exposure to an issuer of assets held by the SPV as an amount equal to the covered company's pro rata share in the SPV multiplied by the value of the SPV's underlying assets issued by that issuer.[136] Otherwise, where the investors do not rank *pari passu,* then the exposure to an issuer would have been calculated as the lower of either the value of the tranche in which the covered company has invested or the value of each asset attributed to the issuer—then multiplied by the covered company's pro rata share.[137]

While one commenter expressed support for the look-through requirement, a number of commenters expressed the view that the look-through approach was overbroad, complex, and unworkable as proposed. Commenters requested a number of modifications related to the proposal's look-through approach. Commenters urged the Board to clarify the scope of the look-through requirement. In particular, commenters argued that the look-through approach should only apply to exposures arising from cash investments in a securitization vehicle, investment fund, or other SPV and synthetic positions, such as derivative contracts or other instruments, that mirror the economics of a cash investment that are held in the banking book and exposures arising from extensions of credit and liquidity facilities that mimic the risks of such cash investments and that exceed 0.25 percent of the large covered company's tier 1 capital. A few commenters urged clarification that the look-through approach would not extend to exposures resulting from the provision of traditional custody services to an investment fund client, including payment, settlement, and asset administration. Certain commenters expressed concerns that covered companies would have to attribute excessive exposures to a single unknown counterparty, which could chill investment in funds and vehicles. Commenters requested clarification as to whether the attribution to a single unknown counterparty was required for a covered company's entire exposure to a securitization vehicle or merely the portion that it is unable to link back to an individual issuer.

Certain commenters argued that the Board should adopt a more risk-based approach to the look-through requirement by only requiring the look-through to underlying assets for which the exposure value is at least 0.25 percent of the company's tier 1 capital (the partial look-through approach available under the large exposure standard). These commenters also requested that the look-through be undertaken at less frequent intervals (*e.g.,* monthly or when asset-level disclosures are publicly filed) and using the most recently available information. Some commenters urged the Board to eliminate the requirement that exposures be attributed to a single, unknown counterparty across all SPVs when a large covered company is unable to identify each issuer of assets.

Commenters requested that the final rule exempt from the look-through requirement exposures such as retail asset-backed securities (including those funds or vehicles backed by credit card receivables, auto-loans, and residential mortgages), pools of finance receivables in which the underlying assets are comprised of small business borrower receivables (such as equipment loans and leases, trade receivables, and loans to auto dealers), and commercial mortgage-backed securities. Commenters also argued that investment funds registered under the Investment Company Act of 1940 (or governed by similar legislation in other jurisdictions) should be exempt based on the stringent diversification requirements to which such funds are subject.[138] Commenters argued that it is unlikely that any of the underlying assets would materially contribute to a

[130] *See* proposed rule § 252.74(g).

[131] *See* final rule § 252.74(g). As noted, the final rule replaces the term ''eligible protection provider'' with ''eligible guarantor,'' as that is the term used in the Board's capital rules. The definition of the term in the final rule is unchanged from the proposal.

[132] *See* proposed rule § 252.75(a).

[133] *See* proposed rule § 252.75(a)(3). The Board notes that a covered company's exposure to each underlying asset in an SPV necessarily would be less than 0.25 percent of the covered company's tier 1 capital if the covered company's entire investment in the SPV is less than 0.25 percent of the covered company's tier 1 capital.

[134] *See* proposed rule § 252.75(a)(2).

[135] *See id.*

[136] *See* proposed rule § 252.75(b)(3)(i).

[137] *See* proposed rule § 252.75(b)(3)(ii).

[138] *See, e.g.,* 15 U.S.C. 80a–5(b)(1).

covered company's exposure to a given counterparty given the granular nature of such assets.

Some commenters recommended that the Board exclude exposures from the look-through requirement that are required under other legal standards, such as the risk retention rule, since these exposures cannot be sold down. Commenters contended that the significant practical challenges of complying with the proposal could result in covered companies not investing in SPVs which could have a negative effect on credit markets. For example, certain commenters argued that covered companies may not have access to information at the frequency and level of granularity required.

In order to address the concerns raised by commenters, the Board has narrowed the scope of the look-through approach and reduced the burden of its implementation. The final rule requires application of the look-through approach only to individual underlying assets for which the exposure value is at least 0.25 percent of the company's tier 1 capital, even in cases where the covered company cannot demonstrate that *each* underlying asset in an SPV is less than 0.25 percent of the covered company's tier 1 capital. This approach is referred to as the partial look-through in this **SUPPLEMENTARY INFORMATION**.[139]

The Board has not modified the look-through approach to exclude explicitly certain types of SPVs. However, certain information provided by commenters (*e.g.,* that some retail exposures are unlikely to have large underlying exposures) bears on the potential compliance burden of the look-through and partial look-through approaches. In particular, covered companies may be able to ascertain that an SPV does not contain any exposures greater than or equal to 0.25 percent of tier 1 capital based on characteristics of the SPV without having to measure each specific exposure within the SPV.

Finally, to address the concerns that covered companies may not have access to information at the frequency and level of granularity required, the final rule allows covered companies to rely in good faith on the most recent available information. In other words, covered companies are allowed to fill in any missing values to the best of their ability (*i.e.,* in a reasonable manner and based on the most recently available information).

Example: An SPV holds $10 of bonds issued by Company A, $10 of bonds issued by Company B, and $20 of bonds issued by Company C. Assume that all investors in the SPV are *pari passu* and that a covered company's pro rata share in the SPV is 50 percent. Assume further that the ratio of the covered company's pro rata investment in each bond (A, B, C) to its tier 1 capital is 0.26 percent, 0.26 percent, and 0.52 percent. The covered company needs to recognize a $5 exposure to Company A and Company B (*i.e.,* 50 percent of $10) and a $10 exposure to Company C (*i.e.,* 50 percent of $20).

The foregoing example considers a case in which all of the underlying investments are at least 0.25 percent of the covered company's tier 1 capital. The following example illustrates application of the partial look-through approach.

Example: An SPV holds $10 of bonds issued by Company A, $10 of bonds issued by Company B, and $20 of bonds issued by Company C. Assume that all investors in the SPV are *pari passu* and that a covered company's pro rata share in the SPV is 50 percent. Assume further that the ratio of the covered company's pro rata investment in each bond (A, B, C) to its tier 1 capital is 0.24 percent, 0.24 percent, and 0.48 percent. The covered company needs to recognize a $10 exposure to the SPV (*i.e.,* 50 percent of the $10 exposure to Company A plus 50 percent of the $10 exposure to Company B). Note that the covered company only recognizes the exposure to the SPV—and not individually to Companies A and B—because those two exposures are under 0.25 percent of tier 1 capital. Finally, the covered company must recognize a $10 exposure to Company C (*i.e.,* 50 percent of the $20 exposure to Company C), as the exposure to Company C is above 0.25 percent of tier 1 capital.

The previous two examples consider situations in which the covered company can identify the counterparty associated with each underlying investment in the SPV. In certain cases, a covered company may not be able to identify the counterparty in each underlying investment of the SPV. In such cases, the underlying investments must be allocated to an unknown counterparty if the pro rata size of the investment exceeds 0.25 percent of tier 1 capital, as demonstrated in the following example.[140]

Example: An SPV holds $10 of bonds issued by one unidentified company, $14 of bonds issued by another unidentified company, and $20 of bonds issued by a third unidentified company. Assume that all investors in the SPV are *pari passu* and that a covered company's pro rata share in the SPV is 50 percent. Assume further that the ratio of the covered company's pro rata investment in each bond (A, B, C) to its tier 1 capital is 0.24 percent, 0.34 percent, and 0.48 percent. A covered company would need to recognize a $5 exposure to the SPV (*i.e.,* 50 percent of the $10 exposure to the first unidentified company) and a $17 exposure to an unknown counterparty (*i.e.,* 50 percent of the $14 exposure to the second unidentified company and 50 percent of the $20 exposure to the third unidentified company).

Note that the example above applies both the partial look-through approach, as the exposure to the first unidentified company is allocated to the SPV since it represents less than 0.25 percent of tier 1 capital, and the unknown counterparty treatment since the exposures to the second and third unknown companies are allocated to a single unknown counterparty, as each pro rata investment in the second and third investment exceeds 0.25 percent of the covered company's tier 1 capital. Finally, note that the foregoing example only considers a single SPV and accordingly the effect of applying the unknown counterparty treatment is to allocate some portion of the underlying investments of the SPV to a single unknown counterparty. To the extent that a covered company cannot identify the counterparty associated with several underlying investments across several SPVs, all of these unidentified investments must be allocated to a single unknown counterparty to the extent that the pro rata size of each investment exceeded 0.25 percent of the covered company's tier 1 capital.

If all investors in an SPV are not *pari passu,* a covered company that is required to use the look-through approach would measure its exposure to an issuer of assets held by the SPV for each tranche in the SPV in which the covered company invests. The covered company would do this using a two-step process. First, the covered company would assume that the total exposure to an issuer of assets held by the SPV among all investors in a given SPV tranche is equal to the lesser of the value of the tranche and the value of the assets issued by the issuer that are held by the SPV. Second, the covered company would multiply this exposure amount by the percentage of the SPV tranche that the covered company holds.

Example: An SPV holds $10 of bonds issued by Company A. The SPV has issued $4 of junior notes and $6 of senior notes to the SPV's investors. A covered company holds 50 percent of the junior notes and 50 percent of the

[139] *See* final rule § 252.75(b)(1).

[140] *See* final rule § 252.75(a)(3)(iii).

senior notes. With respect to the junior tranche of the SPV, the lesser of the value of the tranche (*i.e.,* $4) and the value of the underlying assets issued by Company A (*i.e.,* $10) is $4. With respect to the senior tranche of the SPV, the lesser of the value of the tranche (*i.e.,* $6) and the value of the underlying assets issued by Company A (*i.e.,* $10) is $6. Because the covered company's pro rata share of each tranche is 50 percent, it would need to recognize $2 of exposure to Company A because of its investment in the junior tranche (*i.e.,* 50 percent of $4), and $3 of exposure to Company A because of its investment in the senior tranche (*i.e.,* 50 percent of $6), assuming the look-through approach is required.

2. Aggregation of Exposures to Certain Third Parties

Under the proposal, a large covered company would have been required to recognize a gross credit exposure to each third party with a contractual or other business relationship with an SPV whose failure or material financial distress would cause a loss in the value of the covered company's investment in or exposure to the SPV.[141] A covered company would have been required to recognize gross credit exposure to such a third party in addition to the covered company's gross credit exposure to an SPV.

A number of commenters urged the Board to eliminate the third-party exposure requirement. Commenters argued that this requirement would have required a covered company to recognize additional exposures without a consideration of the actual amount of risk to which the covered company is exposed as a result of such exposures. Commenters contended that the requirement under the proposal referenced a ''loss'' to a covered company's investment in a securitization vehicle or investment fund without reference to the materiality of such an investment relative to the covered company. Moreover, commenters argued that the proposal did not limit in any manner the universe of third parties, which could make it impossible for a covered company to identify all relevant third parties. As an alternative to eliminating this requirement, commenters urged the Board to limit this requirement to third parties that provide credit support or liquidity facilities to an SPV and only apply the requirement where the large covered company's investment in the vehicle exceeds 0.25 percent of its tier 1 capital, consistent with the look-through requirement. Commenters further argued that this requirement should only be on a reasonable ''best efforts'' basis, because covered companies may lack access to information to comply with this requirement (*e.g.,* a covered company may not know the identity of currency or interest rate providers). Commenters noted that in any case this requirement would overstate exposures by requiring a covered company to recognize an exposure to two different parties: The SPV and the third-party credit provider to the SPV.

The Board has modified the final rule to address the concerns raised by commenters, thereby reducing burden on covered companies. First, the Board has narrowed the scope of the requirement. The proposed rule would have applied to third parties that have a contractual or other business relationship with an SPV.[142] Based on suggestions from commenters, the final rule applies solely to third parties that have a contractual obligation to provide credit or liquidity support to an SPV.[143]

Second, the final rule explicitly limits the exposure that a covered company has to attribute to a third party under this requirement. The proposed rule would have required a large covered company to recognize an exposure to the third party in an amount equal to the large covered company's exposure to the SPV.[144] The final rule caps the recognized exposure to the maximum contractual obligation of that third party to the SPV.[145] This should mitigate the concern that the requirement would have required a covered company to recognize additional exposures without consideration of the actual amount of risk to which the covered company is exposed.

Third, under the final rule, covered companies may rely in good faith on the most recent available information. In other words, covered companies are allowed to rely on a reasonable best effort in the event that they lack access to information to comply with this requirement.

F. Aggregation of Exposures to Connected Counterparties

The proposed rule would have required a covered company to aggregate counterparties based on tests of economic interdependence or due to certain control relationships.[146] In cases where the total exposures to a single counterparty exceeded five percent of the covered company's eligible capital base, the covered company would have had to aggregate exposures to that counterparty with its exposures to all other counterparties that are ''economically interdependent'' with the first counterparty.[147] The purpose of this proposed requirement was to limit a covered company's overall credit exposure to two or more counterparties where the underlying risk of one counterparty's financial distress or failure would cause the financial distress or failure of another counterparty. For similar reasons, under the proposed rule, a covered company would have been required to aggregate exposures of an unaffiliated counterparty with its exposures to all other counterparties connected by control relationships.[148]

Commenters argued that it would be very difficult and burdensome for covered companies to obtain the information required under the proposed rule to aggregate their counterparties on the basis of the economic interdependence and control tests. Certain commenters argued that if the control relationship tests were retained in the final rule, it should apply only to exposures exceeding five percent of the eligible capital base, similar to the threshold under the proposal for the economic interdependence test. Commenters urged the Board to make clear that any determinations regarding economic interdependence and control relationships, if retained in the final rule, would be subject to a reasonable inquiry standard (that is, there should be good faith due diligence into the relationship between the counterparty and other potentially related entities). Commenters also requested that the Board make clear these tests applied only within, and not across, different categories of counterparties (that is, the tests would not be used to aggregate a natural person with a company or a company with a State).

1. Economic Interdependence

The Board has incorporated two key provisions into the economic interdependency assessment in the final rule to address the concerns raised by commenters and to reduce burden on covered companies.[149] First, the Board has revised the relevant factors to clarify when firms must aggregate exposures to counterparties. For instance, the proposed rule would have required a

[141] *See* proposed rule § 252.75(c).

[142] *See* proposed rule § 252.75(c)(1).

[143] *See* final rule § 252.75(c)(1).

[144] *See* proposed rule § 252.75(c)(2).

[145] *See* final rule § 252.75(c)(2).

[146] *See* proposed rule § 252.76.

[147] *See* proposed rule § 252.76(a).

[148] *See* proposed rule § 252.76(b).

[149] *See* final rule § 252.76(b).

covered company to consider whether a counterparty (counterparty A) has fully or partly guaranteed the credit exposure of another counterparty (counterparty B), or is liable by other means, and the credit exposure is *significant enough* that counterparty B is likely to default if presented with a claim relating to the guarantee or liability.[150] The final rule reframes this standard to make it more concrete and more formulaic: Whether one counterparty has fully or partly guaranteed the credit exposure of the other counterparty, or is liable by other means, *in an amount that is 50 percent or more* of the covered company's net credit exposure to the counterparty.[151]

Second, the final rule allows firms to request in writing a determination from the Board that two counterparties are not economically interdependent, even if one or more factors in the final rule are met.[152] Upon such a request, the Board may grant temporary relief to the covered company and not require the covered company to aggregate one counterparty with another counterparty provided that the counterparty could modify its business relationships, such as by reducing its reliance on the other counterparty, and provided that such relief is in the public interest and is consistent with the purpose of the final rule and section 165(e).[153]

In addition, as under the proposal, this economic interdependency assessment in the final rule is required only when exposure to a counterparty exceeds five percent of a covered company's tier 1 capital. The Board investigated the potential burden of the above requirement using supervisory data covering U.S. GSIBs and their largest credit counterparties from 2008 to 2017. Although the specific definition of credit exposure in the supervisory data did not match precisely the exposure calculation that will be required under the final rule, the analysis does provide general insight into the frequency of large credit exposures. Based on this data, credit exposures exceeding the five-percent threshold occurred only 20 times per year since 2012, for all firms combined.

Example: A covered company has a credit exposure to a bank that is equal to 4.5 percent of tier 1 capital. This covered company does not have to apply the economic interdependency test to the bank because the credit exposure does not exceed five percent of its tier 1 capital.

Example: A covered company has credit exposures to both a car manufacturer and a tire manufacturer. The exposure to the car manufacturer is equal to 5.5 percent of its tier 1 capital. The exposure to the tire manufacturer is 1.5 percent of its tier 1 capital. The tire manufacturer sells all of its output to the car manufacturer. This satisfies § 252.76(b)(2)(i) of the final rule, so the covered company has to aggregate the credit exposures to both counterparties, which yields a total credit exposure of 7.0 percent of its tier 1 capital. Notably, this example also satisfies § 252.76(b)(2)(iii) of the final rule.

Example: A covered company has credit exposures to a bank and an insurance company. The exposure to the bank is equal to 6.0 percent of its tier 1 capital, or $3 billion. The exposure to the insurance company is 1.0 percent of its tier 1 capital, or $1 billion. As part of its business, the insurance company guaranteed half of the bank's exposures to the covered company, *i.e.,* $1.5 billion. This partial guarantee of $1.5 billion is greater than 50 percent of the covered company's exposure to the insurance company, as $1.5 billion is greater than $0.5 billion. This threshold exceeds the standard in the final rule, which means the covered company must aggregate the exposures to the bank and the insurance company.

2. Control Relationships

Similar to the approach to economically interdependent counterparties, the Board has modified the control relationship tests in the final rule to address the concerns raised by commenters and to reduce burden. First, the control test in the final rule applies only when exposures exceed a threshold of five percent of tier 1 capital, similar to the economic interdependence standard. In practice, the likelihood of a counterparty exceeding this five percent threshold is unlikely.

Second, covered companies will be required to apply only two clear control tests, based on 25 percent voting control and majority control of the board of directors.[154]

Third and finally, the final rule allows covered companies to request a determination in writing from the Board that two counterparties are not under common control, even if one or more of the control factors are met.[155] Upon such a request, the Board may grant temporary relief to the covered company and not require the covered company to aggregate one counterparty with another counterparty provided that, taking into account the specific facts and circumstances, such indicia of control does not result in entities being connected by control relationships for purposes of the final rule, and provided that such relief is in the public interest and is consistent with the purpose of the final rule and section 165(e).[156]

Lastly, it should be noted that the final rule authorizes the Board to determine, after notice to the covered company and opportunity for hearing, that one or more counterparties of the covered company are economically interdependent or connected by control relationships for the purposes of this section, based on consideration of the factors in the final rule as well as related indicia.[157] Moreover, the Board can determine, after notice to the covered company and opportunity for hearing, that the exposures to two counterparties must be aggregated to prevent evasion of the final rule and section 165(e).[158]

Example: A covered company has a credit exposure to a bank that is equal to 4.5 percent of its tier 1 capital. This covered company does not have to apply the control test because the exposure level does not exceed five percent of its tier 1 capital.

Example: A covered company has credit exposures to both a bank and a fund that is sponsored by the bank. The exposure to the bank is equal to 6.5 percent of its tier 1 capital. The exposure to the fund is 2.0 percent of its tier 1 capital. The bank does not own, control, or hold the power to vote 25 percent or more of any class of voting securities of the fund; however, the bank does have the ability to appoint a majority of the directors of the fund. Under the final rule, this covered company is required to aggregate its credit exposures to the fund with its credit exposures to the bank, which yields 8.5 percent of its tier 1 capital.

G. Exemptions

Section 165(e)(6) of the Dodd-Frank Act states that the Board may, by regulation or order, exempt transactions, in whole or in part, from the definition of the term ''credit exposure'' for purposes of that subsection, if the Board

[150] *See* proposed rule § 252.76(a)(2)(ii) (emphasis added).

[151] *See* final rule § 252.76(b)(2)(ii) (emphasis added).

[152] *See* final rule § 252.76(b)(3).

[153] *See* final rule § 252.76(b)(3)(ii).

[154] *See* final rule § 252.76(c)(1). For purposes of the final rule, one counterparty (counterparty A) is deemed to control the other counterparty (counterparty B) if (i) counterparty A owns, controls, or holds with the power to vote 25 percent or more of any class of voting securities of counterparty B; or (ii) counterparty A controls in any manner the election of a majority of the directors, trustees, general partners (or individuals exercising similar functions) of counterparty B.

[155] *See* final rule § 252.76(c)(2)(i).

[156] *See* final rule § 252.76(c)(2)(ii).

[157] *See* final rule § 252.76(d).

[158] *See* final rule § 252.76(e).

finds that the exemption is in the public interest and is consistent with the purposes of that subsection.[159] The proposed rule would have included several exemptions for credit transactions from the SCCL, including (1) direct claims on, and portions of claims that are directly and fully guaranteed as to principal and interest by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, while these entities are operating under the conservatorship or receivership of the Federal Housing Finance Agency; (2) intraday credit exposure to a counterparty; and (3) trade exposures to a central counterparty that meets the definition of a qualifying central counterparty.[160] The proposal also would have exempted any Federal Home Loan Bank from the definition of covered company.[161]

Many commenters expressed support for the proposed exemptions to qualifying central counterparties and for intraday credit exposures to a counterparty. Certain commenters requested an additional exemption for short-dated exposures arising from the provision of traditional custody services or, in the alternative, the implementation of a five-day cure period for such exposures. A few commenters requested an express exemption for credit exposures to the Federal Home Loan Banks. One commenter urged the Board to include regulatory exemptive authority in the final rule that would provide explicit flexibility for tailoring the rule for a particular covered company based on the company's risk profile.

Certain commenters also requested exemptions for multilateral banks and certain supranational entities, including the Bank of International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, and multilateral development banks that are assigned a zero percent risk weight under the Board's capital rules. One commenter argued it is inappropriate to exclude sovereign exposures to zero percent risk weight foreign sovereign entities, which can be risky. Other commenters urged that the exclusion for exposures to zero percent risk weight foreign sovereign entities be extended to their zero percent risk weight public sector entities. These commenters argued that these entities similarly pose little risk of default and such treatment would align with the determination of risk weights under the Board's risk-based capital rules. Certain commenters requested that the Board allow covered companies to exclude any credit exposures to a counterparty that are deducted from their tier 1 capital as credit exposure since the covered company has already reduced its regulatory capital by these amounts. The Board's capital rules require certain unconsolidated investments in financial institutions to be deducted once certain thresholds are reached.

In response to comments, the Board has decided not to allow covered companies to exclude exposures that have been deducted from capital for two reasons. First, the deduction only occurs after a certain threshold is reached and so the full amount of the exposure cannot be excluded as only part of the exposure is deducted from capital. Second, the deduction from capital serves better to reflect the actual loss absorbing capacity of a company's capital base. These deductions are intended to result in a more accurate measure of equity capital; accordingly, no corresponding adjustment to the value of the related credit exposure is required.

Section 252.77 of the final rule sets forth additional exemptions from the single-counterparty credit limits.[162] The Board has retained the exemptions from the proposal and added two additional exemptions.

The first exemption from the final rule is for direct claims on, and the portions of claims that are directly and fully guaranteed as to principal and interest by, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, while these entities are operating under the conservatorship or receivership of the Federal Housing Finance Agency. This exemption reflects a policy decision that credit exposures to these government-sponsored entities should not be subject to a regulatory limit for so long as the entities are in the conservatorship or receivership of the U.S. government.[163] This approach is consistent with the approach that the Board used in its risk retention rules.[164] As determined by the Board, obligations issued by other U.S. government-sponsored entities also would be exempt.

The second exemption from the final rule is for intraday credit exposure to a counterparty.[165] This exemption will help minimize the impact of the rule on the payment and settlement of financial transactions. The Board has declined to broaden this exemption as requested by commenters to ensure that the credit exposure measures accurately reflect actual credit exposures assumed by covered companies. Moreover, the operational and logistical difficulties that extend to measuring intraday credit extensions do not extend in the same manner to longer-term credit extensions.

The third exemption from the final rule is for trade exposures to a central counterparty that meets the definition of a qualifying central counterparty under the Board's capital rules (QCCP).[166] These exposures include potential future exposure arising from transactions cleared by a QCCP and pre-funded default fund contributions. The final rule exempts these exposures to QCCPs from single-counterparty credit limits because of the concern that application of single-counterparty credit limits to these exposures would require firms to spread activity across a greater number of CCPs, which could lead to a reduction in multilateral netting benefits.[167]

In response to comments, the final rule includes two new exemptions. The fourth exemption from the final rule is for any credit transaction with the Bank for International Settlements, the International Monetary Fund, or institutions that are members of the World Bank Group (namely, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the Multilateral Investment Guarantee Agency, and the International Centre for Settlement of Investment Disputes). Although the Bank for International Settlements is not itself a central bank of any sovereign entity, the membership of the Bank for International Settlements is comprised entirely of central banks of sovereign entities, which are generally not defined as counterparties in the final rule.[168] With respect to the other entities, the Board notes that the United States is a shareholder or contributing member of each of those entities, along with other sovereign entities. In light of

[159] *See* 12 U.S.C. 5365(e)(6).

[160] *See* proposed rule § 252.77(a).

[161] *See* proposed rule § 252.77(b).

[162] *See* final rule § 252.77.

[163] *See* final rule § 252.77(a)(1).

[164] *See* 12 CFR 244.8.

[165] *See* final rule § 252.77(a)(2).

[166] *See* final rule § 252.77(a)(3). Qualifying central counterparty is defined to have the same meaning as in § 217.2 of the Board's risk-based capital rules. *See* final rule § 252.71(bb); *See also* 12 CFR 217.2.

[167] As initial margin and excess variation margin posted to the QCCP and held in a segregated account by a third-party custodian are not subject to counterparty risk, these amounts would not be considered credit exposures under the final rule.

[168] Central banks of sovereign entities would only be considered counterparties under the final rule if the central bank's foreign sovereign entity was not assigned a zero percent risk weight under the Board's capital rules. *See* final rule § 252.71(e).

the generally high-credit quality of these institutions and considering that each has a membership structure comprised of a significant proportion of sovereign entities or agencies with strong creditworthiness, the Board is of the view that this treatment is appropriate. The fifth exemption from the final rule is for any credit transaction with the European Commission or European Central Bank. These international organizations share many features of sovereign entities that have been excluded from the final SCCL rule, including the assignment of a zero percent risk weight under the Board's capital rules. The Board believes that these exemptions are in the public interest, given the public purpose of each of these entities, and given the low credit risk of these entities, are consistent with the purposes of section 165(e) and this final rule. Accordingly, for the reasons discussed above and in the proposal, the Board has determined that each of these exemptions is in the public interest and is consistent with the purpose of section 165(e).

The sixth exemption category implements section 165(e)(6) of the Dodd-Frank Act and provides a catch-all category to exempt any transaction which the Board determines to be in the public interest and consistent with the purposes of section 165(e).[169]

Section 252.77(b) of the final rule implements section 165(e)(6) of the Dodd-Frank Act, which provides a statutory exemption for the Federal Home Loan Banks. The Board views section 165(e)(6) as providing an exemption for Federal Home Loan Banks from the definition of covered company but as not providing an exemption for a covered company's credit exposure to the Federal Home Loan Banks. As such, a covered company's exposure to a Federal Home Loan Bank is subject to the SCCL in the final rule.

H. Compliance and Timing of Applicability

1. Scope of Compliance

Under the proposed rule, a covered company with $250 billion or more in total consolidated assets would have been required to comply with the requirements of the proposed rule on a daily basis. These covered companies also would have been required to submit a monthly compliance report to the Board.

Certain commenters requested clarification that the daily compliance requirement for a covered company should be based on the most recent information available with respect to counterparties, consistent with the company's internal risk management processes, and not on information that is updated on a daily basis. Other commenters believed that daily compliance constitutes a significant operational challenge, especially with respect to the look-through approach for SPVs. These commenters noted that the composition of SPVs is typically reported only on a monthly or less frequent basis. To address these concerns, the final rule allows covered companies to rely in good faith on the most recent available information about an SPV. For example, consistent with the final rule, a covered company may fill in values, in a reasonable manner, based on available information.

Similar to the proposal, under § 252.78(a) of the final rule, a covered company is required to comply with the requirements on a daily basis, as of the end of each business day.[170] To address commenters' concerns regarding the ability to access certain information (including information regarding SPVs), the final rule allows covered companies to rely in good faith on the most recent available information. In other words, covered companies are allowed to fill in missing values, in a reasonable manner, based on available information. In addition, under the final rule, a covered company must report its compliance to the Federal Reserve on a quarterly basis, as of the end of the quarter, rather than a monthly basis, unless the Board determines and notifies that company in writing that more frequent reporting is required.[171]

The Board has approved proposed forms, published elsewhere in this issue of the **Federal Register**, for covered companies to report credit exposures to their counterparties as those credit exposures would be measured under the final rule and section 165(e). The comment period on the proposed reporting expires on October 5, 2018.

2. Noncompliance

Section 252.78(c) of the proposed rule addressed the consequences if a covered company were to fail to comply with the credit exposure limits.[172] The proposed rule stated that, if a covered company were not in compliance with respect to a counterparty due to any of four factors—(1) a decrease in the covered company's capital stock and surplus; (2) the merger of the covered company with another covered company; (3) a merger of two unaffiliated counterparties; or (4) any other circumstance the Board determines is appropriate—then the covered company would not have been subject to enforcement actions with respect to such noncompliance for a period of 90 days,[173] so long as the company were to use reasonable efforts to return to compliance with the proposed rule during this period. The covered company would have been prohibited from engaging in any additional credit transactions with such a counterparty in contravention of this requirement during the noncompliance period, except in cases where the Board determined that such additional credit transactions were necessary or appropriate to preserve the safety and soundness of the covered company or financial stability.[174] In granting approval for any such special temporary exceptions, the Board could have imposed supervisory oversight and reporting measures that it determined would have been appropriate to monitor compliance with the foregoing standards.[175]

A number of commenters suggested broadening the cure period to mitigate potential disruptions to proper market activities. In particular, these commenters requested that the cure period be broadened to apply to any breach that is beyond the covered company's control and could be reasonably remediated within the 90-day period. Commenters also requested appropriate transition periods if an exposure or counterparty changes status or loses an exemption under the final rule (*e.g.,* if a sovereign's risk-weight increases or if a qualifying central counterparty loses its status). A few commenters suggested that any breaches of the proposal's credit exposure limits should be promptly reported to the Board.

To address the concerns of commenters, the final rule includes an additional factor for relief during a period of noncompliance: An unforeseen and abrupt change in the status of a counterparty as a result of which the covered company's credit exposure to the counterparty becomes limited by the requirements of this section.[176] Along with the proposed

[169] *See* 12 U.S.C. 5365(e)(6); final rule § 252.77(a)(6).

[170] *See* final rule § 252.78(a)(1).

[171] *See* final rule § 252.78(a)(2).

[172] *See* proposed rule § 252.78(c).

[173] This period could have been adjusted by the Board as appropriate to preserve the safety and soundness of the covered company or U.S. financial stability. *Id.*

[174] *Id.*

[175] *See* proposed rule § 252.78(d).

[176] *See* final rule § 252.78(c)(2). The factors are (i) a decrease in the covered company's capital stock and surplus; (ii) the merger of the covered company with another covered company; (iii) a merger of two

Continued

discretionary factor (''[a]ny other factor(s) the Board determines, in its discretion, is appropriate''),[177] this factor should sufficiently broaden the scope of the cure period to mitigate the risk of an enforcement action due to circumstances outside the control of the covered company.

3. Initial Applicability and Ongoing Applicability

Under the proposed rule, covered companies with $250 billion or more in total consolidated assets would have been required to comply one year from the effective date of the rule, unless that time were extended by the Board in writing.[178] In addition, under the proposed rule, any company that becomes a covered company after the effective date of the rule would have been required to comply with the requirements of the rule beginning on the first day of the fifth calendar quarter after it becomes a covered company, unless that time were accelerated or extended by the Board in writing.[179]

A number of commenters urged the Board to provide covered companies additional time to comply with the requirements of the final rule. Most of these commenters argued that two years from the date the applicable reporting form is finalized is the minimum amount of time covered companies would need to develop the infrastructure to comply with the requirements.[180] These commenters pointed out that compliance with the final rule would entail the deployment of significant resources and development of entirely new systems and procedures, which would depend on the final rule and the associated reporting requirements. Moreover, certain commenters argued that if retail exposures were not exempted from the scope of the final rule, then a minimum of three years from finalization of the applicable reporting form would be necessary for covered companies to develop and implement systems capable of tracking and calculating exposures to millions of individual customers, their intermediate family members, and any other entities a covered company may be required to aggregate.

The Board has simplified the final rule to address the concerns raised by commenters regarding the compliance period of the final rule. The final rule gives major covered companies (*i.e.,* GSIBs) until January 1, 2020, to comply,[181] and gives all other covered companies until July 1, 2020, to comply.[182]

III. Final Rule for Foreign Banking Organizations

A. Background

In February 2014, the Board adopted a final rule establishing enhanced prudential standards for FBOs with U.S. banking operations and total consolidated assets of $50 billion or more.[183] Under that rule, an FBO with U.S. non-branch assets of $50 billion or more is required to form a U.S. IHC to hold its interests in U.S. bank and nonbank subsidiaries.[184] An FBO's U.S. IHC is subject to enhanced prudential standards on a consolidated basis, including risk-based and leverage capital requirements, liquidity requirements, and risk management standards. Certain enhanced prudential standards also apply to an FBO's ''combined U.S. operations,'' which would include an FBO's U.S. branches and agencies, as well as its U.S. IHC and its subsidiaries.

As with covered companies, and consistent with the amendments to section 165(e) made by EGRRCPA, the single-counterparty credit limits in this final rule would apply to the U.S. operations of an FBO with $250 billion or more in total global consolidated assets. The single-counterparty credit limits also would apply to any U.S. IHC of such an FBO with $50 billion or more in total consolidated assets. However, the final rule makes clear that the SCCL applicable to the U.S. operations of an FBO would not apply if an FBO certifies to the Board that it meets large exposure or SCCL standards on a consolidated basis established by its home country supervisor that are consistent with the large exposure standard, unless the Board determines, in writing, after notice to the FBO, that compliance with the final rule is required.

B. Summary of Comments on Proposal for Foreign Banking Organizations

As noted, under the proposal, an FBO was subject to two SCCL: One for its IHC measured against the IHC's capital base and one for its combined U.S. operations (including U.S. branches) measured against the capital base of the entire FBO. With respect to an FBO's combined U.S. operations (rather than its U.S. IHC), the proposal would have applied SCCL with respect to exposures of any U.S. branch or agency of the foreign banking organization; exposures of the U.S. subsidiaries of the foreign banking organization, including any U.S. IHC; and all subsidiaries of such subsidiaries (other than any companies held under section 2(h)(2) of the BHC Act).[185] The U.S. IHC and the FBO itself, with respect to its combined U.S. operations, each would have been a ''covered entity'' under the proposal. A number of commenters argued that application of SCCL to those FBOs that are subject to comparable large exposure or single-counterparty credit limit regimes in their home country is inconsistent with the statutory mandate to give due regard to principles of national treatment and competitive equality.[186] These commenters also noted that certain provisions of the Dodd-Frank Act expressly provide for the recognition of comparable home country regulation.[187] These commenters argued that the development of the large exposure standard made it more likely that other jurisdictions would have comparable single-counterparty credit limit regimes to that of section 165(e) and its implementing regulation.

Commenters also argued that the proposal would have had a materially disproportionate and adverse effect on

unaffiliated counterparties; (iv) an unforeseen and abrupt change in the status of a counterparty as a result of which the covered company's credit exposure to the counterparty becomes limited by the requirements of this section; or (v) any other factor(s) the Board determines, in its discretion, is appropriate.

[177] This prong is § 252.78(c)(4) in the proposed rule and § 252.78(c)(2) in the final rule.

[178] *See* proposed rule § 252.70(g)(2).

[179] *See* proposed rule § 252.70(h).

[180] Section 252.78(a) of the proposal would have required covered companies to comply with the requirements on a daily basis at the end of each business day and submit on a monthly basis a report demonstrating its daily compliance. The preamble to the proposal explained that the Board plans to develop reporting forms for covered companies to use to report credit exposures to their counterparties as those exposures would be measured under rules implementing section 165(e) of the Dodd-Frank Act. 81 FR at 14344 (Mar. 16, 2016).

[181] *See* final rule § 252.70(c)(1)(ii).

[182] *See* final rule § 252.70(c)(1)(i). A covered company that becomes subject to the final rule after its effective date is also given two years from the date on which it becomes a covered company to comply, unless that time is accelerated or extended by the Board in writing. *See* final rule § 252.70(c)(2). The Board may, for instance, exercise its discretion to apply the SCCL to a covered company in a period of less than two years if the Board determined that there was a rapid expansion of risk in that company.

[183] *See* Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations, 79 FR 17240 (Mar. 27, 2014). The definition of ''foreign banking organization'' is the same as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), provided that, if the top-tier foreign banking organization is incorporated in or organized under the laws of any State, the foreign banking organization shall not be treated as a foreign banking organization for purposes of this part. *See* 12 CFR 252.2(j).

[184] An FBO's U.S. IHC is not required to hold the FBO's interest in any company held under section 2(h)(2) of the BHC Act, 12 U.S.C. 1841(h)(2).

[185] 12 U.S.C. 1841(h)(2).

[186] *See* 12 U.S.C. 5365(b)(2).

[187] *See, e.g.,* 12 U.S.C. 5365(b)(2)(B).

FBOs relative to covered companies due to the scope of FBOs subject to the proposal and the existence of limits for both the combined U.S. operations of FBOs and the U.S. IHCs of FBOs. In particular, commenters expressed concern that the proposed rule would apply to all FBOs with $50 billion or more in total global consolidated assets, regardless of the size of their U.S. operations. As a result, these commenters contended that the proposal would subject FBOs to materially greater costs and burdens than their covered company counterparts (*e.g.,* by requiring FBOs to prepare, monitor, and keep records for limits at multiple levels of an FBO's U.S. operations).

Further, commenters expressed the view that the proposal potentially could interfere with the safety and soundness and enterprise-wide risk management of FBOs by applying multiple, redundant, and inconsistent regimes for calculating credit exposures. Commenters also expressed concerns with the noncompliance cross-trigger to FBOs (that is, the prohibition against either the U.S. IHC or the combined U.S. operations of an FBO engaging in additional credit transactions with a counterparty if either entity exceeds its SCCL) as discriminatory and unwarranted. Certain commenters urged that, before applying SCCL to only a portion of the FBO's operations, the Board be required to find that existing federal and state lending limits applicable to an FBO's U.S. branches and agencies and comparable home country SCCL currently applicable to FBOs are not sufficient and that a lower SCCL is necessary to mitigate risks to the financial stability of the United States.

In light of these concerns, some commenters recommended that the final rule apply to a U.S. IHC as if it were a covered company and that an FBO, with respect to their combined U.S. operations, be required to comply with a comparable home country SCCL regime consistent with the large exposure standard. These commenters noted that such an approach would comport with the Board's approach to implementing regulatory capital and stress testing components and meet the requirements of section 165 of the Dodd-Frank Act.

Commenters representing FBOs also expressed substantive concerns with many of the same issues as commenters representing covered companies, such as the definitions of ''covered company'' and ''counterparty,'' the look-through approach for SPVs, and the aggregation of counterparties based on the economic interdependence and control relationship tests. To address these concerns, the final rule for FBOs generally contains the same modifications as those described above for covered companies.

C. Overview of the Final Rule for Foreign Banking Organizations

As noted, the final rule retains both sets of proposed limits that would have applied to FBOs; however, also as noted, an FBO that is subject on a consolidated basis to a home country SCCL framework will be able to comply with the SCCL for its combined U.S. operations by certifying to the Board that the FBO complies with its home country SCCL framework. This modification should address, in large part, the concerns raised by commenters regarding the multiple limits applicable to FBOs under the proposal and mitigate the compliance costs of the final rule for FBOs subject to the requirements in the final rule.[188]

An FBO that cannot make such a certification would be subject to one of two credit exposure limits with respect to its U.S. operations that are tailored to the size and systemic footprint of the firm. Similar to the final rule's provisions for covered companies, the first category of limits applies to any entity that is part of the combined U.S. operations of an FBO with total consolidated assets that equal or exceed $250 billion.[189] These covered foreign entities would be prohibited from having aggregate net credit exposure to an unaffiliated counterparty in excess of 25 percent of the FBO's tier 1 capital.

The second category of limits prohibits any top-tier FBO that has the characteristics of a GSIB under the global methodology [190] (major FBO) from having aggregate net credit exposure in excess of 15 percent of the FBO's tier 1 capital to a major counterparty (a GSIB or a nonbank financial company supervised by the Board) and in excess of 25 percent of the FBO's tier 1 capital to any other counterparty. This standard is similar to the standard in the final rule for covered companies and consistent with the requirements in section 165(a)(1)(B) and section 165(e) of the Dodd-Frank Act, as discussed above.[191] The SCCL applicable to the combined U.S. operations of an FBO that cannot certify to the Board that it complies with a home country SCCL regime consistent with the large exposure standard are summarized in Table 3.

TABLE 3—SINGLE-COUNTERPARTY CREDIT LIMITS APPLICABLE TO THE COMBINED U.S. OPERATIONS OF FOREIGN BANKING ORGANIZATIONS

Category of covered foreign entity	Applicable credit exposure limit
Combined U.S. operations of FBOs with total consolidated assets that equal or exceed $250 billion but are not major FBOs.	Aggregate net credit exposure to a counterparty cannot exceed 25 percent of the FBO's tier 1 capital.
Major FBOs	Aggregate net credit exposure to a *major counterparty* cannot exceed 15 percent of the FBO's tier 1 capital. Aggregate net credit exposure to any *other counterparty* cannot exceed 25 percent of the FBO's tier 1 capital.

Under the final rule, as in the proposal, the SCCL for a U.S. IHC of such an FBO with total consolidated assets that equal or exceed $50 billion to a single counterparty falls into one of three tailored tiers. First, a U.S. IHC with total consolidated assets of at least $50 billion but less than $250 billion is prohibited from having aggregate net

[188] The U.S. IHC and the FBO itself, with respect to its combined U.S. operations, are each a ''covered foreign entity'' under the final rule. For improved clarity, the final rule uses the term ''covered foreign entity'' rather than the term ''covered entity'' that was used in the proposal.

[189] *See* final rule § 252.170(a)(2)(i).

[190] ''Global methodology'' is defined in the Board's Regulation YY as ''the assessment methodology and the higher loss absorbency requirement for global systemically important banks issued by the Basel Committee on Banking Supervision, as updated from time to time.'' 12 CFR 252.2(o).

[191] 12 U.S.C. 5365(a)(1)(B), (e); *See,* ''*Calibrating the Single-Counterparty Credit Limit between Systemically Important Financial Institutions,*'' May 4, 2016, *https://www.federalreserve.gov/aboutthefed/boardmeetings/sccl-paper-20160304.pdf.*

credit exposure to a single counterparty in excess of 25 percent of the company's total regulatory capital plus ALLL.[192] Second, a U.S. IHC with total consolidated assets of $250 billion or more but less than $500 billion is prohibited from having aggregate net credit exposure to a single counterparty in excess of 25 percent of the U.S. IHC's tier 1 capital. (This limit is based on tier 1 capital for the same reasons as described above with respect to the limit applied to covered companies.) Third, a U.S. IHC with $500 billion or more in total consolidated assets is prohibited from having aggregate net credit exposure to a major counterparty in excess of 15 percent of the U.S. IHC's tier 1 capital and faces a 25 percent of tier 1 capital limit for any other counterparty. (This 15 percent limit of tier 1 capital limit is premised on the same rationale as described above with respect to the 15 percent of tier 1 capital limit that applies to major covered companies.) Similar to the final rule applicable to covered companies, a ''major counterparty'' is defined as a U.S. or foreign GSIB or a nonbank financial company supervised by the Board. These limits are summarized in Table 2 above.

In determining whether a U.S. IHC complies with these limits, exposures of the U.S. IHC itself and its subsidiaries needs to be taken into account. Similar to the final rule's requirements for covered companies, ''subsidiary'' is defined as any company that is consolidated by the other company under applicable accounting standards.[193] Definitions of ''counterparty,'' ''affiliate,'' and other related terms in the final rule also are similar to the final rule applicable to covered companies. The attribution requirements and application of the economic interdependence and control relationship tests also are generally the same as under the portions of the final rule applicable to covered companies.[194]

The final rule includes modifications in response to concerns raised by commenters, including comments made to the proposal for covered companies. The Board's final rule applicable to covered companies and the final rule applicable to FBOs have been aligned to the extent such alignment is appropriate. For example, the definition of ''covered foreign entity'' has been revised in the final rule to refer to financial consolidation standards rather than concepts of BHC Act control as under the proposal, which also is consistent with the approach in the final rule for covered companies. Similarly, FBOs that are not GSIBs will have until July 1, 2020, to comply with its requirements, as is the case with similarly situated covered companies.

Although the major components of the SCCL for foreign banking organizations are the same as the requirements applicable to covered companies, there are some differences between these requirements. For example, as discussed in more detail below, the SCCL would not apply to exposures of a U.S. IHC or of the combined U.S. operations of an FBO to the FBO's home country sovereign entity, regardless of the risk weight assigned to that sovereign entity under the Board's capital rules (12 CFR part 217).

D. Key Terminology and Concepts

1. Major Counterparty, Major Foreign Banking Organization, and Major Intermediate Holding Company

Under the proposal, a ''major foreign banking organization'' would have been defined to mean any FBO with total consolidated assets of $500 billion or more. Similarly, a ''major U.S. intermediate holding company'' would have been defined to mean a U.S. IHC with total consolidated assets of $500 billion or more. Under the proposal, major foreign banking organizations and major U.S. IHCs would have been subject to the more stringent 15 percent of tier 1 capital limit with a major counterparty (defined to mean a U.S. GSIB, foreign GSIB, or nonbank financial company supervised by the Board).

Some commenters argued that major FBOs should be defined as GSIBs, in the same manner as ''major covered company'' would have been defined in the proposal for covered companies. These commenters noted that a GSIB determination is based on indicators that correlate to an institution's systemic importance rather than simply consideration of its size, and that basing the classification of FBOs and U.S. IHCs as ''major'' based on size alone would grossly overstate the systemic impact of these entities on the U.S. financial system. Some commenters suggested the Board define a major FBO as an FBO that meets the following criteria: (i) The FBO is a GSIB as determined by the Financial Stability Board; and (ii) the FBO is required to have an IHC for its U.S. operations. These commenters urged that major counterparties also be identified in this manner.

Similar to the definition of ''major covered company'' with respect to covered companies, the final rule generally defines ''major foreign banking organization'' as a covered FBO that has the characteristics of a GSIB under the global methodology.[195] This should address in large part commenters' concerns with respect to FBOs. As discussed above, a U.S. IHC with total consolidated assets of $500 billion or more would present significant risk because of both its size and the likelihood that such a U.S. IHC would have significant cross-border exposure.[196] Therefore, the Board believes that a total consolidated assets threshold of $500 billion or more provides a reasonable indication of a U.S. IHC's ability to impact U.S. financial stability while providing a bright-line threshold that aids administrability of the rule.

2. Eligible Guarantor

Under the proposal, ''eligible protection provider'' for FBOs would not have included the FBO or any entity that is an affiliate either of the U.S. IHC or of any part of the FBO's combined U.S. operations. Commenters argued that the exclusion of an FBO and its affiliates would hinder effective enterprise-wide risk management.

As noted, the final rule replaces the term ''eligible protection provider'' with ''eligible guarantor,'' as that is the term used in the Board's capital rules. The Board has decided not to extend the definition of eligible guarantor to the FBO or any entity that is an affiliate either of the U.S. IHC or of any part of the FBO's combined U.S. operations.[197] Extraterritorial application of the final rule is limited by excluding exposures of the FBO outside the U.S. IHC, or its combined U.S. operations, from the SCCL. Similarly, hedges that are initiated and booked by the FBO outside of the U.S. IHC or its combined U.S. operations are not subject to the SCCL.

[192] The final rule's definition of ''capital stock and surplus'' with respect to a foreign banking organization reflects differences in international accounting standards. *See* final rule § 252.171(e).

[193] *See* final rule § 252.171(gg). For a company that is not subject to applicable accounting standards, ''subsidiary'' includes a company that would have been consolidated if such principles or standards had applied.

[194] A U.S. IHC with total consolidated assets of $50 billion or more but less than $250 billion generally would not be required to apply the economic interdependence or control relationship tests. *See* final rule § 252.176(a).

[195] ''Global methodology'' is defined in the Board's Regulation YY as ''the assessment methodology and the higher loss absorbency requirement for global systemically important banks issued by the Basel Committee on Banking Supervision, as updated from time to time.'' 12 CFR 252.2(o).

[196] As of March 31, 2018, all U.S. IHCs had less than $500 billion in total consolidated assets.

[197] *See* final rule § 252.171(p).

Further, this approach preserves consistent treatment with the SCCL applicable to covered companies—since those covered companies are subject to SCCL on a consolidated basis, a hedge provided by one subsidiary to another subsidiary would not result in any reduction of credit exposure of the covered company. If the Board were to change the definition as requested, an FBO or U.S. IHC would be able to reduce its credit exposures in a way unavailable to covered companies. For these reasons, the Board has decided not to expand the definition of eligible guarantor as requested.

3. Eligible Collateral

The proposal would have excluded from ''eligible collateral'' debt and equity securities, including convertible bonds, issued by an affiliate of the U.S. IHC or by any part of the combined U.S. operations of the FBO. FBO commenters argued that this was discriminatory and noted that a similar restriction did not appear in the definition of eligible collateral for covered companies. In response to comments, the final rule applicable to covered companies clarifies that, with respect to application of the SCCL to covered companies, ''eligible collateral'' does not include debt securities or equity securities issued by the covered company or its affiliate.[198]

Some commenters also expressed concern with the limitation on eligible collateral that would have required a U.S. IHC or the combined U.S. operations of an FBO to have a perfected, first priority security interest in the collateral. Those commenters argued that this requirement could interfere with effective enterprise-wide risk management and urged recognition of collateral where a non-U.S. branch has a security interest if the collateral is held for the benefit of the combined U.S. operations of the FBO. The Board believes that covered foreign entities that operate in the United States should be subject to creditor protections that are consistent with U.S. law and, therefore, has not modified this requirement. Moreover, with respect to exposures within the United States and outside an FBO's U.S. IHC, an FBO that certifies that it complies on a consolidated basis to a home country SCCL regime consistent with the large exposure standard would be subject to its home country requirements, not the final rule, in which case a perfected, first priority security interest in collateral may not be required.

4. Counterparty

The final rule generally defines ''counterparty'' in the same manner as the final rule that applies to covered companies.[199] The Board received similar comments concerning the definition of ''counterparty'' in the proposed rule for FBOs as with the proposed rule for covered companies, and the definition has been modified in the final rule in the same manner and for the same reasons as the revised definition of ''counterparty'' in the final rule for covered companies, as discussed earlier.

One key difference between this definition in the final rule for FBOs and the final rule for covered companies is that, with respect to an FBO, the FBO's home country sovereign entity is not included as a counterparty, notwithstanding the risk weight assigned to that sovereign entity under the Board's Regulation Q (12 CFR part 217).[200] This difference recognizes that an FBO's U.S. IHC and combined U.S. operations may have exposures to the FBO's home country sovereign entity that are required by home country laws or are necessary to facilitate the normal course of business for the consolidated FBO. The proposal included an exemption to exclude these exposures; however, in light of the fact that these foreign sovereign entities would not be considered companies formally subject to the requirements of section 165(e) of the Dodd-Frank Act, the Board believes it is more appropriate simply to not include these entities as defined counterparties. ''Sovereign entity'' is defined in the final rule, as under the proposal, to mean a central national government (including the U.S. government) or an agency, department, ministry, or central bank, but not including any political subdivision such as a state, province or municipality.[201]

Certain commenters requested clarification or confirmation that the home country sovereign entity exemption includes a sovereign's agencies and instrumentalities. Since the definition of ''sovereign entity'' includes an agency, department, ministry or central bank, these entities would fall within the scope of the home country sovereign entity exemption. Some commenters requested that the final rule extend the scope of this exemption to include the sovereign's political subdivisions. These commenters urged that there is no reason to treat political subdivisions differently from sovereign agencies and instrumentalities. As noted, the Board's final rule applicable to covered companies includes a U.S. State (including all of its agencies, instrumentalities, and political subdivisions) as a separate counterparty because the severe distress or failure of a U.S. state or municipality could have effects on a covered company that are comparable to those caused by the failure of a financial firm or nonfinancial corporation to which the covered company has a large credit exposure. For the same reason, the Board includes as a separate counterparty political subdivisions of a foreign sovereign entity (including all of such political subdivision's agencies and instrumentalities), and the final rule does not extend the exclusion for exposures to an FBO's home country sovereign entity.

E. Credit Exposure Limits

Section 252.172 of the proposed rule contained the key quantitative limitations on credit exposure of a covered entity to a single counterparty.[202] As noted, consistent with the final rule applied to covered companies and the amendments to section 165(e) made by EGRRCPA, the final rule would apply SCCL to an FBO with U.S. banking operations and $250 billion or more in total global consolidated assets. The final rule seeks to limit further the burden on FBOs by generally permitting an FBO to comply with the SCCL for the combined U.S. operations of an FBO by certifying to the Board that the FBO meets large exposure or SCCL standards on a consolidated basis established by its home country supervisor that are consistent with the large exposure standard.[203] The final rule applies the SCCL to any U.S. IHC with $50 billion or more in total consolidated assets that is a subsidiary of an FBO with $250 billion or more in total global consolidated assets, consistent with the proposal and the Board's other enhanced prudential standards applicable to U.S. IHCs.[204]

A number of commenters argued that application of SCCL to foreign banking organizations subject to comparable large exposure or single-counterparty credit limit regimes in their home country is inconsistent with the statutory mandate to give due regard to

[198] *See* final rule § 252.171(*l*).

[199] *See* final rule §§ 252.71(e), 252.171(f).

[200] *See* final rule § 252.171(f).

[201] *See* final rule § 252.171(hh).

[202] *See* proposed rule § 252.172.

[203] An FBO that makes such a certification is required to provide to the Board reports relating to its compliance with the large exposure or SCCL standards of its home country supervisor concurrently with filing the FR Y–7Q or any successor report.

[204] *See also* section 401(g) of EGRRCPA.

the principle of national treatment and competitive equality.[205] These commenters noted that certain provisions of the Dodd-Frank Act expressly provide for the recognition of comparable home country regulation,[206] and contended that more jurisdictions are likely to have comparable single-counterparty credit limit regimes following development of the large exposure standard.

The principle of national treatment and equality of competitive opportunity generally means that FBOs operating in the United States should be treated no less favorably than similarly situated U.S. banking organizations and should generally be subject to the same restrictions and obligations in the United States as those that apply to the domestic operations of U.S. banking organizations. The final rule generally applies SCCL to FBOs in the same manner as to covered companies, consistent with the principle of national treatment and equality of competitive opportunity. In particular, the final rule uses the same total consolidated assets threshold of $250 billion or more for both covered companies and FBOs, and both covered companies and FBOs are designated as ''major covered companies'' and ''major foreign banking organizations'' based on whether those firms have certain characteristics of GSIBs.[207] The final rule's application of SCCL to U.S. IHCs is tailored such that U.S. IHCs of similar size to covered companies are subject to the same SCCL. Although the final rule for FBOs differs from the final rule for covered companies by applying SCCL to U.S. IHCs with total consolidated assets of at least $50 billion but less than $250 billion, the SCCL applicable to this category of companies is tailored relative to covered companies (a limit of 25 percent of capital stock and surplus rather than a limit of 25 percent of tier 1 capital). Furthermore, application of the SCCL to these U.S. IHCs promotes equality of competitive opportunity, since they represent one portion of a significantly larger banking organization.

In addition, the final rule also does not include as a counterparty the home country sovereign entity of an FBO, without regard to the risk weight that applies to the sovereign. This treatment is consistent with the exclusion of exposures to the U.S. government from the final rule. Finally, as noted, the final rule permits FBOs to comply with the SCCL for their combined U.S. operations by certifying to the Board that the FBO meets large exposure or SCCL standards on a consolidated basis established by its home country supervisor that are consistent with the large exposure standard. This option should avoid subjecting an FBO to duplicative SCCL standards. For all these reasons, the Board believes it is providing due regard to the principles of national treatment and equality of competitive opportunity in applying SCCL to FBOs through this final rule.[208]

As noted, the Board is developing a comprehensive proposal on application of enhanced prudential standards to FBOs with total consolidated assets of at least $100 billion but less than $250 billion, including any subsidiary U.S. IHC. In connection with this proposal and other tailoring and implementation efforts related to EGRRCPA, the Board may make amendments to the SCCL framework in this final rule.

F. Gross Credit Exposure

Under the proposed rule, a covered entity would have been permitted to calculate gross exposure to certain derivative transactions using any methodology that it is permitted to use under the Board's capital rules, including IMM. This treatment would have been the same as the proposed treatment of covered companies. FBO commenters expressed support for the proposal's flexibility in permitting use of IMM that have been approved for risk based-capital purposes to value exposures due to derivative transactions. However, commenters explained that an FBO would be unable to benefit from this treatment with respect to its U.S. IHC or its combined U.S. operations because there is currently no approval process in place for FBOs to seek approval to use IMM in the United States. As a result, these commenters indicated that an FBO would need to use the standardized methodology, which does not fully consider correlation between derivatives and any netting benefits, and thus may overstate the entity's exposures, in valuing exposures due to derivatives transactions of its U.S. IHC and its combined U.S. operations. Some commenters urged the Board to provide an avenue in the final rule for an FBO to obtain approval for its U.S. IHC and its combined U.S. operations to use IMM in calculating exposures due to derivatives transactions. In particular, these commenters argued that, to the extent FBOs are subject to rigorous approval processes to use IMM in their home countries, the Board should establish a process to recognize and defer to home country regulators' approval of IMM and thereby permit an FBO to use such methodologies in calculating exposures due to derivative transactions of its U.S. IHC or its combined U.S. operations, if desired. These commenters noted that this approach would be consistent with the statutory mandate to give due regard to comparable home country treatment.

Under the final rule, an FBO is authorized to measure its gross credit exposure to a counterparty on a derivatives transaction using the same valuation approaches as those set forth in the final rule applicable to covered companies. As noted, an FBO that is subject on a consolidated basis to a home country SCCL framework will be able to comply with the SCCL for its combined U.S. operations by certifying to the Board that the FBO complies with its home country SCCL framework. To the extent the FBO's home country SCCL framework permits the use of internal models to value derivative transactions, the FBO's certification to the Board that the FBO complies with the SCCL framework could be based, in part, on its measurement of derivatives transactions using such models. In the case of a U.S. IHC, the U.S. IHC is authorized under the final rule to value a derivative transaction using any approach, including internal models, that the U.S. IHC is authorized to use under the capital rules to value the derivatives transaction.

G. Net Credit Exposure

The final rule describes how a covered foreign entity would convert gross credit exposure amounts to net credit exposure amounts by taking into account eligible collateral, eligible guarantees, eligible credit and equity derivatives, and other eligible hedges (that is, a short position in the counterparty's debt or equity securities). An FBO generally would calculate its net credit exposure to a counterparty by adjusting its gross credit exposure to that counterparty in the same way as covered companies would adjust their gross credit exposures. However, the definition of ''eligible collateral'' for

[205] *See* 12 U.S.C. 5365(b)(2).

[206] *See, e.g.,* 12 U.S.C. 5365(b)(2)(B).

[207] As noted, a U.S. IHC with total consolidated assets of $500 billion or more would be considered a ''major U.S. intermediate holding company.'' Although this threshold is not identical to the standard applied to covered companies, the Board believes that an entity with that level of total consolidated assets would present significant risk because of both its size and the likelihood that such a U.S. IHC would have significant cross-border exposure. As a result, it is consistent with the principle of national treatment to subject such U.S. IHCs to the same SCCL as a major covered company.

[208] 12 U.S.C. 5365(b)(2).

covered foreign entities would exclude debt or equity securities (including convertible bonds) issued by an affiliate (rather than a subsidiary) of the U.S. IHC or the combined U.S. operations of a foreign banking organization. Referring to ''affiliate'' in the context of FBOs preserves consistent treatment with covered companies, who are subject to SCCL on a consolidated basis. As discussed above, the definition of ''eligible guarantor'' would exclude the foreign banking organization or any affiliate thereof, in order to preserve consistent treatment with covered companies.[209]

H. Exposures to SPVs and Aggregation of Exposures to Connected Counterparties

The final rule generally treats foreign covered entities in the same manner as covered companies with respect to exposures to SPVs and the application of the economic interdependence and control relationship tests.[210] This treatment includes modifications made in the final rule for covered companies in response to public comments for the same reasons discussed earlier in this **SUPPLEMENTARY INFORMATION**. Just as in the proposal, under the final rule for FBOs, U.S. IHCs with total consolidated assets of at least $50 billion but less than $250 billion generally are not required to apply the specialized SPV treatment of section 252.175 of the final rule. However, the final rule has been revised such that only a covered foreign entity or U.S. IHC with $250 billion or more in total consolidated assets is required to apply the economic interdependence and control relationship tests to aggregate connected counterparties, unless the Board determines it is necessary to apply these tests with respect to such a company to prevent evasion of the rule.

I. Exemptions

As with the proposal for covered companies, certain commenters also requested exemptions for multilateral banks and certain supranational entities, including the Bank of International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, and multilateral development banks that are assigned a zero percent risk weight under the Board's capital rules.

As noted, section 165(e)(6) of the Dodd-Frank Act permits the Board to exempt transactions from the definition of the term ''credit exposure'' for purposes of this subsection, if the Board finds that the exemption is in the public interest and is consistent with the purposes of this subsection. The final rule provides the same exemptions for the credit exposures of covered foreign entities as those provided in the final rule for covered companies.[211]

J. Compliance

Under the proposed rule, a U.S. IHC and the combined U.S. operations of an FBO with less than $250 billion in total consolidated assets, and less than $10 billion in total on-balance-sheet foreign exposures, would have been required to comply with the requirements of the proposed rule as of the end of each quarter.[212] Other U.S. IHCs and FBOs would have been required to comply with the proposed rule on a daily basis as of the end of each business day and submit a monthly compliance report demonstrating its daily compliance.[213] The final rule, like the proposal, requires a U.S. IHC with total consolidated assets of at least $50 billion but less than $250 billion to comply with the requirements of the rule as of the end of each quarter, unless the Board determines and notifies the U.S. IHC in writing that more frequent compliance is required. Also like the proposal, the final rule requires an FBO (with respect to its combined U.S. operations) or U.S. IHC with total consolidated assets of $250 billion or more to comply with the requirements of the rule on a daily basis, as of the end of each business day. The final rule requires all covered foreign entities to report compliance on a quarterly basis.

Under the proposal, an FBO would have been required to ensure the compliance of its U.S. IHC and its combined U.S. operations. If either the U.S. IHC or the combined U.S. operations were not in compliance with respect to a counterparty, both the U.S. IHC and the combined U.S. operations would have been prohibited from engaging in any additional credit transactions with such a counterparty, except in cases when the Board determines that such additional credit transactions were necessary or appropriate to preserve the safety and soundness of the foreign banking organization or financial stability.[214] In considering special temporary exceptions, the Board could have imposed supervisory oversight and reporting measures that the Board determined were appropriate to monitor compliance with the foregoing standards.[215]

Commenters expressed concern with the fact that if either the U.S. IHC or the combined U.S. operations of an FBO were not in compliance, both the U.S. IHC and the combined U.S. operations would be prohibited from engaging in any additional credit transactions with such a counterparty (the ''cross-trigger''). Commenters contended there was no similar restriction on U.S. covered companies (for example, the breach of lending limits that apply to a national bank subsidiary would not restrict lending or additional exposures by other parts of the consolidated BHC). Commenters also noted that this provision would create incentives for FBOs to shift banking, lending, and derivatives activities to non-U.S. branches to avoid the potential curtailment of activities that could result from operation of the cross-trigger.

As noted, the final rule modifies the manner in which the SCCL apply to an FBO. In particular, an FBO that is subject on a consolidated basis to a home country SCCL framework will be able to comply with the SCCL for its combined U.S. operations by certifying to the Board that the FBO complies with its home country SCCL framework. If an FBO is able to make such a certification, the FBO would be viewed as compliant with the final rule with respect to its combined U.S. operations. As a result, any noncompliance by the FBO would be with respect to its IHC. This modification should help mitigate concerns raised by commenters regarding the cross-trigger.

K. Timing of Applicability

Under the proposal, FBOs and U.S. IHCs with less than $250 billion in total consolidated assets and less than $10 billion in total on-balance-sheet foreign assets would have been required to comply with the proposed rule two years from the effective date of the proposed rule, unless that time were extended by the Board in writing.[216] FBOs and U.S. IHCs with $250 billion or more in total consolidated assets or $10 billion or more in total on-balance-sheet foreign assets would have been required to comply with the proposed rule one year from the effective date of any final rule, unless that time were

[209] *See* final rule § 252.171(p).

[210] *See* final rule §§ 252.175–.176.

[211] *See* final rule § 252.177(a). As noted, the final rule retains the treatment for an FBO's exposures to a home country sovereign entity, but does so by modifying the definition of ''counterparty'' to exclude these entities. *See* section III.D.4 supra for additional discussion.

[212] *See* proposed rule § 252.178(a).

[213] *Id.*

[214] *See* proposed rule § 252.178(c).

[215] *See* proposed rule § 252.178(d).

[216] *See* proposed rule § 252.170(c)(1)(i), 252.170(c)(2)(i).

extended by the Board in writing.[217] The proposal would have required any company that became a covered company after the effective date of the final rule to comply with the requirements of the rule beginning on the first day of the fifth calendar quarter after it becomes a covered entity, unless that time were accelerated or extended by the Board in writing.[218]

Commenters argued that FBOs should have more time to comply with the final rule, for reasons similar to those provided by commenters concerning the proposal for covered companies. In particular, these commenters argued that the one-year compliance period might be insufficient for smaller organizations in light of the multiple and complex requirements on the combined U.S. operations of an FBO.

The Board has determined to permit all covered foreign entities that are not major FBOs or major U.S. IHCs until July 1, 2020, to comply with the final rule, while major FBOs and major U.S. IHCs have until January 1, 2020, to comply. This timing is similar to the final compliance period for covered companies. Also similar to the final rule for covered companies, the final rule requires a covered foreign entity that becomes a covered foreign entity after the effective date of the final rule to comply with the SCCL beginning on the first day of the ninth calendar quarter after it becomes a covered foreign entity, unless that time is accelerated or extended by the Board in writing.

IV. Impact Analysis

A quantitative impact study conducted by Board staff on the proposal concluded that banking firms would generally have been able to meet the proposed SCCL with modest adjustments. The study estimated that the total amount of covered companies' credit exposure in excess of the limits in the proposed rule would have been less than $100 billion, and that the overwhelming majority of this excess credit exposure would have been credit exposure of major covered companies to major counterparties. The final rule contains a number of recommended modifications that would reduce this estimated impact. In particular, the final rule would allow covered companies and U.S. IHCs to use internal models to measure exposures from securities financing transactions, which was one of the major sources of excess exposure. Moreover, the narrower scope of application of the final rule, including the narrower definitions of ''covered company'' and ''counterparty,'' would further reduce its impact. Finally, recent staff analysis shows that covered companies and U.S. IHCs have very few single-counterparty exposures above 5 percent of their tier 1 capital. Thus, they are unlikely to exceed the credit limits of the final rule. As a result, staff believes the final rule is unlikely to have a material impact on covered companies and U.S. IHCs.

Importantly, the final rule provides covered companies and U.S. IHCs with a compliance period of 18 to 24 months, which should allow firms sufficient time to construct an infrastructure for monitoring and reporting their credit exposures to the Federal Reserve and for conforming any excess credit exposures. Covered firms will have a number of relatively low-cost mechanisms for reducing any residual excess credit exposures, including shifting exposures to other less-concentrated counterparties, increasing margin requirements for some derivatives or securities financing transactions, or increasing use of derivative transactions that are cleared by qualifying central counterparties.

V. Regulatory Analysis

A. Paperwork Reduction Act

Certain provisions of the final rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3521). The Board has reviewed the reporting requirements in §§ 252.78(a) and 252.178(a) of the final rule under the authority delegated to the Board by Office of Management and Budget. As noted, the Board is addressing these requirements in a separate notice published elsewhere in this issue of the **Federal Register**.

B. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires that an agency prepare and make available an initial regulatory flexibility analysis in connection with a notice of proposed rulemaking.

The Board solicited public comment on this rule in a notice of proposed rulemaking[219] and has since considered the potential impact of this rule on small entities in accordance with section 604 of the RFA. Based on the Board's analysis, and for the reasons stated below, the Board believes the final rule will not have a significant economic impact on a substantial number of small entities.

Under regulations issued by the Small Business Administration (SBA), a ''small entity'' includes a depository institution, bank holding company, or savings and loan holding company with assets of $550 million or less (small banking organizations).[220] As discussed in the **SUPPLEMENTARY INFORMATION**, the final rule generally would apply to bank holding companies and foreign banking organizations with total consolidated assets of $250 billion or more. Companies that are subject to the final rule have consolidated assets that substantially exceed the $550 million asset threshold at which a banking entity is considered a ''small entity'' under SBA regulations. Because the final rule does not apply to any company with assets of $550 million or less, the final rule would not apply to any ''small entity'' for purposes of the RFA. The Board does not believe that the final rule duplicates, overlaps, or conflicts with any other Federal rules. In light of the foregoing, the Board does not believe that the final rule would have a significant economic impact on a substantial number of small entities supervised.

1. *Statement of the need for, and objectives of the final rule.*

In accordance with section 165 of the Dodd-Frank Act, the Board is proposing to amend Regulation YY to establish SCCL for covered companies and covered foreign entities in order to limit the risks that the failure of any individual firm could pose to those organizations.[221] Section 165(e) requires the Board to implement the SCCL by regulation. The reasons and justification for the final rule are described above in more detail in this **SUPPLEMENTARY INFORMATION**.

2. *Summary of the significant issues raised by public comment on the Board's initial analysis, the Board's assessment of any such issues, and a result of such comments.*

The Board performed a regulatory flexibility analysis in connection with the final rule. Moreover, the final rule does not impact small entities as described below.

3. *Small entities affected by the final rule and compliance requirements.*

The provisions of the final rule apply to covered companies and covered foreign entities. Bank holding companies and foreign banking organizations that are subject to the proposed rule therefore substantially exceed the $550 million asset threshold at which a banking entity would qualify as a small banking organization.

[217] *See* proposed rule §§ 252.170(c)(1)(ii), 252.170(c)(2)(ii).

[218] *See* proposed rule § 252.170(d).

[219] 81 FR 14328 (Mar. 16, 2016).

[220] *See* 13 CFR 121.201.

[221] *See* 12 U.S.C. 5365(e).

4. *Significant alternatives to the final rule.*

In light of the foregoing, the Board does not believe that this final rule would have a significant negative economic impact on any small entities.

C. Solicitation of Comments on the Use of Plain Language

Section 722 of the Gramm-Leach Bliley Act of 1999 requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board received no comments on these matters and believes that the final rule is written plainly and clearly.

List of Subjects in 12 CFR Part 252

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System amends 12 CFR part 252 as follows:

PART 252—ENHANCED PRUDENTIAL STANDARDS (REGULATION YY).

■ 1. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 321–338a, 481–486, 1467a(g), 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1844(c), 3904, 3906–3909, 4808, 5361, 5365, 5366, 5367, 5368, 5371.

■ 2. Add subpart H to read as follows:

Subpart H—Single-Counterparty Credit Limits

Sec.

Subpart H—Single-Counterparty Credit Limits

§ 252.70 Applicability and general provisions.

(a) *In general.* (1) This subpart establishes single counterparty credit limits for a covered company.

(2) For purposes of this subpart:

(i) *Covered company* means

(A) Any bank holding company (other than a foreign banking organization that is subject to subpart Q of this part, including any U.S. intermediate holding company of such foreign banking organization) with total consolidated assets that equal or exceed $250 billion; and

(B) Any U.S. bank holding company identified as a global systemically important BHC pursuant to § 217.402 of the Board's Regulation Q (12 CFR 217.402).

(ii) *Major covered company* means any covered company that is a U.S. bank holding company identified as a global systemically important BHC pursuant to § 217.402 of the Board's Regulation Q (12 CFR 217.402).

(b) *Credit exposure limits.* (1) Section 252.72 establishes credit exposure limits for a covered company and a major covered company.

(2) A covered company is required to calculate its aggregate net credit exposure, gross credit exposure, and net credit exposure to a counterparty using the methods in this subpart.

(c) *Applicability of this subpart.* (1)(i) A company that is a covered company as of October 5, 2018, must comply with the requirements of this subpart, including but not limited to § 252.72, beginning on July 1, 2020, unless that time is extended by the Board in writing.

(ii) Notwithstanding paragraph (c)(1)(i) of this section, a company that is a major covered company as of October 5, 2018, must comply with the requirements of this subpart, including but not limited to § 252.72, beginning on January 1, 2020, unless that time is extended by the Board in writing.

(2) A covered company that becomes subject to this subpart after October 5, 2018 must comply with the requirements of this subpart beginning on the first day of the ninth calendar quarter after it becomes a covered company, unless that time is accelerated or extended by the Board in writing.

(d) *Cessation of requirements.* (1) Any company that becomes a covered company will remain subject to the requirements of this subpart unless and until its total consolidated assets fall below $250 billion for each of four consecutive quarters, as reported on the covered company's FR Y–9C, effective on the as-of date of the fourth consecutive FR Y–9C.

(2) A covered company that has ceased to be a major covered company for purposes of § 252.72(b) is no longer subject to the requirements of § 252.72(b) beginning on the first day of the calendar quarter following the reporting date on which it ceased to be a major covered company; provided that the covered company remains subject to the requirements of this subpart, unless it ceases to be a covered company pursuant to paragraph (d)(1) of this section.

§ 252.71 Definitions.

Unless defined in this section, terms that are set forth in § 252.2 of this part and used in this subpart have the definitions assigned in § 252.2. For purposes of this subpart:

(a) *Adjusted market value* means:

(1) With respect to the value of cash, securities, or other eligible collateral transferred by the covered company to a counterparty, the sum of:

(i) The market value of the cash, securities, or other eligible collateral; and

(ii) The product of the market value of the securities or other eligible collateral multiplied by the applicable collateral haircut in Table 1 to § 217.132 of the Board's Regulation Q (12 CFR 217.132); and

(2) With respect to cash, securities, or other eligible collateral received by the covered company from a counterparty:

(i) The market value of the cash, securities, or other eligible collateral; minus

(ii) The market value of the securities or other eligible collateral multiplied by the applicable collateral haircut in Table 1 to § 217.132 of the Board's Regulation Q (12 CFR 217.132).

(3) Prior to calculating the adjusted market value pursuant to paragraphs (a)(1) and (2) of this section, with regard to a transaction that meets the definition of ''repo-style transaction'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2), the covered company would first multiply the applicable collateral haircuts in Table 1 to § 217.132 of the Board's Regulation Q (12 CFR 217.132) by the square root of ½.

(b) *Affiliate* means, with respect to a company:

(1) Any subsidiary of the company and any other company that is consolidated with the company under applicable accounting standards; or

(2) For a company that is not subject to principles or standards referenced in paragraph (b)(1) of this section, any subsidiary of the company and any other company that would be consolidated with the company, if consolidation would have occurred if such principles or standards had applied.

(c) *Aggregate net credit exposure* means the sum of all net credit exposures of a covered company and all

of its subsidiaries to a single counterparty as calculated under this subpart.

(d) *Bank-eligible investments* means investment securities that a national bank is permitted to purchase, sell, deal in, underwrite, and hold under 12 U.S.C. 24 (Seventh) and 12 CFR part 1.

(e) *Counterparty* means, with respect to a credit transaction:

(1) With respect to a natural person, the natural person, and, if the credit exposure of the covered company to such natural person exceeds 5 percent of the covered company's tier 1 capital, the natural person and members of the person's immediate family collectively;

(2) With respect to any company that is not a subsidiary of the covered company, the company and its affiliates collectively;

(3) With respect to a State, the State and all of its agencies, instrumentalities, and political subdivisions (including any municipalities) collectively;

(4) With respect to a foreign sovereign entity that is not assigned a zero percent risk weight under the standardized approach in the Board's Regulation Q (12 CFR part 217, subpart D), the foreign sovereign entity and all of its agencies and instrumentalities (but not including any political subdivision) collectively; and

(5) With respect to a political subdivision of a foreign sovereign entity such as a state, province, or municipality, any political subdivision of the foreign sovereign entity and all of such political subdivision's agencies and instrumentalities, collectively.[1]

(f) *Covered company* is defined in § 252.70(a)(2)(i) of this subpart.

(g) *Credit derivative* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(h) *Credit transaction* means, with respect to a counterparty:

(1) Any extension of credit to the counterparty, including loans, deposits, and lines of credit, but excluding uncommitted lines of credit;

(2) Any repurchase agreement or reverse repurchase agreement with the counterparty;

(3) Any securities lending or securities borrowing transaction with the counterparty;

(4) Any guarantee, acceptance, or letter of credit (including any endorsement, confirmed letter of credit, or standby letter of credit) issued on behalf of the counterparty;

(5) Any purchase of securities issued by or other investment in the counterparty;

(6) Any credit exposure to the counterparty in connection with a derivative transaction between the covered company and the counterparty;

(7) Any credit exposure to the counterparty in connection with a credit derivative or equity derivative between the covered company and a third party, the reference asset of which is an obligation or equity security of, or equity investment in, the counterparty; and

(8) Any transaction that is the functional equivalent of the above, and any other similar transaction that the Board, by regulation or order, determines to be a credit transaction for purposes of this subpart.

(i) *Depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(j) *Derivative transaction* means any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets.

(k) *Eligible collateral* means collateral in which, notwithstanding the prior security interest of any custodial agent, the covered company has a perfected, first priority security interest (or the legal equivalent thereof, if outside of the United States), with the exception of cash on deposit, and is in the form of:

(1) Cash on deposit with the covered company or a subsidiary of the covered company (including cash in foreign currency or U.S. dollars held for the covered company by a custodian or trustee, whether inside or outside of the United States);

(2) Debt securities (other than mortgage- or asset-backed securities and resecuritization securities, unless those securities are issued by a U.S. government-sponsored enterprise) that are bank-eligible investments and that are investment grade, except for any debt securities issued by the covered company or any subsidiary of the covered company;

(3) Equity securities that are publicly traded, except for any equity securities issued by the covered company or any subsidiary of the covered company;

(4) Convertible bonds that are publicly traded, except for any convertible bonds issued by the covered company or any subsidiary of the covered company; or

(5) Gold bullion.

(l) *Eligible credit derivative* means a single-name credit derivative or a standard, non-tranched index credit derivative, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Receivership, insolvency, liquidation, conservatorship, or inability of the reference exposure issuer to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld; and

(7) If the credit derivative is a credit default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event.

(m) *Eligible equity derivative* means an equity derivative, provided that:

(1) The derivative contract has been confirmed by all relevant parties;

(2) Any assignment of the derivative contract has been confirmed by all relevant parties; and

(3) The terms and conditions dictating the manner in which the derivative contract is to be settled are incorporated into the contract.

[1] In addition, under § 252.76, under certain circumstances, a covered company is required to aggregate its net credit exposure to one or more counterparties for all purposes under this subpart.

(n) *Eligible guarantee* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(o) *Eligible guarantor* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(p) *Equity derivative* has the same meaning as ''equity derivative contract'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(q) *Exempt counterparty* means an entity that is identified as exempt from the requirements of this subpart under § 252.77, or that is otherwise excluded from this subpart, including any sovereign entity assigned a zero percent risk weight under the standardized approach in the Board's Regulation Q (12 CFR part 217, subpart D).

(r) *Financial entity* means:

(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company as defined in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)); a U.S. intermediate holding company established or designated for purposes of compliance with this part; or a nonbank financial company supervised by the Board;

(ii) A depository institution as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a federal credit union or state credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); a national association, state member bank, or state nonmember bank that is not a depository institution; an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) Any person registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or an entity that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(v) A securities holding company as defined in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)–(5)); an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(vi) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(vii) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in sections 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in sections 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in section 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(viii) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(ix) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator;

(x) Any designated financial market utility, as defined in section 803 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5462); and

(xi) An entity that would be a financial entity described in paragraphs (r)(1)(i) through (x) of this section, if it were organized under the laws of the United States or any State thereof; and

(2) Provided that, for purposes of this subpart, ''financial entity'' does not include any counterparty that is a foreign sovereign entity or multilateral development bank.

(s) *Foreign sovereign entity* means a sovereign entity other than the United States government and the entity's agencies, departments, ministries, and central bank collectively.

(t) *Gross credit exposure* means, with respect to any credit transaction, the credit exposure of the covered company before adjusting, pursuant to § 252.74, for the effect of any eligible collateral, eligible guarantee, eligible credit derivative, eligible equity derivative, other eligible hedge, and any unused portion of certain extensions of credit.

(u) *Immediate family* means the spouse of an individual, the individual's minor children, and any of the individual's children (including adults) residing in the individual's home.

(v) *Intraday credit exposure* means credit exposure of a covered company to a counterparty that by its terms is to be repaid, sold, or terminated by the end of its business day in the United States.

(w) *Investment grade* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(x) *Major counterparty* means any counterparty that is or includes:

(1) A major covered company;

(2) A top-tier foreign banking organization that meets the requirements of § 252.172(c)(3) through (5); or

(3) Any nonbank financial company supervised by the Board.

(y) *Major covered company* is defined in § 252.70(a)(2)(ii) of this subpart.

(z) *Multilateral development bank* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(aa) *Net credit exposure* means, with respect to any credit transaction, the gross credit exposure of a covered company and all of its subsidiaries calculated under § 252.73, as adjusted in accordance with § 252.74.

(bb) *Qualifying central counterparty* has the same meaning as in § 217.2 of

the Board's Regulation Q (12 CFR 217.2).

(cc) *Qualifying master netting agreement* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(dd) *Securities financing transaction* means any repurchase agreement, reverse repurchase agreement, securities borrowing transaction, or securities lending transaction.

(ee) *Short sale* means any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.

(ff) *Sovereign entity* means a central national government (including the U.S. government) or an agency, department, ministry, or central bank, but not including any political subdivision such as a state, province, or municipality.

(gg) *Subsidiary.* A company is a *subsidiary* of another company if:

(1) The company is consolidated by the other company under applicable accounting standards; or

(2) For a company that is not subject to principles or standards referenced in paragraph (gg)(1) of this definition, consolidation would have occurred if such principles or standards had applied.

(hh) *Tier 1 capital* means common equity tier 1 capital and additional tier 1 capital, as defined in the Board's Regulation Q (12 CFR part 217) and as reported by the bank holding company on the most recent FR Y–9C report on a consolidated basis.

(ii) *Total consolidated assets.* A company's total consolidated assets are determined based on:

(1) The average of the bank holding company's total consolidated assets in the four most recent consecutive quarters as reported quarterly on the FR Y–9C; or

(2) If the bank holding company has not filed an FR Y–9C for each of the four most recent consecutive quarters, the average of the bank holding company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters, as applicable.

§ 252.72 Credit exposure limits.

(a) *General limit on aggregate net credit exposure.* No covered company may have an aggregate net credit exposure to any counterparty that exceeds 25 percent of the tier 1 capital of the covered company.

(b) *Limit on aggregate net credit exposure of major covered companies to major counterparties.* No major covered company may have aggregate net credit exposure to any major counterparty that exceeds 15 percent of the tier 1 capital of the major covered company.

§ 252.73 Gross credit exposure.

(a) *Calculation of gross credit exposure.* The amount of gross credit exposure of a covered company to a counterparty with respect to a credit transaction is, in the case of:

(1) A deposit of the covered company held by the counterparty, loan by a covered company to the counterparty, and lease in which the covered company is the lessor and the counterparty is the lessee, equal to the amount owed by the counterparty to the covered company under the transaction.

(2) A debt security or debt investment held by the covered company that is issued by the counterparty, equal to:

(i) The market value of the securities, for trading and available-for-sale securities; and

(ii) The amortized purchase price of the securities or investments, for securities or investments held to maturity.

(3) An equity security held by the covered company that is issued by the counterparty, equity investment in a counterparty, and other direct investments in a counterparty, equal to the market value.

(4) A securities financing transaction must be valued using any of the methods that the covered company is authorized to use under the Board's Regulation Q (12 CFR part 217, subparts D and E) to value such transactions:

(i)(A) As calculated for each transaction, in the case of a securities financing transaction between the covered company and the counterparty that is not subject to a bilateral netting agreement or does not meet the definition of ''repo-style transaction'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2); or

(B) As calculated for a netting set, in the case of a securities financing transaction between the covered company and the counterparty that is subject to a bilateral netting agreement with that counterparty and meets the definition of ''repo-style transaction'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2);

(ii) For purposes of paragraph (a)(4)(i) of this section, the covered company must:

(A) Assign a value of zero to any security received from the counterparty that does not meet the definition of ''eligible collateral'' in § 252.71(k); and

(B) Include the value of securities that are eligible collateral received by the covered company from the counterparty (including any exempt counterparty), calculated in accordance with paragraphs (a)(4)(i) through (iv) of this section, when calculating its gross credit exposure to the issuer of those securities;

(iii) Notwithstanding paragraphs (a)(4)(i) and (ii) of this section and with respect to each credit transaction, a covered company's gross credit exposure to a collateral issuer under this paragraph (a)(4) is limited to the covered company's gross credit exposure to the counterparty on the credit transaction; and

(iv) In cases where the covered company receives eligible collateral from a counterparty in addition to the cash or securities received from that counterparty, the counterparty may reduce its gross credit exposure to that counterparty in accordance with § 252.74(b).

(5) A committed credit line extended by a covered company to a counterparty, equal to the face amount of the committed credit line.

(6) A guarantee or letter of credit issued by a covered company on behalf of a counterparty, equal to the maximum potential loss to the covered company on the transaction.

(7) A derivative transaction must be valued using any of the methods that the covered company is authorized to use under the Board's Regulation Q (12 CFR part 217, subparts D and E) to value such transactions:

(i)(A) As calculated for each transaction, in the case of a derivative transaction between the covered company and the counterparty, including an equity derivative but excluding a credit derivative described in paragraph (a)(8) of this section, that is not subject to a qualifying master netting agreement; or

(B) As calculated for a netting set, in the case of a derivative transaction between the covered company and the counterparty, including an equity derivative but excluding a credit derivative described in paragraph (a)(8) of this section, that is subject to a qualifying master netting agreement.

(ii) In cases where a covered company is required to recognize an exposure to an eligible guarantor pursuant to § 252.74(d), the covered company must exclude the relevant derivative transaction when calculating its gross exposure to the original counterparty under this section.

(8) A credit derivative between the covered company and a third party where the covered company is the protection provider and the reference asset is an obligation or debt security of the counterparty, equal to the maximum potential loss to the covered company on the transaction.

(b) *Investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not subsidiaries.* Notwithstanding paragraph (a) of this section, a covered company must calculate pursuant to § 252.75 its gross credit exposure due to any investment in the debt or equity of, and any credit derivative or equity derivative between the covered company and a third party where the covered company is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, a securitization vehicle, investment fund, and other special purpose vehicle that is not a subsidiary of the covered company.

(c) *Attribution rule.* Notwithstanding any other requirement in this subpart, a covered company must treat any transaction with any natural person or entity as a credit transaction with another party, to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, the other party.

§ 252.74 Net credit exposure.

(a) *In general.* For purposes of this subpart, a covered company must calculate its net credit exposure to a counterparty by adjusting its gross credit exposure to that counterparty in accordance with the rules set forth in this section.

(b) *Eligible collateral.* (1) In computing its net credit exposure to a counterparty for any credit transaction other than a securities financing transaction, a covered company must reduce its gross credit exposure on the transaction by the adjusted market value of any eligible collateral.

(2) A covered company that reduces its gross credit exposure to a counterparty as required under paragraph (b)(1) of this section must include the adjusted market value of the eligible collateral, when calculating its gross credit exposure to the collateral issuer.

(3) Notwithstanding paragraph (b)(2) of this section, a covered company's gross credit exposure to a collateral issuer under this paragraph (b) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction if valued in accordance with § 252.73(a).

(c) *Eligible guarantees.* (1) In calculating net credit exposure to a counterparty for any credit transaction, a covered company must reduce its gross credit exposure to the counterparty by the amount of any eligible guarantee from an eligible guarantor that covers the transaction.

(2) A covered company that reduces its gross credit exposure to a counterparty as required under paragraph (c)(1) of this section must include the amount of eligible guarantees when calculating its gross credit exposure to the eligible guarantor.

(3) Notwithstanding paragraph (c)(2) of this section, a covered company's gross credit exposure to an eligible guarantor with respect to an eligible guarantee under this paragraph (c) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction prior to recognition of the eligible guarantee, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction prior to recognition of the eligible guarantee if valued in accordance with § 252.73(a).

(d) *Eligible credit and equity derivatives.* (1) In calculating net credit exposure to a counterparty for a credit transaction under this section, a covered company must reduce its gross credit exposure to the counterparty by:

(i) In the case of any eligible credit derivative from an eligible guarantor, the notional amount of the eligible credit derivative; or

(ii) In the case of any eligible equity derivative from an eligible guarantor, the gross credit exposure amount to the counterparty (calculated in accordance with § 252.73(a)(7)).

(2)(i) A covered company that reduces its gross credit exposure to a counterparty as provided under paragraph (d)(1) of this section must include, when calculating its net credit exposure to the eligible guarantor, including in instances where the underlying credit transaction would not be subject to the credit limits of § 252.72 (for example, due to an exempt counterparty), either

(A) In the case of any eligible credit derivative from an eligible guarantor, the notional amount of the eligible credit derivative; or

(B) In the case of any eligible equity derivative from an eligible guarantor, the gross credit exposure amount to the counterparty (calculated in accordance with § 252.73(a)(7)).

(ii) Notwithstanding paragraph (d)(2)(i) of this section, in cases where the eligible credit derivative or eligible equity derivative is used to hedge covered positions that are subject to the Board's market risk rule (12 CFR part 217, subpart F) and the counterparty on the hedged transaction is not a financial entity, the amount of credit exposure that a company must recognize to the eligible guarantor is the amount that would be calculated pursuant to § 252.73(a).

(3) Notwithstanding paragraph (d)(2) of this section, a covered company's gross credit exposure to an eligible guarantor with respect to an eligible credit derivative or an eligible equity derivative under this paragraph (d) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction prior to recognition of the eligible credit derivative or the eligible equity derivative, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction prior to recognition of the eligible credit derivative or the eligible equity derivative if valued in accordance with § 252.73(a).

(e) *Other eligible hedges.* In calculating net credit exposure to a counterparty for a credit transaction under this section, a covered company may reduce its gross credit exposure to the counterparty by the face amount of a short sale of the counterparty's debt security or equity security, provided that:

(1) The instrument in which the covered company has a short position is junior to, or *pari passu* with, the instrument in which the covered company has the long position; and

(2) The instrument in which the covered company has a short position and the instrument in which the covered company has the long position are either both treated as trading or available-for-sale exposures or both treated as held-to-maturity exposures.

(f) *Unused portion of certain extensions of credit.* (1) In computing its net credit exposure to a counterparty for a committed credit line or revolving credit facility under this section, a covered company may reduce its gross credit exposure by the amount of the unused portion of the credit extension to the extent that the covered company does not have any legal obligation to advance additional funds under the extension of credit and the used portion of the credit extension has been fully secured by eligible collateral.

(2) To the extent that the used portion of a credit extension has been secured by eligible collateral, the covered company may reduce its gross credit exposure by the adjusted market value

of any eligible collateral received from the counterparty, even if the used portion has not been fully secured by eligible collateral.

(3) To qualify for the reduction in net credit exposure under this paragraph, the credit contract must specify that any used portion of the credit extension must be fully secured by the adjusted market value of any eligible collateral.

(g) *Credit transactions involving exempt counterparties.* (1) A covered company's credit transactions with an exempt counterparty are not subject to the requirements of this subpart, including but not limited to § 252.72.

(2) Notwithstanding paragraph (g)(1) of this section, in cases where a covered company has a credit transaction with an exempt counterparty and the covered company has obtained eligible collateral from that exempt counterparty or an eligible guarantee or eligible credit or equity derivative from an eligible guarantor, the covered company must include (for purposes of this subpart) such exposure to the issuer of such eligible collateral or the eligible guarantor, as calculated in accordance with the rules set forth in this section, when calculating its gross credit exposure to that issuer of eligible collateral or eligible guarantor.

(h) *Currency mismatch adjustments.* For purposes of calculating its net credit exposure to a counterparty under this section, a covered company must apply, as applicable:

(1) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible collateral and calculating its gross credit exposure to an issuer of eligible collateral, pursuant to paragraph (b) of this section, the currency mismatch adjustment approach of § 217.37(c)(3)(ii) of the Board's Regulation Q (12 CFR 217.37(c)(3)(ii)); and

(2) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible guarantee, eligible equity derivative, or eligible credit derivative from an eligible guarantor and calculating its gross credit exposure to an eligible guarantor, pursuant to paragraphs (c) and (d) of this section, the currency mismatch adjustment approach of § 217.36(f) of the Board's Regulation Q (12 CFR 217.36(f)).

(i) *Maturity mismatch adjustments.* For purposes of calculating its net credit exposure to a counterparty under this section, a covered company must apply, as applicable, the maturity mismatch adjustment approach of § 217.36(d) of the Board's Regulation Q (12 CFR 217.36(d)):

(1) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible collateral or any eligible guarantees, eligible equity derivatives, or eligible credit derivatives from an eligible guarantor, pursuant to paragraphs (b) through (d) of this section, and

(2) In calculating its gross credit exposure to an issuer of eligible collateral, pursuant to paragraph (b) of this section, or to an eligible guarantor, pursuant to paragraphs (c) and (d) of this section; provided that

(3) The eligible collateral, eligible guarantee, eligible equity derivative, or eligible credit derivative subject to paragraph (i)(1) of this section:

(i) Has a shorter maturity than the credit transaction;

(ii) Has an original maturity equal to or greater than one year;

(iii) Has a residual maturity of not less than three months; and

(iv) The adjustment approach is otherwise applicable.

§ 252.75 Investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not subsidiaries of the covered company.

(a) *In general.* (1) For purposes of this section, the following definitions apply:

(i) *SPV* means a securitization vehicle, investment fund, or other special purpose vehicle that is not a subsidiary of the covered company.

(ii) *SPV exposure* means an investment in the debt or equity of an SPV, or a credit derivative or equity derivative between the covered company and a third party where the covered company is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, an SPV.

(2)(i) A covered company must determine whether the amount of its gross credit exposure to an issuer of assets in an SPV, due to an SPV exposure, is equal to or greater than 0.25 percent of the covered company's tier 1 capital using one of the following two methods:

(A) The sum of all of the issuer's assets (with each asset valued in accordance with § 252.73(a)) in the SPV; or

(B) The application of the look-through approach described in paragraph (b) of this section.

(ii) With respect to the determination required under paragraph (a)(2)(i) of this section, a covered company must use the same method to calculate gross credit exposure to each issuer of assets in a particular SPV.

(iii) In making a determination under paragraph (a)(2)(i) of this section, the covered company must consider only the credit exposure to the issuer arising from the covered company's SPV exposure.

(iv) For purposes of this paragraph (a)(2), a covered company that is unable to identify each issuer of assets in an SPV must attribute to a single unknown counterparty the amount of its gross credit exposure to all unidentified issuers and calculate such gross credit exposure using one method in either paragraph (a)(2)(i)(A) or (a)(2)(i)(B) of this section.

(3)(i) If a covered company determines pursuant to paragraph (a)(2) of this section that the amount of its gross credit exposure to an issuer of assets in an SPV is less than 0.25 percent of the covered company's tier 1 capital, the amount of the covered company's gross credit exposure to that issuer may be attributed to either that issuer of assets or the SPV:

(A) If attributed to the issuer of assets, the issuer of assets must be identified as a counterparty, and the gross credit exposure calculated under paragraph (a)(2)(i)(A) of this section to that issuer of assets must be aggregated with any other gross credit exposures (valued in accordance with § 252.73) to that same counterparty; and

(B) If attributed to the SPV, the covered company's gross credit exposure is equal to the covered company's SPV exposure, valued in accordance with § 252.73(a).

(ii) If a covered company determines pursuant to paragraph (a)(2) of this section that the amount of its gross credit exposure to an issuer of assets in an SPV is equal to or greater than 0.25 percent of the covered company's tier 1 capital or the covered company is unable to determine that the amount of the gross credit exposure is less than 0.25 percent of the covered company's tier 1 capital:

(A) The covered company must calculate the amount of its gross credit exposure to the issuer of assets in the SPV using the look-through approach in paragraph (b) of this section;

(B) The issuer of assets in the SPV must be identified as a counterparty, and the gross credit exposure calculated in accordance with paragraph (b) must be aggregated with any other gross credit exposures (valued in accordance with § 252.73) to that same counterparty; and

(C) When applying the look-through approach in paragraph (b) of this section, a covered company that is unable to identify each issuer of assets in an SPV must attribute to a single unknown counterparty the amount of its gross credit exposure, calculated in

accordance with paragraph (b) of this section, to all unidentified issuers.

(iii) For purposes of this section, a covered company must aggregate all gross credit exposures to unknown counterparties for all SPVs as if the exposures related to a single unknown counterparty; this single unknown counterparty is subject to the limits of § 252.72 as if it were a single counterparty.

(b) *Look-through approach.* A covered company that is required to calculate the amount of its gross credit exposure with respect to an issuer of assets in accordance with this paragraph (b) must calculate the amount as follows:

(1) Where all investors in the SPV rank *pari passu,* the amount of the gross credit exposure to the issuer of assets is equal to the covered company's pro rata share of the SPV multiplied by the value of the underlying asset in the SPV, valued in accordance with § 252.73(a); and

(2) Where all investors in the SPV do not rank *pari passu,* the amount of the gross credit exposure to the issuer of assets is equal to:

(i) The pro rata share of the covered company's investment in the tranche of the SPV; multiplied by

(ii) The lesser of:

(A) The market value of the tranche in which the covered company has invested, except in the case of a debt security that is held to maturity, in which case the tranche must be valued at the amortized purchase price of the securities; and

(B) The value of each underlying asset attributed to the issuer in the SPV, each as calculated pursuant to § 252.73(a).

(c) *Exposures to third parties.* (1) Notwithstanding any other requirement in this section, a covered company must recognize, for purposes of this subpart, a gross credit exposure to each third party that has a contractual obligation to provide credit or liquidity support to an SPV whose failure or material financial distress would cause a loss in the value of the covered company's SPV exposure.

(2) The amount of any gross credit exposure that is required to be recognized to a third party under paragraph (c)(1) of this section is equal to the covered company's SPV exposure, up to the maximum contractual obligation of that third party to the SPV, valued in accordance with § 252.73(a). (This gross credit exposure is in addition to the covered company's gross credit exposure to the SPV or the issuers of assets of the SPV, calculated in accordance with paragraphs (a) and (b) of this section.)

(3) A covered company must aggregate the gross credit exposure to a third party recognized in accordance with paragraphs (c)(1) and (2) of this section with its other gross credit exposures to that third party (that are unrelated to the SPV) for purposes of compliance with the limits of § 252.72.

§ 252.76 Aggregation of exposures to more than one counterparty due to economic interdependence or control relationships.

(a) *In general.* (1) If a covered company has an aggregate net credit exposure to any counterparty that exceeds 5 percent of its tier 1 capital, the covered company must assess its relationship with the counterparty under paragraph (b)(2) of this section to determine whether the counterparty is economically interdependent with one or more other counterparties of the covered company and under paragraph (c)(1) of this section to determine whether the counterparty is connected by a control relationship with one or more other counterparties.

(2) If, pursuant to an assessment required under paragraph (a)(1) of this section, the covered company determines that one or more of the factors of paragraph (b)(2) or (c)(1) of this section are met with respect to one or more counterparties, or the Board determines pursuant to paragraph (d) of this section that one or more other counterparties of a covered company are economically interdependent or that one or more other counterparties of a covered company are connected by a control relationship, the covered company must aggregate its net credit exposure to the counterparties for all purposes under this subpart, including, but not limited to, § 252.72.

(3) In connection with any request pursuant to paragraph (b)(3) or (c)(2) of this section, the Board may require the covered company to provide additional information.

(b) *Aggregation of exposures to more than one counterparty due to economic interdependence.* (1) For purposes of this paragraph, two counterparties are economically interdependent if the failure, default, insolvency, or material financial distress of one counterparty would cause the failure, default, insolvency, or material financial distress of the other counterparty, taking into account the factors in paragraph (b)(2) of this section.

(2) A covered company must assess whether the financial distress of one counterparty (counterparty A) would prevent the ability of the other counterparty (counterparty B) to fully and timely repay counterparty B's liabilities and whether the insolvency or default of counterparty A is likely to be associated with the insolvency or default of counterparty B and, therefore, these counterparties are economically interdependent, by evaluating the following:

(i) Whether 50 percent or more of one counterparty's gross revenue is derived from, or gross expenditures are directed to, transactions with the other counterparty;

(ii) Whether counterparty A has fully or partly guaranteed the credit exposure of counterparty B, or is liable by other means, in an amount that is 50 percent or more of the covered company's net credit exposure to counterparty A;

(iii) Whether 25 percent or more of one counterparty's production or output is sold to the other counterparty, which cannot easily be replaced by other customers;

(iv) Whether the expected source of funds to repay the loans of both counterparties is the same and neither counterparty has another independent source of income from which the loans may be serviced and fully repaid; [1] and

(v) Whether two or more counterparties rely on the same source for the majority of their funding and, in the event of the common provider's default, an alternative provider cannot be found.

(3)(i) Notwithstanding paragraph (b)(2) of this section, if a covered company determines that one or more of the factors in paragraph (b)(2) is met, the covered company may request in writing a determination from the Board that those counterparties are not economically interdependent and that the covered company is not required to aggregate those counterparties.

(ii) Upon a request by a covered company pursuant to paragraph (b)(3) of this section, the Board may grant temporary relief to the covered company and not require the covered company to aggregate one counterparty with another counterparty provided that the counterparty could promptly modify its business relationships, such as by reducing its reliance on the other counterparty, to address any economic interdependence concerns, and provided that such relief is in the public interest and is consistent with the purpose of this subpart and 12 U.S.C. 5365(e).

(c) *Aggregation of exposures to more than one counterparty due to certain control relationships.* (1) For purposes of this subpart, one counterparty (counterparty A) is deemed to control the other counterparty (counterparty B) if:

[1] An employer will not be treated as a source of repayment under this paragraph because of wages and salaries paid to an employee.

(i) Counterparty A owns, controls, or holds with the power to vote 25 percent or more of any class of voting securities of counterparty B; or

(ii) Counterparty A controls in any manner the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of counterparty B.

(2)(i) Notwithstanding paragraph (c)(1) of this section, if a covered company determines that one or more of the factors in paragraph (c)(1) is met, the covered company may request in writing a determination from the Board that counterparty A does not control counterparty B and that the covered company is not required to aggregate those counterparties.

(ii) Upon a request by a covered company pursuant to paragraph (c)(2) of this section, the Board may grant temporary relief to the covered company and not require the covered company to aggregate counterparty A with counterparty B provided that, taking into account the specific facts and circumstances, such indicia of control does not result in the entities being connected by control relationships for purposes of this subpart, and provided that such relief is in the public interest and is consistent with the purpose of this subpart and 12 U.S.C. 5365(e).

(d) *Board determinations for aggregation of counterparties due to economic interdependence or control relationships.* The Board may determine, after notice to the covered company and opportunity for hearing, that one or more counterparties of a covered company are:

(i) Economically interdependent for purposes of this subpart, considering the factors in paragraph (b)(2) of this section, as well as any other indicia of economic interdependence that the Board determines in its discretion to be relevant; or

(ii) Connected by control relationships for purposes of this subpart, considering the factors in paragraph (c)(1) of this section and whether counterparty A:

(A) Controls the power to vote 25 percent or more of any class of voting securities of Counterparty B pursuant to a voting agreement;

(B) Has significant influence on the appointment or dismissal of counterparty B's administrative, management, or governing body, or the fact that a majority of members of such body have been appointed solely as a result of the exercise of counterparty A's voting rights; or

(C) Has the power to exercise a controlling influence over the management or policies of counterparty B.

(e) *Board determinations for aggregation of counterparties to prevent evasion.* Notwithstanding paragraphs (b) and (c) of this section, a covered company must aggregate its exposures to a counterparty with the covered company's exposures to another counterparty if the Board determines in writing after notice and opportunity for hearing, that the exposures to the two counterparties must be aggregated to prevent evasions of the purposes of this subpart, including, but not limited to § 252.76 and 12 U.S.C. 5365(e).

§ 252.77 Exemptions.

(a) *Exempted exposure categories.* The following categories of credit transactions are exempt from the limits on credit exposure under this subpart:

(1) Any direct claim on, and the portion of a claim that is directly and fully guaranteed as to principal and interest by, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, only while operating under the conservatorship or receivership of the Federal Housing Finance Agency, and any additional obligation issued by a U.S. government-sponsored entity as determined by the Board;

(2) Intraday credit exposure to a counterparty;

(3) Any trade exposure to a qualifying central counterparty related to the covered company's clearing activity, including potential future exposure arising from transactions cleared by the qualifying central counterparty and pre-funded default fund contributions;

(4) Any credit transaction with the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the Multilateral Investment Guarantee Agency, or the International Centre for Settlement of Investment Disputes;

(5) Any credit transaction with the European Commission or the European Central Bank; and

(6) Any transaction that the Board exempts if the Board finds that such exemption is in the public interest and is consistent with the purpose of this subpart.

(b) *Exemption for Federal Home Loan Banks.* For purposes of this subpart, a covered company does not include any Federal Home Loan Bank.

(c) *Additional exemptions by the Board.* The Board may, by regulation or order, exempt transactions, in whole or in part, from the definition of the term ''credit exposure,'' if the Board finds that the exemption is in the public interest and is consistent with the purpose of 12 U.S.C. 5365(e).

§ 252.78 Compliance.

(a) *Scope of compliance.* (1) Using all available data, including any data required to be maintained or reported to the Federal Reserve under this subpart, a covered company must comply with the requirements of this subpart on a daily basis at the end of each business day.

(2) A covered company must report its compliance to the Federal Reserve as of the end of the quarter, unless the Board determines and notifies that company in writing that more frequent reporting is required.

(3) In reporting its compliance, a covered company must calculate and include in its gross credit exposure to an issuer of eligible collateral or eligible guarantor the amounts of eligible collateral, eligible guarantees, eligible equity derivatives, and eligible credit derivatives that were provided to the covered company in connection with credit transactions with exempt counterparties, valued in accordance with and as required by § 252.74(b) through (d) and (g).

(b) *Qualifying Master Netting Agreement.* With respect to any qualifying master netting agreement, a covered company must establish and maintain procedures that meet or exceed the requirements of § 217.3(d) of the Board's Regulation Q (12 CFR 217.3(d)) to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy these requirements.

(c) *Noncompliance.* (1) Except as otherwise provided in this section, if a covered company is not in compliance with this subpart with respect to a counterparty solely due to the circumstances listed in paragraphs (c)(2)(i) through (v) of this section, the covered company will not be subject to enforcement actions for a period of 90 days (or, with prior notice to the company, such shorter or longer period determined by the Board, in its sole discretion, to be appropriate to preserve the safety and soundness of the covered company or U.S. financial stability), if the covered company uses reasonable efforts to return to compliance with this subpart during this period. The covered company may not engage in any additional credit transactions with such a counterparty in contravention of this rule during the period of noncompliance, except as provided in paragraph (c)(2).

(2) A covered company may request a special temporary credit exposure limit exemption from the Board. The Board may grant approval for such exemption in cases where the Board determines that such credit transactions are necessary or appropriate to preserve the safety and soundness of the covered company or U.S. financial stability. In acting on a request for an exemption, the Board will consider the following:

(i) A decrease in the covered company's capital stock and surplus;

(ii) The merger of the covered company with another covered company;

(iii) A merger of two counterparties; or

(iv) An unforeseen and abrupt change in the status of a counterparty as a result of which the covered company's credit exposure to the counterparty becomes limited by the requirements of this section; or

(v) Any other factor(s) the Board determines, in its discretion, is appropriate.

(d) *Other measures.* The Board may impose supervisory oversight and additional reporting measures that it determines are appropriate to monitor compliance with this subpart. Covered companies must furnish, in the manner and form prescribed by the Board, such information to monitor compliance with this subpart and the limits therein as the Board may require.

■ 3. Add subpart Q to read as follows:

Subpart Q—Single-Counterparty Credit Limits

Sec.

§ 252.170 Applicability and general provisions.

(a) *In general.* (1) This subpart establishes single counterparty credit limits for a covered foreign entity.

(2) For purposes of this subpart:

(i) *Covered foreign entity* means:

(A) A foreign banking organization with total consolidated assets that equal or exceed $250 billion with respect to its combined U.S. operations; and

(B) Any U.S. intermediate holding company of such a foreign banking organization with total consolidated assets that equal or exceed $50 billion, including a U.S. intermediate holding company that is a bank holding company.

(ii) *Major foreign banking organization* means a foreign banking organization that is a covered foreign entity and meets the requirements of § 252.172(c)(3) through (5).

(iii) *Major U.S. intermediate holding company* means any covered foreign entity that is a U.S. intermediate holding company and has total consolidated assets that equal or exceed $500 billion.

(b) *Credit exposure limits.* (1) Section 252.172 establishes credit exposure limits for covered foreign entities, major foreign banking organizations, and major U.S. intermediate holding companies.

(2) A covered foreign entity is required to calculate its aggregate net credit exposure, gross credit exposure, and net credit exposure to a counterparty using the methods in this subpart.

(c) *Applicability of this subpart*—(1) *Foreign banking organizations.* (i) A foreign banking organization that is a covered foreign entity as of October 5, 2018, must comply with the requirements of this subpart, including but not limited to § 252.172, beginning on July 1, 2020, unless that time is extended by the Board in writing.

(ii) Notwithstanding paragraph (c)(1)(i) of this section, a foreign banking organization that is a major foreign banking organization as of October 5, 2018, must comply with the requirements of this subpart, including but not limited to § 252.172, beginning on January 1, 2020, unless that time is extended by the Board in writing.

(iii) A foreign banking organization that becomes a covered foreign entity subject to this subpart after October 5, 2018 must comply with the requirements of this subpart beginning on the first day of the ninth calendar quarter after it becomes a covered foreign entity, unless that time is accelerated or extended by the Board in writing.

(2) *U.S. intermediate holding companies.* (i) A U.S. intermediate holding company that is a covered foreign entity but not a major U.S. intermediate holding company as of October 5, 2018, must comply with the requirements of this subpart, including but not limited to § 252.172, beginning on July 1, 2020, unless that time is extended by the Board in writing.

(ii) Notwithstanding paragraph (c)(2)(i) of this section, a U.S. intermediate holding company that is a major U.S. intermediate holding company as of October 5, 2018, must comply with the requirements of this subpart, including but not limited to § 252.172, beginning on January 1, 2020, unless that time is extended by the Board in writing.

(iii) A U.S. intermediate holding company that becomes a covered foreign entity subject to this subpart after October 5, 2018 must comply with the requirements of this subpart beginning on the first day of the ninth calendar quarter after it becomes a covered foreign entity, unless that time is accelerated or extended by the Board in writing.

(d) *Cessation of requirements*—(1) *Foreign banking organizations.* (i) Any foreign banking organization that becomes a covered foreign entity will remain subject to the requirements of this subpart unless and until its total consolidated assets fall below $250 billion for each of four consecutive quarters, as reported on the covered foreign entity's FR Y–7Q, effective on the as-of date of the fourth consecutive FR Y–7Q.

(ii) A foreign banking organization that is a covered foreign entity and that has ceased to be a major foreign banking organization for purposes of § 252.172(c) is no longer subject to the requirements of § 252.172(c) beginning on the first day of the calendar quarter following the reporting date on which it ceased to be a major foreign banking organization; provided that the foreign banking organization remains subject to the requirements of this subpart, unless it ceases to be a foreign banking organization that is a covered foreign entity pursuant to paragraph (d)(1)(i) of this section.

(2) *U.S. intermediate holding companies.* (i) Any U.S. intermediate holding company that becomes a covered foreign entity will remain subject to the requirements of this subpart unless and until its total consolidated assets fall below $50 billion for each of four consecutive quarters, as reported on the covered foreign entity's FR Y–9C, effective on the as-of date of the fourth consecutive FR Y–9C.

(ii) A U.S. intermediate holding company that is a covered foreign entity and that has ceased to be a major U.S. intermediate holding company for purposes of § 252.172(c) is no longer subject to the requirements of § 252.172(c) beginning on the first day of the calendar quarter following the reporting date on which it ceased to be

a major U.S. intermediate holding company; provided that the U.S. intermediate holding company remains subject to the requirements of this subpart, unless it ceases to be a U.S. intermediate holding company that is a covered foreign entity pursuant to paragraph (d)(2)(i) of this section.

§ 252.171 Definitions.

Unless defined in this section, terms that are set forth in § 252.2 of this part and used in this subpart have the definitions assigned in § 252.2. For purposes of this subpart:

(a) *Adjusted market value* means:

(1) With respect to the value of cash, securities, or other eligible collateral transferred by the covered foreign entity to a counterparty, the sum of:

(i) The market value of the cash, securities, or other eligible collateral; and

(ii) The product of the market value of the securities or other eligible collateral multiplied by the applicable collateral haircut in Table 1 to § 217.132 of the Board's Regulation Q (12 CFR 217.132); and

(2) With respect to cash, securities, or other eligible collateral received by the covered foreign entity from a counterparty:

(i) The market value of the cash, securities, or other eligible collateral; minus

(ii) The market value of the securities or other eligible collateral multiplied by the applicable collateral haircut in Table 1 to § 217.132 of the Board's Regulation Q (12 CFR 217.132).

(3) Prior to calculating the adjusted market value pursuant to paragraphs (1) and (2) of this section, with regard to a transaction that meets the definition of ''repo-style transaction'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2), the covered foreign entity would first multiply the applicable collateral haircuts in Table 1 to § 217.132 of the Board's Regulation Q (12 CFR 217.132) by the square root of ½.

(b) *Affiliate* means, with respect to a company:

(1) Any subsidiary of the company and any other company that is consolidated with the company under applicable accounting standards; or

(2) For a company that is not subject to principles or standards referenced in paragraph (b)(1) of this section, any subsidiary of the company and any other company that would be consolidated with the company, if consolidation would have occurred if such principles or standards had applied.

(c) *Aggregate net credit exposure* means the sum of all net credit exposures of a covered foreign entity and all of its subsidiaries to a single counterparty as calculated under this subpart.

(d) *Bank-eligible investments* means investment securities that a national bank is permitted to purchase, sell, deal in, underwrite, and hold under 12 U.S.C. 24 (Seventh) and 12 CFR part 1.

(e) *Capital stock and surplus* means, with respect to a U.S. intermediate holding company, the sum of the following amounts in each case as reported by the U.S. intermediate holding company on the most recent FR Y–9C on a consolidated basis:

(1) The tier 1 capital and tier 2 capital of the U.S. intermediate holding company, as calculated under the capital adequacy guidelines applicable to that U.S. intermediate holding company under subpart O of the Board's Regulation YY (12 CFR part 252, subpart O); and

(2) The excess allowance for loan and lease losses of the U.S. intermediate holding company not included in its tier 2 capital, as calculated under the capital adequacy guidelines applicable to that U.S. intermediate holding company under subpart O of the Board's Regulation YY (12 CFR part 252, subpart O).

(f) *Counterparty* means with respect to a credit transaction:

(1) With respect to a natural person, the natural person, and, if the credit exposure of the covered foreign entity to such natural person exceeds 5 percent of its capital stock and surplus in the case of a U.S. intermediate holding company that is a covered foreign entity with total consolidated assets of less than $250 billion, or 5 percent of its tier 1 capital in the case of a foreign banking organization that is a covered foreign entity or a U.S. intermediate holding company with total consolidated assets that equal or exceed $250 billion, the natural person and members of the person's immediate family collectively;

(2) With respect to any company that is not an affiliate of the covered foreign entity, the company and its affiliates collectively;

(3) With respect to a State, the State and all of its agencies, instrumentalities, and political subdivisions (including any municipalities) collectively;

(4) With respect to a foreign sovereign entity that is not assigned a zero percent risk weight under the standardized approach in the Board's Regulation Q (12 CFR part 217, subpart D), other than the home country foreign sovereign entity of a foreign banking organization, the foreign sovereign entity and all of its agencies and instrumentalities (but not including any political subdivision), collectively; and

(5) With respect to a political subdivision of a foreign sovereign entity such as a state, province, or municipality, any political subdivision of the foreign sovereign entity and all of such political subdivision's agencies and instrumentalities, collectively.[1]

(g) *Covered foreign entity* is defined in § 252.170(a)(2)(i) of this subpart.

(h) *Credit derivative* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(i) *Credit transaction* means, with respect to a counterparty:

(1) Any extension of credit to the counterparty, including loans, deposits, and lines of credit, but excluding uncommitted lines of credit;

(2) Any repurchase agreement or reverse repurchase agreement with the counterparty;

(3) Any securities lending or securities borrowing transaction with the counterparty;

(4) Any guarantee, acceptance, or letter of credit (including any endorsement, confirmed letter of credit, or standby letter of credit) issued on behalf of the counterparty;

(5) Any purchase of securities issued by or other investment in the counterparty;

(6) Any credit exposure to the counterparty in connection with a derivative transaction between the covered foreign entity and the counterparty;

(7) Any credit exposure to the counterparty in connection with a credit derivative or equity derivative between the covered foreign entity and a third party, the reference asset of which is an obligation or equity security of, or equity investment in, the counterparty; and

(8) Any transaction that is the functional equivalent of the above, and any other similar transaction that the Board, by regulation, determines to be a credit transaction for purposes of this subpart.

(j) *Depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(k) *Derivative transaction* means any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities,

[1] In addition, under § 252.176, under certain circumstances, a covered foreign entity is required to aggregate its net credit exposure to one or more counterparties for all purposes under this subpart.

securities, currencies, interest or other rates, indices, or other assets.

(*l*) *Eligible collateral* means collateral in which, notwithstanding the prior security interest of any custodial agent, the covered foreign entity has a perfected, first priority security interest (or the legal equivalent thereof, if outside of the United States), with the exception of cash on deposit, and is in the form of:

(1) Cash on deposit with the covered foreign entity or an affiliate of the covered foreign entity (including cash in foreign currency or U.S. dollars held for the covered foreign entity by a custodian or trustee, whether inside or outside of the United States);

(2) Debt securities (other than mortgage- or asset-backed securities and resecuritization securities, unless those securities are issued by a U.S. government-sponsored enterprise) that are bank-eligible investments and that are investment grade, except for any debt securities issued by the covered foreign entity or any affiliate of the covered foreign entity;

(3) Equity securities that are publicly traded, except for any equity securities issued by the covered foreign entity or any affiliate of the covered foreign entity;

(4) Convertible bonds that are publicly traded, except for any convertible bonds issued by the covered foreign entity or any affiliate of the covered foreign entity; or

(5) Gold bullion.

(m) *Eligible credit derivative* means a single-name credit derivative or a standard, non-tranched index credit derivative, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Receivership, insolvency, liquidation, conservatorship, or inability of the reference exposure issuer to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld; and

(7) If the credit derivative is a credit default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event.

(n) *Eligible equity derivative* means an equity derivative, provided that:

(1) The derivative contract has been confirmed by all relevant parties;

(2) Any assignment of the derivative contract has been confirmed by all relevant parties; and

(3) The terms and conditions dictating the manner in which the derivative contract is to be settled are incorporated into the contract.

(o) *Eligible guarantee* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(p) *Eligible guarantor* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2), but does not include the foreign banking organization or any entity that is an affiliate of either the U.S. intermediate holding company or of any part of the foreign banking organization's combined U.S. operations.

(q) *Equity derivative* has the same meaning as ''equity derivative contract'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(r) *Exempt counterparty* means an entity that is identified as exempt from the requirements of this subpart under § 252.177, or that is otherwise excluded from this subpart, including any sovereign entity assigned a zero percent risk weight under the standardized approach in the Board's Regulation Q (12 CFR part 217, subpart D).

(s) *Financial entity* means:

(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company as defined in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)); a U.S. intermediate holding company established or designated for purposes of compliance with this part; or a nonbank financial company supervised by the Board;

(ii) A depository institution as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a federal credit union or state credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); a national association, state member bank, or state nonmember bank that is not a depository institution; an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) Any person registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or an entity that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(v) A securities holding company as defined in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)–(5)); an investment adviser as defined in section 202(a) of the

Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(vi) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(vii) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in sections 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in sections 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in section 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(viii) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(ix) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator;

(x) Any designated financial market utility, as defined in section 803 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5462); and

(xi) An entity that would be a financial entity described in paragraphs (s)(1)(i) through (x) of this section, if it were organized under the laws of the United States or any State thereof; and

(2) Provided that, for purposes of this subpart, ''financial entity'' does not include any counterparty that is a foreign sovereign entity or multilateral development bank.

(t) *Foreign sovereign entity* means a sovereign entity other than the United States government and the entity's agencies, departments, ministries, and central bank.

(u) *Gross credit exposure* means, with respect to any credit transaction, the credit exposure of the covered foreign entity before adjusting, pursuant to § 252.174, for the effect of any qualifying master netting agreement, eligible collateral, eligible guarantee, eligible credit derivative, eligible equity derivative, other eligible hedge, and any unused portion of certain extensions of credit.

(v) *Immediate family* means the spouse of an individual, the individual's minor children, and any of the individual's children (including adults) residing in the individual's home.

(w) *Intraday credit exposure* means credit exposure of a covered foreign entity to a counterparty that by its terms is to be repaid, sold, or terminated by the end of its business day in the United States.

(x) *Investment grade* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(y) *Major counterparty* means any counterparty that is or includes:

(1) A U.S. bank holding company identified as a global systemically important BHC pursuant to § 217.402 of the Board's Regulation Q (12 CFR 217.402);

(2) A top-tier foreign banking organization that meets the requirements of § 252.172(c)(3) through (5); or

(3) Any nonbank financial company supervised by the Board.

(z) *Major foreign banking organization* is defined in § 252.170(a)(2)(ii) of this subpart.

(aa) *Major U.S. intermediate holding company* is defined in § 252.170(a)(2)(iii) of this subpart.

(bb) *Multilateral development bank* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(cc) *Net credit exposure* means, with respect to any credit transaction, the gross credit exposure of a covered foreign entity and all of its subsidiaries calculated under § 252.173, as adjusted in accordance with § 252.174.

(dd) *Qualifying central counterparty* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(ee) *Qualifying master netting agreement* has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

(ff) *Securities financing transaction* means any repurchase agreement, reverse repurchase agreement, securities borrowing transaction, or securities lending transaction.

(gg) *Short sale* means any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.

(hh) *Sovereign entity* means a central national government (including the U.S. government) or an agency, department, ministry, or central bank, but not including any political subdivision such as a state, province, or municipality.

(ii) *Subsidiary.* A company is a *subsidiary* of another company if

(1) The company is consolidated by the other company under applicable accounting standards; or

(2) For a company that is not subject to principles or standards referenced in paragraph (ii)(1) of this definition, consolidation would have occurred if such principles or standards had applied.

(jj) *Tier 1 capital* means common equity tier 1 capital and additional tier 1 capital, as defined in subpart O of the Board's Regulation YY(12 CFR part 252, subpart O).

(kk) *Tier 2 capital* means tier 2 capital as defined in subpart O of the Board's Regulation YY (12 CFR part 252, subpart O).

(ll) *Total consolidated assets.* (1) A foreign banking organization's *total consolidated assets* are determined based on:

(i) The average of the foreign banking organization's total consolidated assets in the four most recent consecutive quarters as reported quarterly on the FR Y–7Q; or

(ii) If the foreign banking organization has not filed an FR Y–7Q for each of the four most recent consecutive quarters, the average of the foreign banking organization's total consolidated assets, as reported on the foreign banking organization's FR Y–7Q, for the most recent quarter or consecutive quarters, as applicable; or

(iii) If the foreign banking organization has not yet filed an FR Y–7Q, as determined under applicable accounting standards.

(2) A U.S. intermediate holding company's *total consolidated assets* are determined based on:

(i) The average of the U.S. intermediate holding company's total consolidated assets in the four most recent consecutive quarters as reported quarterly on the FR Y–9C; or

(ii) If the U.S. intermediate holding company has not filed an FR Y–9C for each of the four most recent consecutive quarters, the average of the U.S. intermediate holding company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent

quarter or consecutive quarters, as applicable; or

(iii) If the U.S. intermediate holding company has not yet filed an FR Y–9C, as determined under applicable accounting standards.

§ 252.172 Credit exposure limits.

(a) *General limit on aggregate net credit exposure.* No U.S. intermediate holding company that is a covered foreign entity may have an aggregate net credit exposure to any counterparty that exceeds 25 percent of the consolidated capital stock and surplus of the U.S. intermediate holding company.

(b) *Limit on aggregate net credit exposure for U.S. intermediate holding companies with total consolidated assets that equal or exceed $250 billion and foreign banking organizations that are covered foreign entities.* (1) No U.S. intermediate holding company with total consolidated assets that equal or exceed $250 billion that is a covered foreign entity may have an aggregate net credit exposure to any counterparty that exceeds 25 percent of the tier 1 capital of the U.S. intermediate holding company.

(2) No foreign banking organization that is a covered foreign entity may permit its combined U.S. operations to have aggregate net credit exposure to any counterparty that exceeds 25 percent of the tier 1 capital of the foreign banking organization.

(c) *Limit on aggregate net credit exposure of major U.S. intermediate holding companies and major foreign banking organizations to major counterparties.* (1) No major U.S. intermediate holding company may have aggregate net credit exposure to any major counterparty that exceeds 15 percent of the tier 1 capital of the major U.S. intermediate holding company.

(2) No major foreign banking organization may permit its combined U.S. operations to have aggregate net credit exposure to any major counterparty that exceeds 15 percent of the tier 1 capital of the major foreign banking organization.

(3) For purposes of this subpart, a top-tier foreign banking organization will be a major counterparty if it meets one of the following conditions:

(i) The top-tier foreign banking organization determines, pursuant to 12 CFR 252.153(b)(6), that the top-tier foreign banking organization has the characteristics of a global systemically important banking organization under the global methodology; or

(ii) The Board, using information available to the Board, determines:

(A) That the top-tier foreign banking organization would be a global systemically important banking organization under the global methodology;

(B) That the top-tier foreign banking organization, if it were subject to the Board's Regulation Q, would be identified as a global systemically important BHC under 12 CFR 217.402 of the Board's Regulation Q; or

(C) That the U.S. intermediate holding company, if it were subject to 12 CFR 217.402 of the Board's Regulation Q, would be identified as a global systemically important BHC.

(4) Each top-tier foreign banking organization that controls a U.S. intermediate holding company must submit to the Board by January 1 of each calendar year through the U.S. intermediate holding company:

(A) Notice of whether the home country supervisor (or other appropriate home country regulatory authority) of the top-tier foreign banking organization of the U.S. intermediate holding company has adopted standards consistent with the global methodology; and

(B) Notice of whether the top-tier foreign banking organization prepares or reports the indicators used by the global methodology to identify a banking organization as a global systemically important banking organization and, if it does, whether the top-tier foreign banking organization has determined that it has the characteristics of a global systemically important banking organization under the global methodology pursuant to 12 CFR 252.153(b)(6).

(5) A top-tier foreign banking organization that controls a U.S. intermediate holding company and prepares or reports for any purpose the indicator amounts necessary to determine whether the top-tier foreign banking organization is a global systemically important banking organization under the global methodology must use the data to determine whether the top-tier foreign banking organization has the characteristics of a global systemically important banking organization under the global methodology.

(d) *Foreign banking organizations subject on a consolidated basis to a large exposures or single-counterparty credit limit regime by its home-country supervisor.* (1) Notwithstanding paragraphs (a) through (c) of this section, a foreign banking organization that is a covered foreign entity is not required to comply with the requirements of this subpart with respect to limits on the aggregate net credit exposure of its combined U.S. operations if the foreign banking organization certifies to the Board that it meets large exposure standards on a consolidated basis established by its home-country supervisor that are consistent with the large exposures framework published by the Basel Committee on Banking Supervision (Basel Large Exposures Framework), unless the Board determines in writing, after notice to the foreign banking organization, that compliance with this subpart is required.

(i) For purposes of this paragraph, home-country large exposure standards that are consistent with the Basel Large Exposures Framework include single-counterparty credit limits and any restrictions set forth in ''Supervisory framework for measuring and controlling large exposures'' (2014) (Basel LE Standard), as implemented in accordance with the Basel LE Standard.

(ii) [Reserved]

(2) A foreign banking organization that is a covered foreign entity must provide to the Board reports relating to its compliance with the large exposure standards described in paragraph (d)(1) of this section concurrently with filing the FR Y–7Q or any successor report.

§ 252.173 Gross credit exposure.

(a) *Calculation of gross credit exposure.* The amount of gross credit exposure of a covered foreign entity to a counterparty with respect to a credit transaction is, in the case of:

(1) A deposit of the covered foreign entity held by the counterparty, loan by a covered foreign entity to the counterparty, and lease in which the covered foreign entity is the lessor and the counterparty is the lessee, equal to the amount owed by the counterparty to the covered foreign entity under the transaction.

(2) A debt security or debt investment held by the covered foreign entity that is issued by the counterparty, equal to:

(i) The market value of the securities, for trading and available-for-sale securities; and

(ii) The amortized purchase price of the securities or investments, for securities or investments held to maturity.

(3) An equity security held by the covered foreign entity that is issued by the counterparty, equity investment in a counterparty, and other direct investments in a counterparty, equal to the market value.

(4) A securities financing transaction must be valued using any of the methods that the covered foreign entity is authorized to use under the Board's Regulation Q (12 CFR part 217, subparts D and E) to value such transactions:

(i)(A) As calculated for each transaction, in the case of a securities financing transaction between the covered foreign entity and the counterparty that is not subject to a bilateral netting agreement or does not meet the definition of ''repo-style transaction'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2); or

(B) As calculated for a netting set, in the case of a securities financing transaction between the covered foreign entity and the counterparty that is subject to a bilateral netting agreement with that counterparty and meets the definition of ''repo-style transaction'' in § 217.2 of the Board's Regulation Q (12 CFR 217.2);

(ii) For purposes of paragraph (a)(4)(i) of this section, the covered foreign entity must:

(A) Assign a value of zero to any security received from the counterparty that does not meet the definition of ''eligible collateral'' in § 252.171(*l*); and

(B) Include the value of securities that are eligible collateral received by the covered foreign entity from the counterparty (including any exempt counterparty), calculated in accordance with paragraphs (a)(4)(i) through (iv) of this section, when calculating its gross credit exposure to the issuer of those securities;

(iii) Notwithstanding paragraph (a)(4)(i) and (ii) of this section and with respect to each credit transaction, a covered foreign entity's gross credit exposure to a collateral issuer under this paragraph (a)(4) is limited to the covered foreign entity's gross credit exposure to the counterparty on the credit transaction;

(iv) In cases where the covered foreign entity receives eligible collateral from a counterparty in addition to the cash or securities received from that counterparty, the counterparty may reduce its gross credit exposure to that counterparty in accordance with § 252.174(b).

(5) A committed credit line extended by a covered foreign entity to a counterparty, equal to the face amount of the committed credit line.

(6) A guarantee or letter of credit issued by a covered foreign entity on behalf of a counterparty, equal to the maximum potential loss to the covered foreign entity on the transaction.

(7) A derivative transaction must be valued using any of the methods that the covered foreign entity is authorized to use under the Board's Regulation Q (12 CFR part 217, subparts D and E) to value such transactions:

(i)(A) As calculated for each transaction, in the case of a derivative transaction between the covered foreign entity and the counterparty, including an equity derivative but excluding a credit derivative described in paragraph (a)(8) of this section, that is not subject to a qualifying master netting agreement; or

(B) As calculated for a netting set, in the case of a derivative transaction between the covered foreign entity and the counterparty, including an equity derivative but excluding a credit derivative described in paragraph (a)(8) of this section, that is subject to a qualifying master netting agreement.

(ii) In cases where a covered foreign entity is required to recognize an exposure to an eligible guarantor pursuant to § 252.174(d), the covered foreign entity must exclude the relevant derivative transaction when calculating its gross exposure to the original counterparty under this section.

(8) A credit derivative between the covered foreign entity and a third party where the covered foreign entity is the protection provider and the reference asset is an obligation or debt security of the counterparty, equal to the maximum potential loss to the covered foreign entity on the transaction.

(b) *Investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not affiliates.* Notwithstanding paragraph (a) of this section.

(1) Unless the Board applies the requirements of § 252.175 to the transaction pursuant to § 252.175(d), a U.S. intermediate holding company that is a covered foreign entity but has less than $250 billion in total consolidated assets must:

(A) Calculate pursuant to § 252.173(a) its gross credit exposure due to any investment in the debt or equity of, and any credit derivative or equity derivative between the covered foreign entity and a third party where the covered foreign entity is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, a securitization vehicle, investment fund, and other special purpose vehicle that is not an affiliate of the covered foreign entity; and

(B) Attribute that gross credit exposure to the securitization vehicle, investment fund, or other special purpose vehicle for purposes of this subpart.

(2) A foreign banking organization that is a covered foreign entity or a U.S. intermediate holding company with total consolidated assets that equal or exceed $250 billion must calculate pursuant to § 252.175 its gross credit exposure due to any investment in the debt or equity of, and any credit derivative or equity derivative between the covered foreign entity and a third party where the covered foreign entity is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, a securitization vehicle, investment fund, and other special purpose vehicle that is not an affiliate of the covered foreign entity.

(c) *Attribution rule.* Notwithstanding paragraph (a) of this section, a covered foreign entity must treat any transaction with any natural person or entity as a credit transaction with another party, to the extent that the proceeds of the transaction are used for the benefit of, or transferred to, the other party.

§ 252.174 Net credit exposure.

(a) *In general.* For purposes of this subpart, a covered foreign entity must calculate its net credit exposure to a counterparty by adjusting its gross credit exposure to that counterparty in accordance with the rules set forth in this section.

(b) *Eligible collateral.* (1) In computing its net credit exposure to a counterparty for any credit transaction other than a securities financing transaction, a covered foreign entity must reduce its gross credit exposure on the transaction by the adjusted market value of any eligible collateral.

(2) A covered foreign entity that reduces its gross credit exposure to a counterparty as required under paragraph (b)(1) of this section must include the adjusted market value of the eligible collateral when calculating its gross credit exposure to the collateral issuer.

(3) Notwithstanding paragraph (b)(2) of this section, a covered foreign entity's gross credit exposure to a collateral issuer under this paragraph (b) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction if valued in accordance with § 252.173(a).

(c) *Eligible guarantees.* (1) In calculating net credit exposure to a counterparty for any credit transaction, a covered foreign entity must reduce its gross credit exposure to the counterparty by the amount of any eligible guarantee from an eligible guarantor that covers the transaction.

(2) A covered foreign entity that reduces its gross credit exposure to a counterparty as required under

paragraph (c)(1) of this section must include the amount of eligible guarantees when calculating its gross credit exposure to the eligible guarantor.

(3) Notwithstanding paragraph (c)(2) of this section, a covered foreign entity's gross credit exposure to an eligible guarantor with respect to an eligible guarantee under this paragraph (c) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction prior to recognition of the eligible guarantee, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction prior to recognition of the eligible guarantee if valued in accordance with § 252.173(a).

(d) *Eligible credit and equity derivatives.* (1) In calculating net credit exposure to a counterparty for a credit transaction under this section, a covered foreign entity must reduce its gross credit exposure to the counterparty by:

(i) In the case of any eligible credit derivative from an eligible guarantor, the notional amount of the eligible credit derivative; or

(ii) In the case of any eligible equity derivative from an eligible guarantor, the gross credit exposure amount to the counterparty (calculated in accordance with § 252.173(a)(7)).

(2)(i) A covered foreign entity that reduces its gross credit exposure to a counterparty as provided under paragraph (d)(1) of this section must include, when calculating its net credit exposure to the eligible guarantor, including in instances where the underlying credit transaction would not be subject to the credit limits of § 252.172 (for example, due to an exempt counterparty), either

(A) In the case of any eligible credit derivative from an eligible guarantor, the notional amount of the eligible credit derivative; or

(B) In the case of any eligible equity derivative from an eligible guarantor, the gross credit exposure amount to the counterparty (calculated in accordance with § 252.173(a)(7)).

(ii) Notwithstanding paragraph (d)(2)(i) of this section, in cases where the eligible credit derivative or eligible equity derivative is used to hedge covered positions that are subject to the Board's market risk rule (12 CFR part 217, subpart F) and the counterparty on the hedged transaction is not a financial entity, the amount of credit exposure that a entity must recognize to the eligible guarantor is the amount that would be calculated pursuant to § 252.173(a).

(3) Notwithstanding paragraph (d)(2) of this section, a covered foreign entity's gross credit exposure to an eligible guarantor with respect to an eligible credit derivative or an eligible equity derivative under this paragraph (d) is limited to:

(i) Its gross credit exposure to the counterparty on the credit transaction prior to recognition of the eligible credit derivative or the eligible equity derivative, or

(ii) In the case of an exempt counterparty, the gross credit exposure that would have been attributable to that exempt counterparty on the credit transaction prior to recognition of the eligible credit derivative or the eligible equity derivative if valued in accordance with § 252.173(a).

(e) *Other eligible hedges.* In calculating net credit exposure to a counterparty for a credit transaction under this section, a covered foreign entity may reduce its gross credit exposure to the counterparty by the face amount of a short sale of the counterparty's debt security or equity security, provided that:

(1) The instrument in which the covered foreign entity has a short position is junior to, or *pari passu* with, the instrument in which the covered foreign entity has the long position; and

(2) The instrument in which the covered foreign entity has a short position and the instrument in which the covered foreign entity has the long position are either both treated as trading or available-for-sale exposures or both treated as held-to-maturity exposures.

(f) *Unused portion of certain extensions of credit.* (1) In computing its net credit exposure to a counterparty for a committed credit line or revolving credit facility under this section, a covered foreign entity may reduce its gross credit exposure by the amount of the unused portion of the credit extension to the extent that the covered foreign entity does not have any legal obligation to advance additional funds under the extension of credit and the used portion of the credit extension has been fully secured by eligible collateral.

(2) To the extent that the used portion of a credit extension has been secured by eligible collateral, the covered foreign entity may reduce its gross credit exposure by the adjusted market value of any eligible collateral received from the counterparty, even if the used portion has not been fully secured by eligible collateral.

(3) To qualify for the reduction in net credit exposure under this paragraph, the credit contract must specify that any used portion of the credit extension must be fully secured by the adjusted market value of any eligible collateral.

(g) *Credit transactions involving exempt counterparties.* (1) A covered foreign entity's credit transactions with an exempt counterparty are not subject to the requirements of this subpart, including but not limited to § 252.172.

(2) Notwithstanding paragraph (g)(1) of this section, in cases where a covered foreign entity has a credit transaction with an exempt counterparty and the covered foreign entity has obtained eligible collateral from that exempt counterparty or an eligible guarantee or eligible credit or equity derivative from an eligible guarantor, the covered foreign entity must include (for purposes of this subpart) such exposure to the issuer of such eligible collateral or the eligible guarantor, as calculated in accordance with the rules set forth in this section, when calculating its gross credit exposure to that issuer of eligible collateral or eligible guarantor.

(h) *Currency mismatch adjustments.* For purposes of calculating its net credit exposure to a counterparty under this section, a covered foreign entity must apply, as applicable:

(1) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible collateral and calculating its gross credit exposure to an issuer of eligible collateral, pursuant to paragraph (b) of this section, the currency mismatch adjustment approach of § 217.37(c)(3)(ii) of the Board's Regulation Q (12 CFR 217.37(c)(3)(ii)); and

(2) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible guarantee, eligible equity derivative, or eligible credit derivative from an eligible guarantor and calculating its gross credit exposure to an eligible guarantor, pursuant to paragraphs (c) and (d) of this section, the currency mismatch adjustment approach of § 217.36(f) of the Board's Regulation Q (12 CFR 217.36(f)).

(i) *Maturity mismatch adjustments.* For purposes of calculating its net credit exposure to a counterparty under this section, a covered foreign entity must apply, as applicable, the maturity mismatch adjustment approach of § 217.36(d) of the Board's Regulation Q (12 CFR 217.36(d)):

(1) When reducing its gross credit exposure to a counterparty resulting from any credit transaction due to any eligible collateral or any eligible guarantees, eligible equity derivatives, or eligible credit derivatives from an eligible guarantor, pursuant to

paragraphs (b) through (d) of this section, and

(2) In calculating its gross credit exposure to an issuer of eligible collateral, pursuant to paragraph (b) of this section, or to an eligible guarantor, pursuant to paragraphs (c) and (d) of this section; provided that

(3) The eligible collateral, eligible guarantee, eligible equity derivative, or eligible credit derivative subject to paragraph (i)(1) of this section:

(1) Has a shorter maturity than the credit transaction;

(2) Has an original maturity equal to or greater than one year;

(3) Has a residual maturity of not less than three months; and

(4) The adjustment approach is otherwise applicable.

§ 252.175 Investments in and exposures to securitization vehicles, investment funds, and other special purpose vehicles that are not affiliates of the covered foreign entity.

(a) *In general.* (1) This section applies only to a foreign banking organization that is a covered foreign entity or a U.S. intermediate holding company with total consolidated assets that equal or exceed $250 billion, provided that:

(i) In order to avoid evasion of this subpart, the Board may determine, after notice to the covered foreign entity and opportunity for hearing, that a U.S. intermediate holding company with less than $250 billion in total consolidated assets must apply either the approach in paragraph (a) of this section or the look-through approach in paragraph (b) of this section, or must recognize exposures to a third party that has a contractual obligation to provide credit or liquidity support to a securitization vehicle, investment fund, or other special purpose vehicle that is not an affiliate of the covered foreign entity, as provided in paragraph (c) of this section; and

(ii) For purposes of paragraph (a)(1)(i) of this section, the Board, in its discretion and as applicable, may allow a covered foreign entity to measure its capital base using the covered foreign entity's capital stock and surplus rather than its tier 1 capital.

(2) For purposes of this section, the following definitions apply:

(i) *SPV* means a securitization vehicle, investment fund, or other special purpose vehicle that is not an affiliate of the covered foreign entity.

(ii) *SPV exposure* means an investment in the debt or equity of an SPV or a credit derivative or equity derivative between the covered foreign entity and a third party where the covered foreign entity is the protection provider and the reference asset is an obligation or equity security of, or equity investment in, an SPV.

(3)(i) A covered foreign entity must determine whether the amount of its gross credit exposure to an issuer of assets in an SPV, due to an SPV exposure, is equal to or greater than 0.25 percent of the covered foreign entity's tier 1 capital using one of the following two methods:

(A) The sum of all of the issuer's assets (with each asset valued in accordance with § 252.173(a)) in the SPV; or

(B) The application of the look-through approach described in paragraph (b) of this section.

(ii) With respect to the determination required under paragraph (a)(3)(i) of this section, a covered foreign entity must use the same method to calculate gross credit exposure to each issuer of assets in a particular SPV.

(iii) In making a determination under paragraph (a)(3)(i) of this section, the covered foreign entity must consider only the credit exposure to the issuer arising from the covered foreign entity's SPV exposure.

(iv) For purposes of this paragraph (a)(3), a covered foreign entity that is unable to identify each issuer of assets in an SPV must attribute to a single unknown counterparty the amount of its gross credit exposure to all unidentified issuers and calculate such gross credit exposure using one method in either paragraph (a)(3)(i)(A) or (B) of this section.

(4)(i) If a covered foreign entity determines pursuant to paragraph (a)(3) of this section that the amount of its gross credit exposure to an issuer of assets in an SPV is less than 0.25 percent of the covered foreign entity's tier 1 capital, the amount of the covered foreign entity's gross credit exposure to that issuer may be attributed to either that issuer of assets or the SPV:

(A) If attributed to the issuer of assets, the issuer of assets must be identified as a counterparty, and the gross credit exposure calculated under paragraph (a)(3)(i)(A) of this section to that issuer of assets must be aggregated with any other gross credit exposures (valued in accordance with § 252.173) to that same counterparty; and

(B) If attributed to the SPV, the covered foreign entity's gross credit exposure is equal to the covered foreign entity's SPV exposure, valued in accordance with § 252.173(a).

(ii) If a covered foreign entity determines pursuant to paragraph (a)(3) of this section that the amount of its gross credit exposure to an issuer of assets in an SPV is equal to or greater than 0.25 percent of the covered foreign entity's tier 1 capital or the covered foreign entity is unable to determine that the amount of the gross credit exposure is less than 0.25 percent of the covered foreign entity's tier 1 capital:

(A) The covered foreign entity must calculate the amount of its gross credit exposure to the issuer of assets in the SPV using the look-through approach in paragraph (b) of this section;

(B) The issuer of assets in the SPV must be identified as a counterparty, and the gross credit exposure calculated in accordance with paragraph (b) must be aggregated with any other gross credit exposures (valued in accordance with § 252.173) to that same counterparty; and

(C) When applying the look-through approach in paragraph (b) of this section, a covered foreign entity that is unable to identify each issuer of assets in an SPV must attribute to a single unknown counterparty the amount of its gross credit exposure, calculated in accordance with paragraph (b) of this section, to all unidentified issuers.

(iii) For purposes of this section, a covered foreign entity must aggregate all gross credit exposures to unknown counterparties for all SPVs as if the exposures related to a single unknown counterparty; this single unknown counterparty is subject to the limits of § 252.172 as if it were a single counterparty.

(b) *Look-through approach.* A covered foreign entity that is required to calculate the amount of its gross credit exposure with respect to an issuer of assets in accordance with this paragraph (b) must calculate the amount as follows:

(1) Where all investors in the SPV rank *pari passu,* the amount of the gross credit exposure to the issuer of assets is equal to the covered foreign entity's pro rata share of the SPV multiplied by the value of the underlying asset in the SPV, valued in accordance with § 252.173(a); and

(2) Where all investors in the SPV do not rank *pari passu,* the amount of the gross credit exposure to the issuer of assets is equal to:

(i) The pro rata share of the covered foreign entity's investment in the tranche of the SPV; multiplied by

(ii) The lesser of:

(A) The market value of the tranche in which the covered foreign entity has invested, except in the case of a debt security that is held to maturity, in which case the tranche must be valued at the amortized purchase price of the securities; and

(B) The value of each underlying asset attributed to the issuer in the SPV, each as calculated pursuant to § 252.173(a).

(c) *Exposures to third parties.* (1) Notwithstanding any other requirement in this section, a covered foreign entity must recognize, for purposes of this subpart, a gross credit exposure to each third party that has a contractual obligation to provide credit or liquidity support to an SPV whose failure or material financial distress would cause a loss in the value of the covered foreign entity's SPV exposure.

(2) The amount of any gross credit exposure that is required to be recognized to a third party under paragraph (c)(1) of this section is equal to the covered foreign entity's SPV exposure, up to the maximum contractual obligation of that third party to the SPV, valued in accordance with § 252.173(a). (This gross credit exposure is in addition to the covered foreign entity's gross credit exposure to the SPV or the issuers of assets of the SPV, calculated in accordance with paragraphs (a) and (b) of this section.)

(3) A covered foreign entity must aggregate the gross credit exposure to a third party recognized in accordance with paragraphs (c)(1) and (2) of this section with its other gross credit exposures to that third party (that are unrelated to the SPV) for purposes of compliance with the limits of § 252.172.

§ 252.176 Aggregation of exposures to more than one counterparty due to economic interdependence or control relationships.

(a) *In general.* (1)(i) Paragraphs (a)(2) through (d) of this section apply only to a foreign banking organization that is a covered foreign entity or a U.S. intermediate holding company with total consolidated assets that equal or exceed $250 billion.

(ii) Paragraph (e) of this section applies to all covered foreign entities.

(2)(i) If a covered foreign entity has an aggregate net credit exposure to any counterparty that exceeds 5 percent of its tier 1 capital, the covered foreign entity must assess its relationship with the counterparty under paragraph (b)(2) of this section to determine whether the counterparty is economically interdependent with one or more other counterparties of the covered foreign entity and under paragraph (c)(1) of this section to determine whether the counterparty is connected by a control relationship with one or more other counterparties.

(ii) If, pursuant to an assessment required under paragraph (a)(2)(i) of this section, the covered foreign entity determines that one or more of the factors of paragraph (b)(2) or (c)(1) of this section are met with respect to one or more counterparties, or the Board determines pursuant to paragraph (d) of this section that one or more other counterparties of a covered foreign entity are economically interdependent or that one or more other counterparties of a covered foreign entity are connected by a control relationship, the covered foreign entity must aggregate its net credit exposure to the counterparties for all purposes under this subpart, including, but not limited to, § 252.172.

(iii) In connection with any request pursuant to paragraph (b)(3) or (c)(2) of this section, the Board may require the covered foreign entity to provide additional information.

(b) *Aggregation of exposures to more than one counterparty due to economic interdependence.* (1) For purposes of this paragraph, two counterparties are economically interdependent if the failure, default, insolvency, or material financial distress of one counterparty would cause the failure, default, insolvency, or material financial distress of the other counterparty, taking into account the factors in paragraph (b)(2) of this section.

(2) A covered foreign entity must assess whether the financial distress of one counterparty (counterparty A) would prevent the ability of the other counterparty (counterparty B) to fully and timely repay counterparty B's liabilities and whether the insolvency or default of counterparty A is likely to be associated with the insolvency or default of counterparty B and, therefore, these counterparties are economically interdependent, by evaluating the following:

(i) Whether 50 percent or more of one counterparty's gross revenue is derived from, or gross expenditures are directed to, transactions with the other counterparty;

(ii) Whether counterparty A has fully or partly guaranteed the credit exposure of counterparty B, or is liable by other means, in an amount that is 50 percent or more of the covered foreign entity's net credit exposure to counterparty A;

(iii) Whether 25 percent or more of one counterparty's production or output is sold to the other counterparty, which cannot easily be replaced by other customers;

(iv) Whether the expected source of funds to repay the loans of both counterparties is the same and neither counterparty has another independent source of income from which the loans may be serviced and fully repaid; [1] and

(v) Whether two or more counterparties rely on the same source for the majority of their funding and, in the event of the common provider's default, an alternative provider cannot be found.

(3)(i) Notwithstanding paragraph (b)(2) of this section, if a covered foreign entity determines that one or more of the factors in paragraph (b)(2) is met, the covered foreign entity may request in writing a determination from the Board that those counterparties are not economically interdependent and that the covered foreign entity is not required to aggregate those counterparties.

(ii) Upon a request by a covered foreign entity pursuant to paragraph (b)(3) of this section, the Board may grant temporary relief to the covered foreign entity and not require the covered foreign entity to aggregate one counterparty with another counterparty provided that the counterparty could promptly modify its business relationships, such as by reducing its reliance on the other counterparty, to address any economic interdependence concerns, and provided that such relief is in the public interest and is consistent with the purpose of this subpart and 12 U.S.C. 5365(e).

(c) *Aggregation of exposures to more than one counterparty due to certain control relationships.* (1) For purposes of this subpart, one counterparty (counterparty A) is deemed to control the other counterparty (counterparty B) if:

(i) Counterparty A owns, controls, or holds with the power to vote 25 percent or more of any class of voting securities of counterparty B; or

(ii) Counterparty A controls in any manner the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of counterparty B.

(2)(i) Notwithstanding paragraph (c)(1) of this section, if a covered foreign entity determines that one or more of the factors in paragraph (c)(1) is met, the covered foreign entity may request in writing a determination from the Board that counterparty A does not control counterparty B and that the covered foreign entity is not required to aggregate those counterparties.

(ii) Upon a request by a covered foreign entity pursuant to paragraph (c)(2) of this section, the Board may grant temporary relief to the covered foreign entity and not require the covered foreign entity to aggregate counterparty A with counterparty B provided that, taking into account the specific facts and circumstances, such indicia of control does not result in the entities being connected by control relationships for purposes of this

[1] An employer will not be treated as a source of repayment under this paragraph because of wages and salaries paid to an employee.

subpart, and provided that such relief is in the public interest and is consistent with the purpose of this subpart and 12 U.S.C. 5365(e).

(d) *Board determinations for aggregation of counterparties due to economic interdependence or control relationships.* The Board may determine, after notice to the covered foreign entity and opportunity for hearing, that one or more counterparties of a covered foreign entity are:

(1) Economically interdependent for purposes of this subpart, considering the factors in paragraph (b)(2) of this section, as well as any other indicia of economic interdependence that the Board determines in its discretion to be relevant; or

(2) Connected by control relationships for purpose of this subpart, considering the factors in paragraph (c)(1) of this section and whether counterparty A:

(i) Controls the power to vote 25 percent or more of any class of voting securities of Counterparty B pursuant to a voting agreement;

(ii) Has significant influence on the appointment or dismissal of counterparty B's administrative, management, or governing body, or the fact that a majority of members of such body have been appointed solely as a result of the exercise of counterparty A's voting rights; or

(iii) Has the power to exercise a controlling influence over the management or policies of counterparty B.

(e) *Board determinations for aggregation of counterparties to prevent evasion.* Notwithstanding paragraphs (b) and (c) of this section, a covered foreign entity must aggregate its exposures to a counterparty with the covered foreign entity's exposures to another counterparty if the Board determines in writing after notice and opportunity for hearing, that the exposures to the two counterparties must be aggregated to prevent evasions of the purposes of this subpart, including, but not limited to § 252.176 and 12 U.S.C. 5365(e).

§ 252.177 Exemptions.

(a) *Exempted exposure categories.* The following categories of credit transactions are exempt from the limits on credit exposure under this subpart:

(1) Any direct claim on, and the portion of a claim that is directly and fully guaranteed as to principal and interest by, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, only while operating under the conservatorship or receivership of the Federal Housing Finance Agency, and any additional obligation issued by a U.S. government-sponsored entity as determined by the Board;

(2) Intraday credit exposure to a counterparty;

(3) Any trade exposure to a qualifying central counterparty related to the covered foreign entity's clearing activity, including potential future exposure arising from transactions cleared by the qualifying central counterparty and pre-funded default fund contributions;

(4) Any credit transaction with the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the Multilateral Investment Guarantee Agency, or the International Centre for Settlement of Investment Disputes;

(5) Any credit transaction with the European Commission or the European Central Bank; and

(6) Any transaction that the Board exempts if the Board finds that such exemption is in the public interest and is consistent with the purpose of this subpart.

(b) *Additional exemptions by the Board.* The Board may, by regulation or order, exempt transactions, in whole or in part, from the definition of the term ''credit exposure,'' if the Board finds that the exemption is in the public interest and is consistent with the purpose of 12 U.S.C. 5365(e).

§ 252.178 Compliance.

(a) *Scope of compliance.* (1) Using all available data, including any data required to be maintained or reported to the Federal Reserve under this subpart, a foreign banking organization that is a covered foreign entity or a U.S. intermediate holding company with total consolidated assets that equal or exceed $250 billion must comply with the requirements of this subpart on a daily basis at the end of each business day.

(2) Using all available data, including any data required to be maintained or reported to the Federal Reserve under this subpart, a U.S. intermediate holding company with less than $250 billion in total consolidated assets must comply with the requirements of this subpart on a quarterly basis, unless the Board determines and notifies the entity in writing that more frequent compliance is required.

(3) A covered foreign entity must report its compliance to the Federal Reserve as of the end of the quarter, unless the Board determines and notifies that entity in writing that more frequent reporting is required.

(4) In reporting its compliance, a covered foreign entity must calculate and include in its gross credit exposure to an issuer of eligible collateral or eligible guarantor the amounts of eligible collateral, eligible guarantees, eligible equity derivatives, and eligible credit derivatives that were provided to the covered foreign entity in connection with credit transactions with exempt counterparties, valued in accordance with and as required by § 252.174(b) through (d) and (g).

(b) *Qualifying Master Netting Agreement.* With respect to any qualifying master netting agreement, a covered foreign entity must establish and maintain procedures that meet or exceed the requirements of § 217.3(d) of the Board's Regulation Q (12 CFR 217.3(d)) to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy these requirements.

(c) *Noncompliance.* (1) Except as otherwise provided in this section, if a covered foreign entity is not in compliance with this subpart with respect to a counterparty solely due to the circumstances listed in paragraphs (c)(2)(i) through (v) of this section, the covered foreign entity will not be subject to enforcement actions for a period of 90 days (or, with prior notice to the foreign entity, such shorter or longer period determined by the Board, in its sole discretion, to be appropriate to preserve the safety and soundness of the covered foreign entity or U.S. financial stability), if the covered foreign entity uses reasonable efforts to return to compliance with this subpart during this period. The covered foreign entity may not engage in any additional credit transactions with such a counterparty in contravention of this rule during the period of noncompliance, except as provided in paragraph (c)(2) of this section.

(2) A covered foreign entity may request a special temporary credit exposure limit exemption from the Board. The Board may grant approval for such exemption in cases where the Board determines that such credit transactions are necessary or appropriate to preserve the safety and soundness of the covered foreign entity or U.S. financial stability. In acting on a request for an exemption, the Board will consider the following:

(i) A decrease in the covered foreign entity's capital stock and surplus;

(ii) The merger of the covered foreign entity with another covered foreign entity;

(iii) A merger of two counterparties; or

(iv) An unforeseen and abrupt change in the status of a counterparty as a result of which the covered foreign entity's credit exposure to the counterparty becomes limited by the requirements of this section; or

(v) Any other factor(s) the Board determines, in its discretion, is appropriate.

(d) *Other measures.* The Board may impose supervisory oversight and additional reporting measures that it determines are appropriate to monitor compliance with this subpart. Covered foreign entities must furnish, in the manner and form prescribed by the Board, such information to monitor compliance with this subpart and the limits therein as the Board may require.

By order of the Board of Governors of the Federal Reserve System, July 24, 2018.

Yao-Chin Chao,

Assistant Secretary of the Board.

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2019; Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1688–F]

RIN 0938–AT25

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2019

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the prospective payment rates for inpatient rehabilitation facilities (IRFs) for federal fiscal year (FY) 2019. As required by the Social Security Act (the Act), this final rule includes the classification and weighting factors for the IRF prospective payment system's (PPS) case-mix groups and a description of the methodologies and data used in computing the prospective payment rates for FY 2019. This final rule also alleviates administrative burden for IRFs by removing the Functional Independence Measure (FIM™) instrument and associated Function Modifiers from the IRF Patient Assessment Instrument (IRF–PAI) beginning in FY 2020 and revises certain IRF coverage requirements to reduce the amount of required paperwork in the IRF setting beginning in FY 2019. Additionally, this final rule incorporates certain data items located in the Quality Indicators section of the IRF–PAI into the IRF case-mix classification system using analysis of 2 years of data beginning in FY 2020. For the IRF Quality Reporting Program (QRP), this final rule adopts a new measure removal factor, removes two measures from the IRF QRP measure set, and codifies a number of program requirements in our regulations.

DATES:

Effective Dates: These regulations are effective on October 1, 2018.

Applicability Dates: The updated IRF prospective payment rates are applicable for IRF discharges occurring on or after October 1, 2018, and on or before September 30, 2019 (FY 2019). In addition, the revisions to certain IRF coverage requirements to reduce the amount of required paperwork in the IRF setting and the updated measures and reporting requirements under the IRF QRP are applicable for IRF discharges occurring on or after October 1, 2018. The removal of the FIM™ instrument and associated Function Modifiers from the IRF–PAI and refinements to the case-mix classification system are applicable for IRF discharges occurring on or after October 1, 2019.

FOR FURTHER INFORMATION CONTACT:

Gwendolyn Johnson, (410) 786–6954, for general information.

Catie Kraemer, (410) 786–0179, for information about the IRF payment policies and payment rates.

Kadie Derby, (410) 786–0468, for information about the IRF coverage policies.

Christine Grose, (410) 786–1362, for information about the IRF quality reporting program.

SUPPLEMENTARY INFORMATION: The IRF PPS Addenda along with other supporting documents and tables referenced in this final rule are available through the internet on the CMS website at *http://www.cms.hhs.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/*.

To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

Table of Contents

Regulatory Text

Executive Summary

A. Purpose

This final rule updates the prospective payment rates for IRFs for FY 2019 (that is, for discharges occurring on or after October 1, 2018, and on or before September 30, 2019) as required under section 1886(j)(3)(C) of the Act. As required by section 1886(j)(5) of the Act, this rule includes the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodologies and data used in computing the prospective payment rates for FY 2019. In addition, this final rule reduces the regulatory burden for IRFs by removing data items from the IRF–PAI and revising certain IRF coverage and paperwork requirements. The final rule also updates requirements for the IRF QRP, including adding a new quality measure removal factor, removing two measures from the measure set, and codifying a number of program requirements in our regulations.

B. Summary of Major Provisions

In this final rule, we use the methods described in the FY 2018 IRF PPS final rule (82 FR 36238) to update the prospective payment rates for FY 2019 using updated FY 2017 IRF claims and the most recent available IRF cost report data, which is FY 2016 IRF cost report data. (*Note:* In the interest of brevity, the rates previously referred to as the ''Federal prospective payment rates'' are now referred to as the ''prospective payment rates''. No change in meaning is intended.) We are also finalizing our proposals to alleviate administrative burden for IRFs by removing the FIM™ instrument and associated Function Modifiers from the IRF–PAI and revising certain IRF coverage requirements to reduce the amount of required paperwork in the IRF setting. We are also finalizing updates to requirements for the IRF QRP.

C. Summary of Impacts

Provision description	Transfers
FY 2019 IRF PPS payment rate update	The overall economic impact of this final rule is an estimated $105 million in increased payments from the Federal government to IRFs during FY 2019.
Provision Description	**Costs**
Removal of FIM™ Items from IRF–PAI	The total reduction in costs in FY 2020 for IRFs as a result of the removal of the FIM™ instrument and associated Function Modifiers from the IRF-PAI is estimated to be $10.5 million.
Removal of certain IRF coverage requirements	The total reduction in costs in FY 2019 for IRFs as a result of the removal of certain IRF coverage requirements is estimated to be $20.5 million.
New IRF QRP requirements	The total reduction in costs in FY 2019 for IRFs as a result of the new quality reporting requirements is estimated to be $2.5 million.

D. Improving Patient Outcomes and Reducing Burden Through Meaningful Measures

Regulatory reform and reducing regulatory burden are high priorities for CMS. To reduce the regulatory burden on the healthcare industry, lower health care costs, and enhance patient care, in October 2017, we launched the Meaningful Measures Initiative.[1] This initiative is one component of our agency-wide Patients Over Paperwork Initiative,[2] which is aimed at evaluating and streamlining regulations with a goal to reduce unnecessary cost and burden, increase efficiencies, and improve beneficiary experience. The Meaningful Measures Initiative is aimed at identifying the highest priority areas for quality measurement and quality improvement in order to assess the core quality of care issues that are most vital to advancing our work to improve patient outcomes. The Meaningful Measures Initiative represents a new approach to quality measures that fosters operational efficiencies, and will reduce costs, including collection and reporting burden while producing quality measurement that is more focused on meaningful outcomes.

The Meaningful Measures Framework has the following objectives:

- Address high-impact measure areas that safeguard public health;
- Patient-centered and meaningful to patients;
- Outcome-based where possible;
- Fulfill each program's statutory requirements;
- Minimize the level of burden for health care providers (for example, through a preference for EHR-based measures where possible, such as electronic clinical quality measures);
- Significant opportunity for improvement;
- Address measure needs for population based payment through alternative payment models; and
- Align across programs and/or with other payers.

In order to achieve these objectives, we have identified 19 Meaningful Measures areas and mapped them to six overarching quality priorities as shown in the Table 1:

TABLE 1—MEANINGFUL MEASURES FRAMEWORK DOMAINS AND MEASURE AREAS

Quality priority	Meaningful Measure area
Making Care Safer by Reducing Harm Caused in the Delivery of Care	Healthcare-Associated Infections. Preventable Healthcare Harm.
Strengthen Person and Family Engagement as Partners in Their Care	Care is Personalized and Aligned with Patient's Goals. End of Life Care according to Preferences. Patient's Experience of Care. Patient Reported Functional Outcomes.

[1] Meaningful Measures web page: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/MMF/General-info-Sub-Page.html.*

[2] See Remarks by Administrator Seema Verma at the Health Care Payment Learning and Action Network (LAN) Fall Summit, as prepared for delivery on October 30, 2017. *https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-10-30.html.*

TABLE 1—MEANINGFUL MEASURES FRAMEWORK DOMAINS AND MEASURE AREAS—Continued

Quality priority	Meaningful Measure area
Promote Effective Communication and Coordination of Care	Medication Management. Admissions and Readmissions to Hospitals. Transfer of Health Information and Interoperability.
Promote Effective Prevention and Treatment of Chronic Disease	Preventive Care. Management of Chronic Conditions. Prevention, Treatment, and Management of Mental Health. Prevention and Treatment of Opioid and Substance Use Disorders.
Work with Communities to Promote Best Practices of Healthy Living	Risk Adjusted Mortality. Equity of Care. Community Engagement.
Make Care Affordable	Appropriate Use of Healthcare. Patient-focused Episode of Care. Risk Adjusted Total Cost of Care.

By including Meaningful Measures in our programs, we believe that we can also address the following cross-cutting measure criteria:

- Eliminating disparities;
- Tracking measurable outcomes and impact;
- Safeguarding public health;
- Achieving cost savings;
- Improving access for rural communities; and
- Reducing burden.

We believe that the Meaningful Measures Initiative will improve outcomes for patients, their families, and health care providers while reducing burden and costs for clinicians and providers, as well as promoting operational efficiencies.

Comment: We received numerous comments from stakeholders regarding the Meaningful Measures Initiative and the impact of its implementation in CMS' quality programs. Many of these comments pertained to specific program proposals, and are discussed in the appropriate program-specific sections of this final rule. However, commenters also provided insights and recommendations for the ongoing development of the Meaningful Measures Initiative generally, including: Ensuring transparency in public reporting and the usability of publicly reported data; evaluating the benefit of individual measures to patients via their use in quality programs versus the burden to providers of collecting and reporting that measure data; and identifying additional opportunities for alignment across CMS quality programs.

Response: We will continue to work with stakeholders to refine and further implement the Meaningful Measures Initiative, and will take commenters' insights and recommendations into account moving forward.

I. Background

A. Historical Overview of the IRF PPS

Section 1886(j) of the Act provides for the implementation of a per-discharge prospective payment system (PPS) for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (collectively, hereinafter referred to as IRFs). Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs), but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), we are providing a general description of the IRF PPS for FYs 2002 through 2018.

Under the IRF PPS from FY 2002 through FY 2005, the prospective payment rates were computed across 100 distinct case-mix groups (CMGs), as described in the FY 2002 IRF PPS final rule (66 FR 41316). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed five special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget-neutral conversion factor). For a detailed discussion of the budget-neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRFs' unadjusted prospective payment rates.

For cost reporting periods that began on or after January 1, 2002, and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the federal IRF PPS rate and the payment that the IRFs would have received had the IRF PPS not been implemented. This provision also allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the federal IRF PPS rate.

We established a CMS website as a primary information resource for the IRF PPS which is available at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/index.html.* The website may be accessed to download or view publications, software, data specifications, educational materials, and other information pertinent to the IRF PPS.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS final rule (70 FR 57166) that we published on September 30, 2005, we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of the Office of Management and Budget's (OMB) Core-Based Statistical Area (CBSA) market definitions, modifications to the CMGs, tier comorbidities, and CMG relative weights, implementation of a new teaching status adjustment for IRFs, rebasing and revising the market basket index used to update IRF payments, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments was a market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereinafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket). Any reference to the FY 2006 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166).

In the FY 2007 IRF PPS final rule (71 FR 48354), we further refined the IRF PPS case-mix classification system (the CMG relative weights) and the case-level adjustments, to ensure that IRF PPS payments would continue to reflect as accurately as possible the costs of care. For a detailed discussion of the FY 2007 policy revisions, please refer to the FY 2007 IRF PPS final rule (71 FR 48354).

In the FY 2008 IRF PPS final rule (72 FR 44284), we updated the prospective payment rates and the outlier threshold, revised the IRF wage index policy, and clarified how we determine high-cost outlier payments for transfer cases. For more information on the policy changes implemented for FY 2008, please refer to the FY 2008 IRF PPS final rule (72 FR 44284), in which we published the final FY 2008 IRF prospective payment rates.

After publication of the FY 2008 IRF PPS final rule (72 FR 44284), section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007) (MMSEA) amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. Section 1886(j)(3)(C) of the Act required the Secretary to develop an increase factor to update the IRF prospective payment rates for each FY. Based on the legislative change to the increase factor, we revised the FY 2008 prospective payment rates for IRF discharges occurring on or after April 1, 2008. Thus, the final FY 2008 IRF prospective payment rates that were published in the FY 2008 IRF PPS final rule (72 FR 44284) were effective for discharges occurring on or after October 1, 2007, and on or before March 31, 2008, and the revised FY 2008 IRF prospective payment rates were effective for discharges occurring on or after April 1, 2008, and on or before September 30, 2008. The revised FY 2008 prospective payment rates are available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.*

In the FY 2009 IRF PPS final rule (73 FR 46370), we updated the CMG relative weights, the average length of stay values, and the outlier threshold; clarified IRF wage index policies regarding the treatment of ''New England deemed'' counties and multi-campus hospitals; and revised the regulation text in response to section 115 of the MMSEA to set the IRF compliance percentage at 60 percent (the ''60 percent rule'') and continue the practice of including comorbidities in the calculation of compliance percentages. We also applied a zero percent market basket increase factor for FY 2009 in accordance with section 115 of the MMSEA. For more information on the policy changes implemented for FY 2009, please refer to the FY 2009 IRF PPS final rule (73 FR 46370), in which we published the final FY 2009 IRF prospective payment rates.

In the FY 2010 IRF PPS final rule (74 FR 39762) and in correcting amendments to the FY 2010 IRF PPS final rule (74 FR 50712) that we published on October 1, 2009, we updated the prospective payment rates, the CMG relative weights, the average length of stay values, the rural, LIP, teaching status adjustment factors, and the outlier threshold; implemented new IRF coverage requirements for determining whether an IRF claim is reasonable and necessary; and revised the regulation text to require IRFs to submit patient assessments on Medicare Advantage (MA) (formerly called Medicare Part C) patients for use in the 60 percent rule calculations. Any reference to the FY 2010 IRF PPS final rule in this final rule also includes the provisions effective in the correcting amendments. For more information on the policy changes implemented for FY 2010, please refer to the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712), in which we published the final FY 2010 IRF prospective payment rates.

After publication of the FY 2010 IRF PPS final rule (74 FR 39762), section 3401(d) of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), as amended by section 10319 of the same Act and by section 1105 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010) (collectively, hereinafter referred to as ''PPACA''), amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to estimate a multifactor productivity (MFP) adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 to 2019.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act defined the adjustments that were to be applied to the market basket increase factors in FYs 2010 and 2011. Under these provisions, the Secretary was required to reduce the market basket increase factor in FY 2010 by a 0.25 percentage point adjustment. Notwithstanding this provision, in accordance with section 3401(p) of the PPACA, the adjusted FY 2010 rate was only to be applied to discharges occurring on or after April 1, 2010. Based on the self-implementing legislative changes to section 1886(j)(3) of the Act, we adjusted the FY 2010 federal prospective payment rates as required, and applied these rates to IRF discharges occurring on or after April 1, 2010, and on or before September 30, 2010. Thus, the final FY 2010 IRF prospective payment rates that were published in the FY 2010 IRF PPS final rule (74 FR 39762) were used for

discharges occurring on or after October 1, 2009, and on or before March 31, 2010, and the adjusted FY 2010 IRF prospective payment rates applied to discharges occurring on or after April 1, 2010, and on or before September 30, 2010. The adjusted FY 2010 prospective payment rates are available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.*

In addition, sections 1886(j)(3)(C) and (D) of the Act also affected the FY 2010 IRF outlier threshold amount because they required an adjustment to the FY 2010 RPL market basket increase factor, which changed the standard payment conversion factor for FY 2010. Specifically, the original FY 2010 IRF outlier threshold amount was determined based on the original estimated FY 2010 RPL market basket increase factor of 2.5 percent and the standard payment conversion factor of $13,661. However, as adjusted, the IRF prospective payments are based on the adjusted RPL market basket increase factor of 2.25 percent and the revised standard payment conversion factor of $13,627. To maintain estimated outlier payments for FY 2010 equal to the established standard of 3 percent of total estimated IRF PPS payments for FY 2010, we revised the IRF outlier threshold amount for FY 2010 for discharges occurring on or after April 1, 2010, and on or before September 30, 2010. The revised IRF outlier threshold amount for FY 2010 was $10,721.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act also required the Secretary to reduce the market basket increase factor in FY 2011 by a 0.25 percentage point adjustment. The FY 2011 IRF PPS notice (75 FR 42836) and the correcting amendments to the FY 2011 IRF PPS notice (75 FR 70013) described the required adjustments to the FY 2010 and FY 2011 IRF PPS prospective payment rates and outlier threshold amount for IRF discharges occurring on or after April 1, 2010, and on or before September 30, 2011. It also updated the FY 2011 prospective payment rates, the CMG relative weights, and the average length of stay values. Any reference to the FY 2011 IRF PPS notice in this final rule also includes the provisions effective in the correcting amendments. For more information on the FY 2010 and FY 2011 adjustments or the updates for FY 2011, please refer to the FY 2011 IRF PPS notice (75 FR 42836 and 75 FR 70013).

In the FY 2012 IRF PPS final rule (76 FR 47836), we updated the IRF prospective payment rates, rebased and revised the RPL market basket, and established a new quality reporting program (QRP) for IRFs in accordance with section 1886(j)(7) of the Act. We also consolidated, clarified, and revised existing policies regarding IRF hospitals and IRF units of hospitals to eliminate unnecessary confusion and enhance consistency. For more information on the policy changes implemented for FY 2012, please refer to the FY 2012 IRF PPS final rule (76 FR 47836), in which we published the final FY 2012 IRF prospective payment rates.

The FY 2013 IRF PPS notice (77 FR 44618) described the required adjustments to the FY 2013 prospective payment rates and outlier threshold amount for IRF discharges occurring on or after October 1, 2012, and on or before September 30, 2013. It also updated the FY 2013 prospective payment rates, the CMG relative weights, and the average length of stay values. For more information on the updates for FY 2013, please refer to the FY 2013 IRF PPS notice (77 FR 44618).

In the FY 2014 IRF PPS final rule (78 FR 47860), we updated the prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also updated the facility-level adjustment factors using an enhanced estimation methodology, revised the list of diagnosis codes that count toward an IRF's 60 percent rule compliance calculation to determine ''presumptive compliance,'' revised sections of the inpatient rehabilitation facility patient assessment instrument (IRF–PAI), revised requirements for acute care hospitals that have IRF units, clarified the IRF regulation text regarding limitation of review, updated references to previously changed sections in the regulations text, and updated requirements for the IRF QRP. For more information on the policy changes implemented for FY 2014, please refer to the FY 2014 IRF PPS final rule (78 FR 47860), in which we published the final FY 2014 IRF prospective payment rates.

In the FY 2015 IRF PPS final rule (79 FR 45872), we updated the prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also revised the list of diagnosis codes that count toward an IRF's 60 percent rule compliance calculation to determine ''presumptive compliance,'' revised sections of the IRF–PAI, and updated requirements for the IRF QRP. For more information on the policy changes implemented for FY 2015, please refer to the FY 2015 IRF PPS final rule (79 FR 45872) and the FY 2015 IRF PPS correction notice (79 FR 59121).

In the FY 2016 IRF PPS final rule (80 FR 47036), we updated the prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also adopted an IRF-specific market basket that reflects the cost structures of only IRF providers, a blended 1-year transition wage index based on the adoption of new OMB area delineations, a 3-year phase-out of the rural adjustment for certain IRFs due to the new OMB area delineations, and updates for the IRF QRP. For more information on the policy changes implemented for FY 2016, please refer to the FY 2016 IRF PPS final rule (80 FR 47036).

In the FY 2017 IRF PPS final rule (81 FR 52056), we updated the prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also updated requirements for the IRF QRP. For more information on the policy changes implemented for FY 2017, please refer to the FY 2017 IRF PPS final rule (81 FR 52056) and the FY 2017 IRF PPS correction notice (81 FR 59901).

In the FY 2018 IRF PPS final rule (82 FR 36238), we updated the prospective payment rates, the CMG relative weights, and the outlier threshold amount. We also revised the International Classification of Diseases, 10th Revision, Clinical Modification (ICD–10–CM) diagnosis codes that are used to determine presumptive compliance under the ''60 percent rule,'' removed the 25 percent payment penalty for IRF–PAI late transmissions, removed the voluntary swallowing status item (Item 27) from the IRF–PAI, summarized comments regarding the criteria used to classify facilities for payment under the IRF PPS, provided for a subregulatory process for certain annual updates to the presumptive methodology diagnosis code lists, adopted the use of height/weight items on the IRF–PAI to determine patient body mass index (BMI) greater than 50 for cases of single-joint replacement under the presumptive methodology, and updated requirements for the IRF QRP. For more information on the policy changes implemented for FY 2018, please refer to the FY 2018 IRF PPS final rule (82 FR 36238).

B. Provisions of the PPACA Affecting the IRF PPS in FY 2012 and Beyond

The PPACA included several provisions that affect the IRF PPS in FYs 2012 and beyond. In addition to what was previously discussed, section 3401(d) of the PPACA also added section 1886(j)(3)(C)(ii)(I) of the Act (providing for a ''productivity adjustment'' for fiscal year 2012 and

each subsequent fiscal year). The productivity adjustment for FY 2019 is discussed in section VI.B. of this final rule. Section 3401(d) of the PPACA requires an additional 0.75 percentage point adjustment to the IRF increase factor for each of FYs 2017, 2018, and 2019. The applicable adjustment for FY 2019 is discussed in section VI.B. of this final rule. Section 1886(j)(3)(C)(ii)(II) of the Act provides that the application of these adjustments to the market basket update may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year.

Sections 3004(b) of the PPACA and section 411(b) of the Medicare Access and CHIP Reauthorization Act of 2015 (Pub. L. 114–10, enacted on April 16, 2015) (MACRA) also addressed the IRF PPS. Section 3004(b) of PPACA reassigned the previously designated section 1886(j)(7) of the Act to section 1886(j)(8) of the Act and inserted a new section 1886(j)(7) of the Act, which contains requirements for the Secretary to establish a QRP for IRFs. Under that program, data must be submitted in a form and manner and at a time specified by the Secretary. Section 411(b) of MACRA amended section 1886(j)(3)(C) of the Act by adding clause (iii), which required us to apply for FY 2018, after the application of section 1886(j)(3)(C)(ii) of the Act, an increase factor of 1.0 percent to update the IRF prospective payment rates. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act requires the application of a 2 percentage point reduction to the market basket increase factor otherwise applicable to an IRF (after application of subparagraphs (C)(iii) and (D) of section 1886(j)(3) of the Act) for a fiscal year if the IRF does not comply with the requirements of the IRF QRP for that fiscal year. Application of the 2 percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Reporting-based reductions to the market basket increase factor are not cumulative; they only apply for the FY involved.

C. Operational Overview of the Current IRF PPS

As described in the FY 2002 IRF PPS final rule (66 FR 41316), upon the admission and discharge of a Medicare Part A Fee-for-Service (FFS) patient, the IRF is required to complete the appropriate sections of a patient assessment instrument (PAI), designated as the IRF–PAI. In addition, beginning with IRF discharges occurring on or after October 1, 2009, the IRF is also required to complete the appropriate sections of the IRF–PAI upon the admission and discharge of each Medicare Advantage (MA) patient, as described in the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712). All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the Grouper software. The Grouper software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The Grouper software produces a five-character CMG number. The first character is an alphabetic character that indicates the comorbidity tier. The last four characters are numeric characters that represent the distinct CMG number. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the Grouper software, are available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html.*

Once a Medicare Part A FFS patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted on August 21, 1996) (HIPAA) compliant electronic claim or, if the Administrative Simplification Compliance Act of 2002 (Pub. L. 107–105, enacted on December 27, 2002) (ASCA) permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-character CMG number and sends it to the appropriate Medicare Administrative Contractor (MAC). In addition, once a MA patient is discharged, in accordance with the Medicare Claims Processing Manual, chapter 3, section 20.3 (Pub. 100–04), hospitals (including IRFs) must submit an informational-only bill (Type of Bill (TOB) 111), which includes Condition Code 04 to their MAC. This will ensure that the MA days are included in the hospital's Supplemental Security Income (SSI) ratio (used in calculating the IRF LIP adjustment) for fiscal year 2007 and beyond. Claims submitted to Medicare must comply with both ASCA and HIPAA.

Section 3 of the ASCA amended section 1862(a) of the Act by adding paragraph (22), which requires the Medicare program, subject to section 1862(h) of the Act, to deny payment under Part A or Part B for any expenses for items or services for which a claim is submitted other than in an electronic form specified by the Secretary. Section 1862(h) of the Act, in turn, provides that the Secretary shall waive such denial in situations in which there is no method available for the submission of claims in an electronic form or the entity submitting the claim is a small provider. In addition, the Secretary also has the authority to waive such denial in such unusual cases as the Secretary finds appropriate. For more information, see the ''Medicare Program; Electronic Submission of Medicare Claims'' final rule (70 FR 71008). Our instructions for the limited number of Medicare claims submitted on paper are available at *http://www.cms.gov/manuals/downloads/clm104c25.pdf.*

Section 3 of the ASCA operates in the context of the administrative simplification provisions of HIPAA, which include, among others, the requirements for transaction standards and code sets codified in 45 CFR, parts 160 and 162, subparts A and I through R (generally known as the Transactions Rule). The Transactions Rule requires covered entities, including covered health care providers, to conduct covered electronic transactions according to the applicable transaction standards. (See the CMS program claim memoranda at *http://www.cms.gov/ElectronicBillingEDITrans/* and listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600).

The MAC processes the claim through its software system. This software system includes pricing programming called the ''Pricer'' software. The Pricer software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

D. Advancing Health Information Exchange

The Department of Health and Human Services (HHS) has a number of initiatives designed to encourage and support the adoption of interoperable health information technology and to promote nationwide health information exchange to improve health care. The Office of the National Coordinator for

Health Information Technology (ONC) and CMS work collaboratively to advance interoperability across settings of care, including post-acute care.

The Improving Medicare Post-Acute Care Transformation Act of 2014 (Pub. L. 113–185, enacted on October 6, 2014) (IMPACT Act) requires assessment data to be standardized and interoperable to allow for exchange of the data among post-acute providers and other providers. To further interoperability in post-acute care, CMS is developing a Data Element Library to serve as a publically available centralized, authoritative resource for standardized data elements and their associated mappings to health IT standards. These interoperable data elements can reduce provider burden by supporting the use and reuse of healthcare data, support provider exchange of electronic health information for care coordination, person-centered care, and support real-time, data driven, clinical decision making. Once available, standards in the Data Element Library can be referenced on the CMS website and in the ONC Interoperability Standards Advisory (ISA).

The 2018 Interoperability Standards Advisory (ISA) is available at *https://www.healthit.gov/isa/.*

Most recently, the 21st Century Cures Act (Pub. L. 114–255, enacted on December 13, 2016) (Cures Act), requires HHS to take new steps to enable the electronic sharing of health information ensuring interoperability for providers and settings across the care continuum. Specifically, Congress directed ONC to ''develop or support a trusted exchange framework, including a common agreement among health information networks nationally.'' This framework (*https://beta.healthit.gov/topic/interoperability/trusted-exchange-framework-and-common-agreement*) outlines a common set of principles for trusted exchange and minimum terms and conditions for trusted exchange in order to enable interoperability across disparate health information networks. In another important provision, Congress defined ''information blocking'' as practices likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information, and established new authority for HHS to discourage these practices. We invite providers to learn more about these important developments and how they are likely to affect IRFs.

II. Summary of Provisions of the Proposed Rule

In the FY 2019 IRF PPS proposed rule (83 FR 20972), we proposed to update the IRF prospective payment rates for FY 2019 and to alleviate administrative burden for IRFs by removing the FIM™ instrument and associated Function Modifiers from the IRF–PAI in accordance with section 1886(j)(2)(D) of the Act and revise certain IRF coverage requirements to reduce the amount of required paperwork in the IRF setting. In addition, we solicited comments on removing the face-to-face requirement for rehabilitation physician visits and expanding the use of non-physician practitioners (that is, nurse practitioners and physician assistants) in meeting the IRF coverage requirements. For the IRF QRP, we proposed to add a new quality measure removal factor, remove two quality measures from the measure set, and codify in our regulations a number of requirements.

The proposed updates to the IRF prospective payment rates for FY 2019 are as follows:

- Update the IRF PPS relative weights and average length of stay values for FY 2019 using the most current and complete Medicare claims and cost report data in a budget-neutral manner, as discussed in section III. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20978 through 20981).
- Describe the continued use of FY 2014 facility-level adjustment factors, as discussed in section IV. of the FY 2019 IRF PPS proposed rule (83 FR 20972 at 20981).
- Update the IRF PPS payment rates for FY 2019 by the market basket increase factor, based upon the most current data available, with a 0.75 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act and a productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section V. of the FY 2019 IRF PPS proposed rule (83 FR 20972 at 20982).
- Update the FY 2019 IRF PPS payment rates by the FY 2019 wage index and the labor-related share in a budget-neutral manner, as discussed in section V. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20982 through 20984).
- Describe the calculation of the IRF standard payment conversion factor for FY 2019, as discussed in section V. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20984 through 20985).
- Update the outlier threshold amount for FY 2019, as discussed in section VI. of the FY 2019 IRF PPS proposed rule (83 FR 20972 at 20987).
- Update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2019, as discussed in section VI. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20987 through 20988).
- Remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020 to reduce administrative burden for IRFs, as discussed in section VII. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20988 through 20995).
- Revise certain IRF coverage requirements to reduce administrative burden for IRFs beginning with FY 2019, as discussed in section VIII. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20995 through 20997).
- Solicit comments on removing the face-to-face requirement for rehabilitation physician visits, as discussed in section VIII. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20997 through 20998).
- Solicit comments on expanding the use of non-physician practitioners (that is, nurse practitioners and physician assistants) in meeting the IRF coverage requirements, as discussed in section VIII. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20998 through 20999).
- Update the requirements for the IRF QRP, as discussed in section IX. of the FY 2019 IRF PPS proposed rule (83 FR 20972, 20999 through 21004).

III. Analysis and Response to Public Comments

We received 109 timely responses from the public, many of which contained multiple comments on the FY 2019 IRF PPS proposed rule (83 FR 20972). We received comments from various trade associations, inpatient rehabilitation facilities, individual physicians, therapists, clinicians, health care industry organizations, and health care consulting firms. The following sections, arranged by subject area, include a summary of the public comments that we received, and our responses.

IV. Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2019

As specified in § 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support

beneficiary access to care, as well as provider efficiency.

In the FY 2019 IRF PPS proposed rule (83 FR 20972, 20978 through 20981), we proposed to update the CMG relative weights and average length of stay values for FY 2019. As required by statute, we always use the most recent available data to update the CMG relative weights and average lengths of stay. For FY 2019, we proposed to use the FY 2017 IRF claims and FY 2016 IRF cost report data. These data are the most current and complete data available at this time. We note that, as we typically do, we updated our data between the FY 2019 IRF PPS proposed and final rules to ensure that we use the most recent available data in calculating IRF PPS payments. This updated data reflects a more complete set of claims for FY 2017 and additional cost report data for FY 2016.

In the FY 2019 IRF PPS proposed rule, we proposed to apply these data using the same methodologies that we have used to update the CMG relative weights and average length of stay values each fiscal year since we implemented an update to the methodology to use the more detailed CCR data from the cost reports of IRF subprovider units of primary acute care hospitals, instead of CCR data from the associated primary care hospitals, to calculate IRFs' average costs per case, as discussed in the FY 2009 IRF PPS final rule (73 FR 46372). In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process used to calculate the CMG relative weights for this final rule is as follows:

Step 1. We estimate the effects that comorbidities have on costs.

Step 2. We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

Step 3. We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

Step 4. We normalize the FY 2019 CMG relative weights to the same average CMG relative weight from the CMG relative weights implemented in the FY 2018 IRF PPS final rule (82 FR 36238).

Consistent with the methodology that we have used to update the IRF classification system in each instance in the past, we proposed to update the CMG relative weights for FY 2019 in such a way that total estimated aggregate payments to IRFs for FY 2019 are the same with or without the changes (that is, in a budget-neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate budget neutrality factor for use in updating the FY 2019 CMG relative weights, we use the following steps:

Step 1. Calculate the estimated total amount of IRF PPS payments for FY 2019 (with no changes to the CMG relative weights).

Step 2. Calculate the estimated total amount of IRF PPS payments for FY 2019 by applying the changes to the CMG relative weights (as discussed in this final rule).

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the budget neutrality factor (0.9981) that would maintain the same total estimated aggregate payments in FY 2019 with and without the changes to the CMG relative weights.

Step 4. Apply the budget neutrality factor (0.9981) to the FY 2018 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section VI.E. of this final rule, we discuss the use of the existing methodology to calculate the standard payment conversion factor for FY 2019.

In Table 2, ''Relative Weights and Average Length of Stay Values for Case-Mix Groups,'' we present the CMGs, the comorbidity tiers, the corresponding relative weights, and the average length of stay values for each CMG and tier for FY 2019. The average length of stay for each CMG is used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment.

TABLE 2—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS

CMG	CMG description (M = motor, C = cognitive, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	No comorbidities tier	Tier 1	Tier 2	Tier 3	No comorbidities tier
0101	Stroke M > 51.05	0.8465	0.7365	0.6747	0.6451	8	11	9	8
0102	Stroke M > 44.45 and M < 51.05 and C > 18.5	1.0706	0.9315	0.8533	0.8159	11	12	10	10
0103	Stroke M > 44.45 and M < 51.05 and C < 18.5	1.2391	1.0781	0.9876	0.9443	12	13	11	12
0104	Stroke M > 38.85 and M < 44.45	1.2938	1.1257	1.0312	0.9860	12	13	12	12
0105	Stroke M > 34.25 and M < 38.85	1.4871	1.2938	1.1852	1.1333	14	14	14	13
0106	Stroke M > 30.05 and M < 34.25	1.6628	1.4467	1.3253	1.2673	16	16	15	15
0107	Stroke M > 26.15 and M < 30.05	1.8653	1.6229	1.4867	1.4216	18	18	16	16
0108	Stroke M < 26.15 and A > 84.5	2.3056	2.0060	1.8376	1.7572	22	21	20	20
0109	Stroke M > 22.35 and M < 26.15 and A < 84.5	2.0857	1.8147	1.6624	1.5896	19	19	18	18
0110	Stroke M < 22.35 and A < 84.5	2.7655	2.4060	2.2041	2.1076	26	26	23	23
0201	Traumatic brain injury M > 53.35 and C > 23.5	0.8235	0.6628	0.5922	0.5527	9	9	8	7
0202	Traumatic brain injury M > 44.25 and M < 53.35 and C > 23.5.	1.1508	0.9263	0.8275	0.7724	10	11	10	10
0203	Traumatic brain injury M > 44.25 and C < 23.5	1.2723	1.0240	0.9149	0.8539	13	13	11	10
0204	Traumatic brain injury M > 40.65 and M < 44.25	1.3841	1.1141	0.9953	0.9290	13	13	11	11
0205	Traumatic brain injury M > 28.75 and M < 40.65	1.6330	1.3143	1.1743	1.0960	14	15	13	13
0206	Traumatic brain injury M > 22.05 and M < 28.75	1.9661	1.5825	1.4139	1.3196	18	18	15	15
0207	Traumatic brain injury M < 22.05	2.4863	2.0012	1.7879	1.6687	30	22	19	18
0301	Non-traumatic brain injury M > 41.05	1.1727	0.9483	0.8703	0.8135	11	11	10	10
0302	Non-traumatic brain injury M > 35.05 and M < 41.05	1.4347	1.1603	1.0648	0.9953	12	13	12	12
0303	Non-traumatic brain injury M > 26.15 and M < 35.05	1.6572	1.3402	1.2300	1.1496	15	14	13	13
0304	Non-traumatic brain injury M < 26.15	2.1203	1.7147	1.5737	1.4709	20	19	16	16
0401	Traumatic spinal cord injury M > 48.45	1.0040	0.8097	0.7490	0.6855	10	10	9	9
0402	Traumatic spinal cord injury M > 30.35 and M < 48.45	1.4873	1.1996	1.1096	1.0155	14	13	13	12
0403	Traumatic spinal cord injury M > 16.05 and M < 30.35	2.3688	1.9105	1.7673	1.6175	25	22	19	18
0404	Traumatic spinal cord injury M < 16.05 and A > 63.5	4.0377	3.2566	3.0125	2.7571	45	36	31	30
0405	Traumatic spinal cord injury M < 16.05 and A > 63.5	3.6175	2.9177	2.6989	2.4701	26	35	29	26
0501	Non-traumatic spinal cord injury M > 51.35	0.9171	0.7145	0.6605	0.6070	9	10	8	8
0502	Non-traumatic spinal cord injury M > 40.15 and M < 51.35.	1.2182	0.9491	0.8774	0.8063	11	11	10	10

TABLE 2—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description (M = motor, C = cognitive, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	No comorbidities tier	Tier 1	Tier 2	Tier 3	No comorbidities tier
0503	Non-traumatic spinal cord injury M > 31.25 and M < 40.15.	1.5156	1.1809	1.0916	1.0031	14	13	12	12
0504	Non-traumatic spinal cord injury M > 29.25 and M < 31.25.	1.7426	1.3577	1.2551	1.1533	16	14	14	13
0505	Non-traumatic spinal cord injury M > 23.75 and M < 29.25.	1.9957	1.5550	1.4374	1.3209	18	17	16	15
0506	Non-traumatic spinal cord injury M < 23.75	2.6996	2.1034	1.9443	1.7867	26	23	21	20
0601	Neurological M > 47.75	1.0736	0.8242	0.7624	0.6948	9	9	9	8
0602	Neurological M > 37.35 and M < 47.75	1.3920	1.0686	0.9884	0.9008	12	12	11	10
0603	Neurological M > 25.85 and M < 37.35	1.7124	1.3146	1.2159	1.1082	14	14	13	13
0604	Neurological M < 25.85	2.2148	1.7003	1.5727	1.4334	19	17	16	16
0701	Fracture of lower extremity M > 42.15	1.0280	0.8387	0.7948	0.7171	10	10	9	9
0702	Fracture of lower extremity M > 34.15 and M < 42.15	1.3083	1.0674	1.0115	0.9127	12	12	12	11
0703	Fracture of lower extremity M > 28.15 and M < 34.15	1.5600	1.2728	1.2062	1.0883	14	14	14	13
0704	Fracture of lower extremity M < 28.15	1.9907	1.6242	1.5392	1.3888	18	18	17	16
0801	Replacement of lower extremity joint M > 49.55	0.8391	0.6841	0.6185	0.5754	8	8	8	7
0802	Replacement of lower extremity joint M > 37.05 and M < 49.55.	1.0766	0.8777	0.7936	0.7382	11	9	9	9
0803	Replacement of lower extremity joint M > 28.65 and M < 37.05 and A > 83.5.	1.4123	1.1514	1.0410	0.9684	13	13	12	11
0804	Replacement of lower extremity joint M > 28.65 and M < 37.05 and A > 83.5.	1.2727	1.0376	0.9381	0.8727	12	12	11	10
0805	Replacement of lower extremity joint M > 22.05 and M < 28.65.	1.5169	1.2367	1.1181	1.0401	14	14	12	12
0806	Replacement of lower extremity joint M < 22.05	1.8691	1.5238	1.3777	1.2816	17	17	15	14
0901	Other orthopedic M > 44.75	1.0283	0.8073	0.7481	0.6894	11	10	9	8
0902	Other orthopedic M > 34.35 and M < 44.75	1.3030	1.0230	0.9479	0.8736	12	12	11	10
0903	Other orthopedic M > 24.15 and M < 34.35	1.6262	1.2768	1.1831	1.0903	14	14	13	12
0904	Other orthopedic M < 24.15	2.0372	1.5995	1.4821	1.3659	17	17	16	15
1001	Amputation, lower extremity M > 47.65	1.0941	0.9260	0.8226	0.7584	11	11	10	9
1002	Amputation, lower extremity M > 36.25 and M < 47.65	1.3984	1.1835	1.0513	0.9693	13	13	12	12
1003	Amputation, lower extremity M < 36.25	2.0247	1.7136	1.5222	1.4034	18	18	16	15
1101	Amputation, non-lower extremity M > 36.35	1.3618	1.0044	1.0044	0.8832	12	11	11	11
1102	Amputation, non-lower extremity M < 36.35	1.9208	1.4167	1.4167	1.2458	17	15	15	13
1201	Osteoarthritis M > 37.65	1.1125	0.9541	0.8710	0.7877	11	10	10	9
1202	Osteoarthritis M > 30.75 and M < 37.65	1.4092	1.2085	1.1032	0.9978	13	13	12	12
1203	Osteoarthritis M < 30.75	1.7067	1.4637	1.3361	1.2084	15	16	15	14
1301	Rheumatoid, other arthritis M > 36.35	1.0977	0.9523	0.8893	0.8342	10	10	10	10
1302	Rheumatoid, other arthritis M > 26.15 and M < 36.35	1.4355	1.2454	1.1630	1.0909	12	13	13	12
1303	Rheumatoid, other arthritis M < 26.15	1.7337	1.5041	1.4046	1.3175	14	17	15	15
1401	Cardiac M > 48.85	0.9226	0.7511	0.6772	0.6103	9	8	8	7
1402	Cardiac M > 38.55 and M < 48.85	1.2379	1.0079	0.9086	0.8189	11	11	10	10
1403	Cardiac M > 31.15 and M < 38.55	1.4752	1.2011	1.0828	0.9759	13	13	12	11
1404	Cardiac M < 31.15	1.8581	1.5129	1.3639	1.2292	17	16	15	13
1501	Pulmonary M > 49.25	1.0145	0.8753	0.7927	0.7596	9	10	9	8
1502	Pulmonary M > 39.05 and M < 49.25	1.2970	1.1191	1.0134	0.9711	11	11	10	11
1503	Pulmonary M > 29.15 and M < 39.05	1.5391	1.3280	1.2026	1.1524	14	13	12	12
1504	Pulmonary M < 29.15	1.9395	1.6735	1.5155	1.4522	19	16	15	14
1601	Pain syndrome M > 37.15	1.2123	0.9280	0.8814	0.7954	9	11	10	10
1602	Pain syndrome M > 26.75 and M < 37.15	1.5361	1.1758	1.1169	1.0079	11	12	12	12
1603	Pain syndrome M < 26.75	1.8637	1.4266	1.3551	1.2228	12	16	15	14
1701	Major multiple trauma without brain or spinal cord injury M > 39.25.	1.2825	0.9724	0.9103	0.8196	14	11	10	10
1702	Major multiple trauma without brain or spinal cord injury M > 31.05 and M < 39.25.	1.5510	1.1760	1.1009	0.9912	14	14	12	11
1703	Major multiple trauma without brain or spinal cord injury M > 25.55 and M < 31.05.	1.8097	1.3722	1.2846	1.1565	15	15	14	13
1704	Major multiple trauma without brain or spinal cord injury M < 25.55.	2.3097	1.7513	1.6395	1.4761	20	19	17	16
1801	Major multiple trauma with brain or spinal cord injury M > 40.85.	1.1285	1.0063	0.8504	0.7943	12	11	10	10
1802	Major multiple trauma with brain or spinal cord injury M > 23.05 and M < 40.85.	1.6639	1.4838	1.2539	1.1712	16	17	14	13
1803	Major multiple trauma with brain or spinal cord injury M < 23.05.	2.6145	2.3315	1.9703	1.8403	30	25	20	19
1901	Guillain Barre M > 35.95	1.4000	1.0049	0.9440	0.9096	15	13	11	11
1902	Guillain Barre M > 18.05 and M < 35.95	2.4651	1.7694	1.6622	1.6017	24	21	18	18
1903	Guillain Barre M < 18.05	4.2669	3.0627	2.8772	2.7725	46	31	30	30
2001	Miscellaneous M > 49.15	0.9693	0.7709	0.7160	0.6500	9	9	8	8
2002	Miscellaneous M > 38.75 and M < 49.15	1.2597	1.0018	0.9306	0.8448	12	11	10	10
2003	Miscellaneous M > 27.85 and M < 38.75	1.5484	1.2314	1.1438	1.0384	14	14	12	12
2004	Miscellaneous M < 27.85	1.9734	1.5695	1.4578	1.3234	18	17	15	15
2101	Burns M > 0	1.9075	1.5493	1.4963	1.3168	22	16	16	14
5001	Short-stay cases, length of stay is 3 days or fewer	.....	.....	.....	0.1599	.....	.....	.....	2
5101	Expired, orthopedic, length of stay is 13 days or fewer	.....	.....	.....	0.7539	.....	.....	.....	8
5102	Expired, orthopedic, length of stay is 14 days or more	.....	.....	.....	1.6493	.....	.....	.....	18
5103	Expired, not orthopedic, length of stay is 15 days or fewer.	.....	.....	.....	0.8091	.....	.....	.....	8

TABLE 2—RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description (M = motor, C = cognitive, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	No comorbidities tier	Tier 1	Tier 2	Tier 3	No comorbidities tier
5104	Expired, not orthopedic, length of stay is 16 days or more.	.....	.....	.....	2.1145	.....	.....	.....	21

Generally, updates to the CMG relative weights result in some increases and some decreases to the CMG relative weight values. Table 3 shows how we estimate that the application of the revisions for FY 2019 would affect particular CMG relative weight values, which would affect the overall distribution of payments within CMGs and tiers. Note that, because we proposed to implement the CMG relative weight revisions in a budget-neutral manner (as previously described), total estimated aggregate payments to IRFs for FY 2019 would not be affected as a result of the CMG relative weight revisions. However, the revisions would affect the distribution of payments within CMGs and tiers.

TABLE 3—DISTRIBUTIONAL EFFECTS OF THE CHANGES TO THE CMG RELATIVE WEIGHTS

[FY 2018 values compared with FY 2019 values]

Percentage change in CMG relative weights	Number of cases affected	Percentage of cases affected
Increased by 15% or more	19	0.0
Increased by between 5% and 15%	1,634	0.4
Changed by less than 5%	397,675	99.3
Decreased by between 5% and 15%	1,160	0.3
Decreased by 15% or more	73	0.0

As Table 3 shows, 99.3 percent of all IRF cases are in CMGs and tiers that would experience less than a 5 percent change (either increase or decrease) in the CMG relative weight value as a result of the revisions for FY 2019. The largest estimated increase in the CMG relative weight values that affects the largest number of IRF discharges would be a 3.4 percent change in the CMG relative weight value for CMG 0806 Replacement of lower extremity joint, with a motor score less than 22.05 —with no tier adjustment. In the FY 2017 claims data, 1,593 IRF discharges (0.4 percent of all IRF discharges) were classified into this CMG and tier.

The largest estimated decrease in a CMG relative weight value affecting the largest number of IRF cases would be a 2.1 percent decrease in the CMG relative weight for CMG 0304—Non-traumatic brain injury, with a motor score less than 26.5—with no tier adjustment. In the FY 2017 IRF claims data, this change would have affected 3,388 cases (0.8 percent of all IRF cases).

The proposed changes in the average length of stay values for FY 2019, compared with the FY 2018 average length of stay values, are small and do not show any particular trends in IRF length of stay patterns.

We received 1 comment on the proposed update to the CMG relative weights and average length of stay values for FY 2019, which is summarized below.

Comment: The commenter was supportive of our proposal to use the most recent data available to update the relative weights and average length of stays values for FY 2019. The commenter also requested that CMS make available any reports and analyses that we used to update the relative weights and average length of stay values.

Response: We appreciate the commenter's support of our proposal to use the most recent data available to update the relative weights and average length of stays values for FY 2019. For reports on the methodology that we use annually to update the relative weights and average length of stay values, we refer stakeholders to reports issued by the RAND Corporation (RAND) for the implementation of the IRF PPS, which can be downloaded from RAND's website at *https://www.rand.org/pubs/drafts/DRU2309.html* and at *https://www.rand.org/pubs/monograph_reports/MR1500.html.* We also refer stakeholders to a report that was issued by RAND in 2005 that specifically discusses the methodology for construction of the CMGs and the relative weights associated with the CMGs, which can be downloaded from RAND's website at *https://www.rand.org/pubs/technical_reports/TR207.html.* We used the same methodology, with one exception, that RAND used in these reports to calculate the CMG relative weights and average length of stay values. For a specific discussion of the change in our methodology that we implemented in FY 2009, we refer stakeholders to the FY 2009 IRF PPS final rule (73 FR 46372).

Final Decision: After consideration of the public comments, we are finalizing our proposal to update the CMG relative weight and average length of stay values for FY 2019, as shown in Table 2 of this final rule. These updates are effective October 1, 2018.

V. Facility-Level Adjustment Factors

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate by such factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities. Under this authority, we currently adjust the prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

Based on the substantive changes to the facility-level adjustment factors that were adopted in the FY IRF PPS 2014 final rule (78 FR 47860, 47868 through 47872), in the FY 2015 IRF PPS final rule (79 FR 45872, 45882 through 45883), we froze the facility-level adjustment factors at the FY 2014 levels for FY 2015 and all subsequent years

(unless and until we propose to update them again through future notice-and-comment rulemaking). For FY 2019, we will continue to hold the adjustment factors at the FY 2014 levels as we continue to monitor the most current IRF claims data available and continue to evaluate and monitor the effects of the FY 2014 changes.

VI. FY 2019 IRF PPS Payment Update

A. Background

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the IRF PPS payment, which is referred to as a market basket index. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF prospective payment rates for each FY. Section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment. In addition, sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act require the application of a 0.75 percentage point reduction to the market basket increase factor for FY 2019. Thus, in the FY 2019 IRF proposed rule (83 FR 20981), we proposed to update the IRF PPS payments for FY 2019 by a market basket increase factor as required by section 1886(j)(3)(C) of the Act, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.75 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act.

Beginning with the FY 2016 IRF PPS, we created and adopted a stand-alone IRF market basket, which was referred to as the 2012-based IRF market basket, reflecting the operating and capital cost structures for freestanding IRFs and hospital-based IRFs. The FY 2016 IRF PPS final rule (80 FR 47046 through 47068) contains a complete discussion of the development of the 2012-based IRF market basket.

B. FY 2019 Market Basket Update and Productivity Adjustment

For FY 2018, we applied an increase factor of 1.0 percent to update the IRF prospective payment rates in accordance with section 1886(j)(3)(C)(iii) of the Act, as added by section 411(b) of MACRA. However, as discussed previously, for FY 2019, we proposed to update the IRF PPS payments by a market basket increase factor as required by section 1886(j)(3)(C) of the Act, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.75 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act. For FY 2019, we proposed to use the same methodology described in the FY 2017 IRF PPS final rule (81 FR 52071) to compute the FY 2019 market basket increase factor to update the IRF PPS base payment rate.

Consistent with historical practice, we proposed to estimate the market basket update for the IRF PPS based on the most up-to-date forecast of price indexes used in the market basket as forecasted by IHS Global Inc. (IGI). IGI is a nationally recognized economic and financial forecasting firm with which we contract to forecast the components of the market baskets and MFP. Based on IGI's first quarter 2018 forecast with historical data through the fourth quarter of 2017, we proposed that the projected 2012-based IRF market basket increase factor for FY 2019 would be 2.9 percent. We also proposed that if more recent data were subsequently available (for example, a more recent estimate of the market basket update), we would use such data to determine the FY 2019 market basket update in the final rule. Incorporating the most recent data available, based on IGI's second quarter 2018 forecast with historical data through the first quarter of 2018, the projected 2012-based IRF market basket increase factor for FY 2019 is 2.9 percent.

According to section 1886(j)(3)(C)(i) of the Act, the Secretary shall establish an increase factor based on an appropriate percentage increase in a market basket of goods and services. Section 1886(j)(3)(C)(ii) of the Act then requires that, after establishing the increase factor for a FY, the Secretary shall reduce such increase factor for FY 2012 and each subsequent FY, by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act. Section 1886(b)(3)(B)(xi)(II) of the Act sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable FY, year, cost reporting period, or other annual period) (the ''MFP adjustment''). The BLS publishes the official measure of private nonfarm business MFP. Please see *http://www.bls.gov/mfp* for the BLS historical published MFP data. A complete description of the MFP projection methodology is available on the CMS website at *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketResearch.html.*

Using IGI's first quarter 2018 forecast, the projected MFP adjustment for FY 2019 (the 10-year moving average of MFP for the period ending FY 2019) was 0.8 percent. We proposed that if more recent data were subsequently available, we would use such data to determine the FY 2019 MFP adjustment in the final rule. Incorporating the most recent data available, based on IGI's second quarter 2018 forecast, the projected MFP adjustment for FY 2019 is 0.8 percent.

Thus, in accordance with section 1886(j)(3)(C) of the Act, we proposed to base the FY 2019 market basket update, which is used to determine the applicable percentage increase for the IRF payments, on the most recent estimate of the 2012-based IRF market basket. We proposed to then reduce this percentage increase by the most recent estimate of the MFP adjustment for FY 2019. Following application of the MFP adjustment, we proposed to further reduce the applicable percentage increase by 0.75 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act. Therefore, the proposed FY 2019 IRF update was 1.35 percent (2.9 percent market basket update, less 0.8 percentage point MFP adjustment, less 0.75 percentage point statutorily required adjustment). Furthermore, we proposed that if more recent data were subsequently available (for example, a more recent estimate of the MFP adjustment), we would use such data to determine the FY 2019 MFP adjustment in the final rule. Incorporating the most recent data, the current estimate of the FY 2019 IRF update is 1.35 percent (2.9 percent market basket update, less 0.8 percentage point MFP adjustment, less 0.75 percentage point statutorily required adjustment).

For FY 2019, the Medicare Payment Advisory Commission (MedPAC) recommends that we reduce IRF PPS payment rates by 5 percent. As discussed, and in accordance with sections 1886(j)(3)(C) and 1886(j)(3)(D) of the Act, the Secretary proposed to update the IRF PPS payment rates for FY 2019 by an adjusted market basket increase factor of 1.35 percent, as section 1886(j)(3)(C) of the Act does not provide the Secretary with the authority to apply a different update factor to IRF PPS payment rates for FY 2019. As noted above, incorporating the most recent data, the current estimate of the FY 2019 IRF update is 1.35 percent.

We received 4 comments on the proposed market basket increase update and productivity adjustment, which are summarized below.

Comment: One commenter noted that they generally concur with the methodology CMS has used to arrive at the proposed net market basket update of 1.35 percent and encouraged CMS to use the latest available information to update this market basket percentage in the final rule.

Response: We appreciate the commenter's support for the proposed payment update for FY 2019 and, as proposed, have used more recent data to determine the market basket percentage for the final rule.

Comment: One commenter requested CMS provide access to the analyses done by contractors to calculate the market basket update each year.

Response: The market basket update is derived using (1) the market basket base year cost weights as finalized by CMS through rulemaking and (2) the most up-to-date forecast of the price proxies used in the market basket as forecasted by IGI. As stated previously, IGI is a nationally recognized economic and financial forecasting firm, with which we contract to forecast the components of the market baskets and MFP. To determine the market basket update, for each cost category in the market basket (for example, Wages and Salaries, Pharmaceuticals), the level of each of these price forecasts are multiplied by the cost weight for that cost category. The sum of these products (that is, weights multiplied by proxied index levels) for all cost categories yields the composite index level in the market basket in a given year. The most recent forecast of each market basket is available on the CMS website at *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketData.html.*

More detailed forecasts are readily available by request; please send an email to *CMSDNHS@cms.hhs.gov* to be added to the mailing list for detailed market basket forecasts.

Comment: Several commenters recommended that CMS carefully monitor the impact productivity adjustments have on the rehabilitation hospital sector, provide feedback to Congress as appropriate, and utilize any authority the agency has to reduce the productivity adjustment. One commenter stated their concern that IRFs will not have the ability to generate additional productivity gains at a pace matching the productivity of the economy at large on an ongoing, consistent basis as currently contemplated by the PPACA. The commenter further noted the difficulties in achieving productivity gains in the IRF setting due to the labor intensive nature of the care and unchanging labor-intensive standards such as the 3-hour therapy rule. One commenter specifically requested that CMS provide feedback to Congress, which would include a proposal to end the productivity adjustment effective with the end of the mandated PPACA Market Basket reductions.

Response: We acknowledge the commenters' concerns regarding MFP growth at the economy-wide level and its application to IRFs. As stated above, section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment to the IRF PPS market basket increase factor.

We will continue to monitor the impact of the payment updates, including the effects of the productivity adjustment, on IRF provider margins as well as beneficiary access to care. We note that each year, MedPAC makes an annual update recommendation to Congress based on a variety of measures related to payment adequacy, including analysis that showed freestanding IRF Medicare margins have been above 10 percent since 2011.

Comment: One commenter (MedPAC) noted that while they understand that CMS is required to implement the statutory update for IRF payment for FY 2019, the commenter continue to recommend that IRF payment rates be reduced by 5 percent for FY 2019. The commenter noted that this recommendation is based on a review of many factors—including indicators of beneficiary access to rehabilitative services, the supply of providers, and aggregate IRF Medicare margins, which have been above 10 percent since 2011. The commenter also noted their appreciation that CMS cited their recommendation, even though the Secretary does not have the authority to deviate from statutorily mandated updates.

Response: As discussed, in accordance with section 1886(j)(3)(C) of the Act, the increase factor for FY 2019 must be set equal to the FY 2019 projected market basket increase factor, reduced by the productivity adjustment, and further reduced by a 0.75 percent statutorily required adjustment. Section 1886(j)(3)(C) of the Act does not provide the Secretary with the authority to apply a different update factor to IRF PPS payment rates for FY 2019.

Final Decision: After careful consideration of comments, we are finalizing the FY 2019 IRF update of 1.35 percent.

C. Labor-Related Share for FY 2019

Section 1886(j)(6) of the Act specifies that the Secretary is to adjust the proportion (as estimated by the Secretary from time to time) of rehabilitation facilities' costs which are attributable to wages and wage-related costs of the prospective payment rates computed under section 1886(j)(3) of the Act for area differences in wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for such facilities. The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market.

Based on our definition of the labor-related share and the cost categories in the 2012-based IRF market basket, we proposed to calculate the labor-related share for FY 2019 as the sum of the FY 2019 relative importance of Wages and Salaries, Employee Benefits, Professional Fees: Labor-Related, Administrative and Facilities Support Services, Installation, Maintenance, and Repair Services, All Other: Labor-related Services, and a portion of the Capital-Related cost weight from the 2012-based IRF market basket. For more details regarding the methodology for determining specific cost categories for inclusion in the 2012-based IRF labor-related share, see the FY 2016 IRF final rule (80 FR 47066 through 47068).

Using this method and IGI's first quarter 2018 forecast for the 2012-based IRF market basket, the proposed IRF labor-related share for FY 2019 was 70.6 percent. We also proposed that if more recent data were subsequently available (for example, a more recent estimate of the labor-related share), we would use such data to determine the FY 2019 IRF labor-related share in the final rule.

Incorporating the most recent estimate of the 2012-based IRF market basket based on IGI's second quarter 2018 forecast with historical data through the first quarter of 2018, the sum of the relative importance for FY 2019 operating costs (Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Facilities Support Services, Installation Maintenance & Repair Services, and All Other: Labor-related Services) using the 2012-based IRF market basket is 66.7 percent. We proposed that the portion of Capital-Related Costs that are influenced by the local labor market was estimated to be 46 percent. Incorporating the most recent estimate of the FY 2019 relative importance of Capital-Related costs from the 2012-

based IRF market basket based on IGI's second quarter 2018 forecast with historical data through the first quarter of 2018, which is 8.2 percent, we take 46 percent of 8.2 percent to determine the labor-related share of Capital for FY 2019. We proposed to then add this amount (3.8 percent) to the sum of the relative importance for FY 2019 operating costs (66.7 percent) to determine the total labor-related share for FY 2019 of 70.5 percent.

TABLE 4—IRF LABOR-RELATED SHARE

	FY 2019 final labor-related share [1]	FY 2018 final labor related share [2]
Wages and Salaries	47.7	47.8
Employee Benefits	11.1	11.2
Professional Fees: Labor-related	3.4	3.4
Administrative and Facilities Support Services	0.8	0.8
Installation, Maintenance, and Repair Services	1.9	1.9
All Other: Labor-related Services	1.8	1.8
Subtotal	66.7	66.9
Labor-related portion of capital (46%)	3.8	3.8
Total Labor-Related Share	70.5	70.7

[1] Based on the 2012-based IRF Market Basket, IGI's 2nd quarter 2018 forecast with historical data through the 1st quarter of 2018.
[2] **Federal Register** (82 FR 36249).

Final Decision: As we did not receive any comments on the proposed labor-related share for FY 2019, we are finalizing the FY 2019 labor-related share of 70.5 percent.

D. Wage Adjustment for FY 2019

1. Background

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion of rehabilitation facilities' costs attributable to wages and wage-related costs (as estimated by the Secretary from time to time) by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustment or updates made under section 1886(j)(6) of the Act for a FY are made in a budget-neutral manner.

For FY 2019, we proposed to maintain the policies and methodologies described in the FY 2018 IRF PPS final rule (82 FR 36238, 36249 through 36250) related to the labor market area definitions and the wage index methodology for areas with wage data. Thus, we proposed to use the CBSA labor market area definitions and the FY 2018 pre-reclassification and pre-floor hospital wage index data. In accordance with section 1886(d)(3)(E) of the Act, the FY 2018 pre-reclassification and pre-floor hospital wage index is based on data submitted for hospital cost reporting periods beginning on or after October 1, 2013, and before October 1, 2014 (that is, FY 2014 cost report data).

The labor market designations made by the OMB include some geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the IRF PPS wage index. We proposed to continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation for the FY 2019 IRF PPS wage index.

We received 9 public comments on the proposed wage index adjustment and related policies for FY 2019, which are summarized below.

Comment: Commenters suggested that we should use the FY 2019 IPPS pre-reclassified acute care hospital wage index in the calculation of the FY 2019 IRF PPS wage index, as we do for the IPPS, the long-term care hospital PPS, the skilled nursing facility PPS, and the home health PPS, rather than using the FY 2018 IPPS pre-reclassified acute care hospital wage index, as we do in the IRF PPS, the inpatient psychiatric facility PPS, and the hospice PPS. Commenters indicated that using the same wage index data for the IRF PPS that is used in other post-acute and acute care settings would eliminate one difference between Medicare payments for IRFs and Medicare payments for other post-acute and acute care providers, thereby allowing IRFs to demonstrate their cost-effectiveness relative to other post-acute care service providers. By demonstrating their cost-effectiveness relative to other post-acute care service providers, IRFs would have more of an opportunity to participate successfully in alternative payment models currently being tested by Medicare, which generally provide financial incentives for cost effectiveness.

Response: Consistent with historical practice and to ensure the stability and predictability of Medicare payments under the IRF PPS, we proposed to update the IRF wage index for FY 2019 using the FY 2018 pre-reclassification and pre-floor acute care hospital wage index (that is, using a one-year lag of the hospital wage index). The FY 2018 pre-reclassification and pre-floor hospital wage index values are based on data collected from the Medicare cost reports submitted by hospitals for cost reporting periods beginning in FY 2014. We use FY 2014 cost reporting period data to determine the applicable IRF PPS wage index values because, at the point we use these data, the values are more stable and do not tend to change. We do not believe that our continued use of the one-year lag of the hospital wage index for the IRF PPS hinders the ability of IRFs to demonstrate their cost effectiveness. However, we will continue to analyze these issues for future policy development.

Comment: One commenter requested that, until a new wage index system is implemented, we should establish a smoothing variable to be applied to the current IRF wage index to reduce the fluctuations IRFs experience annually.

Response: As stated above, under section 1886(j)(6) of the Act, we adjust IRF PPS rates to account for differences in area wage levels. Any perceived volatility in the wage index is predicated upon volatility in actual

wages in that area and reflects real differences in area wage levels. As we believe that the application of a smoothing variable would make the wage index values less reflective of the area wage levels, we do not believe it would be appropriate to implement such a change to the IRF wage index policy.

As we most recently discussed in the FY 2018 IRF PPS final rule (82 FR 36238, 36250), section 3137(b) of the PPACA required us to submit a report to the Congress by December 31, 2011 that included a plan to reform the hospital wage index system. This report describes the concept of a Commuting Based Wage Index as a potential replacement to the current Medicare wage index methodology. While this report addresses the goals of broad based Medicare wage index reform, no consensus has been achieved regarding how best to implement a replacement system. This concern will be taken into consideration while we continue to explore potential wage index reforms. The report that we submitted is available online at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html.*

Comment: One commenter requested that CMS implement a wage index floor of 1.00 for IRFs located in frontier states.

Response: As we do not have an IRF-specific wage index, we are unable to determine if a rural floor policy under the IRF PPS would be appropriate. The rationale for our current wage index policies is fully described in the FY 2006 IRF PPS final rule (70 FR 47880, 47926 through 47928).

Additionally, as most recently noted in the FY 2017 IRF PPS Final rule (81 FR 52075) MedPAC's June 2007 report to the Congress, titled ''Report to Congress: Promoting Greater Efficiency in Medicare'' (available at *http://www.medpac.gov/-/documents/-/reports*), recommends that Congress ''repeal the existing hospital wage index statute, including reclassification and exceptions, and give the Secretary authority to establish a new wage index systems.'' We continue to believe it would not be appropriate, at this time, to adopt wage index policies afforded to acute care hospitals into the IRF PPS, such as a rural floor policy. Therefore, we will continue to use the CBSA labor market area definitions and the pre-reclassification and pre-floor hospital wage index data based on 2014 cost report data.

Final Decision: After careful consideration of the comments, we are finalizing our proposal to use the CBSA labor market area definitions and the FY 2018 pre-reclassification and pre-floor hospital wage index data for areas with wage data. We are also finalizing our proposal to continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data.

2. Core-Based Statistical Areas (CBSAs) for the Proposed FY 2019 IRF Wage Index

The wage index used for the IRF PPS is calculated using the pre-reclassification and pre-floor acute care hospital wage index data and is assigned to the IRF on the basis of the labor market area in which the IRF is geographically located. IRF labor market areas are delineated based on the CBSAs established by the OMB. The current CBSA delineations (which were implemented for the IRF PPS beginning with FY 2016) are based on revised OMB delineations issued on February 28, 2013, in OMB Bulletin No. 13–01. OMB Bulletin No. 13–01 established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas in the United States and Puerto Rico based on the 2010 Census, and provided guidance on the use of the delineations of these statistical areas using standards published on June 28, 2010, in the **Federal Register** (75 FR 37246 through 37252). We refer readers to the FY 2016 IRF PPS final rule (80 FR 47068 through 47076) for a full discussion of our implementation of the OMB labor market area delineations beginning with the FY 2016 wage index.

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 minor 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 OMB Bulletin No. 15–01. In the FY 2018 IRF PPS final rule (82 FR 36250 through 36251), we adopted the updates set forth in OMB Bulletin No. 15–01 effective October 1, 2017, beginning with the FY 2018 wage index. For a complete discussion of the adoption of the updates set forth in OMB Bulletin No. 15–01, we refer readers to the FY 2018 IRF PPS final rule.

For FY 2019, we proposed to continue using the OMB delineations that we adopted beginning with FY 2016 to calculate the area wage indexes, with the updates set forth in OMB Bulletin No. 15–01 that we adopted beginning with the FY 2018 wage index.

We invited public comment on our proposal to continue using the OMB delineations that we adopted beginning with FY 2016 to calculate the area wage indexes for FY 2019. We received one comment on the use of these OMB delineations, which is summarized below.

Comment: One commenter requested that CMS extend the transition period that was afforded to rural IRFs that transitioned to urban status due to the adoption of updated OMB delineations that were finalized in the FY 2016 IRF PPS final rule. This commenter requested that CMS extend the transition period to at least 5 years or allow the affected facilities to apply for reclassification back to rural status for a 5-year period.

Response: We believe the 3-year transition was sufficient to mitigate any adverse payment impacts for these IRFs while also ensuring that payment rates for all IRF providers are set accurately and appropriately. As the wage index is a relative measure of the value of labor in prescribed labor market areas, we do not believe it is appropriate to expand the transition wage index beyond than what was finalized. We believe extending the transition would further delay the use of what we believe are accurate wage index rates. As we did not propose any such changes, this comment is out of scope of the proposed rule.

Final Decision: After careful consideration of the comment we received on the proposal to continue using the OMB delineations that we adopted beginning with FY 2016 to calculate the area wage indexes for FY 2019, we are finalizing this policy for FY 2019.

3. Codes for Constituent Counties in CBSAs

CBSAs are made up of one or more constituent counties. Each CBSA and constituent county has its own unique identifying codes. There are two different lists of codes associated with

counties: Social Security Administration (SSA) codes and Federal Information Processing Standard (FIPS) codes. Historically, we have used SSA and FIPS county codes to identify and crosswalk counties to CBSA codes for purposes of the IRF wage index. We have learned that SSA county codes are no longer being maintained and updated. However, 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. For purposes of cross-walking counties to CBSA codes, we proposed to discontinue the use of SSA county codes and continue using only the FIPS county codes. We proposed to use the FIPS county codes to calculate area wage indexes in a manner that is generally consistent with the CBSA-based methodologies finalized in the FY 2006 IRF final rule (70 FR 47880) and the FY 2016 IRF final rule (80 FR 47036). The use of the FIPS codes for cross-walking counties to CBSAs does not result in any changes to the constituent counties of any CBSA. Thus, there is no impact or change for any IRF due to the use of the FIPS county codes. 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.

As discussed in the FY 2018 Inpatient prospective payment system (IPPS) and Long-Term Care Hospital (LTCH) PPS final rule (82 FR 38130), this change was implemented under the IPPS beginning on October 1, 2017. Therefore, we proposed to implement this revision for the IRF PPS beginning October 1, 2018, consistent with our historical practice of modeling IRF PPS adoption of updates to labor market areas after IPPS adoption of these changes.

We invited public comments on this proposal. However, we did not receive any comments on the proposed revisions to the CBSA codes.

Final Decision: As we did not receive any comments on our proposal to discontinue the use of SSA county codes and continue using only the FIPS County codes for purposes of cross-walking counties to CBSA codes, we are finalizing these changes for FY 2019.

4. Wage Adjustment

The wage index applicable to FY 2019 is available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.* Table A is for urban areas, and Table B is for rural areas.

To calculate the wage-adjusted facility payment for the payment rates set forth in this final rule, we multiply the unadjusted federal payment rate for IRFs by the FY 2019 labor-related share based on the 2012-based IRF market basket (70.5 percent) to determine the labor-related portion of the standard payment amount. A full discussion of the calculation of the labor-related share is located in section VI.C of this final rule. We then multiply the labor-related portion by the applicable IRF wage index from the tables in the addendum to this final rule. These tables are available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.*

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget-neutral manner. We proposed to calculate a budget-neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45689), codified at § 412.624(e)(1), as described in the steps below. We proposed to use the listed steps to ensure that the FY 2019 IRF standard payment conversion factor reflects the update to the wage indexes (based on the FY 2014 hospital cost report data) and the labor-related share in a budget-neutral manner:

Step 1. Determine the total amount of the estimated FY 2018 IRF PPS payments, using the FY 2018 standard payment conversion factor and the labor-related share and the wage indexes from FY 2018 (as published in the FY 2018 IRF PPS final rule (82 FR 36238)).

Step 2. Calculate the total amount of estimated IRF PPS payments using the FY 2019 standard payment conversion factor and the FY 2019 labor-related share and CBSA urban and rural wage indexes.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the FY 2019 budget-neutral wage adjustment factor of 1.0000.

Step 4. Apply the FY 2019 budget-neutral wage adjustment factor from step 3 to the FY 2018 IRF PPS standard payment conversion factor after the application of the increase factor to determine the FY 2019 standard payment conversion factor.

We discuss the calculation of the standard payment conversion factor for FY 2019 in section VI.E. of this final rule.

We invited public comments on this proposal. However, we did not receive any comments on the proposed methodology for calculating the budget-neutral wage index.

Final Decision: As we did not receive any comments on the proposed methodology for calculating the budget-neutral wage index, we are finalizing this policy for FY 2019.

E. Description of the IRF Standard Payment Conversion Factor and Payment Rates for FY 2019

To calculate the standard payment conversion factor for FY 2019, as illustrated in Table 5, we begin by applying the increase factor for FY 2019, as adjusted in accordance with sections 1886(j)(3)(C) and (D) of the Act, to the standard payment conversion factor for FY 2018 ($15,838). Applying the 1.35 percent increase factor for FY 2019 to the standard payment conversion factor for FY 2018 of $15,838 yields a standard payment amount of $16,052. Then, we apply the budget neutrality factor for the FY 2019 wage index and labor-related share of 1.0000, which results in a standard payment amount of $16,052. We next apply the budget neutrality factor for the revised CMG relative weights of 0.9981, which results in the standard payment conversion factor of $16,021 for FY 2019.

TABLE 5—CALCULATIONS TO DETERMINE THE FY 2019 STANDARD PAYMENT CONVERSION FACTOR

Explanation for adjustment	Calculations
Standard Payment Conversion Factor for FY 2018	$15,838
Market Basket Increase Factor for FY 2019 (2.9 percent), reduced by 0.8 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and reduced by 0.75 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act	× 1.0135
Budget Neutrality Factor for the Wage Index and Labor-Related Share	× 1.0000
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	× 0.9981

TABLE 5—CALCULATIONS TO DETERMINE THE FY 2019 STANDARD PAYMENT CONVERSION FACTOR—Continued

Explanation for adjustment	Calculations
FY 2019 Standard Payment Conversion Factor	= $16,021

We received 1 comment on the proposed FY 2019 standard payment conversion factor.

Comment: The commenter noted that the FY 2019 standard payment conversion factor does not include any additional payment to IRFs for the time and resources needed to complete assessments for quality reporting.

Response: Section 1886(j)(3) of the Act does not provide the Secretary with the authority to adjust payments to reflect increases in costs due to time and resources needed to complete assessments for quality reporting. We will continue to monitor the impact of the FY 2019 payment updates and quality reporting requirements on IRF providers.

Final Decision: After careful consideration of the comment we received, we are finalizing the IRF standard payment conversion factor of $16,021 for FY 2019.

After the application of the CMG relative weights described in section IV of this final rule to the FY 2019 standard payment conversion factor ($16,021), the resulting unadjusted IRF prospective payment rates for FY 2019 are shown in Table 6.

TABLE 6—FY 2019 PAYMENT RATES

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
0101	$ 13,561.78	$ 11,799.47	$ 10,809.37	$ 10,335.15
0102	17,152.08	14,923.56	13,670.72	13,071.53
0103	19,851.62	17,272.24	15,822.34	15,128.63
0104	20,727.97	18,034.84	16,520.86	15,796.71
0105	23,824.83	20,727.97	18,988.09	18,156.60
0106	26,639.72	23,177.58	21,232.63	20,303.41
0107	29,883.97	26,000.48	23,818.42	22,775.45
0108	36,938.02	32,138.13	29,440.19	28,152.10
0109	33,415.00	29,073.31	26,633.31	25,466.98
0110	44,306.08	38,546.53	35,311.89	33,765.86
0201	13,193.29	10,618.72	9,487.64	8,854.81
0202	18,436.97	14,840.25	13,257.38	12,374.62
0203	20,383.52	16,405.50	14,657.61	13,680.33
0204	22,174.67	17,849.00	15,945.70	14,883.51
0205	26,162.29	21,056.40	18,813.46	17,559.02
0206	31,498.89	25,353.23	22,652.09	21,141.31
0207	39,833.01	32,061.23	28,643.95	26,734.24
0301	18,787.83	15,192.71	13,943.08	13,033.08
0302	22,985.33	18,589.17	17,059.16	15,945.70
0303	26,550.00	21,471.34	19,705.83	18,417.74
0304	33,969.33	27,471.21	25,212.25	23,565.29
0401	16,085.08	12,972.20	11,999.73	10,982.40
0402	23,828.03	19,218.79	17,776.90	16,269.33
0403	37,950.54	30,608.12	28,313.91	25,913.97
0404	64,687.99	52,173.99	48,263.26	44,171.50
0405	57,955.97	46,744.47	43,239.08	39,573.47
0501	14,692.86	11,447.00	10,581.87	9,724.75
0502	19,516.78	15,205.53	14,056.83	12,917.73
0503	24,281.43	18,919.20	17,488.52	16,070.67
0504	27,918.19	21,751.71	20,107.96	18,477.02
0505	31,973.11	24,912.66	23,028.59	21,162.14
0506	43,250.29	33,698.57	31,149.63	28,624.72
0601	17,200.15	13,204.51	12,214.41	11,131.39
0602	22,301.23	17,120.04	15,835.16	14,431.72
0603	27,434.36	21,061.21	19,479.93	17,754.47
0604	35,483.31	27,240.51	25,196.23	22,964.50
0701	16,469.59	13,436.81	12,733.49	11,488.66
0702	20,960.27	17,100.82	16,205.24	14,622.37
0703	24,992.76	20,391.53	19,324.53	17,435.65
0704	31,893.00	26,021.31	24,659.52	22,249.96
0801	13,443.22	10,959.97	9,908.99	9,218.48
0802	17,248.21	14,061.63	12,714.27	11,826.70
0803	22,626.46	18,446.58	16,677.86	15,514.74
0804	20,389.93	16,623.39	15,029.30	13,981.53
0805	24,302.25	19,813.17	17,913.08	16,663.44
0806	29,944.85	24,412.80	22,072.13	20,532.51
0901	16,474.39	12,933.75	11,985.31	11,044.88
0902	20,875.36	16,389.48	15,186.31	13,995.95
0903	26,053.35	20,455.61	18,954.45	17,467.70
0904	32,637.98	25,625.59	23,744.72	21,883.08
1001	17,528.58	14,835.45	13,178.87	12,150.33

TABLE 6—FY 2019 PAYMENT RATES—Continued

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
1002	22,403.77	18,960.85	16,842.88	15,529.16
1003	32,437.72	27,453.59	24,387.17	22,483.87
1101	21,817.40	16,091.49	16,091.49	14,149.75
1102	30,773.14	22,696.95	22,696.95	19,958.96
1201	17,823.36	15,285.64	13,954.29	12,619.74
1202	22,576.79	19,361.38	17,674.37	15,985.75
1203	27,343.04	23,449.94	21,405.66	19,359.78
1301	17,586.25	15,256.80	14,247.48	13,364.72
1302	22,998.15	19,952.55	18,632.42	17,477.31
1303	27,775.61	24,097.19	22,503.10	21,107.67
1401	14,780.97	12,033.37	10,849.42	9,777.62
1402	19,832.40	16,147.57	14,556.68	13,119.60
1403	23,634.18	19,242.82	17,347.54	15,634.89
1404	29,768.62	24,238.17	21,851.04	19,693.01
1501	16,253.30	14,023.18	12,699.85	12,169.55
1502	20,779.24	17,929.10	16,235.68	15,557.99
1503	24,657.92	21,275.89	19,266.85	18,462.60
1504	31,072.73	26,811.14	24,279.83	23,265.70
1601	19,422.26	14,867.49	14,120.91	12,743.10
1602	24,609.86	18,837.49	17,893.85	16,147.57
1603	29,858.34	22,855.56	21,710.06	19,590.48
1701	20,546.93	15,578.82	14,583.92	13,130.81
1702	24,848.57	18,840.70	17,637.52	15,880.02
1703	28,993.20	21,984.02	20,580.58	18,528.29
1704	37,003.70	28,057.58	26,266.43	23,648.60
1801	18,079.70	16,121.93	13,624.26	12,725.48
1802	26,657.34	23,771.96	20,088.73	18,763.80
1803	41,886.90	37,352.96	31,566.18	29,483.45
1901	22,429.40	16,099.50	15,123.82	14,572.70
1902	39,493.37	28,347.56	26,630.11	25,660.84
1903	68,360.00	49,067.52	46,095.62	44,418.22
2001	15,529.16	12,350.59	11,471.04	10,413.65
2002	20,181.65	16,049.84	14,909.14	13,534.54
2003	24,806.92	19,728.26	18,324.82	16,636.21
2004	31,615.84	25,144.96	23,355.41	21,202.19
2101	30,560.06	24,821.34	23,972.22	21,096.45
5001	.....	.....	.....	2,561.76
5101	.....	.....	.....	12,078.23
5102	.....	.....	.....	26,423.44
5103	.....	.....	.....	12,962.59
5104	.....	.....	.....	33,876.40

F. Example of the Methodology for Adjusting the Prospective Payment Rates

Table 7 illustrates the methodology for adjusting the federal prospective payments (as described in section VI. of this final rule). The following examples are based on two hypothetical Medicare beneficiaries, both classified into CMG 0110 (without comorbidities). The unadjusted prospective payment rate for CMG 0110 (without comorbidities) appears in Table 6.

Example: One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a Disproportionate Share Hospital (DSH) percentage of 5 percent (which would result in a LIP adjustment of 1.0156), a wage index of 0.8088, and a rural adjustment of 14.9 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0454 percent), a wage index of 0.8689, and a teaching status adjustment of 0.0784.

To calculate each IRF's labor and non-labor portion of the prospective payment, we begin by taking the unadjusted prospective payment rate for CMG 0110 (without comorbidities) from Table 6. Then, we multiply the labor-related share for FY 2019 (70.5 percent) described in section VI.C. of this final rule by the unadjusted prospective payment rate. To determine the non-labor portion of the prospective payment rate, we subtract the labor portion of the federal payment from the unadjusted prospective payment.

To compute the wage-adjusted prospective payment, we multiply the labor portion of the federal payment by the appropriate wage index located in Tables A and B. These tables are available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Data-Files.html.* The resulting figure is the wage-adjusted labor amount. Next, we compute the wage-adjusted federal payment by adding the wage-adjusted labor amount to the non-labor portion of the federal payment.

Adjusting the wage-adjusted federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (0.0784, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the

additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted prospective payment rates. Table 7 illustrates the components of the adjusted payment calculation.

TABLE 7—EXAMPLE OF COMPUTING THE FY 2019 IRF PROSPECTIVE PAYMENT

Steps	Rural facility A (Spencer Co., IN)	Urban facility B (Harrison Co., IN)
1. Unadjusted Payment	$33,765.86	$33,765.86
2. Labor Share	× 0.705	× 0.705
3. Labor Portion of Payment	= 23,804.93	= 23,804.93
4. CBSA-Based Wage Index (shown in the Addendum, Tables A and B)	× 0.8088	× 0.8689
5. Wage-Adjusted Amount	= 19,253.43	= 20,684.10
6. Non-Labor Amount	+ 9,960.93	+ 9,960.93
7. Wage-Adjusted Payment	= 29,214.36	= 30,645.03
8. Rural Adjustment	× 1.149	×1.000
9. Wage- and Rural-Adjusted Payment	= 33,567.30	= 30,645.03
10. LIP Adjustment	× 1.0156	× 1.0454
11. Wage-, Rural- and LIP-Adjusted Payment	= 34,090.95	= 32,036.32
12. Wage- and Rural-Adjusted Payment	33,567.30	30,645.03
13. Teaching Status Adjustment	× 0	× 0.0784
14. Teaching Status Adjustment Amount	= 0.00	= 2,402.57
15. Wage-, Rural-, and LIP-Adjusted Payment	+ 34,090.95	+ 32,036.32
16. Total Adjusted Payment	= 34,090.95	= 34,438.89

Thus, the adjusted payment for Facility A would be $34,090.95, and the adjusted payment for Facility B would be $34,438.89.

VII. Update to Payments for High-Cost Outliers Under the IRF PPS for FY 2019

A. Update to the Outlier Threshold Amount for FY 2019

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments). Then, we calculate the estimated cost of a case by multiplying the IRF's overall CCR by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006 through 2018 IRF PPS final rules and the FY 2011 and FY 2013 notices (70 FR 47880, 71 FR 48354, 72 FR 44284, 73 FR 46370, 74 FR 39762, 75 FR 42836, 76 FR 47836, 76 FR 59256, 77 FR 44618, 78 FR 47860, 79 FR 45872, 80 FR 47036, 81 FR 52056, and 82 FR 36238, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (73 FR 46370 at 46385) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

To update the IRF outlier threshold amount for FY 2019, we proposed to use FY 2017 claims data and the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316 and 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2018. The outlier threshold is calculated by simulating aggregate payments and using an iterative process to determine a threshold that results in outlier payments being equal to 3 percent of total payments under the simulation. To determine the outlier threshold for FY 2019, we estimate the amount of FY 2019 IRF PPS aggregate and outlier payments using the most recent claims available (FY 2017) and the FY 2019 standard payment conversion factor, labor-related share, and wage indexes, incorporating any applicable budget-neutrality adjustment factors. The outlier threshold is adjusted either up or down in this simulation until the estimated outlier payments equal 3 percent of the estimated aggregate payments. Based on an analysis of the preliminary data used for the proposed rule, we estimated that IRF outlier payments as a percentage of total estimated payments would be approximately 3.4 percent in FY 2018. Therefore, we proposed to update the outlier threshold amount from $8,679 for FY 2018 to $10,509 for FY 2019 to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2019.

We note that, as we typically do, we updated our data between the FY 2019 IRF PPS proposed and final rules to ensure that we use the most recent available data in calculating IRF PPS payments. This updated data includes a more complete set of claims for FY 2017. Based on our analysis using this updated data, we now estimate that IRF outlier payments as a percentage of total estimated payments are approximately 3.1 percent in FY 2018. Therefore, we will update the outlier threshold amount from $8,679 for FY 2018 to $9,402 for FY 2019 to account for the increases in IRF PPS payments and estimated costs and to maintain estimated outlier payments at

approximately 3 percent of total estimated aggregate IRF payments for FY 2019.

We received 5 comments on the proposed update to the FY 2019 outlier threshold amount to maintain estimated outlier payments at approximately 3 percent of total estimated IRF payments, which are summarized below.

Comment: Some commenters were supportive of maintaining estimated payments for outlier payments at approximately 3 percent and requested that CMS update the outlier threshold amount in the final rule using the latest available data. One commenter reiterated their recommendation to expand the outlier pool from 3 to 5 percent to redistribute payments within the IRF PPS and to reduce the impact of misalignments between IRF payments and costs. Specifically, the commenter suggested that expanding the outlier pool would help to ameliorate the financial burden on IRFs that have a relatively high share of costly cases. However, this same commenter noted that such an expansion in the outlier pool could inappropriately reward some facilities for inefficiencies. Another commenter suggested that CMS should lower the outlier pool below 3 percent.

Response: We agree that we should use the most recent data available to calculate the outlier threshold. Therefore, as previously stated, we updated the data used to calculate the outlier threshold between the FY 2019 IRF PPS proposed and final rule.

We refer readers to the 2002 IRF PPS final rule (66 FR 41316, 41362 through 41363), for a discussion of the rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases. We continue to believe that the outlier policy of 3 percent of total estimated aggregate payments accomplishes this objective. Increasing the outlier pool would leave less money available to cover the costs of non-outlier cases, due to the fact that we would implement such a change in a budget-neutral manner. We believe that our current outlier policy, to set outlier payments at 3 percent of total estimated aggregate payments, is consistent with the statute and the goals of the IRF PPS.

Comment: Several commenters stated that CMS should ensure that the full 3 percent outlier pool is paid out to providers, as the commenters indicated that CMS has paid out less than the estimated 3 percent in the past. Some commenters suggested implementing a forecast error correction if the full amount of the outlier pool is not paid out.

Response: We appreciate the commenters' analyses and suggestions regarding the outlier threshold calculations. Our analysis of recent data shows that IRF outlier payments as a percentage of total estimated aggregate payments are approximately 3.1 percent in FYs 2017 and 2018, thus indicating that we paid out more than 3 percent, not less, in the 2 most recent fiscal years. Thus, we have not found that our outlier threshold calculations show any tendency to underpay on outlier payments.

However, we will continue to monitor our IRF outlier policies to ensure that they continue to compensate IRFs appropriately for treating unusually high-cost patients and do not limit access to care for patients who are likely to require unusually high-cost care. As we most recently noted in the FY 2018 IRF PPS final rule (82 FR 36255), we do not make adjustments to IRF PPS payment rates for the sole purpose of accounting for differences between projected and actual outlier payments. We use the best available data at the time to establish an outlier threshold for IRF PPS payments prior to the beginning of each fiscal year to help ensure that estimated outlier payments for that fiscal year will equal 3 percent of total estimated IRF PPS payments. We analyze expenditures annually, and if there is a difference from our projection, that information is used to make a prospective adjustment to lower or raise the outlier threshold for the upcoming fiscal year. We believe a retrospective adjustment would not be appropriate to recoup or make excess payments to hospitals.

If outlier payments for a given year turn out to be greater than projected, we do not recoup money from hospitals; if outlier payments for a given year are lower than projected, we do not make an adjustment to account for the difference. Payments for a given discharge in a given fiscal year are generally intended to reflect or address the prospective average costs of that discharge in that year; that goal would be undermined if we adjusted IRF PPS payments to account for ''underpayments'' or ''overpayments'' in IRF outliers in previous years.

Comment: Several commenters suggested that we consider implementing a cap on the amount of outlier payments an individual IRF can receive under the IRF PPS to ensure that outliers are fairly distributed.

Response: As we did not propose to implement a cap on the amount of outlier payments an individual IRF can receive under the IRF PPS, these comments are outside the scope of this rule. However, we note that any future consideration given to imposing a limit on outlier payments would have to carefully analyze and take into consideration the effect on access to IRF care for certain high-cost populations.

Comment: One commenter expressed concern that the proposal to increase the outlier threshold amount from $8,679 to $10,509 was too large an increase and suggested that we increase the threshold by no more than 5 or 10 percent.

Response: We note that, as is our standard practice, we have used updated data to calculate the FY 2019 IRF outlier threshold for this final rule, which results in us finalizing a lower outlier threshold amount ($9,402) than we proposed ($10,509) for FY 2019. We believe that this decrease between the proposed and final outlier threshold amount for FY 2019 should at least partially address the commenter's stated concerns. We note, however, that our methodology is designed to maintain estimated outlier payments at 3 percent of total estimated payments, and we do not adjust the outlier threshold amount beyond what is required to meet the target percentage.

Final Decision: Having carefully considered the public comments received and also taking into account the most recent available data, we are finalizing the outlier threshold amount of $9,402 to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2019.

B. Update to the IRF Cost-to-Charge Ratio Ceiling and Urban/Rural Averages for FY 2019

Cost-to-charge ratios are used to adjust charges from Medicare claims to costs and are computed annually from facility-specific data obtained from Medicare cost reports. IRF specific cost-to-charge ratios are used in the development of the CMG relative weights and the calculation of outlier payments under the IRF prospective payment system. In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we proposed to apply a ceiling to IRFs' CCRs. Using the methodology described in that final

rule, we proposed to update the national urban and rural CCRs for IRFs, as well as the national CCR ceiling for FY 2019, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first Medicare cost report.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2019, as discussed below in this section.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2019, we proposed to estimate a national average CCR of 0.518 for rural IRFs, which we calculated by taking an average of the CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, we proposed to estimate a national average CCR of 0.414 for urban IRFs, which we calculated by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher total costs factor more heavily into the averages than the CCRs of IRFs with lower total costs. For this final rule, we have used the most recent available cost report data (FY 2016). This includes all IRFs whose cost reporting periods begin on or after October 1, 2015, and before October 1, 2016. If, for any IRF, the FY 2016 cost report was missing or had an ''as submitted'' status, we used data from a previous fiscal year's (that is, FY 2004 through FY 2015) settled cost report for that IRF. We do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the 60 percent rule and IRF medical review activities suggest that these older data do not adequately reflect the current cost of care. Using updated FY 2016 cost report data for this final rule, we estimate a national average CCR of 0.515 for rural IRFs, and a national average CCR of 0.412 for urban IRFs.

In accordance with past practice, we proposed to set the national CCR ceiling at 3 standard deviations above the mean CCR. Using this method, we proposed a national CCR ceiling of 1.31 for FY 2019. This means that, if an individual IRF's CCR were to exceed this ceiling of 1.31 for FY 2019, we would replace the IRF's CCR with the appropriate proposed national average CCR (either rural or urban, depending on the geographic location of the IRF). We calculated the proposed national CCR ceiling by:

Step 1. Taking the national average CCR (weighted by each IRF's total costs, as previously discussed) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined).

Step 2. Estimating the standard deviation of the national average CCR computed in step 1.

Step 3. Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling.

Step 4. Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

Using the updated FY 2016 cost report data for this final rule, we estimate a national average CCR ceiling of 1.32, using the same methodology. We did not receive any comments on the proposed update to the IRF CCR ceiling and the urban/rural averages for FY 2019.

Final Decision: As we did not receive any comments on the proposed update to the IRF CCR ceiling and the urban/rural averages for FY 2019, we are finalizing the national average urban CCR at 0.412, the national average rural CCR at 0.515, and the national average CCR ceiling at 1.32 for FY 2019.

VIII. Removal of the FIM™ Instrument and Associated Function Modifiers From the IRF–PAI Beginning With FY 2020 and Refinements to the Case-Mix Classification System Beginning With FY 2020

A. Removal of the FIM™ Instrument and Associated Function Modifiers From the IRF–PAI Beginning With FY 2020

Under section 1886(j)(2)(D) of the Act, the Secretary is authorized to require rehabilitation facilities that provide inpatient hospital services to submit such data as the Secretary deems necessary to establish and administer the IRF PPS. In the FY 2002 IRF PPS final rule (66 FR 41324 through 41328), we finalized the use of the IRF–PAI, through which IRFs are now required to collect and electronically submit patient data for all Medicare Part A FFS and Medicare Part C (Medicare Advantage) patients. Data collected in the IRF–PAI is used to classify patients into distinct payment groups based on clinical characteristics and expected resource needs as well as to monitor the quality of care furnished in IRFs.

The IRF–PAI currently in use under the IRF PPS (IRF–PAI version 2.0) was originally developed based on a modified version of the Uniform Data System for medical rehabilitation (UDSmr) patient assessment instrument, commonly referred to as the FIM™. Item 39 of the IRF–PAI version 2.0 contains 18 of the FIM™ data elements and the FIM™ measurement scale that are used to score both motor and cognitive functioning at admission and discharge. The FIM™ data elements and measurement scale are collectively referred to as the FIM™ instrument. Additionally, items 29 through 38 of the IRF–PAI version 2.0 contain Function Modifiers associated with the FIM™ instrument. The FIM™ instrument and associated Function Modifiers are currently used to assign a patient into a CMG for payment purposes under the IRF PPS based on the patient's ability to perform specific activities of daily living and, in some cases, the patient's cognitive ability.

In the FY 2012 IRF PPS final rule (76 FR 47873 through 47883), we established the IRF QRP in accordance with section 1886(j)(7) of the Act and finalized revisions to the IRF–PAI to begin collecting data items under the IRF QRP. Under the IRF QRP, the following data items are collected in the Quality Indicators section of the IRF–PAI:

- GG0130A1 Eating.
- GG0130B1 Oral hygiene.
- GG0130C1 Toileting hygiene.
- GG0130E1 Shower/bathe self.
- GG0130F1 Upper-body dressing.
- GG0130G1 Lower-body dressing.
- GG0130H1 Putting on/taking off footwear.
- GG0170A1 Roll left and right.
- GG0170B1 Sit to lying.
- GG0170C1 Lying to sitting on side of bed.
- GG0170D1 Sit to stand.
- GG0170E1 Chair/bed-to-chair transfer.
- GG0170F1 Toilet transfer.
- GG0170I1 Walk 10 feet.
- GG0170J1 Walk 50 feet with two turns.
- GG0170K1 Walk 150 feet.
- GG0170M1 One step curb.
- H0350 Bladder continence.
- H0400 Bowel continence.
- BB0700 Expression of ideas and wants.
- BB0800 Understanding verbal content.
- C0500 Brief Interview for Mental Status (BIMS) summary score.

Because these data items collect data that are similar in nature to, and overlap with, data collected through the FIM™ instrument and associated Function Modifiers, we proposed to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020 to reduce administrative burden on IRFs.

Currently, data elements in the FIM™ instrument and associated Function Modifiers capture data on eating, grooming, bathing, dressing upper body, dressing lower body, toileting, bladder management, bowel management, transfer to bed/chair/wheelchair, transfer to toilet, transfer to tub/shower, walking or wheelchair use, stair climbing, comprehension, expression, social interaction, problem solving, and memory. The Function Modifiers are used to assist in the scoring of the related FIM™ instrument data elements and provide additional information as to how the FIM™ instrument data element score has been determined. For example, item 29 (Bladder Level of Assistance) and item 30 (Bladder Frequency of Accidents) are used to determine the score for the item 39G, the Bladder data element contained in the FIM™ instrument.

Data items in the Quality Indicators section of the IRF–PAI capture data on functional status, cognitive function, and changes in function and cognitive function among other elements used for quality reporting. For example, the data items in the Quality Indicators section of the IRF–PAI capture data on eating, oral hygiene, toileting hygiene, shower/bathing, dressing upper body, dressing lower body, bowel continence, bladder continence, chair/bed-to-chair transfer, toilet transfer, walking, stair climbing, expression of ideas and wants, understanding verbal and non-verbal content, temporal orientation, and memory/recall ability. As the data elements in the FIM™ instrument (item 39 of the IRF–PAI) and associated Function Modifiers (items 29 through 38 of the IRF–PAI) overlap, directly or indirectly, with data items in the Quality Indicators section of the IRF–PAI, and as we can now use data items in the Quality Indicators section of the IRF–PAI to assign patients to CMGs for payment under the IRF PPS, we believe that the collection of the FIM™ instrument and associated Function Modifiers is no longer necessary. Accordingly, we believe that continuing to collect the FIM™ instrument and associated Function Modifiers places undue burden on IRFs. Additionally, the removal of the FIM™ instrument and associated Function Modifiers from the IRF–PAI would support the broader goal to standardize data collection across PAC settings as several of the data items we proposed to incorporate into the IRF case-mix system in place of the FIM™ instrument and associated Function Modifiers are similar to data elements that are also collected on Skilled Nursing Facility (SNF) and LTCH assessment instruments. In support of our goal to reduce administrative burden on providers, we proposed to remove the FIM™ instrument (item 39) and associated Function Modifiers (items 29 through 38) from the IRF–PAI beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019. This decrease in burden will be accounted for in the information collection under OMB control number (0938–0842).

We invited public comment on our proposal to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019. We summarize and respond to the comments received on this proposal and discuss our final decision on this proposal in section VIII.B.4 of this final rule.

In section VIII.B of this final rule, we discuss the proposed CMG case-mix classification revisions that are necessary to replace our use of the FIM™ items in assigning CMGs with use of data items located in the Quality Indicators section of the IRF–PAI.

B. Refinements to the Case-Mix Classification System Beginning With FY 2020

1. IRF Classification System Overview

Section 1886(j)(2) of the Act requires the Secretary to establish case-mix groups for payment under the IRF PPS. Under section 1886(j)(2)(B) of the Act, the Secretary must assign each case-mix group a weighting factor that reflects the relative facility resources used for patients classified within the group as compared to patients classified within other groups. Additionally, section 1886(j)(2)(C)(i) of the Act requires the Secretary from time to time to adjust the classifications and weighting factors as appropriate to reflect changes in treatment patterns, technology, case-mix, number of payment units for which payment is made under title XVIII of the Act, and other factors which may affect the relative use of resources. Such adjustments must be made in a manner so that changes in aggregate payments under the classification system are a result of real changes and are not a result of changes in coding that are unrelated to real changes in case mix.

In the FY 2002 IRF PPS final rule (66 FR 41316), we established a case-mix classification system for IRFs under the IRF PPS. Under the case-mix classification system, a patient's principal diagnosis or impairment is used to classify the patient into a RIC. The patient is then placed into a CMG within the RIC, based on the patient's functional status (motor and cognitive scores) and sometimes age. Other special circumstances, such as the occurrence of very short stays, or cases where the patient expired, are also considered in determining the appropriate CMG. CMGs are further divided into tiers based on the presence of certain comorbidities. These tiers reflect the differential cost of care compared with the average beneficiary in a CMG. We refer readers to the FY 2002 final rule (66 FR 41316) and the FY 2006 IRF final rule (70 FR 47886) for a detailed discussion of the development of, and refinements to, the IRF case-mix classification system.

As discussed in section VIII.A of this final rule, we proposed to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019. This would necessitate the incorporation of the data items collected on admission and located in the Quality Indicators section of the IRF–PAI version 2.0 into the CMG classification system, as the FIM™ data would no longer be available to assign patients to CMGs for purposes of payment under the IRF PPS. In accordance with section 1886(j)(2)(C)(i) of the Act and as specified in § 412.620(c) we proposed to replace our use of the FIM™ items in assigning CMGs with use of data items located in the Quality Indicators section of the IRF–PAI. In addition, to ensure that IRF payments are accurately calculated using the data items located in the Quality Indicators section of the IRF–PAI, we also proposed to update the functional status scores used in the case-mix system and to revise the CMGs and update the relative weights and average length of stay values associated with the revised CMGs. We proposed to implement these revisions to the case-mix classification system in a budget neutral manner.

We proposed to make these changes effective beginning with FY 2020, that is, for discharges occurring on or after October 1, 2019, as they require extensive systems changes. That is, we proposed to implement these changes with a one-year delayed effective date to allow adequate time for providers and vendors to make the necessary systems changes. These proposed changes are discussed in detail below. We did not propose any changes to the methodology used to update the CMGs, relative weights and average length of stay values for FY 2019, that is, for discharges occurring on or after October

1, 2018, and on or before September 30, 2019. For information on the updates to the CMG relative weights and average length of stay values for FY 2019, please refer to section IV of this final rule.

2. Changes to the Functional Status Scores Beginning With FY 2020

As discussed in the FY 2006 IRF final rule (70 FR 47886), under the CMG case-mix classification system, a patient's principal diagnosis or impairment is used to classify the patient into a RIC. After using the RIC to define the first division among the inpatient rehabilitation groups, a patient's motor and cognitive scores and age are used to partition the cases further. To classify a patient into a CMG, IRFs use the admission assessment data from the IRF–PAI to score a patient's functional status. Currently, the functional status scores consist of what are termed ''motor'' items and ''cognitive'' items. In addition to the functional status scores, the patient's age may also influence the patient's CMG classification. The motor items are generally indications of the patient's physical functioning level. The cognitive items are generally indications of the patient's mental functioning level, and are related to the patient's ability to process and respond to empirical factual information, use judgment, and accurately perceive what is happening. Under the current case-mix system, the motor and cognitive scores are derived from a combination of data elements in the FIM™ instrument (item 39 of the IRF–PAI). Eating, grooming, bathing, dressing upper body, dressing lower body, toileting, bladder management, bowel management, transfer to bed/chair/wheelchair, transfer to toilet, walking or wheelchair use, and stair climbing are the data elements collected through the FIM™ instrument that are currently used to compute a patient's weighted motor score. Comprehension, expression, social interaction, problem solving, and memory are the data elements collected through the FIM™ instrument that are used to compute a patient's cognitive score. Each data element is recorded on the IRF–PAI and scored on a scale of 1 to 7, with a 7 indicating complete independence in this area of functioning, and a one indicating that a patient is very impaired in this area of functioning. Additionally, a value of zero is used to indicate that an activity did not occur. The scores for each data element above are then used to determine the patient's weighted motor score and cognitive score, which may be used to group a patient into a CMG for payment purposes under the IRF PPS.

As discussed in section VIII.A of this final rule, we proposed to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020. As the data in the FIM™ instrument section will no longer be available to determine the motor and cognitive scores used to assign patients to CMGs, we proposed to use data items collected on admission and located in the Quality Indicators section of the IRF–PAI to derive the functional status scores used to assign patients to a CMG for payment purposes under the IRF PPS. The Quality Indicators section of the IRF–PAI includes data items that are similar to the data elements located in the FIM™ instrument, in addition to new data elements that capture additional functional status information.

In the summer of 2013, we contracted with Research Triangle Institute, International (RTI) to explore use of the data items collected in the Quality Indicators section of the IRF–PAI in setting IRF PPS payments. Some of the data items collected in the Quality Indicators section of the IRF–PAI were originally developed and tested as part of the Post-Acute Care Payment Reform Demonstration (PAC–PRD) version of the Continuity Assessment Record and Evaluation (CARE) Item Set. The CARE item set was developed in response to a mandate in section 5008 of the Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006) (DRA) to develop a uniform patient assessment instrument to assess patients across all types of acute and PAC providers.

In the first stage of this analysis, RTI hosted a Technical Expert Panel (TEP) on September 18, 2014, which brought together researchers, clinicians, and representatives from provider associations to discuss exploratory research on the potential to incorporate the CARE data items in the current case-mix system utilized in the IRF PPS. We received helpful feedback on the exploratory research including clinicians' views of the importance and significance of various findings, input on the methodology used to incorporate the CARE items, and potential limitations of the analysis. RTI's analysis of the original CARE data set, along with guidance from the TEP, suggested the need to derive different functional status measures from the data collected in the Quality Indicators section of the IRF–PAI. The data items from the Quality Indicators section of the IRF–PAI contain slightly different information and utilize a different rating system than the items collected on the FIM™ instrument. Thus, we proposed to modify the IRF case-mix classification system to calculate IRF PPS payments correctly using the admission data items from the Quality Indicators section of the IRF–PAI. RTI considered a broad range of the data items in the Quality Indicators section of the IRF–PAI to identify the best predictors of IRF costs. These analyses examined all motor, cognitive, and additional items collected at admission to predict costs. The regression analysis indicated that the components of functional status that were found to best predict costs were the patient's motor function, a memory function, a communication function based on comprehension and expression, and age.

The motor items used to derive the additive motor score are eating, oral hygiene, toileting hygiene, shower bathe/self, upper body dressing, lower body dressing, putting on/taking off footwear, bladder continence, bowel continence, roll left and right, sit to lying, lying to sitting on side of bed, sit to stand, chair/bed-to-chair transfer, toilet transfer, walk 10 feet, walk 50 feet with two turns, walk 150 feet, and 1 step (curb). The item used to derive the memory score is the BIMS summary score, which is based on the repetition of three words, temporal orientation, and recall. The communication score is derived from the hearing, speech, and vision items including expression of ideas and wants and understanding verbal and non-verbal content. We proposed to incorporate a motor score, a memory score, a communication score, and age into the IRF case-mix classification system. Currently, the IRF case-mix system uses a weighted motor score and an unweighted cognitive score. We did not propose to apply a weighting methodology to the motor score at this time. We proposed to derive the scores for each respective group of the functional status items described above by calculating the sum of the items that constitute each functional status component. For a more detailed discussion of these analyses, please refer to the technical report, ''Analyses to Inform the Potential Use of Standardized Patient Assessment Data Elements in the Inpatient Rehabilitation Facility Prospective Payment System,'' available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Research.html.*

As noted in the proposed rule, we believe that it is appropriate to utilize the admission data items located in the Quality Indicators section of the IRF–PAI, as described above, in place of the FIM™ items to determine functional status, as the data items located in the Quality Indicators section are now

available and collected by all IRF providers for purposes of the IRF QRP. We believed the proposed motor score, a memory score, a communication score, and age should compose the functional status scores in the IRF case-mix classification system, as our analysis determined these to be the best predictors of cost. The removal of the FIM™ instrument and the incorporation of certain items from the Quality Indicators section of the IRF–PAI to assign patients to CMGs support our efforts to reduce burden on providers. Additionally, the removal of the FIM™ instrument and the incorporation of certain items from the Quality Indicators section of the IRF–PAI into the CMG case-mix system support our broader goal of standardizing assessment data collection across PAC settings.

We proposed to utilize certain data items located in the Quality Indicators section of the IRF–PAI, as described above, to generate the functional status scores that will be used to group patients into CMGs for payment purposes under the IRF PPS beginning in FY 2020.

We invited public comments on the proposed use of certain data items located in the Quality Indicators section of the IRF–PAI, as described above, for payment purposes under the IRF PPS beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019. We summarize and respond to the comments received on this proposal and discuss our final decision on this proposal in section VIII.B.4 of this final rule.

3. Updates to the Score Reassignment Methodology Beginning With FY 2020

As previously noted, the data items located in the Quality Indicators section of the IRF–PAI utilize a different rating system than the FIM™ instrument. There are several important differences to note regarding the rating systems for the data items from the Quality Indicators section of the IRF–PAI and the data contained in the FIM™ instrument. First, the data items from the Quality Indicators section of the IRF–PAI are assessed based on a patient's usual performance during the assessment period in contrast to the FIM™ items, which are assessed based on the patient's lowest functional score during the assessment period. The data items from the Quality Indicators section of the IRF–PAI are generally assessed using a 6 level rating scale for the self-care and mobility elements and a 4 level scale for the cognitive elements. The FIM™ data items use a 7 level scale. Additionally, the FIM™ scale includes a value of zero to indicate an activity did not occur or was not observed. The data items from the Quality Indicators section of the IRF–PAI utilize the following four codes to indicate why an activity did not occur: the patient refused to complete an activity (code 07), the patient did not perform this activity (code 09), the activity was not attempted due to environmental limitations (code 10), or the activity was not attempted due to a medical condition or safety concern (code 88).

As the rating scale for the data items in the Quality Indicators section of the IRF–PAI captures multiple reasons an activity did not occur, we proposed to modify the methodology currently used to reassign values indicating an activity did not occur or was not observed, when they are recorded on an item used for payment, beginning with FY 2020. Currently, when a code of 0 appears for one of the FIM™ items on the IRF–PAI used to determine payment, the item is reassigned another value to determine the appropriate payment for the patient. In the FY 2002 IRF PPS final rule (66 FR 41316), we finalized a methodology to assign a code of 1 (indicating the patient needed total assistance) whenever the recorded code indicated that the activity did not occur. Subsequently, in the FY 2006 IRF PPS final rule, we revised this methodology to assign a value of 2 when the transfer to toilet item was coded with a zero value. For more information on the rationale behind this decision we refer readers to the 2006 IRF PPS final rule (70 FR 47896 through 47902). As the data items from the Quality Indicators section of the IRF–PAI now utilize 4 values to indicate an activity did not occur and a dash to indicate ''no information'', we proposed to modify the reassignment methodology to incorporate the new codes. For the self-care and mobility items identified above, we proposed to recode values of 07, 09, 10, 88, and the presence of a dash (''–'') to 1, the most dependent level, except the toilet transfer item, which is recoded to 2. These recodes are consistent with the current reassignment methodology rules. We also proposed to change the way we treat specific values for the bowel continence and bladder continence items, as our analysis of these items and current coding guidelines indicate these changes are necessary. The bladder continence and bowel continence items utilize a different scale than the other function items and may capture clinical information that is not necessarily reflective of a patient's functional ability. For instance, the bladder continence scale includes the options ''no urine output'' or ''not applicable'' for cases where a patient may have renal failure or an indwelling catheter. A clinical review of these cases determined that patients for whom these values are coded are similar in terms of resource needs and costliness to patients for whom functional ability is captured. Based on this review, we proposed to recode these values to be able to score the functional status of a patient when these values are coded on the IRF–PAI. For the bladder continence item, we proposed to reassign a value of 1 (stress incontinence only) to 0 (always continent), a value of 5 (no urine output) to 0 (always continent), and a value of 9 (not applicable) to 4 (always incontinent). For the bowel continence item, we proposed to reassign a value of 9 (not rated) to 2 (frequently incontinent). For both items, we proposed to reassign a missing score to 0 (always continent). As noted in the proposed rule, we believe these changes are necessary to update the score reassignment methodology used to derive the functional status scores to reflect use of the new data items from the Quality Indicators section of the IRF–PAI and to accurately assign payments based on a patients' expected costliness.

We invited public comments on the proposed updates to the score reassignment methodology beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019. We summarize and respond to the comments received on this proposal and discuss our final decision on this proposal in section VIII.B.4 of this final rule.

4. Refinements to the CMGs Beginning With FY 2020

As previously noted, we proposed to modify the methodology used to update the CMGs used to classify IRF patients for purposes of establishing payment amounts, beginning with FY 2020. We proposed to implement revisions to the CMGs in a budget-neutral manner. As discussed in the FY 2006 IRF PPS final rule (70 FR 47886 through 47887), the current CMGs were derived through Classification and Regression Trees (CART) analysis that incorporated a patient's functional status (motor score and cognitive score) and age into the construction of the CMGs. Under the IRF case-mix classification system, a patient's principal diagnosis or impairment is used to classify the patient into a RIC. Currently, there are 21 diagnosis-based RICs. The RICs are then further subdivided into 92 CMGs.

Of the 92 CMGs, patients are assigned to 87 of the CMGs based on the patient's primary reason for rehabilitation care, age and functional status. There are also five special CMGs to account for very short stays and for patients who expire in the IRF.

The CART method is useful in identifying statistical relationships among data and, using these relationships, constructing a predictive model for organizing and separating a large set of data into smaller, similar groups. CART ensures that the proposed CMGs recognize that patients with clinically distinct resource needs are appropriately grouped in the case-mix classification system. CART is an iterative process that creates initial groups of patients then searches for ways to split the initial groups to further decrease the clinical and cost variances within a group and increase the explanatory power of the CMGs.

As noted previously, the data items from the Quality Indicators section of the IRF–PAI contain slightly different information and utilize a different rating system than the items collected on the FIM™ instrument. Thus, we proposed to update the IRF case-mix classification system to ensure that IRF PPS payments reflect as closely as possible the costs of care when we convert to using the admission data items from the Quality Indicators section of the IRF–PAI. To convert from using the FIM™ items to using the data items from the Quality Indicators section of the IRF–PAI, RTI first had to identify which quality indicator data items would be the best predictors of cost, as previously discussed. Then, RTI used CART analysis to modify the CMG definitions to reflect the use of the different assessment items.

To develop CMGs based on the data items from the Quality Indicators section of the IRF–PAI, RTI used CART analysis to divide patients into payment groups based on similarities in their clinical characteristics and relative costs. As part of this analysis, RTI imposed certain restraints on these groupings to decrease the resulting number of CMGs (to ensure that the payment system did not become unduly complicated). For a more detailed discussion of these analyses or for more information on the development of the CMGs, we refer readers to the technical report, ''Analyses to Inform the Potential Use of Standardized Patient Assessment Data Elements in the Inpatient Rehabilitation Facility Prospective Payment System'', available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Research.html.*

In developing the revised CMGs, RTI's analysis indicated that RIC 16 and RIC 17 should incorporate the CMGs shown in Table 8, based on motor score and cognitive function, derived from the memory and communication scores.

TABLE 8—CART-BASED CMGS FOR RIC 16 (PAIN SYNDROME) AND RIC 17 (MAJOR MULTIPLE TRAUMA WITHOUT BRAIN OR SPINAL CORD INJURY)

RIC	CMG	Cases	Avg. cost	Rule 1	Rule 2	Rule 3
16	1	255	$11,088.65	Motor >= 70.		
16	2	270	13,402.22	Motor < 70	Motor >= 61.	
16	3	188	14,775.04	Motor < 61	Cognition >= 7.	
16	4	260	16,806.16	Motor < 61	Cognition >= 7.	
17	1	1149	12,911.91	Motor >= 62.		
17	2	1557	15,504.35	Motor < 62	Motor >= 51.	
17	3	624	17,273.01	Motor < 51	Motor >= 47.	
17	4	927	19,209.23	Motor < 47	Motor >= 39.	
17	5	289	20,245.80	Motor < 51	Motor < 39	Cognition < 8.
17	6	205	23,465.77	Motor < 51	Motor < 39	Cognition >= 8.

We considered proposing to revise the CMGs for RIC 16 and RIC 17 as shown above. However, these CMGs indicate higher costs for patients with no cognitive impairment as compared to those with any level of impairment. As this unexpected result may be driven by small sample size, we proposed to combine CMG 03 and 04 for RIC 16 and to combine CMG 05 and 06 for RIC 17 as shown in Table 9.

Table 9 contains the proposed CMGs and their respective descriptions, including the functional status scores and age that we proposed to use to classify discharges into CMGs. Table 9 also contains the CMG relative weights and average length of stay values for the CMGs. We did not propose any changes to methodology used to determine the CMG relative weights that was finalized in the FY 2002 IRF final rule (66 FR 41351 through 41357) and revised in the FY 2009 IRF final rule (73 FR 46372 through 46374). For more information on the methodology used to calculate the CMG relative weights please refer to section IV. of this final rule.

TABLE 9—REVISED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR THE REVISED CASE-MIX GROUPS

CMG	CMG description (M = motor, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	No comorbidity tier	Tier 1	Tier 2	Tier 3	No comorbidity tier
0101	Stroke M >= 77	1.0570	0.9232	0.8492	0.8050	11	11	10	10
0102	Stroke M < 77 and M >= 68	1.3370	1.1678	1.0741	1.0182	13	13	12	12
0103	Stroke M < 68 and M >= 55	1.6848	1.4715	1.3535	1.2831	15	16	15	15
0104	Stroke M < 55 and M >= 47	2.1484	1.8764	1.7260	1.6361	19	20	19	19
0105	Stroke M < 47 and A >= 85	2.4137	2.1081	1.9391	1.8382	22	22	21	20
0106	Stroke M < 47 and A < 85	2.7956	2.4417	2.2460	2.1291	26	27	24	23
0201	Traumatic Brain Injury M >= 73	1.2418	1.0426	0.9376	0.8708	12	12	11	11
0202	Traumatic Brain Injury M < 73 and M >= 64	1.4929	1.2534	1.1272	1.0468	14	14	13	12
0203	Traumatic Brain Injury M < 64 and M >= 51	1.7699	1.4859	1.3363	1.2411	16	17	15	14
0204	Traumatic Brain Injury M < 51 and M >= 36	2.1753	1.8263	1.6424	1.5254	21	20	18	17
0205	Traumatic Brain Injury M < 36	2.6959	2.2634	2.0355	1.8904	36	24	22	19

TABLE 9—REVISED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR THE REVISED CASE-MIX GROUPS—Continued

CMG	CMG description (M = motor, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	No comorbidity tier	Tier 1	Tier 2	Tier 3	No comorbidity tier
0301	Non-Traumatic Brain Injury M >= 70	1.2192	1.0096	0.9348	0.8735	11	11	11	10
0302	Non-Traumatic Brain Injury M < 70 and M >= 57	1.5403	1.2755	1.1810	1.1034	14	14	13	13
0303	Non-Traumatic Brain Injury M < 57 and M >= 45	1.8496	1.5316	1.4182	1.3251	17	16	15	15
0304	Non-Traumatic Brain Injury M < 45 and A >= 79	2.0666	1.7113	1.5846	1.4806	20	18	17	16
0305	Non-Traumatic Brain Injury M < 45 and A < 79	2.2755	1.8843	1.7447	1.6302	21	21	18	17
0401	Traumatic Spinal Cord Injury M >= 64	1.2999	1.0952	1.0122	0.9370	13	12	12	11
0402	Traumatic Spinal Cord Injury M < 64 and M >= 57	1.6630	1.4011	1.2949	1.1987	15	15	15	14
0403	Traumatic Spinal Cord Injury M < 57 and M >= 46	1.9672	1.6574	1.5318	1.4180	15	18	17	16
0404	Traumatic Spinal Cord Injury M < 46 and M >= 36	2.6209	2.2082	2.0408	1.8892	25	24	23	21
0405	Traumatic Spinal Cord Injury M < 36 and A < 63	3.1923	2.6895	2.4857	2.3010	34	29	27	24
0406	Traumatic Spinal Cord Injury M < 36 and A >= 63	3.6963	3.1142	2.8782	2.6643	46	34	28	29
0501	Non-Traumatic Spinal Cord Injury M >= 75	1.1291	0.9068	0.8382	0.7642	10	11	10	9
0502	Non-Traumatic Spinal Cord Injury M < 75 and M >= 63.	1.4096	1.1322	1.0464	0.9541	14	13	12	11
0503	Non-Traumatic Spinal Cord Injury M < 63 and M >= 52.	1.7905	1.4381	1.3292	1.2119	16	15	15	14
0504	Non-Traumatic Spinal Cord Injury M < 52 and M >= 44.	2.2191	1.7823	1.6473	1.5020	21	19	18	17
0505	Non-Traumatic Spinal Cord Injury M < 44	2.8377	2.2792	2.1065	1.9206	27	24	22	21
0601	Neurological M >= 69	1.3205	1.0500	0.9795	0.8873	12	12	11	10
0602	Neurological M < 69 and M >= 57	1.6324	1.2981	1.2109	1.0969	14	14	13	13
0603	Neurological M < 57 and M >= 47	1.9170	1.5244	1.4220	1.2882	16	16	15	14
0604	Neurological M < 47	2.2218	1.7667	1.6481	1.4929	20	18	17	16
0701	Fracture of Lower Extremity M >= 67	1.1960	0.9851	0.9487	0.8595	11	11	11	10
0702	Fracture of Lower Extremity M < 67 and M >= 55	1.5308	1.2608	1.2142	1.1001	14	14	14	13
0703	Fracture of Lower Extremity M < 55 and M >= 45	1.8510	1.5245	1.4682	1.3302	17	17	16	15
0704	Fracture of Lower Extremity M < 45	2.0790	1.7124	1.6491	1.4941	18	18	18	17
0801	Replacement of Lower Extremity Joint M >= 67	1.0475	0.8892	0.8044	0.7437	10	10	9	9
0802	Replacement of Lower Extremity Joint M < 67 and M >= 56.	1.2925	1.0972	0.9926	0.9176	12	12	11	11
0803	Replacement of Lower Extremity Joint M < 56 and M >= 47.	1.5469	1.3132	1.1880	1.0982	15	15	13	12
0804	Replacement of Lower Extremity Joint M < 47	1.8517	1.5719	1.4220	1.3146	16	17	15	15
0901	Other Orthopedic M >= 69	1.1749	0.9376	0.8792	0.8083	11	11	10	10
0902	Other Orthopedic M < 69 and M >= 55	1.5103	1.2052	1.1302	1.0390	13	14	13	12
0903	Other Orthopedic M < 55 and M >= 47	1.8117	1.4457	1.3557	1.2463	15	16	15	14
0904	Other Orthopedic M < 47	2.0393	1.6273	1.5261	1.4029	17	17	16	16
1001	Amputation Lower Extremity M >= 67	1.3231	1.1340	1.0276	0.9487	12	13	12	11
1002	Amputation Lower Extremity M < 67 and M >= 59	1.6372	1.4032	1.2715	1.1739	15	15	14	14
1003	Amputation Lower Extremity M < 59 and M >= 49	1.8961	1.6251	1.4726	1.3596	17	16	16	15
1004	Amputation Lower Extremity M < 49	2.1617	1.8527	1.6788	1.5500	19	20	18	17
1101	Amputation Non-Lower Extremity	1.8322	1.3022	1.3022	1.0585	15	14	13	12
1201	Osteoarthritis M >= 65	1.3071	1.0757	0.9575	0.8777	11	12	11	11
1202	Osteoarthritis M < 65 and M >= 49	1.6787	1.3816	1.2297	1.1273	14	15	14	13
1203	Osteoarthritis M < 49	1.9145	1.5756	1.4024	1.2857	16	16	16	15
1301	Rheumatoid Other Arthritis M >= 69	1.1111	0.9753	0.9076	0.8570	10	11	10	11
1302	Rheumatoid Other Arthritis M < 69 and M >= 58	1.3176	1.1567	1.0764	1.0164	12	13	12	12
1303	Rheumatoid Other Arthritis M < 58 and A >= 72	1.6691	1.4652	1.3635	1.2875	13	17	14	14
1304	Rheumatoid Other Arthritis M < 58 and A < 72	1.7642	1.5487	1.4412	1.3609	14	17	15	15
1401	Cardiac M >= 70	1.1839	0.9920	0.8991	0.8023	11	11	10	9
1402	Cardiac M < 70 and M >= 59	1.4635	1.2263	1.1115	0.9918	13	13	12	11
1403	Cardiac M < 59 and M >= 51	1.7034	1.4272	1.2936	1.1544	15	15	14	13
1404	Cardiac M < 51	1.9704	1.6510	1.4964	1.3353	18	17	16	14
1501	Pulmonary M >= 84	1.0149	0.9214	0.8346	0.7907	7	10	9	9
1502	Pulmonary M < 84 and M >= 74	1.2323	1.1187	1.0133	0.9601	11	12	11	10
1503	Pulmonary M < 74 and M >= 59	1.4557	1.3215	1.1970	1.1341	13	13	12	12
1504	Pulmonary M < 59 and M >= 46	1.7464	1.5853	1.4360	1.3606	15	15	14	14
1505	Pulmonary M < 46	2.0273	1.8404	1.6670	1.5794	20	17	15	16
1601	Pain Syndrome M >= 70	1.2293	0.9242	0.8776	0.7774	10	11	10	10
1602	Pain Syndrome M < 70 and M >= 61	1.5216	1.1439	1.0863	0.9622	12	12	12	11
1603	Pain Syndrome M < 61	1.8391	1.3826	1.3129	1.1630	13	15	14	13
1701	Major Multiple Trauma Without Brain or Spinal Cord Injury M >= 62.	1.4355	1.1154	1.0668	0.9504	14	13	12	11
1702	Major Multiple Trauma Without Brain or Spinal Cord Injury M < 62 and M >= 51.	1.7939	1.3938	1.3330	1.1876	16	15	15	14
1703	Major Multiple Trauma Without Brain or Spinal Cord Injury M < 51 and M >= 47.	2.0059	1.5585	1.4906	1.3280	17	16	16	15
1704	Major Multiple Trauma Without Brain or Spinal Cord Injury M < 47 and M >= 39.	2.1848	1.6975	1.6236	1.4465	19	18	17	16
1705	Major Multiple Trauma Without Brain or Spinal Cord Injury M < 39.	2.4250	1.8841	1.8020	1.6055	21	21	19	17
1801	Major Multiple Trauma With Brain or Spinal Cord Injury M >= 72.	1.1980	1.0351	0.8752	0.8233	13	11	10	10
1802	Major Multiple Trauma With Brain or Spinal Cord Injury M < 72 and M >= 58.	1.5335	1.3250	1.1204	1.0539	14	16	12	12
1803	Major Multiple Trauma With Brain or Spinal Cord Injury M < 58 and M >= 42.	2.0608	1.7806	1.5056	1.4162	23	19	16	16

TABLE 9—REVISED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR THE REVISED CASE-MIX GROUPS—Continued

CMG	CMG description (M = motor, A = age)	Relative weight				Average length of stay			
		Tier 1	Tier 2	Tier 3	No comorbidity tier	Tier 1	Tier 2	Tier 3	No comorbidity tier
1804	Major Multiple Trauma With Brain or Spinal Cord Injury M < 42.	2.9220	2.5248	2.1348	2.0081	34	25	23	22
1901	Guillain-Barré M >= 54	1.5211	1.2331	1.1228	1.0834	16	15	12	13
1902	Guillain-Barré M < 54	3.4558	2.8014	2.5507	2.4613	39	28	27	27
2001	Miscellaneous M >= 70	1.2339	1.0047	0.9349	0.8447	11	11	10	10
2002	Miscellaneous M < 70 and M >= 58	1.5240	1.2410	1.1547	1.0433	14	13	12	12
2003	Miscellaneous M < 58 and M >= 49	1.7837	1.4525	1.3515	1.2211	16	15	14	14
2004	Miscellaneous M < 49	2.0373	1.6589	1.5436	1.3947	19	17	16	15
2101	Burns	1.9058	1.5390	1.5118	1.3015	22	16	16	14
5001	Short-stay cases, length of stay is 3 days or fewer				0.1801				3
5101	Expired, orthopedic, length of stay is 13 days or fewer				0.6240				7
5102	Expired, orthopedic, length of stay is 14 days or more				1.7071				18
5103	Expired, not orthopedic, length of stay is 15 days or fewer.				0.6795				7
5104	Expired, not orthopedic, length of stay is 16 days or more.				2.1069				21

The following would be the most significant differences between the current CMGs and the revised CMGs:

- There would be fewer CMGs than before (88 instead of 92 currently).
- There would be fewer CMGs in RICs 1, 2, 5, 8, 11, and 19, while there would be more CMGs in RICs 3, 4, 10, 13, 15, 17, and 18.
- A patient's age would affect assignment for CMGs in RICs 1, 3, 4, and 13 whereas it currently affects assignment for CMGs in RICs 1, 4, and 8.

We proposed to utilize the CMGs based on the data items from the Quality Indicators section of the IRF–PAI to classify IRF patients for purposes of establishing payment under the IRF PPS beginning with FY 2020. We proposed to implement these revisions in a budget neutral manner. For more information on the specific impacts of this change, we refer readers to Table 10. We also proposed to update the CMG relative weights and average length of stay values associated with the CMGs based on the data items from the Quality Indicators section of the IRF–PAI. We believe it is appropriate to update the CMGs and relative weights for FY 2020 to better align IRF payments with the costs of caring for IRF patients, given the new information that is captured by the data items from the Quality Indicators section of the IRF–PAI. Additionally, changes in treatment patterns, technology, case-mix, and other factors affecting the relative use of resources in IRFs since the current CMGs were last revised, likely require an update to the classification system.

TABLE 10—DISTRIBUTIONAL EFFECTS OF THE CHANGES TO THE CMGS

Facility classification	Number of IRFs	Number of cases	% Change in mean payment
(1)	(2)	(3)	(4)
Total	1,111	369,684	0
Urban unit	702	155,121	3
Rural unit	133	20,074	3
Urban hospital	265	190,431	−2
Rural hospital	11	4,058	−1
Urban For-Profit	339	185,702	−2
Rural For-Profit	37	7,388	2
Urban Non-Profit	529	137,321	2
Rural Non-Profit	84	13,338	2
Urban Government	99	22,529	3
Rural Government	23	3,406	4
Urban	967	345,552	0
Rural	144	24,132	2
Urban by region			
Urban New England	29	15,514	−2
Urban Middle Atlantic	134	48,194	−2
Urban South Atlantic	144	69,040	0
Urban East North Central	173	46,132	3
Urban East South Central	56	24,250	−1
Urban West North Central	73	18,333	0
Urban West South Central	180	75,717	−1
Urban Mountain	81	26,683	−1
Urban Pacific	97	21,689	4
Rural by region			
Rural New England	4	1,048	−6
Rural Middle Atlantic	11	1,244	3
Rural South Atlantic	16	3,491	−1
Rural East North Central	21	3,599	2

TABLE 10—DISTRIBUTIONAL EFFECTS OF THE CHANGES TO THE CMGS—Continued

Facility classification	Number of IRFs	Number of cases	% Change in mean payment
(1)	(2)	(3)	(4)
Rural East South Central	21	4,174	4
Rural West North Central	21	2,829	2
Rural West South Central	40	6,765	4
Rural Mountain	7	722	4
Rural Pacific	3	260	2
Teaching status			
Non-teaching	842	303,102	−1
Teaching	269	66,582	2
Bed size			
<25	563	85,835	3
25–49	314	107,858	1
50–74	134	85,923	−1
75–99	58	48,564	−2
100–124	19	14,527	−2
125+	23	26,977	−1

Table 10 shows how we estimate that the application of the revisions to the case-mix system for FY 2020 would affect particular groups. Table 10 categorizes IRFs by geographic location, including urban or rural location, and location for CMS's 9 Census divisions of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), by teaching status, and bed size. The changes to the case-mix classification system are expected to affect the overall distribution of payments across CMGs. Note that, because we proposed to implement the revisions to the case-mix classification system in a budget-neutral manner, total estimated aggregate payments to IRFs would not be affected as a result of the revisions to the CMGs. However, these revisions may affect the distribution of payments across CMGs.

We received 94 comments on our proposals to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020 and to incorporate certain data items located in the Quality Indicators section of the IRF–PAI in the IRF case-mix classification system, which are summarized below.

Comment: Several commenters expressed support for the removal of the FIM™ and associated Function Modifier items from the IRF–PAI. One commenter stated that collection of both sets of data items is inefficient and takes time away from patient care and also noted that they prefer the data items located in the Quality Indicators section of the IRF–PAI as they are easier to score and are better understood. Another commenter was fully supportive of this proposal, noting that it would remove the requirement of having to report on similar data twice, which providers have indicated is a substantial burden. This commenter stated that they believe this proposal would result in only minor changes to the payment system because of the similarities between the FIM™ and Quality Indicators data items and noted that there would not be any changes to the RICs used in the IRF PPS. Additionally, this commenter stated that the removal of the FIM™ instrument is responsive to the IMPACT Act requirement to remove duplicative or overlapping data as soon as practicable.

Response: We appreciate the commenters' support for our proposal to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI and agree with the one commenter's assessment that this proposal will not result in major changes to the IRF case-mix classification system. We also agree with the commenter that the proposal to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI aligns with the overall goals of the IMPACT Act.

Comment: While many commenters were appreciative of efforts to reduce burden and generally supportive of future post-acute care payment reform efforts, most commenters did not support the removal of the FIM™ instrument and associated Function Modifiers from the IRF–PAI, citing concerns over the incorporation of the data items located in the Quality Indicators section of the IRF–PAI into the IRF PPS. Several commenters stated that too little is known about the accuracy, consistency and clinical efficacy of these data items. Many commenters expressed concern that these items have not been meaningfully evaluated and have not been found to be valid and reliable measures of patients' functional status. Additionally, many commenters stated that the data items in the Quality Indictors section of the IRF–PAI have not been sufficiently studied, understood, or validated to be used as the basis for a new budget neutral case-mix system. Many commenters noted they were supportive of the objective to eliminate duplicative data elements, and some were supportive of potentially removing the FIM™ in the future, but many commenters stated that finalizing the removal of the FIM™ data would be premature at this time. Commenters expressed concerns that the data items that we had proposed to replace the FIM™ data items have not been proven reliable or valid for payment purposes and requested to continue reporting data through the FIM™ instrument.

Response: We disagree with the commenters that the data items in the Quality Indicators section of the IRF–PAI have not been meaningfully evaluated and have not been proven reliable and valid. The data items and response codes located in the Quality Indicators section of the IRF–PAI that were proposed to be incorporated into the IRF case-mix classification system were derived from a subset of items within the CARE Tool that were extensively tested for validity and reliability in the IRF setting as part of the Post-Acute Care Payment Reform Demonstration (PAC PRD). These items were developed to accurately measure the functional and cognitive status of

patients across PAC settings and were found to be reliable and valid. A description of the reliability and validity testing methodology and results are available in several reports, including *The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set, the Final Report On Reliability Testing, and the Final Report on CARE Item Set and Current Assessment Comparisons.* These reports are available at *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/CARE-Item-Set-and-B-CARE.html.*

Additionally, these data items were extensively tested for payment purposes under the IRF PPS as part of the PAC PRD. These data items were developed in response to a mandate in Section 5008 of the Deficit Reduction Act of 2005 and were collected for analysis under the PAC PRD from 2008 to 2010. Analyses conducted through the PAC PRD found that the elements of the CARE tool include proven predictors of health care costs and utilization across PAC prospective payment systems. More information on the PAC PRD is available on the CMS website at *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Reports/Research-Reports-Items/PAC_Payment_Reform_Demo_Final.html.*

In addition to this, we conducted reliability and validity testing of the data items associated with the four IRF QRP functional outcome measures when these measures were submitted for NQF endorsement as discussed in the FY 2016 IRF PPS final rule (80 FR 47096 through 47120). The testing of the data elements, the scale and facility-level data showed very good reliability and validity. We will update the reliability and validity testing of the data items associated with the four IRF QRP functional outcome measures, as these outcome measures are due for maintenance of NQF endorsement in 2019.

In addition to the work conducted under the PAC PRD, RTI conducted analysis to identify the best predictors of cost and then used CART analysis to modify the CMG definitions to reflect the use of the different assessment items. RTI found that the model predicting costs using CMGs derived from the items located in the Quality Indicators section of the IRF–PAI, based on data from FY 2017, had a slightly higher R-squared value than models using the current CMGs which are derived from items in the FIM™ instrument, thus indicating that the revised CMGs more accurately predict costs than the CMGs that are currently utilized.

Additionally, we disagree with the commenters' characterization of this proposal as the construction of a new budget neutral case-mix system. Instead, we proposed revisions to the case-mix system solely to incorporate the data items from the Quality Indicators section instead of the FIM™ instrument. We note that that we did not propose any changes to the RICs, comorbidity tiers, or the relative weight methodology that are currently in place, and we believe the proposed revisions to the case-mix groups would result in minor changes to the structure of the CMGs.

Comment: A number of commenters expressed concerns that the removal of the FIM™ instrument could, paradoxically, increase burden on providers and potentially worsen patient outcomes. Many commenters noted that providers would need to invest in system changes due to these proposals. Several commenters stated that facilities need adequate lead time, measured in years, to change electronic medical record systems, financial tracking and reporting systems, quality measurement recording, and program improvement purposes and that any regulatory burden reduction derived from eliminating duplicative reporting would be offset by having to adapt to major changes in the payment system. Additionally, several commenters suggested that eliminating the FIM™ instrument to reduce burden may have the opposite effect in light of ongoing confusion and uncertainty in proper coding of section GG items, which are the data items in the Quality Indicators section, and suggested that burden would increase from education and training activities.

Response: We disagree with the suggestion that the proposed removal of the FIM™ instrument and associated Function Modifiers would increase administrative burden associated with Medicare data reporting requirements or have an adverse effect on patient outcomes. This proposal would simply remove data items from the IRF–PAI and was proposed with a one year delayed effective date of October 1, 2019 to allow providers time to make necessary system changes. We note that with each assessment release, we provide free software to providers that allows for the completion and submission of any required assessment data. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product are available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html.* Additionally, we disagree with the commenters' suggestions that the proposal would create additional burden on providers from training activities, as these data items have been collected nationally for almost 2 years. We do not believe providers will experience additional burden from the continued reporting and collection of this subset of Quality Indicator data items.

Comment: Several commenters supported the continued collection of FIM™ data because the commenters said that they did not believe that the Quality Indicator items accurately capture burden of care. Multiple commenters noted that the Quality Indicators data items use a different scale, and that this compressed scale may limit the ability to capture the complexity of the sickest IRF patients. Commenters stated that they believe the scale used for the data items located in the Quality Indicators section of the IRF–PAI is less sensitive than the scale used for the FIM™ items and expressed concern that the scale does not capture a patient's true severity of impairment. Several commenters stated the scale for the Quality Indicator items does not have the specificity or predictability of the FIM™ scale and expressed concern that the scale for these items does not reflect progress between admission and discharge in a similar manner as the FIM™ scale.

Response: We disagree with the commenters and believe that the data items located in the Quality Indicators section of the IRF–PAI accurately capture the functional and cognitive status of patients and can also be used to accurately assess changes in patients' functional status. We believe that the six level scale utilized for the data items located in the Quality Indicators section of the IRF–PAI better distinguishes change at the highest and lowest levels of patient function by documenting minimal change from no change at the low end of the scale. This is important for measuring progress in some of the most complex cases treated in PAC settings. Additionally, we note that these data items were developed with input from the clinical therapy communities to better measure the change in function, regardless of the severity of the individual's impairment. The self-care and mobility data elements included on the IRF–PAI were selected to represent a wide range of activity difficulty, and cover a wide range of patient functioning, from low to high functioning. At admission, activities in the areas of toileting hygiene, dressing,

bed mobility, bed and toilet transfers, and walking distinguish patient ability. Several data elements are activities that are very challenging for patients to complete and are frequently coded using the ''activity not attempted codes'' at admission. Thus, these more challenging data elements may not contribute as much to identify differences in patient ability at admission beyond the included data elements. These more challenging activities (for example, car transfers and 12 steps) are important to assess at discharge as they represent daily activities that are important for a person living in the community and are important in differentiating patient abilities at discharge when most patients have gained function. Overall, the inclusion of these items allows the patient the opportunity to demonstrate gains in a variety of functional activities and tasks. Rehabilitation care typically focuses on several aspects of functioning, and patients may be expected to make varying amounts of improvement, from minimal to substantial improvement, across different functional activities.

Comment: A number of commenters noted they use the FIM™ data for various purposes and that removing the FIM™ instrument from the IRF–PAI would not reduce burden as providers would still need to collect this data for internal purposes. Other commenters indicated that FIM™ scores are sent to insurance companies for approval of continued treatment, are used in other acute settings, and are used by private payers to make determinations about IRF coverage.

Response: We appreciate the commenters' concerns regarding the various uses of the FIM™ data items outside of their use for Medicare payment, but we note that these concerns are specific to business decisions of individual IRF providers. For Medicare payment purposes, we believe that the Quality Indicator items represent an improved and more standardized way of collecting functional assessment data on patients in the IRF setting and across PAC settings, and we therefore also believe that collecting both the FIM™ instrument and the Quality Indicator items on the same IRF–PAI form is unnecessarily burdensome for providers. We certainly have no issues with IRF providers choosing to continue to continue to collect the FIM™ instrument data on their own, but this choice has no bearing on our decision to remove the FIM™ items from the IRF–PAI to minimize regulatory burden on providers.

Comment: One commenter noted that FIM™ items are universally understood across PAC settings and suggested that we should continue to collect the FIM™ items. This commenter also suggested that we make the FIM™ instrument the standard throughout all PAC areas to describe motor and cognitive function.

Response: As certain Quality Indicator data items collect data that are similar in nature to data collected through the FIM™ instrument and these items are currently collected in multiple PAC settings, we believe that these items are understood by providers in the settings in which they are currently collected and that they will be well understood in settings in which they may be collected in the future. We disagree with the commenter and do not believe that the FIM™ instrument is the best instrument to use to collect standardized patient assessment data across all PAC settings. As noted above, the data items collected in the Quality Indicators section of the IRF–PAI are a subset of items derived from the original CARE tool item set that was specifically developed to measure the clinical complexity of patients in acute care hospitals and across all four types of PAC providers. We continue to believe that the data items located in the Quality Indicators section of the IRF–PAI are the most appropriate data for assessing functional status in the IRF setting and across all PAC settings.

Comment: Several commenters suggested that we utilize a demonstration or establish a model through CMS' Center for Medicare and Medicaid Innovation to test the revisions to the IRF–PAI, inform future policy recommendations, and gather additional data before making IRFs invest in system changes for revisions to the IRF–PAI.

Response: We do not believe there is any need to test the collection of IRF–PAI data as it would not have any impact on, or fundamentally change, the current IRF–PAI submission process. The Quality Indicator data items that we proposed to use to determine Medicare payment to IRFs are already being collected on the IRF–PAI and were originally developed and tested as part of the PAC PRD version of the CARE item set. These items have undergone extensive testing and validation and have been found to be accurate and valid to use for payment purposes under the IRF PPS.

Comment: One commenter stated they were concerned that the discontinued use of the FIM™ instrument could stymy research and advancements in treatment and care management, as most rehabilitation research and other Physical Medicine and Rehabilitation (PM&R) academic papers use FIM™ data to assess function and intervention outcomes.

Response: As noted previously, the FIM™ data items and the Quality Indicator data items are very similar, and we therefore do not believe that the proposed removal of the FIM™ instrument and replacement with the Quality Indicator data will have a substantial impact on the research being conducted in this area. Researchers may choose to continue to use the FIM™ data items, subject to obtaining any necessary permissions, or alternatively, utilize the Quality Indicator data items.

Comment: One commenter inquired if preadmission screening requirements would be updated to utilize Quality Indicator item scoring.

Response: We do not currently require FIM™ scoring on the preadmission screening documentation, and we will not require the Quality Indicator item scoring on the preadmission screening documentation either.

Comment: Several commenters expressed concerns that there are no certification requirements and no clinician-level certification materials for section GG items and inquired if there would be a certification process developed for this in the future.

Response: There is currently no plan to require any certification process for completion of the IRF–PAI. Patient assessments must be completed in accordance with applicable federal requirements.

Comment: Commenters stated that transitioning from the FIM™ instrument to the Quality Indicators items will take time and sufficient training to ensure the industry understands and consistently applies the new definitions and standards. Commenters stated that we have not provided enough guidance to ensure the accuracy of this data and noted that guidance received during training on the CARE tool was inconsistent and that additional training with the CARE tool is needed. Commenters requested that we clarify the new rules for section GG patient assessment items, revise the IRF–PAI training manual to reflect these clarifications, and provide more opportunities for education and outreach to IRF providers. One commenter did not object to the proposed removal of the FIM™, but requested that we develop decision trees to assist clinical teams in accurately coding the Quality Indicators data items.

Response: We disagree with the commenters' assertions that we have provided insufficient guidance on the

proper coding of this data. We are committed to providing information and support that will allow providers to accurately interpret and complete quality reporting items. We believe we have provided adequate training opportunities for IRFs on coding the Quality Indicator data items, including in-person training, webinars, on-line training and help desk emails. We will continue to provide these types of opportunities to the IRF community and plan to provide training and updated educational resources regarding the Quality Indicators items before the data items are used for payment purposes beginning on October 1, 2019.

We finalized the collection of the Quality Indicators data items in the FY 2016 IRF PPS final rule (80 FR 47036, 47100 through 47120). Prior to October 1, 2016, the data collection start date, we hosted two in-person training programs for IRFs that included coding guidance for the Quality Indicators items followed by practice examples and a case study so IRF clinicians could practice applying the guidance. Additionally, we offered an IRF QRP Refresher Webinar in August 2017, which covered coding guidance and examples for this data, and then hosted an additional in-person training in May 2018, which also covered coding guidance and new examples for coding this data.

The 2016, 2017, and 2018 training materials (for example, slides and case study) are available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Training.html.* Video recordings of previous trainings can be accessed at CMS YouTube channel at *https://www.youtube.com/user/CMSHHSgov.* Search for ''IRF QRP'' on the CMS You Tube channel.

A web-based training program focused on the coding of the Quality Indicators items was published on the CMS website in December 2017. This training module can be accessed at *https://www.cms.gov/medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/gg-training/.*

We also note that we receive questions about coding the items via the IRF QRP help desk email (*IRF.questions@cms.hhs.gov*), and we encourage providers to reach out to us with any questions.

We have updated the Quality Indicators section of the IRF–PAI Training Manual in 2016, 2017, and 2018 and incorporated coding tips based on the questions we have received via the help desk and during training programs. We also post on the CMS website ''Post-training Question and Answer'' documents and ''Frequently-Asked Questions'' so that all providers can learn from questions requested by their colleagues. These resources are available on the IRF QRP website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/.*

We thank the commenters for their suggestion to improve training materials by incorporating more decision trees. We will work to incorporate this approach into our training materials.

Comment: Several commenters stated that there is considerable confusion and uncertainty among many rehabilitation hospital clinicians as to how to accurately and consistently score a patient's ''usual performance'' under the Quality Indicator items and expressed concern that the data may not be accurate due to duplication and discrepancies in the definitions of the term ''usual performance''. One commenter indicated that CMS has not adequately defined what it means to assess a patient's ''usual performance'' on a Section GG item or activity and requested that CMS clarify the definition for ''usual performance'' with specific examples.

Response: We disagree with the commenters on this point. Usual performance has been the approach used since the development and testing of the data elements, starting in 2006, and we believe that IRF clinicians are able to accurately assess patients' ''usual performance'' on the Quality Indicator items, as we have undertaken numerous training efforts and developed comprehensive training materials to assist providers in accurately coding these data items. We have been pleased with the participation of IRF clinicians at the in-person training programs and via the IRF QRP help desk since the introduction of the Quality Indicator data elements. Our responses to questions from the IRF QRP help desk have reflected more specific guidance and examples related to coding usual performance. In an effort to share this information widely with the IRF industry, we have updated Section GG of the IRF–PAI Training Manual in 2016, 2017 and 2018 and incorporated coding tips based on the questions we have received via the help desk and during training programs. The IRF–PAI manual and change tables can be found in the Download section on the IRF QRP website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-PAI-and-IRF-QRP-Manual.html.*

We also post on the CMS website ''Post-training Question and Answer'' documents and ''Frequently-Asked Questions'' so that all providers can learn from questions requested by their colleagues. These resources are available on the IRF QRP website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/.*

In addition, we refer readers to the most recent IRF QRP Providers Training, held May 9–10, 2018 in Baltimore, MD. Training materials and video recordings are available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Training.html.*

We thank the commenters for the suggestions to improve training materials by including specific examples and appreciate the feedback on the types of training materials that are most helpful to providers. We will continue to offer training sessions and will work to incorporate these approaches into our training materials. We also plan to offer these training sessions and update training materials and educational resources before the refinements to the case-mix classification take effect on October 1, 2019.

Comment: One commenter sought additional information on the expectations for capturing patient level of care and what role nursing staff has in capturing the patient's usual performance.

Response: As noted above, the data items located in the Quality Indicators section of the IRF–PAI and the revised CMGs have been found to accurately reflect the relative resources needs and costliness of patients. With regard to the expectations and role of nursing staff in capturing patient level of care, we believe it is the responsibility of each IRF to ensure that any staff, including nurses, that complete the IRF–PAI assessments adhere to the coding instructions and specifications identified in the IRF–PAI training manual for coding the data items located in the Quality Indicators section of the IRF–PAI.

Comment: One commenter requested that we clarify how cognitive abilities for stroke patients should be reported under the Quality Indicator items.

Response: The reporting of cognitive ability for stroke patients should follow the coding guidelines outlined in the IRF–PAI Training Manual. The IRF–PAI Training Manual can be accessed on the CMS IRF QRP website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-*

Instruments/IRF-Quality-Reporting/IRF-PAI-and-IRF-QRP-Manual.html.

Comment: Several commenters requested that we better clarify the instructions for completing the Quality Indicator items on the IRF–PAI. Specifically, these commenters requested that we clarify any differences between the reporting of the FIM™ instrument and the Section GG items, including the timing of the data collection (that is, the first 3 days of admission), and that we explain how Section GG items align with other IRF requirements.

Response: We refer these commenters to Section GG in the IRF–PAI Training Manual on the CMS IRF QRP website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-PAI-and-IRF-QRP-Manual.html* for additional information about completing the Section GG items. As we do not understand from the comments exactly what questions these commenters have about the Section GG items, we also encourage them to send specific questions that they may have regarding how to report the Section GG items or how these items align with other IRF regulations to us at *IRF.Questions@cms.hhs.gov.* We will be happy to try to answer the commenters' questions directly. We also plan to provide training and updated educational resources regarding the Quality Indicators items before the data items are used for payment purposes beginning on October 1, 2019.

Comment: Several commenters specifically expressed concern with the new cognitive function items in Section GG, stating that they believe these items lack the appropriate sensitivity and do not capture a complete picture of cognition, especially when compared to the legacy cognition items from the FIM™ instrument. These commenters said that using the new items and excluding the legacy cognitive FIM™ items may produce an inadequate picture of patient severity, level of impairment, and the resources needed to care for patients. Several commenters expressed concerns with the BIMS item, stating that the item cannot measure progress, social interaction, or problem solving, which can lead to unsafe discharges, repeat re-admissions, and higher SNF placement and that the item cannot define critical deficits within cognitive domains that are useful for care planning such as social interaction, levels of supervision, safety considerations, and the need and use of medications. Commenters noted that CMS is still testing these data items and recommended that these items not be utilized until they are found to be sufficiently reliable and valid. Another commenter indicated that work is underway to develop better function and cognition measures and encouraged us to incorporate the improved cognition measures into the IRF–PAI as they become available to ensure that the breadth of cognition is captured in patient assessment.

Response: We believe that the cognitive items including the expression of ideas and wants, understanding verbal and non-verbal content, and the BIMS items have been tested and have been shown to be sensitive and valid. The reliability of these communication items was tested in the IRF setting and results are reported in the report entitled *The Development and Testing of the Continuity Assessment Record and Evaluation (CARE) Item Set: Final Report on Reliability Testing Volume 2 of 3* (available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/The-Development-and-Testing-of-the-Continuity-Assessment-Record-and-Evaluation-CARE-Item-Set-Final-Report-on-Reliability-Testing-Volume-2-of-3.pdf*).

This analysis indicated that the data element focused on understanding verbal and non-verbal content and had very good reliability with unweighted and weighted kappa values that ranged from 0.677 to 0.777. The data element focused on expression of needs also showed very good reliability with unweighted and weighted kappa values between 0.656–0.789.

We examined the reliability of the BIMS items in post-acute care providers and found very good agreement with weighted kappas ranging from 0.71 to 0.91 and unweighted kappas ranging from 0.62 to 0.86. The kappas were highest for the ''Temporal orientation'' items at 0.86 and above and ''Recall of three words'' at 0.89 or above for the second recall item. The first memory item, ''Repetition of 3 words,'' was slightly lower with kappas of 0.71.

We would also like to note that the cognitive items that were used in RTI's CART analysis only emerged as potential splits in two RICs. As we proposed to merge the CMGs within these RICs, these cognitive items were not included in the proposed revised CMG definitions. We appreciate the commenter's suggestion to incorporate improved cognition measures into the IRF–PAI if and when they become available and will take this into consideration in future analyses.

Comment: Several commenters expressed concerns that we have not adequately evaluated how clinicians across the nation have been scoring and assessing the Quality Indicators data items and suggested that we conduct new inter-rater reliability studies to validate practice consistency in the field before finalizing these proposals.

Response: We agree with the commenters about the importance of reliability testing on these items to ensure that they are being scored consistently across all IRF providers. For this reason, we examined reliability using two distinct methods. Our initial testing focused on within-facility testing. We requested two clinicians to assess the same patient at the same time and independently report the patient's ability. Our subsequent testing focused on using ''standardized patients'' by using videotapes of persons completing daily activities and being interviewed by a clinician. By showing the same videos to multiple clinicians, we were able to examine the agreement of data element coding across all the providers and across disciplines and with coding experts. We report on the ''standardized patient'' reliability testing in a report entitled ''Continuity Assessment Record and Evaluation (CARE) Item Set: Video Reliability Testing'' which is available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/Downloads/Continuity-Assessment-Record-and-Evaluation-CARE-Item-Set-Video-Reliability-Testing.pdf.*

When we submitted the four functional outcome measures for NQF endorsement consideration, our NQF applications included reliability and validity testing of the data elements, the scale and facility-level data. The testing of the data elements, the scale and facility-level data showed very good reliability and validity. The NQF applications can be found at *http://www.qualityforum.org/QPS/2633* and *http://www.qualityforum.org/QPS/2634* and *http://www.qualityforum.org/QPS/2635* and *http://www.qualityforum/QPS/2636*. We note that these four functional outcome measures are due for maintenance of NQF endorsement in 2019 and that we will submit NQF applications with updated reliability and validity testing for the data elements, scale and provider-level data, which will be reviewed by the NQF methods panel, person- and family-centered care committee and the public.

Comment: Several commenters suggested that because the data items in the FIM™ instrument and the data items collected in the Quality Indicators section of the IRF–PAI use different scales, there is a need to crosswalk

future performance to historical performance to ensure continuity in ongoing care improvement activities. Several commenters noted there are no available tools to crosswalk the FIM™ data items to the CARE data items set and requested that CMS make such a tool available so that providers can study and compare patient functional outcomes if the FIM™ instrument is removed. A number of commenters indicated they use national and regional benchmark data to measure clinical outcomes and improvement efforts and recommend that CMS delay the removal of the FIM™ instrument until benchmark data is available for the data items located in the Quality Indicators section of the IRF–PAI.

Response: Although the data items collected in the Quality Indicators section of the IRF–PAI utilize different reporting guidelines and a different scale than the FIM™ items, we believe that the FIM™ and the Quality Indicator items are similar enough to facilitate ongoing care improvement activities. The items do not lend themselves to a specific cross-walk, but we do provide national IRF Medicare data for the Functional Outcome Measures derived from the data items located in the Quality Indicators section of the IRF PAI in Confidential QM Reports and Provider Preview Reports to IRFs in CASPER, so that the providers have the ability to compare their patients' functional outcomes with those of other IRFs. The data items located in the Quality Indicators section of the IRF–PAI have been collected since October 1, 2016, so IRFs may use this data to compare functional outcomes over time. By October 1, 2019, 2 years (24 months) of this data will be available. The methods used to calculate the functional outcome measures using this data are provided in the IRF Quality Measures User's Manual, which is available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

Comment: Several commenters stated that 1 year of data is too little to be used as the basis for a new case-mix system. Many commenters noted that providers have limited experience using the assessment items in the Quality Indicators section of the IRF–PAI and suggested that the data may not be accurate and valid and therefore the revised case-mix groups may not accurately reflect patients' nursing, therapy, cognitive and other needs. Commenters suggested that CMS should study and evaluate the accuracy of the data before basing any changes on it and noted CMS has not audited this data to determine if providers are reporting the Quality Indicator items appropriately and accurately. Many of these commenters noted that there was a 4-year baseline of data used when the FIM™ instrument was incorporated into the IRF PPS and that the same baseline is not present for the analysis used to incorporate the Quality Indicators items into the IRF PPS. Commenters suggested that we should consider delaying this proposal until multiple years of data are available for analysis. Other commenters suggested excluding 1 or more years of the initial data collected from the analysis to provide a more stable foundation to support this proposed policy change. Commenters encouraged CMS to monitor any shifts in this data and update the model to reflect these changes.

Response: We note that the data items in the Quality Indicators section of the IRF–PAI have been collected for close to 2 years, and we believe the data to be accurate and valid at this time. Additionally, we note that we do not generally audit the FIM™ data that is used for payment and believe it is the responsibility of the IRF to submit accurate and valid data that adheres to the coding guidelines detailed in the IRF–PAI training manual.

As published in the aforementioned technical report, ''Analyses to Inform the Potential Use of Standardized Patient Assessment Data Elements in the Inpatient Rehabilitation Facility Prospective Payment System,'' RTI found that the model predicting costs using CMGs derived from the items located in the Quality Indicators section of the IRF–PAI, based on data from FY 2017, had a slightly higher R-squared value than models using the current CMGs which are derived from items in the FIM™ instrument, thus indicating that the revised CMGs more accurately predict costs than the CMGs that are currently utilized.

We also note that the data items and response codes located in the Quality Indicators section of the IRF–PAI have been collected nationally for all IRFs since October 1, 2016. As such, the proposed revised CMGs reflect data collected from the entire universe of Medicare-covered inpatient rehabilitation patients, allowing for greater precision in the analysis compared to the analysis used in the construction of the original CMGs. The original CMGs that were implemented at the inception of the IRF PPS were based on data from just a sample of hospitals, which was the best available data at the time and which contributed to the use of multiple years of data in those analyses. As the most recently available year of national data portrays the most recent and complete picture of patients under the IRF PPS, we believe it was sufficient and appropriate to utilize in this analysis.

However, we appreciate the commenters' concerns and suggestions to incorporate multiple years of data into this analysis and conduct monitoring activities and we will therefore ensure that we use multiple years of data in our analysis when we incorporate the Quality Indicator data items into the IRF case-mix classification system on October 1, 2019. We will incorporate an additional year of data into the analysis used to update the revised CMG definitions to reflect the use of the different assessment items. Any changes to the revised CMG definitions will be addressed in future rulemaking prior to their implementation beginning in FY 2020.

Comment: Several commenters requested clarifications and further detail on how cognitive function would play a role in defining the CMGs. Other commenters noted that current CMGs incorporate cognition and expressed concern that cognition does not factor into the revised CMGs. Commenters suggested that cognition is an important factor in determining how costly a patient will be in the IRF and indicated that not reflecting a patient's cognitive score in the CMG definitions misses an important factor in predicting patient costs. Another commenter recommended that we investigate whether there are floor or ceiling effects with the proposed cognitive function items. Commenters also requested that we allow and recognize additional cognitive research to consider impacts on costs of care before finalizing this policy and suggested that we conduct further study into the relationship between cognitive function and resource use in the inpatient rehabilitation setting. One commenter requested that the FIM™ cognitive items be included in the CMGs to account for the cost and impact of cognitive deficits.

Response: To clarify, a cognitive score was identified in the early stages of the analysis for inclusion in the proposed revised CMG definitions as a potential split for CMGs in both RIC 16 and RIC 17, presented separately in Table 8 of the FY 2019 IRF PPS proposed rule (83 FR 20992). Ultimately, however, we decided to propose to combine the CMGs within these RICs because, in both cases, higher patient cognitive deficits would have led to lower IRF payments, which we believed would be

inappropriate. Also, we were concerned about this result because it was based on a relatively small number of patients that could be inappropriately skewing our results. As the CMGs we proposed to combine within these RICs were only differentiated by a cognitive score, our decision to consolidate the CMGs in these 2 RICs, resulted in the exclusion of a cognitive score from the definitions of the revised CMGs presented in Table 9 of the FY 2019 IRF PPS proposed rule.

We believe that the fact that patients' cognitive scores do not show up as significant in the CART analysis in any other RICs may be due in large part to the limitations with the cognitive items that were proposed to be incorporated into the revised case-mix system. The cognitive items that we used for this analysis are the best ones that we have for use at the present time, but we will certainly consider the incorporation of revised cognitive data items into the CMG definitions if and when they become available in the future. We also note that, while a cognitive score is not included in the revised CMG definitions, the motor score may capture aspects of cognitive status as the scale measures the need for assistance, including supervision. We will take the commenters' concerns into consideration in future analysis.

Comment: Several commenters noted particular concerns that they had with the proposed motor score, including concerns with the exclusion of certain items from the score's calculation, general concerns with the structure of the data items that were proposed for inclusion in the motor score, and concerns with the definition of the score response codes utilized by the data items that were proposed for inclusion in the motor score. Commenters also requested additional information on the predictive ability of the items that were included in the proposed motor score. One commenter specifically requested additional information on why item ''GG017O1—12 Steps'' was not included in the motor score.

Response: We appreciate the commenters' concerns with the proposed motor score. We note that RTI analyzed a range of available data to identify the variables that were most predictive of costs in the IRF setting. RTI's analysis shows that the correlation between the standardized item motor score and the FIM™ motor score was between 0.76 and 0.90 across all RICs. In addition, each of the proposed Quality Indicators data items that were included in the motor score were found to have statistically significant correlation with IRF costs.

RTI's analysis of the variables that were most predictive of costs found a higher use of ''activity not attempted codes'' for more challenging items such as GG017O1 and found that there was less variability overall in the score for these items across all patients on admission, which may be due to discretion in the assessment of these activities. Based on this finding, the more challenging items including stairs and car transfers were not included in the motor score.

Comment: A number of commenters disagreed with the omission of wheelchair locomotion from the motor score items that were found to best predict costs and sought additional information on how patients that are wheelchair dependent would be accounted for in the proposed CMGs and what impact this would have on wheelchair-dependent patients. One commenter noted that omitting wheelchair locomotion items from the motor score would underestimate a patient's functional ability at admission if the patient is more functional in a wheelchair than walking and recommended including ''wheels 50 feet with 2 turns'' and ''wheels 150 feet'' into the motor score. One commenter noted that omitting wheelchair items from the motor score would inappropriately produce a higher facility payment for some patients that may be more functional in a wheelchair than walking, as these patients' functional ability would be underestimated based on walking items alone.

Response: We appreciate the commenters' concerns about wheelchair-dependent patients. Patients that are considered wheelchair dependent or are otherwise unable to walk would be accounted for in the proposed motor score through the ''not attempted'' response codes captured through some of the other items, especially some of the walking items that are incorporated in the proposed motor score. We proposed to recode any ''not attempted'' response codes to 1, the most dependent status, because RTI's analysis of the items ''wheel 50 with two turns'' and ''wheel 150 feet with two turns'' indicated that the majority of these items are currently coded as 1, ''dependent'' or utilized an ''activity was not attempted code''. We do not believe that the omission of these items from the motor score would have any impact on wheelchair dependent patients. We thank the commenters for their suggestions and will consider the incorporation of the data items identified above into the motor score in the future.

Comment: Commenters requested that we explain why we proposed to use an unweighted motor score when RAND previously found that a weighted motor score using the FIM™ items improved the explanation of variance within each RIC.

Response: We proposed to use an unweighted motor score as our analysis at this time does not identify any benefit from weighting the items in the motor score. Additionally, the unweighted motor score facilitates greater understanding among the provider community, as it is less complex. We will take these comments into consideration in future analysis.

Comment: Several commenters expressed concerns with the number of claims used in the analysis and questioned if we were using statistically sound data. Some of these commenters also suggested that it would be more appropriate to utilize multiple years of data for this analysis.

Response: We believe that the data utilized in this analysis was sufficient and statistically sound. The exclusion criteria utilized in the analysis and outlined in the technical report aligned with the approach used by RAND when revisions to the current CMGs were finalized in the FY 2006 IRF PPS final rule (70 FR 47892 through 47896). We appreciate the commenter's suggestion to incorporate multiple years of data into the analysis and will use 2 years of data (FYs 2017 and 2018) to revise the CMG definitions prior to implementing the proposed changes in FY 2020.

Comment: We received several comments on the proposed score recoding methodology that was discussed in the proposed rule and in the technical report. One commenter supported the proposed score recoding methodology. Another commenter recommended that a value of 10 be recoded to a 6 for the bladder continence item, and suggested that a non-response items for the bladder item should be recoded to ''0'' instead of ''1'', noting that recoding it to ''1'' would overestimate a patient's bladder function at admission. Another commenter stated that they did not support the proposed score recoding methodology, and requested that we provide additional rationale and explanation for the methodology. Some commenters also requested that we conduct further regression analysis to test the proposed score recoding methodology. Additionally, one commenter expressed concern that the proposed score recoding methodology could have significant operational impacts on providers.

Response: We thank the commenters for these suggestions and will take them into consideration in the future. We note that the proposed methodology for recoding the ''non-response'' values aligns with the current recoding methodology, and reflects both findings from regression analysis and clinical input. We also note that we do not believe that the proposed score recoding methodology could have a significant operational impact on providers as it does not impact the data collection or submission process of IRF–PAI data.

Comment: One commenter noted that the bladder continence and bowel continence items use a scoring methodology where higher scores indicate more impairment which does not align with the scoring methodology used for the other motor items where lower scores indicate higher impairment.

Response: As outlined in the aforementioned technical report, available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Research.html,* we proposed to reverse the bladder continence and bowel continence responses for purposes of determining the motor score so that the higher response codes would reflect less impairment to be consistent with the scale used for the other proposed motor items.

Comment: One commenter disagreed with the use of the response code ''10-the activity was not attempted due to environmental limitations'' and suggested that allowing a facility to not assess a patient due to environmental limitations would reduce the quality of care for patients.

Response: We appreciate the commenter's concerns but have no reason to believe that ability to indicate why an activity was not attempted would reduce the quality of care for patients. We note that responses indicating an activity did not occur or was not attempted are currently used on the IRF–PAI for items in both the FIM™ Instrument and items located in the Quality Indicators section of the IRF PAI. The addition of this code allows for the collection of additional data indicating why an activity was not attempted.

Comment: One commenter was generally supportive of the proposed refinements to the CMGs but expressed concern about the proposal to combine CMGs within RIC 16 and RIC 17, stating that fewer CMGs within RICs may degrade the ability to quantify burden of care in sufficient detail. Another commenter did not support the proposal to combine certain CMGs and requested that we increase the sample size of the data on which the analysis was conducted.

Response: As noted in the aforementioned technical report, RTI's analysis indicated that the CMGs generated by the CART analysis for RIC 16 and RIC 17 attributed considerably higher costs for what could amount to a small level of impairment. Given the high threshold for the splits, the inconsistency with clinical expectations, and the low number of observations in these RICs, we proposed to remove these splits from the final CMG definitions. Specifically, these splits went against clinical expectations by attributing higher payments to beneficiaries with less impairment than to those with greater impairment, which we believed would be inappropriate. As noted above, we will incorporate an additional year of data into our analysis and will revisit any changes in this proposal due to the incorporation of additional data into the analysis in future notice and comment rulemaking prior to implementing the revised CMG definitions beginning in FY 2020. We appreciate the commenter's concerns and will take them into consideration for future analysis.

Comment: Several commenters expressed concern that the new CMGs may not accurately reflect the severity of illness of some of the most clinically complex IRF patients, noting that there were fewer CMGs in some RICs, thereby creating less specificity in payment determinations for some patients. Commenters also suggested that these changes will impact access to and quality of care for medically complex patients and suggested that we assess the impact of these proposed changes on patient outcomes.

Response: While the commenters are correct that, in certain RICs, there are fewer proposed CMGs than under the current IRF case-mix classification system, there are more proposed CMGs in other RICs. We disagree with the commenters' concerns that the revised CMGs may not accurately reflect resource needs for clinically complex patients. As noted in the FY 2019 IRF PPS proposed rule (83 FR 20991 through 20992) and the accompanying technical report, RTI utilized CART analysis on FY 2017 Medicare claims to determine the revised CMG definitions. As such, we believe the revised CMGs reflect the severity or distinct resource needs of the current Medicare IRF population. We believe that, if anything, the revised CMGs will have a neutral or positive impact on access to and quality of care for IRF patients by increasing the accuracy of IRF payments to providers. We appreciate the commenters' concerns and will continue to monitor the IRF data closely to ensure that IRF payments are appropriately aligned with costs of care and that Medicare patients continue to have appropriate access to IRF services.

Comment: Several commenters expressed concern that utilizing a patient's usual performance instead of lowest function will make IRF patients appear ''less severe'' and that the revised CMG definitions will result in decreased lengths of stay and decreased payments.

Response: We agree with commenters that the scales and coding instructions are slightly different between the data sets and that coding a patient's usual performance instead of the patient's lowest function may result in higher functional scores for some patients. As noted above, we believe that the scale for the data items located in the Quality Indicators section of the IRF–PAI is sensitive and may more accurately reflect the costs of caring for patients.

Regarding the commenters' assertion that this proposal will lead to shorter lengths of stay, we disagree with the commenters that the proposal will have any substantial or long-term impact on the average lengths of stay in the IRFs. First, we believe that these commenters have misunderstood the purpose of the published average lengths of stay values in the IRF PPS proposed and final rules. We note that the average length of stay values are not prescribed lengths of stay for patients admitted to IRFs and should not considered to be target lengths of stay. IRFs generally have the flexibility to treat patients for as few or as many days as they deem medically appropriate. We encourage IRFs to admit patients for the length of time that results in the best quality of care for the patient. The average length of stay values are used to determine when an IRF discharge meets the definition of a short-stay transfer.

Additionally, we believe that commenters may have been inappropriately comparing the average lengths of stay published for the proposed revised CMGs to the average lengths of stay for the current CMGs. As the definitions for the proposed revised CMGs are different than those for the current CMGs, the average length of stay values cannot be directly compared between the two. The proposed revised CMGs group patients differently, and therefore result in different average length of stays for the new patient groupings. We do not believe that the proposed revised CMGs would result in any systematic changes in average length of stay in the IRF setting since,

as noted above, the average length of stay values should not considered to be target lengths of stay.

Comment: Several commenters expressed concern that the proposed CMGs may not, in fact, be budget neutral as proposed and requested that we reevaluate our budget neutrality adjustment. One commenter noted that they anticipated lower payments due to this proposal and therefore, the proposal was not budget neutral.

Response: We disagree with the commenters' suggestions that the proposed budget neutrality adjustment was incorrect. As stated in the FY 2019 IRF PPS proposed rule, the proposed revisions to the IRF case-mix classification were to be implemented in a budget neutral manner. Thus, we proposed to apply a budget-neutrality adjustment to payments to ensure that aggregate payments to IRFs due to the implementation of these proposals would neither increase nor decrease overall. However, the proposed changes would result in some redistribution of payments among providers.

Comment: One commenter stated that we have not adequately determined the impact of these proposed changes on patient outcomes, including medically complex, low functioning patients and that these types of analyses should be an essential component of the IMPACT Act's eventual research framework before moving forward.

Response: As noted previously, the Quality Indicator data items have been extensively tested for reliability, accuracy, and sensitivity and were found to be reliable, accurate, and sensitive for use in the IRF PPS. As these items are more sensitive and more accurately reflect patients' functional status in the IRF, we believe that IRF payments based on these items will do a better job of reflecting patients' costs than payments based on the FIM™ items. Therefore, we disagree with the commenter and believe that, if anything, the proposed changes will have a neutral or positive impact on access to care and outcomes for more medically complex, low-functioning patients by paying more accurately for these patients' care in the IRF.

Comment: One commenter requested that we adjust the classifications and weighting factors to reflect the special care and complex medical needs of oncology patients in the rehabilitation setting. This commenter suggested adding additional codes to the list of impairment group codes to better define patients with impairments due to cancer under the RIC classification system and noted that without these specific classifications, cancer patients may not be admitted to IRFs due to the high costs of care for these patients.

Response: As we did not propose any changes to the RICs or comorbidity tiers, this comment is outside the scope of the proposed rule.

Comment: Several commenters requested more information about how comorbid conditions will be reported for the revised case-mix classification system and requested that we review and update the comorbid condition code listings.

Response: As we did not propose any changes to how comorbid conditions are to be reported or any changes to the list of comorbid condition codes, these comments are out of scope of the proposed rule.

Comment: Many commenters noted that they were supportive of policies in the IMPACT Act and of future Medicare payment reforms that would move Medicare in the direction of unified post-acute care payment. However, several of these commenters suggested that the proposed revisions to the CMGs are inconsistent with the intent of the IMPACT ACT. Multiple commenters noted that the IMPACT Act's core premise is to develop a complete evidentiary basis, inform broad post-acute care payment and delivery reform, and provide recommendations for replacing existing payment policies based on the incorporation of standardized patient assessment data. These commenters suggested that finalizing the proposed policies now would be premature and recommended that we refrain from finalizing the proposed changes at this time. Commenters stated that because the proposal would be implemented in a budget neutral manner, there is no financial rationale or budgetary impact that supports moving faster than the IMPACT Act mandates. Many commenters also stated that the functional assessment data items located in the Quality Indicators section of the IRF–PAI were designed for quality purposes and should not be used to develop a new payment system.

Response: We disagree with the commenters' suggestion that these proposals are inconsistent with the intent of the IMPACT Act and would like to note that these policies were proposed under the authority of section 1886(j)(2)(D), 1886(j)(2)(B), and 1886(j)(2)(C) of the Act. We believe that the proposed policies align with the overall goals of the IMPACT Act and are a necessary step toward a potential unified PAC PPS in the future. We would like to note that the data items that we proposed to incorporate into the IRF case-mix system were tested for use in all PAC settings under the PAC PRD, and were found to be appropriate to use for payment purposes.

We also disagree with the commenters' suggestions that the data items located in the Quality Indicators section of the IRF–PAI were developed for quality purposes and are therefore not suitable for use in payment because they were developed for quality reporting purposes. Many of these data items were derived from the original CARE Tool data item set. The CARE Tool's development was based on certain guiding principles, including the ability to measure the needs and clinical characteristics of patients that were predictive of resource intensity and that could be used to inform payment policy. While we agree with commenters that the IMPACT Act imposed new data reporting requirements for the purposes of the quality reporting program, it does not preclude the use of these items for payment purposes. As noted above, these items were developed and tested for payment purposes and were found to be appropriate for incorporation in the IRF case-mix system. We would also like to reiterate that we disagree with the commenter's assessment of the proposed revisions to the CMGs as the development of a new payment system. We believe these proposals would generate minor changes to the current IRF case-mix classification system.

Comment: Several commenters stated that they believe that the proposed incorporation of data items located in the Quality Indicators section of the IRF–PAI into the IRF case-mix system conflicts with the timelines specified in the IMPACT Act. Commenters noted that CMS and MEDPAC are directed to submit a report to Congress by 2021 on the findings of the IMPACT Act and to provide recommendations for replacing existing PAC payment systems. Several commenters stated that, if we were to move forward with finalizing the proposed changes, it would be in direct conflict with the timelines in the IMPACT Act.

Response: We believe commenters may have misinterpreted the reporting requirements and associated deadlines stipulated in the IMPACT Act, as these requirements are not applicable to the proposed removal of the FIM™ instrument and associated Function Modifiers from the IRF–PAI or the proposed incorporation of data items located in the Quality Indicators section of the IRF–PAI into the IRF case-mix system at this time. While these proposals are generally consistent with the broad goal of standardizing patient assessment data collection across PAC settings and aligning the IRF PPS with

other PAC payment systems, they do not implement or conflict with any specific provision of the IMPACT Act.

Comment: Several commenters noted that they did not believe that we have performed the thorough data analyses, testing, and engagement with the provider community that are necessary prior to making significant changes to the IRF–PAI and the IRF PPS. Many commenters did not support the proposed revisions to the IRF PPS and noted they would be willing to work with us to develop appropriate changes to payment policies in the future. One commenter specifically expressed concern that CMS did not seek stakeholder input through an advanced notice of public rulemaking, similar to the process used in proposing the new SNF case-mix classification system. Several commenters requested that we solicit additional feedback from the stakeholder community, including convening a technical advisory panel, to assist us in developing the proposed changes to the IRF case-mix classification system.

Response: We are committed to engaging with the provider community and providing information that will support a clear understanding of our proposals and the potential impacts on providers. We would like to note that RTI hosted a TEP in 2014 to discuss their initial research and findings on the potential incorporation of the CARE data items into the IRF case-mix system. Through the TEP, we received helpful feedback on the initial research that was taken into consideration in the development of these proposals. We appreciate the offers from stakeholders to assist in the development of future revisions to payment policies and we recognize the value from these partnerships. We appreciate the request for increased engagement and will continue to engage stakeholders in future development of payment policies. However, we do not believe an advanced notice of proposed rulemaking would have been necessary or that a technical advisory panel is needed at this time as the proposed changes to the case-mix system are minor.

Comment: Several commenters expressed concern that providers needed more time or information to model the impact of a new case-mix classification system. Multiple commenters requested that we provide additional information, including the algorithms and CART trees used in the analysis to better understand how we arrived at the proposed revisions to the CMG definitions. One commenter requested that we make available all standardized data being collected from providers across all settings of care. Another commenter requested that we make all data utilized in the analysis, including the Medicare Inpatient National Claims History, IRF–PAI data, and IRF cost reports available in full to enable IRFs to replicate our analyses. Some commenters indicated that, without additional data, they would not be able to provide meaningful input on the proposed significant changes to the IRF case-mix classification system.

Response: We believe that we released sufficient information in the proposed rule and the accompanying technical report to enable stakeholders to model impacts and submit meaningful comments. The technical report, entitled ''Analyses to Inform the Potential Use of Standardized Patient Assessment Data Elements in the Inpatient Rehabilitation Facility Prospective Payment System,'' was released contemporaneously with the proposed rule and describes, in detail, the data and analysis used to construct the revised CMGs. This technical report included the methodology used to calculate the revised functional scores and the CMG relative weights for the revised CMG definitions, which would allow providers to model impacts. Additionally, the FY 2019 IRF PPS proposed rule included an impact analysis for IRFs at a group level based on IRF provider characteristics.

Regarding the request for additional data, we note that the release of all standardized data being collected from providers in other settings of care is outside the scope of the proposed rule. Additionally, the FY 2017 IRF claims and IRF–PAI data utilized in this analysis contain information that can be used to identify individual Medicare beneficiaries and therefore cannot be made publicly available.

Final Decision: After careful consideration of the comments received, we are finalizing our proposal, as discussed in section VIII.A of this final rule, to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning in FY 2020 that is, for all discharges occurring on or after October 1, 2019.

We are also finalizing our proposal to incorporate certain data items from the Quality Indicators section of the IRF–PAI into the IRF case-mix classification system for payment purposes beginning in FY 2020. Specifically, we are finalizing our proposal to use the Quality Indicator data items identified in section VIII.B.2 of this final rule, to construct the functional status scores for use in the IRF case-mix classification system and to derive the scores for each respective group of the functional status items by calculating the sum of the items that constitute each functional status component.

Additionally, we are finalizing our proposal to update the score reassignment methodology, as discussed in section VIII.B.3 of this final rule, beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019.

We are also finalizing our proposal, as discussed in section VIII.B.4 of this final rule, to utilize CMGs based on the data items from the Quality Indicators section of the IRF–PAI to classify IRF patients for purposes of establishing payment under the IRF PPS beginning with FY 2020. However, based on public comments, we are not finalizing the revised CMG definitions as proposed and as identified in table 9 of this final rule. Instead, we have noted the commenters' concerns regarding the use of one year of data and will incorporate two full years of data (FY 2017 and FY 2018) into our analyses used to revise the CMG definitions that will be implemented beginning in FY 2020. Any changes to the proposed CMG definitions resulting from the incorporation of an additional year of data (FY 2018) into the analysis will be addressed in future rulemaking prior to their implementation beginning in FY 2020. Additionally, we will also update the relative weights and average length of stay values associated with the revised CMG definitions in future rulemaking. We also plan to provide training and educational resources on the data items in the Quality Indicators section of the IRF–PAI before this finalized policy takes effect on October 1, 2019.

IX. Revisions to Certain IRF Coverage Requirements Beginning With FY 2019

We are committed to transforming the health care delivery system, and the Medicare program, by putting an additional focus on patient-centered care and working with providers and physicians to improve patient outcomes. As an agency, we recognize it is imperative that we develop and implement policies that allow providers and physicians to focus the majority of their time treating patients rather than completing paperwork. Moreover, we believe it is essential for us to reexamine current regulations and administrative requirements, to assure that we are not placing unnecessary burden on providers.

We believe the agency initiative of treating patients over paperwork will improve patient outcomes, decrease provider costs, and ensure that patients

and providers are making the best health care choices possible. In the FY 2018 IRF PPS proposed rule (82 FR 20743), we included a request for information (RFI) to solicit comments from stakeholders requesting information on CMS flexibilities and efficiencies. The purpose of the RFI was to receive feedback regarding ways in which we could reduce burden for hospitals and physicians, improve quality of care, decrease costs and ensure that patients receive the best care. We received comments from IRF industry associations, state and national hospital associations, industry groups representing hospitals, and individual IRF providers in response to the solicitation. We are appreciative of the feedback. As discussed in more detail below, we in some cases used the commenters' specific suggestions to propose changes to regulatory requirements to alleviate provider burden. In other cases, however, we proposed additional changes to the regulatory requirements that we believed would be responsive to stakeholder feedback and helpful to providers in reducing administrative burden.

In the FY 2010 IRF PPS final rule (74 FR 39788 through 39798), we updated the IRF coverage criteria requirements to reflect changes that had occurred in medical practice since the IRF PPS was first implemented in 2002. IRF care is only considered by Medicare to be reasonable and necessary under section 1862(a)(1) of the Act if the patient meets all of the IRF coverage requirements outlined in § 412.622(a)(3), (4), and (5). Failure to meet the IRF coverage criteria in a particular case will result in denial of the IRF claim. The IRF coverage requirements have not been updated since they became effective on January 1, 2010. To reduce unnecessary burden on IRF providers and physicians, we proposed to revise the current IRF coverage criteria as suggested by some of the comments received in response to the RFI. Specifically, we focused on reducing medical record documentation requirements that we believe have become overly burdensome to IRF providers over time.

A. Changes to the Physician Supervision Requirement Beginning With FY 2019

In response to the RFI, several commenters suggested that we consider decreasing the number of required weekly face-to-face visits that the rehabilitation physician must complete and document in the IRF medical record. Commenters suggested that the decrease in visits would not only assist with reducing the medical record documentation burden on rehabilitation physicians, but it would also afford the rehabilitation physician more time to focus on higher-acuity, more complex patients resulting in improved outcomes and lower readmission rates. Additionally, we received comments suggesting that we consider either eliminating the requirement to document post-admission physician evaluation in the IRF medical record altogether in an effort to reduce paperwork and duplicative requirements or that we allow the post-admission physician evaluation to count as one of the required face-to-face visits completed and documented by the rehabilitation physician in the IRF medical record. We agreed with the commenters and proposed a combination of these two suggested ideas in order to reduce unnecessary burden on rehabilitation physicians.

Under § 412.622(a)(3)(iv), for an IRF claim to be considered reasonable and necessary under section 1862(a)(1) of the Act, there must be a reasonable expectation at the time of the patient's admission to the IRF that the patient requires physician supervision by a rehabilitation physician, defined as a licensed physician with specialized training and experience in inpatient rehabilitation. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. Under § 412.622(a)(4)(ii), to document that each patient for whom the IRF seeks payment is reasonably expected to meet all of the requirements in § 412.622(a)(3) at the time of admission, the patient's medical record at the IRF must contain a post-admission physician evaluation that meets all of the requirements specified in the regulation. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, sections 110.1.2 and 110.2.4 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

While the purpose of the physician supervision requirement is to ensure that the patient's medical and functional statuses are being continuously monitored as the patient's overall plan of care is being carried out, the purpose of the post-admission physician evaluation is to document (in the IRF medical record) the patient's status on admission, identify any relevant changes that may have occurred since the preadmission screening, and provide the rehabilitation physician with the necessary information to begin development of the patient's overall plan of care. When the coverage criteria were initially implemented, we believed that the post-admission physician evaluation should not be used as a way to fulfill one of the face-to-face visits required under § 412.622(a)(3)(iv) because we considered them to be different types of assessments. We also believed it was in the patient's best interest to be seen by a rehabilitation physician at least four times in the first week of the IRF admission when the patient is in the most critical phase of their recovery process.

While we continue to believe that the post-admission physician evaluation and the face-to-face physician visits are two different types of assessments, after reevaluating these coverage criteria, we believe that the rehabilitation physician should have the flexibility to assess the patient and conduct the post-admission physician evaluation during one of the three face-to-face physician visits required in the first week of the IRF admission. Additionally, based on the comments that we received in response to the RFI, we believe that it should be the responsibility of the rehabilitation physician to use his or her best clinical judgment to determine whether the patient needs to be seen more than three times in the first week of the IRF admission. Therefore, allowing these two requirements to be met (and documented in the IRF medical record) concurrently would reduce redundancy and regulatory burden while still ensuring adequate care to the patient.

Therefore, we proposed to modify § 412.622(a)(3)(iv) to provide that the post-admission physician evaluation required under § 412.622(a)(4)(ii) may count as one of the face-to-face physician visits required under § 412.622(a)(3)(iv) beginning with FY 2019, that is, for all IRF discharges beginning on or after October 1, 2018. To clarify, we did not propose to modify § 412.622(a)(4)(ii), including the 24-hour timeframe within which the post-admission physician evaluation requirement must be completed.

We received 33 comments on the proposal to modify § 412.622(a)(3)(iv) to provide that the post-admission physician evaluation required under § 412.622(a)(4)(ii) (and documented in the IRF medical record) may count as one of the face-to-face physician visits required under § 412.622(a)(3)(iv) beginning with FY 2019, that is, for all

IRF discharges beginning on or after October 1, 2018, which are summarized below.

Comment: The majority of commenters supported our proposal. Commenters agreed that the proposed change would provide additional flexibility to rehabilitation physicians and reduce redundancy of documentation requirements and regulatory burden, while still ensuring adequate care to patients. Additionally, some commenters suggested that they believed this proposed change would allow rehabilitation physicians the flexibility to use their clinical judgment to determine the need and frequency of physician visits based on each patient's needs during the first week of admission.

Response: We appreciate the commenters' support for the proposal. We agree that finalizing this proposal will ease administrative and documentation burden for rehabilitation physicians.

Comment: One commenter supported the proposal, but stated that they did not expect the proposal to produce the cost savings in Medicare expenditures as estimated by CMS since many IRF physicians visit patients far more frequently than the minimum three times per week.

Response: We appreciate the commenter's support for the proposal. Based on this comment, we decided to take a more conservative approach when estimating the burden reduction for IRFs. Therefore, we are estimating that the rehabilitation physicians in only about half of the IRFs would adopt this new policy change. While some IRFs may choose not to reduce the number of physician visits, removing the need to specifically document a visit as meeting the requirements at § 412.622(a)(3) increases the flexibility that IRFs have to make these types of decisions in the best interest of their patients and will free up valuable physician time that can be spent on patient care.

Comment: One commenter suggested that CMS should provide greater flexibility for IRFs to complete the post-admission physician evaluation by allowing more lenient timeframes in which the evaluation could be completed or should consider removing the requirement completely. The commenter stated that the post-admission physician evaluation is redundant with other documentation requirements such as the pre-admission screening or the overall plan of care.

Response: We appreciate the commenters' suggestions, but we respectfully disagree with both suggestions, as we continue to believe that the post-admission physician evaluation, as well as the timeframe in which it is currently required to be completed, are integral parts of the patient's care. The purpose of the post-admission physician evaluation is to document in the IRF medical record the patient's status on admission, identify any relevant changes that may have occurred since the preadmission screening, and provide the rehabilitation physician with the necessary information to begin development of the patients overall plan of care. We believe that removing this requirement completely or changing the 24-hour timeframe within which the post-admission physician evaluation must be completed, could jeopardize initial contact with the patient and result in a decrease in quality of care. We believe that evaluating the patient after admission to the IRF in order to confirm that their medical and functional status has not decreased since the pre-admission screening is necessary to ensure the patient is still an appropriate candidate for IRF care.

Comment: Several commenters stated that CMS should more clearly articulate that, although we are proposing to combine the two requirements, three face-to-face rehabilitation physician visits during the first week of a patient's admission serves as a minimum, and patients are entitled to additional physician visits as medically necessary based on their rehabilitation physician's clinical judgment. Another commenter expressed concern that loosening IRF coverage requirements suggests that such high levels of care may not be required by all patients who are cared for in an IRF or that the level of resources needed to provide IRF care has decreased.

Response: To clarify, we are not limiting rehabilitation physicians from seeing patients more than three times in the first week of a patient's admission, nor are we limiting rehabilitation physicians from using their best clinical judgment regarding the frequency in which they believe patients should to be seen. Though we are finalizing our proposal to combine these two requirements, we continue to expect that each rehabilitation physician will exercise his or her best clinical judgment to determine the need and frequency of rehabilitation physician visits for a given patient.

Additionally, we respectfully disagree with the commenter that allowing the post-admission physician evaluation to count as one of the required face-to-face physician visits in any way implies a reduction in the intensity of care required by IRF patients. By allowing the two requirements to be met concurrently, we are decreasing documentation burden on rehabilitation physicians, which will free up valuable physician time that can be spent on patient care and oversight.

Comment: One commenter stated that after both of the requirements were initially implemented, it was clarified through sub-regulatory guidance that the post-admission physician evaluation and the required face-to-face rehabilitation physician visits could not be combined. The commenter suggested that while they support the proposal to allow the post-admission physician evaluation to count as one of the required face-to-face physician visits, it could also be clarified through sub-regulatory guidance and proposing it through rulemaking was not necessary.

Response: We appreciate the commenter's suggestion. However, since both the post-admission physician evaluation requirement and the required face-to-face physician visits were implemented through the rulemaking process, we believe it is appropriate to revise our IRF coverage policies through notice and comment rulemaking. We also want to avoid creating any confusion for stakeholders.

Final Decision: After careful consideration of the comments we received, we are finalizing our proposal to modify § 412.622(a)(3)(iv) to provide that the post-admission physician evaluation required under § 412.622(a)(4)(ii) may count as one of the face-to-face physician visits required under § 412.622(a)(3)(iv) beginning with FY 2019, that is, for all IRF discharges beginning on or after October 1, 2018.

B. Changes to the Interdisciplinary Team Meeting Requirement Beginning With FY 2019

Under § 412.622(a)(5), for an IRF claim to be considered reasonable and necessary under section 1862(a)(1) of the Act, the patient must require an interdisciplinary team approach to care, as evidenced by documentation in the patient's medical record of weekly interdisciplinary team meetings that meet all of the requirements specified in the regulation. Among those requirements are that the team meetings must be led by a rehabilitation physician and that the results and findings of the team meetings, and the concurrence by the rehabilitation physician with those results and findings, are retained in the patient's medical record. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, section 110.2.5 (Pub. 100–02), which can be

downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

We understand that it may occasionally be difficult for the rehabilitation physician to be physically present in the team meetings and for that reason we have always instructed providers that the rehabilitation physician may participate in the interdisciplinary team meetings by telephone as long as it is clearly demonstrated in the documentation of the IRF medical record that the meeting was led by the rehabilitation physician. However, with the advancements in technology since the inception of the IRF coverage criteria in 2010, we believe it is appropriate to allow rehabilitation physicians to lead the meeting remotely via another mode of communication, such as video or telephone conferencing. Therefore, we proposed to amend § 412.622(a)(5)(A) to expressly provide that the rehabilitation physician may lead the interdisciplinary meeting remotely without any additional documentation requirements. We believe that other communication modes such as video and telephone conferencing are acceptable ways of leading the interdisciplinary team meeting. We believe this change will allow time management flexibility and convenience for all rehabilitation physicians, especially those located in rural areas who may need to travel greater distances between facilities. We proposed for this change to apply only to the rehabilitation physician and not the other required interdisciplinary team meeting attendees to give IRFs time to adapt to this change. However, we stated that we may consider expanding this policy to include other interdisciplinary team meeting attendees in future rulemaking. Please note that the requirement that the rehabilitation physician must lead the interdisciplinary team meeting will remain the same.

We received 37 comments on the proposal to amend § 412.622(a)(5)(A) to expressly provide that the rehabilitation physician may lead the interdisciplinary team meeting remotely without any additional documentation requirements, which are summarized below.

Comment: The majority of commenters agreed with our proposal, stating that it would decrease burdensome documentation requirements and increase time management flexibility for rehabilitation physicians.

Response: We appreciate the support that we received from commenters regarding this proposed change. We agree that this proposed policy will allow rehabilitation physicians the flexibility to use their clinical judgment regarding when it is necessary to conduct the team meeting in-person versus when it can be conducted remotely without hindering patient coordination and care. Additionally, we believe that allowing the rehabilitation physician the flexibility to conduct the interdisciplinary team meeting remotely without additional documentation requirements will free up valuable time for the rehabilitation physician to focus on patient care.

Comment: Some commenters stated that while they agree with allowing the rehabilitation physician to lead the interdisciplinary team meeting remotely without any additional documentation requirements, it should only be allowed on a limited basis as in-person meetings enhance the flow of communication and result in a more clearly articulated plan of care. The commenters expressed that they believe in-person team meetings are more effective and create a positive team involvement.

Response: We believe that each IRF should maintain the flexibility to determine how to appropriately organize their medical staff, as well as how to best implement a protocol for where the rehabilitation physician leads the interdisciplinary team meeting. We are finalizing this policy as proposed. However, we would like to clarify that this policy in no way precludes IRFs from exercising their own discretion in determining how best to organize their medical staff or implementing a protocol for determining when the rehabilitation physician should lead the interdisciplinary team meeting in person or remotely. If IRFs would like to maintain a protocol that their rehabilitation physician must continue to lead the interdisciplinary team meeting in-person, then we believe they should have the flexibility to do so. Likewise, if IRFs believe that they would like to implement a more flexible protocol for their rehabilitation physician, we believe they should have the ability to do so. Our purpose in revising this policy is to give rehabilitation physicians increased flexibility for time management, as well as to reduce documentation requirements that we believe are burdensome and provide limited benefit to patient care and coordination.

Comment: A few commenters were not supportive of this proposal, suggesting that in-person communication is the most effective way for the rehabilitation physician to lead discussions regarding patient care and coordination and that using other forms of communication such as videoconferencing or telephone conferencing could possibly hinder the flow of communication where critical discussions are needed. Commenters also suggested that team members could become more easily distracted during meetings if the rehabilitation physician was conducting the meeting remotely. In addition, commenters suggested that although meetings conducted with the assistance of technology have increased throughout the medical arena, technology is not always cooperative or reliable and could result in ineffective meetings with valuable time lost.

Response: We appreciate the commenters' feedback and understand the concerns that commenters have expressed. To clarify, we have always, and continue to believe, that the role of the rehabilitation physician during the interdisciplinary team meeting is vital to patient coordination and care. We believe that it is of utmost importance for the rehabilitation physician to lead the interdisciplinary team meeting in order to make critical decisions regarding patient care. However, we do not feel that documentation of the rehabilitation physician's physical location during the team meeting in the IRF medical record is needed to ensure that the rehabilitation physician is making the decisions. We also do not believe that removal of this documentation requirement in any way hinders patient coordination and care. For these reasons, we have decided to finalize this policy as proposed. As noted above, however, this policy in no way precludes IRFs from exercising their own discretion in determining how best to organize their medical staff or implementing a protocol for determining when the rehabilitation physician should lead the interdisciplinary team meeting in person or remotely. We support IRFs that want to continue requiring the interdisciplinary team meetings to be led by the rehabilitation physician in-person. Likewise, if IRFs would like to allow the rehabilitation physicians more flexibility to lead the team meetings remotely (for example, during extenuating situations only), we support that decision as well.

Comment: A few commenters suggested that this policy should only apply to IRFs in rural areas or underserved areas, or to small IRFs with few staff. These commenters indicated that physician access is frequently limited in rural and underserved areas and that this proposal would increase access to care for patients in these areas. The commenters suggested that for all other IRFs it should be mandatory that

the rehabilitation physician leads the interdisciplinary team meeting in-person.

Response: We appreciate the commenters' suggestion, but we believe that implementing this policy change for some IRFs and not others would be unduly complicated and confusing to administer, and would likely increase administrative burden for providers rather than lessen it.

Comment: Some commenters that agreed with our proposal also suggested that we extend the policy to allow all members of the interdisciplinary team meeting to participate in the meeting remotely if necessary.

Response: We appreciate the commenters' suggestion to allow additional interdisciplinary team meeting members to participate in the meetings remotely, if necessary. After careful consideration of the comments, at this time, we are only applying this policy to rehabilitation physicians. We will monitor the implementation of this new policy and possibly consider applying this policy to other interdisciplinary team meeting members in the future, through notice and comment rulemaking, as appropriate.

Final Decision: After careful consideration of the comments we received, we are finalizing our proposal to amend § 412.622(a)(5)(A) to expressly provide that the rehabilitation physician may lead the interdisciplinary meeting remotely without any additional documentation requirements beginning with FY 2019, that is, for all IRF discharges beginning on or after October 1, 2018. We also note that this policy in no way precludes IRFs from exercising their own discretion in determining how best to organize their medical staff or implementing a protocol for determining when the rehabilitation physician should lead the interdisciplinary team meeting in person or remotely.

C. Changes to the Admission Order Documentation Requirement Beginning With FY 2019

In response to the RFI, several commenters suggest that in general, we should consider eliminating duplicative requirements. Commenters stated that duplicative requirements placed unnecessary administrative burden on facilities trying to make sure they comply with each nuance of each requirement. We agreed with the commenters, and for that reason we proposed to remove § 412.606(a) as we believe that IRFs are already required to fulfill this requirement under §§ 482.12(c), 482.24(c), and 412.3.

Under § 412.606(a), at the time that each Medicare Part A FFS patient is admitted, the IRF must have physician orders for the patient's care during the time the patient is hospitalized. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, section 110.1.4 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

Additionally, under § 412.3(a) of the hospital payment requirements, for the purposes of payment under Medicare Part A, an individual is considered an inpatient of a hospital, including a critical access hospital, if formally admitted as an inpatient under an order for inpatient admission by a physician or other qualified practitioner in accordance with §§ 412.3, 482.24(c), 482.12(c), and 485.638(a)(4)(iii) for a critical access hospital.

In an effort to reduce duplicative requirements, we believe that if we remove the admission order documentation requirement at § 412.606(a), this requirement would continue to be appropriately addressed through the enforcement of § 482.12(c) and § 482.24(c) of the hospital conditions of participation (CoPs), as well as the hospital admission order payment requirements at § 412.3. IRFs are responsible for meeting all of the inpatient hospital CoPs and the hospital admission order payment requirements at § 412.3, and, therefore, we believe that by removing the admission order documentation requirement at § 412.606(a), we would be reducing both regulatory redundancy as well as administrative burden.

Therefore, we proposed to amend § 412.606(a) to remove the admission order documentation requirement beginning with FY 2019, that is, for all IRF discharges beginning on or after October 1, 2018. IRFs would continue to meet the requirements at §§ 482.12(c), 482.24(c), and 412.3.

We received 21 comments on the proposal to amend § 412.606(a) to remove the admission order documentation requirement, which are summarized below.

Comment: All of the comments that we received regarding the proposal to amend § 412.606(a) to remove the admission order documentation requirement were supportive. The commenters agreed with our assessment that the regulations currently have duplicative admission order requirements for IRFs. Commenters agreed that, if we remove the admission order documentation requirement at § 412.606(a), the admission order requirement would continue to be addressed through the enforcement of the hospital conditions of participation.

Response: We appreciate the support from the commenters regarding the removal of the admission order documentation requirement at § 412.606(a). We believe that removal of this duplicative requirement will reduce unnecessary administrative burden on IRFs.

Comment: One commenter suggested that CMS remove the reference to § 412.3 as a requirement that IRFs will continue to be required to meet for the purposes of admission orders, as we proposed to revise that requirement in the FY 2019 IPPS/LTCH proposed rule to no longer require a written inpatient admission order to be present in the medical record as a specific condition of Medicare Part A payment.

Response: We respectfully disagree with the commenters' suggestion to remove the reference at § 412.3 as a requirement that IRFs will need to meet. While we proposed revisions to the language at § 412.3 in the FY 2019 IPPS/LTCH proposed rule (83 FR 20447 through 20448), we did not propose to remove the admission order requirement completely. Therefore, IRFs must still meet the requirements at § 412.3 as well as §§ 482.12(c) and 482.24(c). We are finalizing our proposal to remove the admission order requirement at § 412.606(a) because it is duplicative.

Final Decision: After careful consideration of the comments we received, we are finalizing our proposal to amend § 412.606(a) to remove the admission order documentation requirement beginning with FY 2019, that is, for all IRF discharges beginning on or after October 1, 2018. IRFs will continue to meet the requirements at §§ 482.12(c), 482.24(c), and 412.3.

D. Summary of Comments Regarding Additional Changes to the Physician Supervision Requirement

As discussed in section VIII.A of the proposed rule, under § 412.622(a)(3)(iv), for an IRF claim to be considered reasonable and necessary under section 1862(a)(1) of the Act, there must be a reasonable expectation at the time of the patient's admission to the IRF that the patient requires physician supervision by a rehabilitation physician, defined as a licensed physician with specialized training and experience in inpatient rehabilitation. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the

patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, section 110.2.4 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

When the IRF coverage criteria were initially implemented in 2010, we believed that the rehabilitation physician visits should be completed face-to-face to ensure that the patient receives the most comprehensive in-person care by a rehabilitation physician throughout the IRF stay.

As part of our efforts to assist in reducing unnecessary regulatory burden on IRFs, this is an issue we would like to further explore. We solicited public comments in the FY 2019 IRF PPS proposed rule (83 FR 20997 through 20998) on whether the rehabilitation physician should have the flexibility to determine that some of the IRF visits can be appropriately conducted remotely via another mode of communication, such as video or telephone conferencing. Given the level of complexity of IRF patients, we had some concerns about whether this approach would have an impact on the quality of care provided to IRF patients. To maintain the hospital level of care that IRF patients require, we would continue to expect that the majority of IRF physician visits would continue to be performed face-to-face. However, we were interested in feedback from stakeholders on whether we should allow a limited number of visits to be conducted remotely. In order to better assist us in balancing the needs of the patient, as well as retaining the hospital level quality of care provided in an IRF with the goal of reducing the regulatory burden on rehabilitation physicians, we sought feedback from stakeholders about potentially amending the face-to-face visit requirement for rehabilitation physicians. Specifically, we sought feedback regarding the following:

- Do stakeholders believe that the rehabilitation physician would be able to fully assess both the medical and functional needs and progress of the patient remotely?
- Would this assist facilities in rural areas where it may be difficult to employ an abundance of physicians?
- Do stakeholders believe that assessing the patient remotely would affect the quality or intensity of the physician visit in any way?
- How many and what types of visits do stakeholders believe should be able to be performed remotely?
- From an operational standpoint, how would the remote visit work?
- What type of clinician would need to be present in the room with the patient while the rehabilitation physician was in a remote location?

Thus, to assist us in generating ideas and information for analyzing potential refinements in this area, we specifically solicited public comments from stakeholders on whether the rehabilitation physician should have the flexibility to determine that some of the IRF visits can be appropriately conducted remotely via another mode of communication, such as video or telephone conferencing, while maintaining a hospital level high quality of care for IRF patients.

We received 22 comments in response to our solicitation. We appreciate the commenters' responses to this solicitation and will take them into consideration for possible future policy development.

E. Summary of Comments Regarding Changes to the Use of Non-Physician Practitioners in Meeting the Requirements Under § 412.622(a)(3), (4), and (5)

Several of the requirements under § 412.622(a)(3), (4), and (5) require documentation that a rehabilitation physician, defined as a licensed physician with specialized training and experience in inpatient rehabilitation, visited each patient admitted to an IRF and performed an assessment of the patient. For example, under § 412.622(a)(3)(iv), for an IRF claim to be considered reasonable and necessary under section 1862(a)(1) of the Act, there must be a reasonable expectation at the time of the patient's admission to the IRF that the patient requires physician supervision by a rehabilitation physician. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. For more information, please refer to the Medicare Benefit Policy Manual, chapter 1, section 110.2.4 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

In addition, under § 412.622(a)(4)(ii), to document that each patient for whom the IRF seeks payment is reasonably expected to meet all of the requirements in § 412.622(a)(3) at the time of admission, the patient's medical record at the IRF must contain a post-admission physician evaluation that must, among other requirements, be completed by a rehabilitation physician within 24 hours of the patient's admission to the IRF. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, section 110.1.2 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

In the feedback that we received in response to the RFI, it was suggested that we consider amending the requirements in § 412.622(a)(3)(iv) and § 412.622(a)(4)(ii) to enable IRFs to expand their use of non-physician practitioners (physician assistants and nurse practitioners) to fulfill some of the requirements that rehabilitation physicians are currently required to complete. The commenters suggested that expanding the use of non-physician practitioners in meeting some of the IRF requirements would ease the documentation burden on rehabilitation physicians.

In exploring this issue, we had questions about whether non-physician practitioners have the specialized training in inpatient rehabilitation that would enable them to adequately assess the interaction between patients' medical and functional care needs in an IRF. Another concern that had been raised regarding this issue, was whether IRF patients will continue to receive the hospital level and quality of care that is necessary to treat such complex conditions.

To better assist us in balancing the needs of the patient with the desire to reduce the regulatory burden on rehabilitation physicians, in the FY 2019 IRF PPS proposed rule (83 FR 20998 through 20999), we specifically solicited public comments from stakeholders about potentially allowing IRFs to expand their use of non-physician practitioners to fulfill some of the requirements that rehabilitation physicians are currently required to complete. Specifically, we sought feedback regarding the following:

- Do non-physician practitioners have the specialized training in rehabilitation that they need to have to

assess IRF patients both medically and functionally?

• How would the non-physician practitioner's credentials be documented and monitored to ensure that IRF patients are receiving high quality care?

• Are non-physician practitioners required to do rotations in inpatient rehabilitation facilities as part of their training, or could this be added to their training programs in the future?

• Do stakeholders believe that utilizing non-physician practitioners to fulfill some of the requirements that are currently required to be completed by a rehabilitation physician would have an impact of the quality of care for IRF patients?

Thus, to assist us in generating ideas and information for analyzing potential refinements in this area, we specifically solicited public comments from stakeholders on the ways in which the role of non-physician practitioners could be expanded in the IRF setting while maintaining a hospital level high quality of care for IRF patients.

We received 39 comments in response to our solicitation. We appreciate the commenters' responses to this solicitation and will take them into consideration for future possible policy development.

X. Updates to the IRF Quality Reporting Program (QRP)

A. Background

The Inpatient Rehabilitation Facility Quality Reporting Program (IRF QRP) is authorized by section 1886(j)(7) of the Act, and it applies to freestanding IRFs, as well as inpatient rehabilitation units of hospitals or critical access hospitals (CAHs) paid by Medicare under the IRF PPS. Under the IRF QRP, the Secretary reduces the annual increase factor for discharges occurring during such fiscal year by 2 percentage points for any IRF that does not submit data in accordance with the requirements established by the Secretary. For more information on the background and statutory authority for the IRF QRP, we refer readers to the FY 2012 IRF PPS final rule (76 FR 47873 through 47874), the CY 2013 Hospital Outpatient Prospective Payment System/Ambulatory Surgical Center (OPPS/ASC) Payment Systems and Quality Reporting Programs final rule (77 FR 68500 through 68503), the FY 2014 IRF PPS final rule (78 FR 47902), the FY 2015 IRF PPS final rule (79 FR 45908), the FY 2016 IRF PPS final rule (80 FR 47080 through 47083), the FY 2017 IRF PPS final rule (81 FR 52080 through 52081), and the FY 2018 IRF PPS final rule (82 FR 36269 through 36270).

Although we have historically used the preamble to the IRF PPS proposed and final rules each year to remind stakeholders of all previously finalized program requirements, we have concluded that repeating the same discussion each year is not necessary for every requirement, especially if we have codified it in our regulations. Accordingly, the following discussion is limited as much as possible to a discussion of our proposals, responses to comments on those proposals, and policies we are finalizing for future years of the IRF QRP after consideration of the comments, and represents the approach we intend to use in our rulemakings for this program going forward.

B. General Considerations Used for the Selection of Measures for the IRF QRP

1. Background

For a detailed discussion of the considerations we historically used for the selection of IRF QRP quality, resource use, and other measures, we refer readers to the FY 2016 IRF PPS final rule (80 FR 47083 through 47084).

Comment: Several commenters offered support, suggestions for improvement, and concerns about the implementation of the IMPACT Act. Some commenters requested greater stakeholder engagement, including IRF involvement in the testing of Standardized Patient Assessment Data Elements (SPADE), and that CMS provide publicly available cross-setting data on SPADEs. One commenter recommended that quality measurement (QM) and SPADE development be suspended until QMs are standardized and interoperable for all post-acute care (PAC) sites, measures are NQF endorsed for their setting, SPADE provides evidence that it predicts costs and/or improves quality, and additional training materials and specifications are provided.

Response: We appreciate the comments, and we will take them into account as we engage in future quality measure and SPADE development for the IRF QRP. For a discussion of the IMPACT Act, the selection of IRF QRP measures, and SPADEs, we refer readers to the FY 2016 IRF PPS final rule (80 FR 47083 through 47084) and the FY 2018 IRF PPS final rule (82 FR 36270 through 36276) respectively.

2. Accounting for Social Risk Factors in the IRF QRP

In the FY 2018 IRF PPS final rule (82 FR 36273 through 36274), we discussed the importance of improving beneficiary outcomes including reducing health disparities. We also discussed our commitment to ensuring that medically complex patients, as well as those with social risk factors, receive excellent care. We discussed how studies show that social risk factors, such as being near or below the poverty level as determined by HHS, belonging to a racial or ethnic minority group, or living with a disability, can be associated with poor health outcomes and how some of this disparity is related to the quality of health care.[3] Among our core objectives, we aim to improve health outcomes, attain health equity for all beneficiaries, and ensure that complex patients as well as those with social risk factors receive excellent care. Within this context, reports by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) and the National Academy of Medicine have examined the influence of social risk factors in our value-based purchasing programs.[4] As we noted in the FY 2018 IRF PPS final rule (82 FR 36273 through 36274), ASPE's report to Congress, which was required by the IMPACT Act, found that, in the context of value-based purchasing programs, dual eligibility was the most powerful predictor of poor health care outcomes among those social risk factors that they examined and tested. ASPE is continuing to examine this issue in its second report required by the IMPACT Act, which is due to Congress in the fall of 2019. In addition, as we noted in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38428), the National Quality Forum (NQF) undertook a 2-year trial period in which certain new measures and measures undergoing maintenance review have been assessed to determine if risk adjustment for social risk factors is appropriate for these measures.[5] The trial period ended in April 2017 and a final report is available at *http://www.qualityforum.org/SES_Trial_Period.aspx.* The trial concluded that

[3] See, for example, United States Department of Health and Human Services. ''Healthy People 2020: Disparities. 2014,'' *http://www.healthypeople.gov/2020/about/foundation-health-measures/Disparities* or National Academies of Sciences, Engineering, and Medicine. Accounting for Social Risk Factors in Medicare Payment: Identifying Social Risk Factors. Washington, DC: National Academies of Sciences, Engineering, and Medicine 2016.

[4] Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation (ASPE), ''Report to Congress: Social Risk Factors and Performance Under Medicare's Value-Based Purchasing Programs.'' December 2016, *https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicares-value-based-purchasing-programs.*

[5] Available at *http://www.qualityforum.org/SES_Trial_Period.aspx.*

''measures with a conceptual basis for adjustment generally did not demonstrate an empirical relationship'' between social risk factors and the outcomes measured. This discrepancy may be explained in part by the methods used for adjustment and the limited availability of robust data on social risk factors. NQF has extended the socioeconomic status (SES) trial,[6] allowing further examination of social risk factors in outcome measures.

In the FY/CY 2018 proposed rules for our quality reporting and value-based purchasing programs, we solicited feedback on which social risk factors provide the most valuable information to stakeholders and the methodology for illuminating differences in outcomes rates among patient groups within a provider that would also allow for a comparison of those differences, or disparities, across providers. Feedback we received across our quality reporting programs included encouraging CMS to explore whether factors that could be used to stratify or risk adjust the measures (beyond dual eligibility); to consider the full range of differences in patient backgrounds that might affect outcomes; to explore risk adjustment approaches; and to offer careful consideration of what type of information display would be most useful to the public.

We also sought public comment on confidential reporting and future public reporting of some of our measures stratified by patient dual eligibility. In general, commenters noted that stratified measures could serve as tools for hospitals to identify gaps in outcomes for different groups of patients, improve the quality of health care for all patients, and empower consumers to make informed decisions about health care. Commenters encouraged CMS to stratify measures by other social risk factors such as age, income, and educational attainment. With regard to value-based purchasing programs, commenters also cautioned to balance fair and equitable payment while avoiding payment penalties that mask health disparities or discouraging the provision of care to more medically complex patients. Commenters also noted that value-based payment program measure selection, domain weighting, performance scoring, and payment methodology must account for social risk.

As a next step, we are considering options to improve health disparities among patient groups within and across hospitals by increasing the transparency of disparities, as shown by quality measures. We also are considering how this work applies to other CMS quality programs in the future. We refer readers to the FY 2018 IPPS/LTCH PPS final rule (82 FR 38403 through 38409) for more details where we discuss the potential stratification of certain Hospital Inpatient Quality Reporting Program outcome measures. Furthermore, we continue to consider options to address equity and disparities in our value-based purchasing programs.

We plan to continue working with ASPE, the public, and other key stakeholders on this important issue to identify policy solutions that achieve the goals of attaining health equity for all beneficiaries and minimizing unintended consequences.

Comment: Many commenters supported the future implementation of a strategy to account for social risk factors in the IRF QRP that includes risk stratification by race, ethnicity, geographic area, sex, and disability. The commenters also suggested that CMS consider the role of primary language and family, caregiver and community support in developing this strategy.

Response: We thank the commenters for their comments and will take these comments into account as we further consider how to appropriately account for social risk factors in the IRF QRP. We also refer the reader to the FY 2018 IRF PPS final rule (82 FR 36273 through 36274), where we discussed in depth many of the issues raised by these commenters.

C. New Removal Factor for Previously Adopted IRF QRP Measures

As part of our Meaningful Measures Initiative, discussed in section D.1. of the Executive Summary of this final rule, we strive to put patients first, ensuring that they, along with their clinicians, are empowered to make decisions about their own healthcare using data-driven information that is increasingly aligned with a parsimonious set of meaningful quality measures. We began reviewing the IRF QRP's measures in accordance with the Meaningful Measures Initiative, and we are working to identify how to move the IRF QRP forward in the least burdensome manner possible, while continuing to incentivize improvement in the quality of care provided to patients.

Specifically, we believe the goals of the IRF QRP and the measures used in the program cover most of the Meaningful Measures Initiative priorities, including making care safer, strengthening person and family engagement, promoting coordination of care, promoting effective prevention and treatment, and making care affordable.

We also evaluated the appropriateness and completeness of the IRF QRP's current measure removal factors. We have previously finalized that we would use notice and comment rulemaking to remove measures from the IRF QRP based on the following factors: [7]

- Factor 1. Measure performance among IRFs is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made.
- Factor 2. Performance or improvement on a measure does not result in better patient outcomes.
- Factor 3. A measure does not align with current clinical guidelines or practice.
- Factor 4. A more broadly applicable measure (across settings, populations, or conditions) for the particular topic is available.
- Factor 5. A measure that is more proximal in time to desired patient outcomes for the particular topic is available.
- Factor 6. A measure that is more strongly associated with desired patient outcomes for the particular topic is available.
- Factor 7. Collection or public reporting of a measure leads to negative unintended consequences other than patient harm.

We continue to believe these measure removal factors are appropriate for use in the IRF QRP. However, even if one or more of the measure removal factors applies, we might nonetheless choose to retain the measure for certain specified reasons. Examples of such instances could include when a particular measure addresses a gap in quality that is so significant that removing the measure could in turn result in poor quality, or in the event that a given measure is statutorily required. We note further that, consistent with other quality reporting programs, we apply these factors on a case-by-case basis.

In the FY 2019 IRF PPS proposed rule, we proposed to adopt an additional factor to consider when evaluating measures for removal from the IRF QRP measure set:

Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program.

[6] Available at: *http://www.qualityforum.org/SES_Trial_Period.aspx.*

[7] We refer readers to the FY 2013 CY 2013 Hospital Outpatient Prospective Payment System/Ambulatory Surgical Center (OPPS/ASC) Payment Systems and Quality Reporting Programs final rule (77 FR 45194 through 45195) and FY 2018 IRF PPS final rule (82 FR 36276) for more information on the factors we consider for removing measures and standardized patient assessment data.

As we discussed in section D.1. of the Executive Summary of this final rule, in furtherance of our new Meaningful Measures Initiative, we are engaging in efforts to ensure that the IRF QRP measure set continues to promote improved health outcomes for beneficiaries while minimizing the overall costs associated with the program. We believe these costs are multifaceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program. We have identified several different types of costs, including, but not limited to: (1) Provider and clinician information collection burden and burden associated with the submitting/reporting of quality measures to CMS; (2) the provider and clinician cost associated with complying with other programmatic requirements; (3) the provider and clinician cost associated with participating in multiple quality programs, and tracking multiple similar or duplicative measures within or across those programs; (4) the cost to CMS associated with the program oversight of the measure including measure maintenance and public display; and (5) the provider and clinician cost associated with compliance to other federal and/or state regulations (if applicable).

For example, it may be needlessly costly and/or of limited benefit to retain or maintain a measure which our analyses show no longer meaningfully supports program objectives (for example, informing beneficiary choice). It may also be costly for health care providers to track confidential feedback, preview reports, and publicly reported information on a measure where we use the measure in more than one program. We may also have to expend unnecessary resources to maintain the specifications for the measure, including the tools needed to collect, validate, analyze, and publicly report the measure data. Furthermore, beneficiaries may find it confusing to see public reporting on the same measure in different programs.

When these costs outweigh the evidence supporting the continued use of a measure in the IRF QRP, we believe it may be appropriate to remove the measure from the program. Although we recognize that one of the main goals of the IRF QRP is to improve beneficiary outcomes by incentivizing health care providers to focus on specific care issues and making public data related to those issues, we also recognize that those goals can have limited utility where, for example, the publicly reported data is of limited use because it cannot be easily interpreted by beneficiaries and used to influence their choice of providers. In these cases, removing the measure from the IRF QRP may better accommodate the costs of program administration and compliance without sacrificing improved health outcomes and beneficiary choice.

We proposed that we would remove measures based on this factor on a case-by-case basis. We might, for example, decide to retain a measure that is burdensome for health care providers to report if we conclude that the benefit to beneficiaries is so high that it justifies the reporting burden. Our goal is to move the program forward in the least burdensome manner possible, while maintaining a parsimonious set of meaningful quality measures and continuing to incentivize improvement in the quality of care provided to patients.

We invited public comment on our proposal to adopt an additional measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program.

Comment: Several commenters supported the proposal to add measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program. Commenters appreciated the consideration of costs beyond those associated with data collection and submission.

Response: We appreciate the support of the addition of this measure removal factor for the IRF QRP.

Comment: A few commenters had concerns about the new measure removal Factor 8. Some commenters suggested that CMS should involve stakeholders when determining if Factor 8 applies to a measure, to get input about whether clinicians or patients believe a measure is important. One commenter requested clarification about the methods or criteria used to assess when the measure cost or burden outweighs the benefits of retaining it.

Response: We appreciate commenters' concerns about the new measure removal factor. We value transparency in our processes, and continually seek stakeholder input through education and outreach sessions, other webinars, rulemaking, and other collaborative engagements with stakeholders. We agree with commenters that benefits can be difficult to define and that various stakeholders may have different perspectives on these benefits. Because of these challenges, we intend to evaluate each measure on a case-by-case basis, while considering input from a variety of stakeholders, including, but not limited to: Patients, caregivers, patient and family advocates, providers, provider associations, healthcare researchers, data vendors, and other stakeholders with insight into the benefits and costs (financial and otherwise) of maintaining the specific measure in the IRF QRP.

With regard to the request for clarification about criteria used to assess costs and burden, in the FY 2019 IRF PPS proposed rule (83 FR 21000 through 21001), we provided examples of five different costs that could be considered in this proposed measure removal factor. We intend to assess the costs and benefits to all program stakeholders, including but not limited to, those listed above. We intend to balance the costs with the benefits to a variety of stakeholders. These stakeholders include, but are not limited to, patients and their families or caregivers, providers, the healthcare research community, healthcare payers, and patient and family advocates. Because for each measure the relative benefit to each stakeholder may vary, we believe that the benefits to be evaluated for each measure are specific to the measure and the original rationale for including the measure in the program.

Final Decision: After consideration of the public comments, we are finalizing our proposal to add the IRF QRP measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program.

We proposed to revise § 412.634(b)(2) of our regulations to codify both the removal factors we have previously finalized for the IRF QRP, as well as the new measure removal factor that we are finalizing in this final rule. We also proposed to remove the reference to the payment impact from the heading of § 412.634(b) and, as discussed more fully in section X.J. of this final rule, remove the language in current § 412.634(b)(2) related to the 2 percentage point payment reduction because that payment reduction is also addressed at § 412.624(c)(4).

We did not receive any public comments on our proposals to update to the IRF QRP regulatory text.

Final Decision: We are finalizing the codification of the IRF QRP measure removal factors at § 412.634(b)(2) and the updates to the regulatory text at § 412.634(b). We are also making minor grammatical edits to the IRF QRP measure removal factor language to align with the language of other programs.

D. Quality Measures Currently Adopted for the FY 2020 IRF QRP

The IRF QRP currently has 18 measures for the FY 2020 program year, which are outlined in Table 11.

TABLE 11—QUALITY MEASURES CURRENTLY ADOPTED FOR THE FY 2020 IRF QRP

Short name	Measure name and data source
IRF–PAI	
Pressure Ulcer	Percent of Residents or Patients With Pressure Ulcers That Are New or Worsened (Short Stay) (NQF #0678)*.
Pressure Ulcer/Injury	Changes in Skin Integrity Post-Acute Care: Pressure Ulcer/Injury.
Patient Influenza Vaccine	Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680).
Application of Falls	Application of Percent of Residents Experiencing One or More Falls with Major Injury (Long Stay) (NQF #0674).
Application of Functional Assessment.	Application of Percent of Long-Term Care Hospital (LTCH) Patients with an Admission and Discharge Functional Assessment and a Care Plan That Addresses Function (NQF #2631).
DRR	Drug Regimen Review Conducted With Follow-Up for Identified Issues—Post Acute Care (PAC) Inpatient Rehabilitation Facility (IRF) Quality Reporting Program (QRP).
Change in Self-Care	IRF Functional Outcome Measure: Change in Self-Care Score for Medical Rehabilitation Patients (NQF #2633).
Change in Mobility	IRF Functional Outcome Measure: Change in Mobility Score for Medical Rehabilitation Patients (NQF #2634).
Discharge Self-Care Score	IRF Functional Outcome Measure: Discharge Self-Care Score for Medical Rehabilitation Patients (NQF #2635).
Discharge Mobility Score	IRF Functional Outcome Measure: Discharge Mobility Score for Medical Rehabilitation Patients (NQF #2636).
NHSN	
CAUTI	National Healthcare Safety Network (NHSN) Catheter-Associated Urinary Tract Infection Outcome Measure (NQF #0138).
MRSA	National Healthcare Safety Network (NHSN) Facility-wide Inpatient Hospital-onset Methicillin-resistant Staphylococcus aureus (MRSA) Bacteremia Outcome Measure (NQF #1716).
CDI	National Healthcare Safety Network (NHSN) Facility-wide Inpatient Hospital-onset Clostridium difficile Infection (CDI) Outcome Measure (NQF #1717).
HCP Influenza Vaccine	Influenza Vaccination Coverage among Healthcare Personnel (NQF #0431).
Claims-Based	
MSPB IRF	Medicare Spending Per Beneficiary (MSPB)-Post Acute Care (PAC) PAC IRF QRP.
DTC	Discharge to Community—PAC IRF QRP.
PPR 30 day	Potentially Preventable 30-Day Post-Discharge Readmission Measure for IRF QRP.
PPR Within Stay	Potentially Preventable Within Stay Readmission Measure for IRFs.

*The measure will be replaced with the Changes in Skin Integrity Post-Acute Care: Pressure Ulcer/Injury measure, effective October 1, 2018.

While we did not solicit comments on currently adopted or future IRF QRP measures, we received several comments.

Comment: Several commenters suggested additional measures that could be removed from the IRF QRP, including the NHSN Catheter Associated Urinary Tract Infection (CAUTI) Outcome Measure (NQF #0138); the NHSN Facility-wide Inpatient Hospital-onset Clostridium difficile Infection (CDI) Outcome Measure (NQF #1717); Influenza Vaccination among Healthcare Personnel (NQF #0431); Application of Percent of Residents Experiencing one or more falls with major injury; and Application of percent of LTCH patients with an admission and discharge functional assessment and a care plan that addresses function.

Response: We thank the commenters for their comments. We did not propose any changes to our previously finalized measures, nor did we propose additional measure removals from the IRF QRP. We will take these comments into account as we engage in future measure selection activities for the IRF QRP.

Comment: A few commenters suggested future measures for the IRF QRP, including a measure on Pneumococcal Vaccination Coverage, an adult immunization composite measure, and a standardized patient care survey.

Response: While we did not solicit public comment about future measures, we will take these comments into account as we engage in future measure development and selection activities for the IRF QRP.

E. Removal of Two IRF QRP Measures

We proposed to remove two measures from the IRF QRP measure set. Beginning with the FY 2020 IRF QRP, we proposed to remove the National Healthcare Safety Network (NHSN) Facility-wide Inpatient Hospital-onset Methicillin-resistant *Staphylococcus aureus* (MRSA) Bacteremia Outcome Measure (NQF #1716). We also proposed to remove one measure beginning with the FY 2021 IRF QRP: Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680). We discuss these proposals below.

1. Removal of National Healthcare Safety Network (NHSN) Facility-Wide Inpatient Hospital-Onset Methicillin-Resistant Staphylococcus aureus (MRSA) Bacteremia Outcome Measure (NQF #1716) Beginning With the FY 2020 IRF QRP

We proposed to remove the measure, Facility-wide Inpatient Hospital-onset Methicillin-resistant Staphylococcus aureus (MRSA) Bacteremia Outcome Measure (NQF #1716), from the IRF QRP measure set beginning with the FY 2020 IRF QRP under measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the IRF QRP.

We originally adopted this measure in the FY 2015 IRF PPS final rule (79 FR 45911 through 45913). The measure assesses MRSA infections caused by a strain of MRSA bacteria that has become resistant to antibiotics commonly used to treat MRSA infections. The measure is reported as a Standardized Infection Ratio (SIR) of hospital-onset unique blood source MRSA laboratory-identified events among all inpatients in the facility.

The data on this measure is submitted by IRFs via the National Health Safety Network (NHSN), and we adopted it for use in several quality reporting programs because we believe that MRSA is a serious healthcare associated infection. To calculate a measure rate for an individual IRF, we must be able to attribute to the IRF at least one expected MRSA infection during the reporting period. However, we have found that the number of IRFs with expected MRSA infections during a given reporting period is extraordinarily low. For 99.9 percent of IRFs, the expected MRSA infection incident rate is less than one, which is too low to use for purposes of generating a reliable standardized infection ratio. As a result, we are unable to calculate reliable measure rates and publicly report those rates for almost all IRFs because their expected infection rates during a given reporting period are less than one. Therefore, while we still recognize that MRSA is a serious healthcare associated infection, the benefit of this NHSN Facility-wide Inpatient Hospital-onset MRSA Bacteremia Outcome Measure (NQF #1716) is small. For this reason, we believe that the burden required for data collection and submission on this measure and the costs associated with this measure, which include the costs to maintain and publicly report it for the IRF QRP and the costs for a small number of IRFs to track their rates when reliable rates cannot be calculated for most IRFs, outweigh the benefit of its continued use in the program.

Therefore, we proposed to remove this measure from the IRF QRP, beginning with the FY 2020 IRF QRP.

We proposed that IRFs would no longer be required to submit data on this measure for the purposes of the IRF QRP beginning with October 1, 2018 admissions and discharges.

We invited public comment on this proposal.

Comment: Several commenters supported the proposal to remove this measure from the IRF QRP.

Response: We thank the commenters for their support.

Final Decision: After considering public comment, we are finalizing our proposal to remove the NHSN Facility-wide Inpatient Hospital-onset MRSA Bacteremia Outcome Measure (NQF #1716) from the IRF QRP beginning with the FY 2020 IRF QRP. IRFs will no longer be required to submit data on this measure for the purposes of the IRF QRP beginning with October 1, 2018 admissions and discharges.

2. Removal of Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680) Beginning With the FY 2021 IRF QRP

We proposed to remove the measure, Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680), from the IRF QRP beginning with the FY 2021 IRF QRP under measure removal Factor 1. Measure performance among IRFs is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made.

In the FY 2014 IRF PPS final rule (78 FR 47910 through 47911), we adopted the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) measure (NQF #0680) to assess vaccination rates among IRF patients because many patients receiving care in the IRF setting are 65 years and older and considered to be the target population for the influenza vaccination.

This process measure reports the percentage of stays in which the patient was assessed and appropriately given the influenza vaccine for the most recent influenza vaccination season. In our evaluation of this measure, we identified that IRF performance has been high and relatively stable, demonstrating nominal improvements across influenza seasons since data collection began. Our analysis of this particular measure revealed that for the 2015–2016 and the 2016–2017 influenza seasons, nearly every IRF patient was assessed and more than 75 percent of IRFs (n = 836) are vaccinating IRF patients who have not already received a flu vaccination at 90 percent or higher. Further, throughout the last two influenza seasons, the number of IRFs who achieved a perfect score (100 percent) on this measure has grown substantially, increasing by approximately 50 percent from 146 IRFs (12.9 percent) in the 2015–2016 influenza season to 210 IRFs (18.8 percent) in the 2016–2017 influenza season.

The Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680) measure rates are also unvarying. With respect to the 2015–2016 influenza season, the mean performance score was 91.04 percent, and with respect to the 2016–2017 influenza season, the mean performance score on this measure was 93.88 percent. The proximity of these mean rates to the maximum score of 100 percent suggests a potential ceiling effect and a lack of variation that restricts distinction between facilities. Given that performance among IRFs has remained so high and that no meaningful distinction in performance can be made across the majority of IRFs, we proposed the removal of this measure.

Therefore, we proposed to remove this measure from the IRF QRP beginning with the FY 2021 IRF QRP under measure removal Factor 1. Measure performance among IRFs is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made.

We proposed that IRFs would no longer be required to submit data on this measure for the purposes of the IRF QRP beginning with patients discharged on or after October 1, 2018. We also stated that we plan to remove these data elements from the IRF–PAI version 3.0, effective October 1, 2019, and that beginning with October 1, 2018 discharges, IRFs should enter a dash (–) for O0250A, O0250B, and O0250C until the IRF–PAI version 3.0 is released.

Comment: Several commenters, including MedPAC, supported the proposal to remove the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680) (Patient Influenza Vaccine) measure from the IRF QRP. Several commenters stated that the removal of this measure will allow providers to

devote more time to patient care by reducing the burden of collecting and reporting data. A few commenters, including MedPAC, suggested focusing on more meaningful measures, as this measure is no longer effective in improving the quality of care or patient outcomes. A few commenters requested that CMS provide guidance to clarify the appropriateness of dash use for the IRF–PAI influenza vaccine items beginning FY 2019.

Response: We appreciate the support from MedPAC and other commenters for the proposed removal of the Patient Influenza Vaccine measure from the IRF QRP. Due to IRFs effectively assessing and vaccinating patients across the 2015–2016 and 2016–2017 influenza seasons, performance on this measure has remained so high that we are no longer able to make meaningful distinctions in improvements in performance. Removing the Patient Influenza Vaccine measure due to its high and unvarying performance will allow providers to address highest priority issues for improving overall health and focus more on meaningful measures that are most vital to patient outcomes in the IRF setting. We will provide ongoing guidance to IRFs to clarify that use of a dash for IRF–PAI items O0250A, O0250B, and O0250C beginning FY 2019 is appropriate and will not cause a non-compliance determination.

Comment: Some commenters did not support the removal of the Patient Influenza Vaccine measure from the IRF QRP, citing concerns with patient care consequences that could occur as a result of its removal. One commenter stated that the Patient Influenza Vaccine measure is an important safety measure that may be overlooked if providers are no longer required to report data. Another commenter indicated that removing the measure will send the impression that preventative health services, such as immunizations, are not a priority in the inpatient setting, could leave a vulnerable population of Medicare-beneficiaries more susceptible to vaccine-preventable illness, and may generate reporting confusion among providers.

Response: While we understand that assessing and appropriately vaccinating patients are important components of the care process, many patients admitted to IRFs come from an acute care setting where influenza vaccinations are tracked and, due to that tracking, have already been immunized before they are admitted to the IRF. For that reason, the process of assessing IRF patients for influenza vaccination is duplicative of a process that most of these patients have already undergone. In addition, our analysis has shown that IRFs regularly assess and vaccinate their patients when appropriate to do so. As a result, we do not believe that the removal of the measure from the IRF QRP will lead to lower immunization rates in the IRF patient population.

Final decision: After careful consideration of the public comments, we are finalizing our proposal to remove the Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680) measure from the IRF QRP beginning with the FY 2021 IRF QRP. IRFs will no longer be required to submit data on this measure for the purposes of the IRF QRP beginning with patients discharged on or after October 1, 2018. We plan to remove these data elements from the IRF–PAI version 3.0, effective October 1, 2019. Beginning with October 1, 2018 discharges, IRFs should enter a dash (–) for O0250A, O0250B, and O0250C until the IRF–PAI version 3.0 is released.

F. IMPACT Act Implementation Update

In the FY 2018 IRF PPS final rule (82 FR 36285 through 36286), we stated that we intended to specify two measures that would satisfy the domain of accurately communicating the existence and provision of the transfer of health information and care preferences under section 1899B(c)(1)(E) of the Act no later than October 1, 2018, and intended to propose to adopt them for the FY 2021 IRF QRP with data collection beginning on or about October 1, 2019.

In the FY 2019 IRF PPS proposed rule (83 FR 21002 through 21003), we stated that, as a result of the input provided during a public comment period between November 10, 2016 and December 11, 2016, input provided by a technical expert panel (TEP), and pilot measure testing conducted in 2017, we are engaging in continued development work on these two measures, including supplementary measure testing and providing the public with an opportunity for comment in 2018. We stated that we would reconvene a TEP for these measures in mid-2018, which occurred in April 2018. We stated that we now intend to specify the measures under section 1899B(c)(1)(E) of the Act no later than October 1, 2019, and intend to propose to adopt the measures for the FY 2022 IRF QRP, with data collection beginning with patients discharged on or after October 1, 2020. For more information on the pilot testing, we refer readers to *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Post-Acute-Care-Quality-Initiatives/IMPACT-Act-of-2014/IMPACT-Act-Downloads-and-Videos.html.*

Comment: A few commenters supported the updated implementation timeline for the transfer of health information and care preference domain measures, allowing additional time for measure development. A commenter further stated that, given the complexity of the draft measures under development for this domain, it is important that CMS prioritize sound measure development to ensure that the measures are implementable, minimally burdensome to providers, and add value beyond current care practices.

Response: We appreciate the commenters' support.

Comment: A few commenters noted the extension of the IMPACT Act measure deadline for the transfer of health information and care preferences domain measures and requested further explanation and clarification for extending quality measure implementation beyond statutory deadlines. Another commenter questions why the agency is delaying these measures, but did not delay the implementation of other measures, such as the Section GG functional assessment items and measures despite multiple requests from stakeholders to delay implementation to facilitate more deliberation, input, and research.

Response: In the FY 2016 proposed and final rules, we described the statutory timeline for measure specification under the IMPACT Act and how that timeline was not feasible in light of operational and other practical constraints. We outlined our historical timeline for developing and adopting quality measures, which pre-dates the IMPACT Act, and how that timeline takes into consideration the time needed to specify and adopt valid and reliable measures, as well as give IRFs enough notice of their new data reporting obligations. We intended to specify the measures required by the IMPACT Act in accordance with our historical timeline in order to ensure that the measures we adopt are developed in a transparent manner that involves stakeholder input, MAP review, and NQF endorsement.

We have largely been able to comply with the implementation timeline we set forth in the FY 2016 proposed and final rules. The measures we have adopted in accordance with that timeline were developed in a transparent manner and incorporate both expert and stakeholder input. They were also reviewed by the MAP and, in many cases, are NQF-endorsed for at least one of the four PAC settings. We

also considered the input of stakeholders who requested that we conduct further testing and research before we adopted various measures and determined, based on our own assessment of the evidence, as well as input of experts and other stakeholders, that the measures were valid and reliable enough to be adopted.

The two measures that would satisfy the domain of accurately communicating the existence and provision of the transfer of health information and care preferences that are currently under development do not enjoy a level of support that is akin to the support that we received for other IMPACT Act measures. Results from the pilot test of the original measure concept recommended CMS to continue to further modify the measures to increase the usefulness and feasibility of the constructs for PAC settings. The core concern of the MAP was the measure testing, including incomplete development, and other topics such as what information would be needed at the time of transfer and measure attribution issues. Based on input from the MAP and more recently from stakeholders and our own research, we have determined that the measures are not sufficiently developed at this time to support their use in the four PAC settings, and we have concluded that it is better to delay their implementation while we engage in further development and testing than it would be to adopt the measures prematurely.

G. Form, Manner, and Timing of Data Submission Under the IRF QRP

Under our current policy, IRFs report data on IRF QRP assessment-based measures and standardized patient assessment data by completing applicable sections of the IRF–PAI and submitting the IRF–PAI to CMS through the Quality Improvement Evaluation System (QIES) Assessment Submission and Processing (ASAP) system. For more information on IRF QRP reporting through the Quality Improvement and Evaluation System Assessment Submission and Processing (QIES ASAP) system, refer to the ''Related Links'' section at the bottom of *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html.* Data on IRF QRP measures that are also collected by the Centers for Disease Control and Prevention (CDC) for other purposes are reported by IRFs to the CDC through the NHSN, and the CDC then transmits the relevant data to CMS. Information regarding the CDC's NHSN is available at *https://www.cdc.gov/nhsn/index.html.* We refer readers to the FY 2018 IRF PPS final rule (82 FR 36291 through 36292) for the data collection and submission timeframes that we finalized for the IRF QRP.

We previously codified at § 412.634(b)(1) of our regulations the requirement that IRFs submit data on measures specified under sections 1886(j)(7)(D), 1899B(c)(1), and 1899B(d)(1) of the Act in the form and manner, and at a time, specified by CMS. In the FY 2019 IRF PPS proposed rule (83 FR 21003), we proposed to revise § 412.634(b)(1) to include the policy we previously finalized in the FY 2018 IRF PPS final rule (82 FR 36292 through 36293) that IRFs must also submit standardized patient assessment data required under section 1899B(b)(1) of the Act in the form and manner, and at a time, specified by CMS.

We invited public comment on this proposal.

Comment: One commenter supported the codification of the policy that IRFs must also submit standardized patient assessment data required under section 1899B(b)(1) of the Act in the form and manner, and at a time, specified by CMS.

Response: We appreciate the commenter's support for this proposal.

Comment: Several commenters expressed concern about data submission using the National Healthcare Safety Network (NHSN), including the additional time and effort required to submit data using this method.

Response: We acknowledge the commenters' concerns, but note that we did not propose changes to the data submission requirements related to the NHSN. We refer readers to the IRF NHSN website for IRFs, *https://www.cdc.gov/nhsn/inpatient-rehab/index.html,* which contains guidelines and protocols for NHSN submission, along with Frequently Asked Questions and resources for data submission.

Final decision: After careful consideration of the public comments, we are finalizing our proposal to revise § 412.634(b)(1) and codify in our regulations that IRFs must also submit standardized patient assessment data required under section 1899B(b)(1) of the Act in the form and manner, and at a time, specified by CMS.

H. Changes to Reconsideration Requirements Under the IRF QRP

Section 412.634(d)(1) of our regulations states, in part, that IRFs found to be non-compliant with the quality reporting requirements for a particular fiscal year will receive a letter of non-compliance through the Quality Improvement and Evaluation System Assessment Submission and Processing (QIES–ASAP) system, as well as through the United States Postal Service.

In the FY 2019 IRF PPS proposed rule (83 FR 21003), we proposed to revise § 412.634(d)(1) to expand the methods by which we would notify an IRF of non-compliance with the IRF QRP requirements for a program year. Revised § 412.634(d)(1) would state that we would notify IRFs of non-compliance with the IRF QRP requirements via a letter sent through at least one of the following notification methods: The QIES–ASAP system, the United States Postal Service, or via an email from the Medicare Administrative Contractor (MAC). We believe that this change will address feedback from providers who requested additional methods for notification.

We also proposed to revise § 412.634(d)(5) to clarify that we will notify IRFs, in writing, of our final decision regarding any reconsideration request using the same notification process.

We invited public comments on these proposals.

Comment: One commenter was supportive of our proposal to use the same process to notify IRFs of both non-compliance and our final decision on reconsideration requests.

Response: We appreciate the commenter's support.

Comment: Many commenters supported the efforts by CMS to provide more methods of communication for notifying IRFs of IRF QRP non-compliance and reconsideration decisions. A few commenters requested additional details about the logistics of these methods of notification, and a few had concerns that this would add uncertainty to the notification process. Some providers expressed confusion about how many methods of notification would be required. One commenter requested a timeline for this change. Some commenters questioned who in the provider organization would receive the notification or wanted the option to designate one person.

Response: We thank commenters for their support. We will use at least one method of notification, and providers will be notified regarding the specific method of communication that we will use via the IRF QRP Reconsideration and Exception & Extension website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Reconsideration-and-Exception-and-Extension.html* and announcements via the PAC listserv. The announcements will be posted annually following the May 15 data

submission deadline—prior to the distribution of the initial notices of non-compliance determination in late spring/early summer. Messaging will include method of communication for the notices, instructions for sending a reconsideration request, and the final deadline for submitting the request. This policy would be effective October 1, 2018.

With regard to the point of contact for a specific facility, our notifications are sent to the point of contact on file in the QIES database. This information is populated via ASPEN. It is the responsibility of the facility to ensure that this information is up-to-date. For information regarding how to update provider information in QIES, we refer providers to *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Downloads/How-to-Update-IRF-Demographic-Data-1-4-18-Final.pdf.*

Comment: A few commenters did not support the use of MACs in the notification process, citing concerns that this might cause additional confusion. One commenter noted that MACs do not have prior experience with the IRF QRP, and are too bureaucratically complex for efficient provider communication. Several commenters suggested utilizing the existing QRP Helpdesk contractor to communicate QRP non-compliance.

Response: The MACs have been active in the notification process since the establishment of the IRF QRP. MACs serve as the primary operational contact between the Medicare FFS program and IRFs, and they work with CMS and the agency's other contractors to implement the 2 percent reduction in the annual increase factor within the Fiscal Intermediary Standard System (FISS). They also send to IRFs both the initial notices of non-compliance with the requirements of the IRF QRP and the final decisions on reconsideration requests. We are confident that the MACs will continue to be a valuable addition to the notification process.

Final decision: After careful consideration of the public comments, we are finalizing our proposal to revise § 412.634(d)(1) to state that we will notify IRFs of non-compliance with the IRF QRP requirements via a letter sent through at least one of the following notification methods: The QIES–ASAP system, the United States Postal Service, or via an email from the Medicare Administrative Contractor (MAC). We are also finalizing our proposal to revise § 412.634(d)(5) to clarify that we will notify IRFs, in writing, of our final decision regarding any reconsideration request using the same notification process.

I. Policies Regarding Public Display of Measure Data for the IRF QRP

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making the IRF QRP data available to the public after ensuring that an IRF has the opportunity to review its data prior to public display. Measure data are currently displayed on the *IRF Compare* website, an interactive web tool that assists individuals by providing information on IRF quality of care to those who need to select an IRF. For more information on *IRF Compare,* we refer readers to *https://www.medicare.gov/inpatientrehabilitationfacilitycompare/.*

In the FY 2019 IRF PPS proposed rule (83 FR 21003), we proposed to begin publicly displaying data on the following four assessment-based measures in CY 2020, or as soon thereafter as technically feasible: (1) Change in Self-Care (NQF #2633); (2) Change in Mobility (NQF #2634); (3) Discharge Self-Care Score (NQF #2635); (4) and Discharge Mobility Score (NQF #2636). Data collection for these four assessment-based measures began with patients discharged on or after October 1, 2016. We proposed to display data for these assessment-based measures based on four rolling quarters of data, initially using discharges from January 1, 2019 through December 31, 2019 (Quarter 1 2019 through Quarter 4 2019). To ensure the statistical reliability of the data for these four assessment-based measures, we also proposed that if an IRF has fewer than 20 cases during any four consecutive rolling quarters of data that we are displaying for any of these measures, then we would note in our public display of that measure that with respect to that IRF the number of cases/patient stays is too small to publicly report.

We sought public comment on these proposals.

Comment: One commenter supported the proposal to begin publicly displaying the four assessment-based measures on the IRF Compare website in CY 2020.

Response: We appreciate the commenter's support.

Comment: A few commenters recommended that CMS provide education for IRFs prior to the public display of the four assessment-based measures. The commenters requested training for providers on the calculation and interpretation of their performance data in the CASPER reports to ensure accurate public reporting. Some commenters also requested increased transparency regarding the statistical methodologies that CMS uses to calculate provider performance.

Response: We recently held provider training in May 2018 on the interpretation of the assessment-based quality measure data on the CASPER reports as well as the data review process prior to public reporting. These and other training materials are posted on the IRF QRP website at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html.* We intend to hold additional training programs on this topic and will include information on the calculation of the performance data including for the four assessment-based measures: (1) Change in Self-Care (NQF #2633); (2) Change in Mobility (NQF #2634); (3) Discharge Self-Care Score (NQF #2635); (4) and Discharge Mobility Score (NQF #2636). Information related to measure calculation is currently available in IRF QM User's Manual, available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.* We will continue to closely monitor the performance data and assist IRFs on CASPER and public reporting efforts through ongoing stakeholder education, national trainings, IRF provider announcements, website postings, CMS Open Door Forums, and responses to help desk inquiries.

Comment: Some commenters provided recommendations on the public display of the assessment-based measures. One commenter suggested revising the measure names to better distinguish the measures and that CMS provide an explanation of the differences between these assessment-based measures in different post-acute care settings. This commenter further recommended that the data displayed on the IRF Compare website be stratified by clinical conditions to make the data more valuable for patients and their caregivers. Another commenter suggested that the assessment-based measures be divided into two larger categories labeled ''Self-Care'' and ''Mobility'' for further clarity, and recommended that the observed, expected, and national values be publicly displayed on the IRF Compare website.

Response: We appreciate commenters' suggestions on the public display of the assessment-based measures on the IRF Compare website, and we will take these suggestions into consideration. We would like to clarify that the measure names that will be displayed on the IRF Compare website will use consumer-

friendly language that differs from the technical measure name. A crosswalk between the consumer-friendly name and the technical measure name is available on the IRF Compare website at *https://www.medicare.gov/inpatientrehabilitationfacilitycompare/#about/theData.*

Comment: MedPAC expressed concern about the functional status and other quality measure data that would be publicly displayed on the IRF Compare website. MedPAC cautioned that because functional status data are gathered through patient observation, there are concerns regarding the objectivity of this data and encouraged CMS to monitor the accuracy of the data and to confirm the inter-rater reliability of the four assessment-based measures to be displayed on the IRF Compare website.

Response: We thank MedPAC for its feedback regarding the public display of the four assessment-based measures. We understand these concerns and will continue to monitor the reliability and validity of all IRF QRP measures, including these measures, by conducting training on how to properly collect and report the measure data, and conducting our own testing as part of our measure monitoring activities.

Comment: Some commenters opposed the public display of the four assessment-based measures on the IRF Compare website in CY 2020. One commenter requested that CMS defer, or suspend, the public display of the assessment-based measures that we proposed to publicly report until providers have been given the opportunity to review the risk adjustment model and evaluate their performance. Other commenters said they do not support the proposal without first receiving more information on the way these measures will be publicly displayed.

A few commenters requested that CMS provide additional information on providers' CASPER reports. Another commenter was concerned that risk adjusted data are not currently available on the CASPER reports, and therefore, IRFs do not have sufficient information to track their performance and ensure that their provider-level performance is accurately represented on IRF Compare. One commenter suggested that CMS provide actionable patient-level data for these measures in the providers' CASPER reports.

Response: We plan to provide IRFs with the intercept and coefficient values needed for risk-adjustment in the fall of 2018. We also plan to include data on the four assessment-based measures, including patient-level data and risk-adjusted data, in the CASPER reports that we provide to IRFs in the fall of 2018, and training to assist IRFs in interpreting those data and how the data will be publicly reported. We believe that this information will allow IRFs to track their performance and ensure that their performance is accurately represented on IRF Compare. Details about the risk adjustment model variables and the calculation of these assessment-based measures can currently be found in the IRF QM User's Manual, available at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Program-Measures-Information-.html.*

Comment: One commenter stated that there is currently no standardization of the beneficiary populations across IMPACT Act measures and recommended that CMS align these patient populations across PAC settings. If this cannot be done, the commenter then suggested using a uniform population, such as on Medicare Part A patients, for the purposes of public reporting for cross-setting comparisons. The commenter further recommended that in the future the data should be stratified by payer status, and that CMS should work with stakeholders to develop appropriate reporting methods for non-Medicare patients. Another commenter expressed concern about the standardization of Section GG functional status data and related measures across PAC settings and about the accurate depiction of differences between settings viewed on public websites.

Response: We thank the commenters for their comments. We would like to note that as we continue to develop and refine all quality measures for purposes of assessment and public reporting, we are working to align Medicare patient populations across the PAC settings. We will take into consideration the suggestion to use a uniform patient population for purposes of reporting cross-setting comparisons. We will ensure that all future development work will be aided by public comment and work with our stakeholders.

Comment: We received comments on a number of other issues related to public display. One commenter recommended implementing consumer testing prior to public reporting. A few commenters recommended that CMS provide patient-level feedback data for their claims-based measures to help IRFs improve their quality of care. One commenter requested that CMS evaluate the use of performance categories on the IRF Compare website and either remove the current performance categories or use a different methodology.

Response: We thank commenters for their comments. We will consider the commenters' suggestions about consumer testing and the use of performance categories, and we will provide the details prior to publicly reporting the four assessment-based measures. We did not propose any changes related to the public display of claims-based or CDC NHSN measures, which currently include performance categories, or to provide patient-level feedback data for their claims-based measures. However, we appreciate the feedback and will consider the commenters' concerns as we continue to monitor and evaluate measure performance and reporting methods.

Final decision: After consideration of the public comments, we are finalizing our proposal to begin publicly displaying data on the following four assessment-based measures in CY 2020, or as soon thereafter as technically feasible: (1) Change in Self-Care (NQF #2633); (2) Change in Mobility (NQF #2634); (3) Discharge Self-Care Score (NQF #2635); (4) and Discharge Mobility Score (NQF #2636) based on four rolling quarters of data, initially using discharges from January 1, 2019 through December 31, 2019 (Quarter 1 2019 through Quarter 4 2019).

J. Method for Applying the Reduction to the FY 2019 IRF Increase Factor for IRFs That Fail To Meet the Quality Reporting Requirements

As previously noted, section 1886(j)(7)(A)(i) of the Act requires the application of a 2-percentage point reduction of the applicable market basket increase factor for payments for discharges occurring during such fiscal year for IRFs that fail to comply with the quality data submission requirements. We proposed to apply a 2-percentage point reduction to the applicable FY 2019 market basket increase factor in calculating an adjusted FY 2019 standard payment conversion factor to apply to payments for only those IRFs that failed to comply with the data submission requirements. As previously noted, application of the 2-percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Also, reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY involved.

We invited public comment on the proposed method for applying the reduction to the FY 2019 IRF increase

factor for IRFs that fail to meet the quality reporting requirements.

Comment: Some commenters suggested that CMS provide flexibility in its application of the IRF QRP payment penalty for IRFs who make a good-faith effort to comply and submit quality reporting data.

Response: We interpret the commenter's suggestion that CMS take into consideration case by case exceptions and apply leniency for providers have attempted but failed to submit their quality reporting data for the IRF QRP. While we did not seek comment on flexibilities on which the penalty is applied, we note that we have provided flexibility where the failure of the IRF to comply with the requirements of the IRF QRP stemmed from circumstances beyond its control. For example, we have finalized policies that grant exceptions or extensions for IRFs if we determine that a systemic problem with one of our data collection systems affected the ability of IRFs to submit data (79 FR 45920). We have also adopted policies (78 FR 47920) that allow us to grant exemptions or extensions to an IRF if it has experienced an extraordinary circumstance beyond its control. In addition we set the reporting compliance threshold at 95 percent rather than at 100 percent to data to for account for the rare instances when assessment data collection and submission maybe impossible, such as when patients have been discharged emergently, or against medical advice.

Table 12 shows the calculation of the adjusted FY 2019 standard payment conversion factor that will be used to compute IRF PPS payment rates for any IRF that failed to meet the quality reporting requirements for the applicable reporting period.

TABLE 12—CALCULATIONS TO DETERMINE THE ADJUSTED FY 2019 STANDARD PAYMENT CONVERSION FACTOR FOR IRFS THAT FAILED TO MEET THE QUALITY REPORTING REQUIREMENT

Explanation for adjustment	Calculations
Standard Payment Conversion Factor for FY 2018	$15,838
Market Basket Increase Factor for FY 2019 (2.9 percent), reduced by 0.8 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, reduced by 0.75 percentage point in accordance with sections 1886(j)(3)(C) and (D) of the Act and further reduced by 2 percentage points for IRFs that failed to meet the quality reporting requirement	× 0.9935
Budget Neutrality Factor for the Wage Index and Labor-Related Share	× 1.0000
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	× 0.9981
Adjusted FY 2019 Standard Payment Conversion Factor	= $15,705

Our regulations currently address the 2 percentage point payment reduction for failure to meet requirements under the IRF QRP in two places: §§ 412.624(c)(4) and 412.634(b)(2). We believe that these provisions are duplicative and proposed to revise the regulations so that the payment reduction is addressed only in § 412.624(c)(4). As noted in section X.C. of this final rule, we are finalizing our proposal to remove the language regarding the payment reduction that is currently at § 412.634(b)(2) and to codify that section instead the retention and removal policies for the IRF QRP.

We also proposed to revise § 412.624(c)(4)(i) to clarify that an IRF's failure to submit data under the IRF QRP in accordance with § 412.634 will result in the 2 percentage point reduction to the applicable increase factor specified in § 412.624(a)(3).

Finally, we proposed to revise § 412.624(c)(4) for greater consistency with the language of section 1886(j)(7)(A)(i) of the Act. Specifically, we would revise paragraph (i) to clarify that the 2 percentage point reduction is applied ''after application of subparagraphs (C)(iii) and (D) of section 1886(j)(3) of the Act.'' In addition, we would add a new paragraph (iii) that clarifies that the 2 percentage point reduction required under section 1886(j)(7)(A)(i) of the Act may result in an update that is less than 0.0 for a fiscal year. We sought public comment on these proposals.

We did not receive any public comments on the revision of the regulatory text at § 412.624(c).

Final decision: We are finalizing our proposed revisions to our regulatory text at § 412.624(c).

XI. Miscellaneous Comments

We received several comments that were outside the scope of the FY 2019 IRF PPS proposed rule. Specifically, we received comments regarding the processes for updating the IRF facility-level adjustment factors and the transparency of these updates, transitions for IRFs that are redesignated from rural to urban status due to CBSA updates, the IRF 60 percent rule and ICD–10–CM codes that might be appropriate for addition to the presumptive methodology, coverage of recreational therapy under the IRF PPS, participation of licensed therapy assistants in the interdisciplinary team meetings, requirements for hospitals to publicly report charges on the internet, access to IRF services for beneficiaries in Medicare Advantage plans, hospital-within-hospital requirements for satellite facilities, MedPAC recommendations regarding monitoring of inter-rater reliability concerns with the IRF–PAI, the role of residents in completing IRF documentation requirements, need for the overall plan of care, and the overall need to update rules on an ongoing basis to maintain their relevancy. We thank commenters for bringing these issues to our attention, and we will take these comments into consideration for potential policy refinements.

XII. Provisions of the Final Regulations

In this final rule, we are adopting the provisions set forth in the FY 2019 IRF PPS proposed rule (83 FR 20972). Specifically:

- We will update the FY 2019 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget-neutral manner, as discussed in section IV. of this final rule.
- The facility-level adjustments will remain frozen at FY 2014 levels for FY 2015 and all subsequent years, as discussed in section V. of this final rule.
- We will update the FY 2019 IRF PPS payment rates by the market basket increase factor, based upon the most current data available, with a 0.75 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act and a productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section VI. of this final rule.
- We will update the FY 2019 IRF PPS payment rates by the FY 2019 wage index and the labor-related share in a

budget-neutral manner, as discussed in section VI. of this final rule.

- We will calculate the final IRF standard payment conversion factor for FY 2019, as discussed in section VI. of this final rule.
- We will update the outlier threshold amount for FY 2019, as discussed in section VII. of this final rule.
- We will update the CCR ceiling and urban/rural average CCRs for FY 2019, as discussed in section VII. of this final rule.
- We will remove the FIM™ Instrument and Associated Function Modifiers from the IRF–PAI beginning with FY 2020 and make refinements to the case-mix classification system using 2 full years of data, beginning with FY 2020, as discussed in section VIII. of this final rule.
- We will revise certain IRF coverage requirements beginning with FY 2019, as discussed in section IX. of this final rule.
- We will adopt updates to the IRF QRP in accordance with sections 1886(j)(7) of the Act, as discussed in section X. of this final rule.

XIII. Request for Information on Promoting Interoperability and Electronic Healthcare Information Exchange Through Possible Revisions to the CMS Patient Health and Safety Requirements for Hospitals and Other Medicare- and Medicaid-Participating Providers and Suppliers

In the FY 2019 IRF PPS proposed rule, we included a Request for Information (RFI) related to promoting interoperability and electronic healthcare information exchange (83 FR 20972 through 21015). We received 15 comments on this RFI, and appreciate the input provided by commenters.

XIV. Collection of Information Requirements

A. Statutory Requirement for Solicitation of Comments

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the OMB for review and approval. To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA 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; and
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

This final rule makes reference to associated information collections that are not discussed in the regulation text contained in this document.

B. Collection of Information Requirements for Updates Related to the IRF PPS

As discussed in section VIII.A of this final rule, we are removing the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning with FY 2020, that is, for all IRF discharges beginning on or after October 1, 2019. The removal of the FIM™ instrument and associated Function Modifiers from the IRF–PAI would result in the removal of 11 data items. As a result, we estimate the burden and costs associated with the collection of this data will be reduced for IRFs. Specifically, we estimate the removal of the FIM™ instrument and the associated Function Modifiers will save 25 minutes of nursing/clinical staff time used to report data on both admission and discharge which was the estimated time needed to complete these items when the FIMM™ instrument was added to the IRF–PAI in the FY 2002 IRF PPS Final Rule (66 FR 41375). We believe that the FIM™ items we are removing may be completed by social service assistants, Licensed Practical Nurses (LPN), recreational therapists, social workers, dietitians and nutritionists, Registered Nurses (RN), Occupational Therapists (OT), Speech Language Pathologists (SLP) and audiologists, and or Physical Therapists (PT), depending on the item. To estimate the burden associated with the collection of these data items, we obtained mean hourly wages for these staff from the U.S. Bureau of Labor Statistics' May 2017 National Occupational Employment and Wage Estimates (*https://www.bls.gov/oes/current/oes_nat.htm*) and doubled them to account for overhead and fringe benefits. We estimate IRF–PAI preparation and coding costs using a social worker hourly wage rate of $49.64, a social work assistant's hourly wage rate of $34.10, an RN hourly wage rate of $70.72, an LPN hourly wage rate of $43.96, a recreation therapist hourly wage rate of $47.76, a dietitian/nutritionist hourly wage rate of $57.84, a speech-language pathologist hourly wage rate of $76.70, an audiologist hourly wage rate of $76.96, an occupational therapist hourly wage rate of $81.38, and a physical therapist hourly wage rate of $84.68. Using the mean hourly wages (doubled to account for overhead and fringe benefits) for the staffing categories above, we calculate an average rate of $62.37. The $62.37 rate is a blend of all of these categories, and reflects the fact that IRF providers have historically used all of these clinicians for preparation and coding for the IRF–PAI.

To estimate the burden reduction associated with this change, we estimate that there are approximately 403,341 discharges from 1,126 IRFs in FY 2017 resulting in an approximate average of 358 discharges per IRF annually. This equates to a reduction of 168,059 hours for all IRFs (403,341 discharges × 0.416 hours). This is 149 hours (168,059 hours/1,126 IRFs) per IRF annually. We estimate the total cost savings per IRF will be approximately $9,293 (149 hours × $62.37) annually. We estimate that the total cost savings for all IRF providers will be approximately $10.5 million (1,126 IRFs × $9,293) annually.

C. Collection of Information Requirements for Updates Related to the IRF QRP

An IRF that does not meet the requirements of the IRF QRP for a fiscal year will receive a 2 percentage point reduction to its otherwise applicable annual increase factor for that fiscal year. Information is not currently available to determine the precise number of IRFs that will receive less than the full annual increase factor for FY 2019 due to non-compliance with the requirements of the IRF QRP.

We believe that the burden associated with the IRF QRP is the time and effort associated with complying with the requirements of the IRF QRP. As of June 1, 2018, there are approximately 1,126 IRFs reporting quality data to CMS. For the purposes of calculating the costs associated with the collection of information requirements, we obtained mean hourly wages for these staff from the U.S. Bureau of Labor Statistics' May 2017 National Occupational Employment and Wage Estimates (*http://www.bls.gov/oes/current/oes_nat.htm*). To account for overhead and fringe benefits, we have doubled the hourly wage. These amounts are detailed in Table 13.

TABLE 13—U.S. BUREAU OF LABOR STATISTICS' MAY 2017 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupation code	Mean hourly wage ($/hr)	Overhead and fringe benefit ($/hr)	Adjusted hourly wage ($/hr)
Registered Nurse (RN)	29–1141	$35.65	$35.65	$71.30
Medical Records and Health Information Technician	29–2071	18.83	18.83	37.66

As discussed in section X.4. of this rule, we are finalizing our proposal to remove two measures from the IRF QRP.

In section X.4.2 of the final rule, we are finalizing our proposal to remove the measure, Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680), beginning with the FY 2021 IRF QRP. IRFs will no longer be required to submit data on this measure beginning with patients discharged on October 1, 2018, and the items will be removed from the IRF–PAI V3.0, effective October 1, 2019. As a result, the estimated burden and cost for IRFs for complying with requirements of the FY 2021 IRF QRP will be reduced. Specifically, we believe that there will be a 4.8 minute reduction in clinical staff time to report data per patient stay. We estimate 403,341 discharges from 1,126 IRFs annually. This equates to a decrease of 32,267 hours in burden for all IRFs (0.08 hours per assessment × 403,341 discharges). Given 4.8 minutes of RN time at $71.30 per hour completing an average of 358 sets of IRF–PAI assessments per provider per year, we estimate that the total cost will be reduced by $2,043 per IRF annually, or $2,300,657 for all IRFs annually. This decrease in burden will be accounted for in the information collection under OMB control number (0938–0842).

In addition, we are finalizing our proposal to remove one CDC National Healthcare Safety Network (NHSN) measure, beginning with the FY 2020 IRF QRP, which will result in a decrease in burden and cost for IRFs. Providers will no longer be required to submit data beginning with October 1, 2018 admissions and discharges. We estimate that the removal of the National Healthcare Safety Network (NHSN) Facility-wide Inpatient Hospital-onset Methicillin-resistant Staphylococcus aureus (MRSA) Bacteremia Outcome Measure (NQF #1716) will result in a 3-hour (15 minutes per MRSA submission × 12 estimated submissions IRF per year) reduction in clinical staff time annually to report data which equates to a decrease of 3,378 hours (3 hours burden per IRF per year × 1,126 total IRFs) in burden for all IRFs. Given 10 minutes of RN time at $71.30 per hour, and 5 minutes of Medical Records or Health Information Technician at $37.66 per hour, for the submission of 12 estimated submissions of MRSA data to the NHSN per IRF per year, we estimate that the total cost of complying with requirements of the IRF QRP will be reduced by $180 per IRF annually, or $202,973 for all IRFs annually.

In summary, the finalized IRF QRP measure removals will result in a burden reduction of $2,223 per IRF annually, and $2,503,630 for all IRFs annually.

XV. Regulatory Impact Analysis

A. Statement of Need

This final rule updates the IRF prospective payment rates for FY 2019 as required under section 1886(j)(3)(C) of the Act. It responds to section 1886(j)(5) of the Act, which requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF PPS's case-mix groups, and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

This final rule also implements sections 1886(j)(3)(C) and (D) of the Act. Section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a multifactor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010 through 2019.

Furthermore, this final rule also adopts policy changes under the statutory discretion afforded to the Secretary under section 1886(j)(7) of the Act. Specifically, we are removing the FIM™ instrument and associated Function Modifiers from the IRF–PAI, revising certain IRF coverage requirements, removing two measures from the IRF QRP measure set, and codifying policies that were previously finalized under the IRF QRP.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2) and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate the total impact of the policy updates described in this final rule by comparing the estimated payments in FY 2019 with those in FY 2018. This analysis results in an estimated $105 million increase for FY 2019 IRF PPS

payments. Additionally we estimate that costs associated with the proposals to revise certain IRF coverage requirements and update the reporting requirements under the IRF quality reporting program result in an estimated $23 million reduction in costs in FY 2019 for IRFs. We also estimate that the provisions in this final rule will result in an estimated $18.5 million reduction in Medicare Part B spending from physicians billing one fewer visit to Medicare Part B. We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Also, the rule has been reviewed by OMB. Accordingly, we have prepared a Regulatory Impact Analysis that, to the best of our ability, presents the costs and benefits of the rulemaking.

C. Anticipated Effects

1. Effects on IRFs

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IRFs and most other providers and suppliers are small entities, either by having revenues of $7.5 million to $38.5 million or less in any 1 year depending on industry classification, or by being nonprofit organizations that are not dominant in their markets. (For details, see the Small Business Administration's final rule that set forth size standards for health care industries, at 65 FR 69432 at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf,* effective March 26, 2012 and updated on February 26, 2016.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an approximate total of 1,120 IRFs, of which approximately 55 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. The HHS generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 14, we estimate that the net revenue impact of this final rule on all IRFs is to increase estimated payments by approximately 1.3 percent. The rates and policies set forth in this final rule will not have a significant impact (not greater than 3 percent) on a substantial number of small entities. Medicare Administrative Contractors are not considered to be small entities. Individuals and states are not included in the definition of a small entity. In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. As discussed in detail below in this section, the rates and policies set forth in this final rule will not have a significant impact (not greater than 3 percent) on a substantial number of rural hospitals based on the data of the 137 rural units and 11 rural hospitals in our database of 1,126 IRFs for which data were available.

Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–04, enacted on March 22, 1995) (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately $150 million. This final rule does not mandate any requirements for State, local, or tribal governments, or for the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. As stated, this final rule will not have a substantial effect on state and local governments, preempt state law, or otherwise have a federalism implication.

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017 and requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' This final rule is considered an E.O. 13771 deregulatory action. We estimate that this rule would generate $27.24 million in annualized cost savings, discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated costs savings of this rule can be found in the preceding analyses.

2. Detailed Economic Analysis

This final rule updates to the IRF PPS rates contained in the FY 2018 IRF PPS final rule (82 FR 36238). Specifically, this final rule updates the CMG relative weights and average length of stay values, the wage index, and the outlier threshold for high-cost cases. This final rule applies a MFP adjustment to the FY 2019 IRF market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.75 percentage point reduction to the FY 2019 IRF market basket increase factor in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(v) of the Act. Further, this final rule contains revisions to remove the FIM™ instrument and associated Function Modifiers from the IRF–PAI beginning in FY 2020, revise certain IRF coverage requirements, and revises and updates the IRF quality reporting requirements that are expected to result in some additional financial effects on IRFs. In addition, section X.J. of this final rule discusses the implementation of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements, in accordance with section 1886(j)(7) of the Act.

We estimate that the impact of the changes and updates described in this final rule will be a net estimated increase of $105 million in payments to IRF providers. This estimate does not include the implementation of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements (as discussed in section X.J. of this final rule). The impact analysis in Table 14 of this final rule represents the projected effects of the updates to IRF PPS payments for FY 2019 compared with the estimated IRF PPS payments in FY 2018. We determine the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in such variables as number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs.

Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2019, we are adopting standard annual revisions described in this final rule (for example, the update to the wage and market basket indexes used to adjust the federal rates). We are also implementing a productivity adjustment to the FY 2019 IRF market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.75 percentage point reduction to the FY 2017 IRF market basket increase factor in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(v) of the Act. We estimate the total increase in payments to IRFs in FY 2019, relative to FY 2018, will be approximately $105 million.

This estimate is derived from the application of the FY 2019 IRF market basket increase factor, as reduced by a productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and a 0.75 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(v) of the Act, which yields an estimated increase in aggregate payments to IRFs of $110 million. Furthermore, there is an additional estimated $5 million decrease in aggregate payments to IRFs due to the proposed update to the outlier threshold amount. Outlier payments are estimated to decrease from approximately 3.1 percent in FY 2018 to 3.0 percent in FY 2019. Therefore, summed together, we estimate that these updates will result in a net increase in estimated payments of $105 million from FY 2018 to FY 2019.

The effects of the updates that impact IRF PPS payment rates are shown in Table 14. The following updates that affect the IRF PPS payment rates are discussed separately below:

- The effects of the update to the outlier threshold amount, from approximately 3.1 percent to 3.0 percent of total estimated payments for FY 2019, consistent with section 1886(j)(4) of the Act.
- The effects of the annual market basket update (using the IRF market basket) to IRF PPS payment rates, as required by section 1886(j)(3)(A)(i) and sections 1886(j)(3)(C) and (D) of the Act, including a productivity adjustment in accordance with section 1886(j)(3)(C)(i)(I) of the Act, and a 0.75 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(v) of the Act.
- The effects of applying the budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the budget-neutral changes to the CMG relative weights and average length of stay values, under the authority of section 1886(j)(2)(C)(i) of the Act.
- The total change in estimated payments based on the FY 2019 payment changes relative to the estimated FY 2018 payments.

3. Description of Table 14

Table 14 categorizes IRFs by geographic location, including urban or rural location, and location for CMS's 9 Census divisions (as defined on the cost report) of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), by teaching status, and by disproportionate share patient percentage (DSH PP). The top row of Table 14 shows the overall impact on the 1,126 IRFs included in the analysis.

The next 12 rows of Table 14 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 978 IRFs located in urban areas included in our analysis. Among these, there are 709 IRF units of hospitals located in urban areas and 269 freestanding IRF hospitals located in urban areas. There are 148 IRFs located in rural areas included in our analysis. Among these, there are 137 IRF units of hospitals located in rural areas and 11 freestanding IRF hospitals located in rural areas. There are 389 for-profit IRFs. Among these, there are 349 IRFs in urban areas and 40 IRFs in rural areas. There are 619 non-profit IRFs. Among these, there are 532 urban IRFs and 87 rural IRFs. There are 118 government-owned IRFs. Among these, there are 97 urban IRFs and 21 rural IRFs.

The remaining four parts of Table 14 show IRFs grouped by their geographic location within a region, by teaching status, and by DSH PP. First, IRFs located in urban areas are categorized for their location within a particular one of the nine Census geographic regions. Second, IRFs located in rural areas are categorized for their location within a particular one of the nine Census geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. IRFs are then grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to average daily census (ADC) ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent. Finally, IRFs are grouped by DSH PP, including IRFs with zero DSH PP, IRFs with a DSH PP less than 5 percent, IRFs with a DSH PP between 5 and less than 10 percent, IRFs with a DSH PP between 10 and 20 percent, and IRFs with a DSH PP greater than 20 percent.

The estimated impacts of each policy described in this rule to the facility categories listed are shown in the columns of Table 14. The description of each column is as follows:

- Column (1) shows the facility classification categories.
- Column (2) shows the number of IRFs in each category in our FY 2019 analysis file.
- Column (3) shows the number of cases in each category in our FY 2019 analysis file.
- Column (4) shows the estimated effect of the adjustment to the outlier threshold amount.
- Column (5) shows the estimated effect of the update to the IRF labor-related share and wage index, in a budget-neutral manner.
- Column (6) shows the estimated effect of the update to the CMG relative weights and average length of stay values, in a budget-neutral manner.
- Column (7) compares our estimates of the payments per discharge, incorporating all of the policies reflected in this final rule for FY 2019 to our estimates of payments per discharge in FY 2018.

The average estimated increase for all IRFs is approximately 1.3 percent. This estimated net increase includes the effects of the IRF market basket increase factor for FY 2019 of 2.9 percent, reduced by a productivity adjustment of 0.8 percentage point in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, and further reduced by 0.75 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(v) of the Act.

It also includes the approximate 0.1 percent overall decrease in estimated IRF outlier payments from the update to the outlier threshold amount. Since we are making the updates to the IRF wage index and the CMG relative weights in a budget-neutral manner, they will not be expected to affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they will be expected to affect the estimated distribution of payments among providers.

TABLE 14—IRF IMPACT TABLE FOR FY 2019

[Columns 4 through 7 in percentage]

Facility classification	Number of IRF's	Number of cases	Outlier	FY 2019 CBSA wage index and labor-share	CMG weights	Total percent change [1]
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Total	1,126	403,341	−0.1	0.0	0.0	1.3
Urban unit	709	170,586	−0.1	0.0	0.0	1.2
Rural unit	137	22,274	−0.1	−0.3	0.1	1.0
Urban hospital	269	206,108	0.0	0.0	0.0	1.3
Rural hospital	11	4,373	0.0	0.2	0.1	1.6
Urban For-Profit	349	203,684	0.0	0.1	0.0	1.3
Rural For-Profit	40	8,557	−0.1	0.1	0.1	1.4
Urban Non-Profit	532	150,179	−0.1	0.0	0.0	1.2
Rural Non-Profit	87	14,952	−0.1	−0.3	0.1	0.9
Urban Government	97	22,831	−0.2	−0.1	0.0	1.2
Rural Government	21	3,138	−0.1	−0.2	0.1	1.2
Urban	978	376,694	−0.1	0.0	0.0	1.3
Rural	148	26,647	−0.1	−0.2	0.1	1.1
Urban by region:						
Urban New England	29	16,673	−0.1	0.0	0.0	1.3
Urban Middle Atlantic	141	53,414	−0.1	0.0	0.0	1.2
Urban South Atlantic	112	49,765	−0.1	−0.3	0.0	0.9
Urban East North Central	172	48,719	−0.1	0.1	0.1	1.4
Urban East South Central	55	35,817	0.0	0.0	−0.1	1.3
Urban West North Central	109	37,719	−0.1	−0.1	0.0	1.2
Urban West South Central	184	82,002	−0.1	0.4	0.0	1.7
Urban Mountain	78	28,796	−0.1	−0.3	0.0	1.0
Urban Pacific	98	23,789	−0.2	0.0	0.0	1.2
Rural by region:						
Rural New England	5	1,282	−0.1	1.9	0.0	3.2
Rural Middle Atlantic	11	1,450	−0.1	−0.4	0.0	0.8
Rural South Atlantic	13	2,716	0.0	−0.5	0.0	0.8
Rural East North Central	25	4,558	−0.1	−0.6	0.1	0.7
Rural East South Central	15	3,721	0.0	−0.2	0.1	1.3
Rural West North Central	29	4,702	−0.1	0.1	0.1	1.4
Rural West South Central	40	7,161	−0.1	−0.4	0.1	0.9
Rural Mountain	6	704	−0.2	0.4	0.2	1.7
Rural Pacific	4	353	−0.4	−0.3	0.0	0.7
Teaching status:						
Non-teaching	1021	357,816	−0.1	0.0	0.0	1.3
Resident to A DC less than 10%	62	33,936	−0.1	0.0	0.0	1.2
Resident to A DC 10%–19%	29	9,489	−0.1	0.1	0.1	1.3
Resident to A DC greater than 19%	14	2,100	−0.1	0.5	0.0	1.7
Disproportionate share patient percentage (DSH PP):						
DSH PP = 0%	24	4,936	−0.3	0.3	0.0	1.3
DSH PP <5%	150	62,891	−0.1	0.0	0.0	1.2
DSH PP 5%–10%	298	123,109	−0.1	0.1	0.0	1.3
DSH PP 10%–20%	372	135,115	−0.1	0.0	0.0	1.3
DSH PP greater than 20%	282	77,290	−0.1	−0.1	0.0	1.1

[1] This column includes the impact of the updates in columns (4), (5), and (6) above, and of the IRF market basket increase factor for FY 2019 (2.9 percent), reduced by 0.8 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and reduced by 0.75 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and -(D)(v) of the Act.

4. Impact of the Update to the Outlier Threshold Amount

The estimated effects of the update to the outlier threshold adjustment are presented in column 4 of Table 14. In the FY 2018 IRF PPS final rule (82 FR 36238), we used FY 2016 IRF claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2018 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2018.

For the FY 2019 IRF PPS proposed rule (83 FR 20987), we used preliminary FY 2017 IRF claims data, and, based on that preliminary analysis, we estimated that IRF outlier payments as a percentage of total estimated IRF payments would be 3.4 percent in FY 2018. As we typically do between the proposed and final rules each year, we updated our FY 2017 IRF claims data to

ensure that we are using the most recent available data in setting IRF payments. Therefore, based on updated analysis of the most recent IRF claims data for this final rule, we now estimate that IRF outlier payments as a percentage of total estimated IRF payments are 3.1 percent in FY 2018. Thus, we are adjusting the outlier threshold amount in this final rule to set total estimated outlier payments equal to 3 percent of total estimated payments in FY 2019. The estimated change in total IRF payments for FY 2019, therefore, includes an approximate 0.1 percent decrease in payments because the estimated outlier portion of total payments is estimated to decrease from approximately 3.1 percent to 3 percent.

The impact of this outlier adjustment update (as shown in column 4 of Table 14) is to decrease estimated overall payments to IRFs by about 0.1 percent. We estimate the largest decrease in payments from the update to the outlier threshold amount to be 0.4 percent for rural IRFs in the Pacific region.

5. Impact of the CBSA Wage Index and Labor-Related Share

In column 5 of Table 14, we present the effects of the budget-neutral update of the wage index and labor-related share. The changes to the wage index and the labor-related share are discussed together because the wage index is applied to the labor-related share portion of payments, so the changes in the two have a combined effect on payments to providers. As discussed in section VI.C. of this final rule, we are updating the labor-related share from 70.7 percent in FY 2018 to 70.5 percent in FY 2019.

6. Impact of the Update to the CMG Relative Weights and Average Length of Stay Values

In column 6 of Table 14, we present the effects of the budget-neutral update of the CMG relative weights and average length of stay values. In the aggregate, we do not estimate that these updates will affect overall estimated payments of IRFs. However, we do expect these updates to have small distributional effects.

7. Effects of the Removal of the FIM™ Instrument and Associated Function Modifiers From the IRF–PAI Beginning in FY 2020

As discussed in section VIII. of this final rule, we are removing the FIM™ Instrument and Associated Function Modifiers from the IRF–PAI beginning in FY 2020. We estimate that removal of these data items from the IRF–PAI will reduce administrative burden on IRF providers and reduce the costs incurred by IRFs by $10.5 million for FY 2020.

8. Effects of Revisions to Certain IRF PPS Requirements

As discussed in section IX. of this final rule, in response to the RFI, we are removing and amending certain IRF coverage criteria requirements that are overly burdensome on IRF providers beginning in FY 2019, that is, all IRF discharges on or after October 1, 2018.

We estimate the cost savings associated with our change to allow the post-admission physician evaluation to count as one of the required face-to-face physician visits, as discussed in section IX.A of this final rule, in the following way. We first estimate that the post-admission physician evaluation takes approximately 60 minutes to complete and the required face-to-face physician visits take, on average, 30 minutes each to complete. Both of these requirements must be fulfilled by a rehabilitation physician. To estimate the burden reduction of this change, therefore, we obtained the hourly wage rate for a physician (there was not a specific wage rate for a rehabilitation physician) from the Bureau of Labor Statistics (*http://www.bls.gov/ooh/healthcare/home.htm*) to be $100.00. The hourly wage rate including fringe benefits and overhead is $200.00.

In FY 2017, we estimate that there were approximately 1,126 total IRFs and on average 358 discharges per IRF annually. Therefore, there were an estimated seven patients (358 discharges/52 weeks) at the IRF per week. The rehabilitation physician spends 358 hours (60 minutes × 358 discharges) annually completing the post-admission physician evaluation. If on average each IRF has seven patients per week and each face-to-face visit takes an estimated 30 minutes for the rehabilitation physician to complete, annually the rehabilitation physician spends an estimated 546 hours ((7 patients × 3 visits × 0.5 hours) × 52 weeks) completing the required face-to-face physician visits. On average, a rehabilitation physician currently spends 903 hours (357 hours + 546 hours) annually completing post-admission physician evaluations and the required face-to-face physician visits.

If we allow the post-admission physician evaluation to count as one of the face-to-face required physician visits, and to be documented as such in the IRF medical record, we would need to estimate the average time spent on one face-to-face visit ((7 patients × 1 visit × 0.5 hours) × 52 weeks). Removing one of the face-to-face visits required in the first week of the IRF admission will save the rehabilitation physician approximately 182 hours ((7 patients × 1 visit × 0.5 hours) × 52 weeks) annually per IRF. This is a savings of 204,932 hours across all IRFs annually (1,126 IRFs × 182 hours).

To estimate the total cost savings per IRF annually, we multiply 182 hours by $200.00 (average physician's salary doubled to account for fringe and overhead costs). Therefore, we can estimate the total cost savings per IRF will be $36,400 annually. We estimate that the total cost savings for allowing the post-admission physician evaluation to count as one of the required face-to-face physician visits, will be $41 million (1,126 IRFs × $36,400) annually across the IRF setting. As described above, based on stakeholder feedback, we anticipate that rehabilitation physicians in a majority of IRFs will adopt this policy change; because there is some uncertainty, we assume in our burden reduction estimate that rehabilitation physicians in half of all IRFs will change their visiting practices accordingly. Therefore, we now estimate that the total cost savings for allowing the post-admission physician evaluation to count as one of the required face-to-face physician visits will be $20.5 million (563 IRFs × $36,400).

We also note that fewer physician visits will result in Medicare savings from lower Part B payments to physicians under the physician fee schedule. The national average Medicare Part B payment for a 30 minute moderate intensity ''subsequent'' visit (versus an initial visit) is $93. Therefore, if the estimated number of discharges per IRF is 358 and we multiply that by the estimated cost of one physician visit, then we estimate that the reduction in Part B billing per IRF would be approximately $33,000. Across the Medicare program for all IRFs, we estimate it would be approximately $37 million in Part B savings. However, we reduce this estimate by 50 percent, as we assume that only half of IRFs will adopt this policy. Therefore, we estimate that Medicare Part B payments to rehabilitation physicians in IRFs will be reduced by approximately $18.5 million.

We do not estimate a cost savings in removing the admission order coverage criteria requirements as IRFs are still required to comply with the enforcement of the admission requirements located in §§ 482.24(c), 482.12(c) and 412.3. Any increase in Medicare payments due to the change would be negligible given the anticipated low volume of claims that

would be payable under this revised policy that would not have been paid under the current policy. Therefore, we believe that the reduction of burden in this removal is in reducing the redundancy of requirements only.

Therefore, we estimate that the removal and updates to these requirements will reduce unnecessary regulatory and administrative burden on IRF providers and reduce the costs incurred by IRFs by $20.5 million for FY 2019. Additionally, we estimate that the removal and updates to these requirements will also reduce Medicare Part B payments by $18.5 million for FY 2019.

Though we are unsure exactly how many, we recognize that some IRFs may have facility protocols in place that exceed our IRF requirements regarding how many times the rehabilitation physician must visit each patient per week and document these visits in the IRF medical record. While our requirement is a minimum of three face-to-face visits a week, we understand that it is not uncommon for IRFs institute a facility protocol requiring the rehabilitation physician to see the patient daily. To the extent that some IRFs are choosing to exceed our requirements, we recognize that the savings estimate could be lower than what we have projected.

9. Effects of the Requirements for the IRF QRP for FY 2020

In accordance with section 1886(j)(7) of the Act, we will reduce by 2 percentage points the market basket increase factor otherwise applicable to an IRF for a fiscal year if the IRF does not comply with the requirements of the IRF QRP for that fiscal year. In section VII.K of this final rule, we discuss the method for applying the 2 percentage point reduction to IRFs that fail to meet the IRF QRP requirements.

As discussed in section X.4. of this final rule, we are removing two measures from the IRF QRP: Percent of Residents or Patients Who Were Assessed and Appropriately Given the Seasonal Influenza Vaccine (Short Stay) (NQF #0680) and the National Healthcare Safety Network (NHSN) Facility-wide Inpatient Hospital-onset Methicillin-resistant Staphylococcus aureus (MRSA) Bacteremia Outcome Measure (NQF #1716).

We describe the estimated burden and cost reductions for both of these measures in section XIV.C of this rule. In summary, the finalized IRF QRP measure removals will result in a burden reduction of $2,223.26 per IRF annually, and $2,503,629.76 for all IRFs annually.

We intend to continue closely monitoring the effects of the IRF QRP on IRFs and to help perpetuate successful reporting outcomes through ongoing stakeholder education, national trainings, IRF announcements, website postings, CMS Open Door Forums, and general and technical help desks.

D. Alternatives Considered

The following is a discussion of the alternatives considered for the IRF PPS updates contained in this final rule.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services. Thus, we did not consider alternatives to updating payments using the estimated IRF market basket increase factor for FY 2019. However, as noted previously in this final rule, section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a productivity adjustment to the market basket increase factor for FY 2019, and sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(v) of the Act require the Secretary to apply a 0.75 percentage point reduction to the market basket increase factor for FY 2019. Thus, in accordance with section 1886(j)(3)(C) of the Act, we are updating the IRF federal prospective payments in this final rule by 1.35 percent (which equals the 2.9 percent estimated IRF market basket increase factor for FY 2019 reduced by a 0.8 percentage point productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act and further reduced by 0.75 percentage point).

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2019. However, in light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of recent changes in IRF utilization and case-mix, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time to ensure that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs.

We considered updating facility-level adjustment factors for FY 2019. However, as discussed in more detail in the FY 2015 final rule (79 FR 45872), we believe that freezing the facility-level adjustments at FY 2014 levels for FY 2015 and all subsequent years (unless and until the data indicate that they need to be further updated) will allow us an opportunity to monitor the effects of the substantial changes to the adjustment factors for FY 2014, and will allow IRFs time to adjust to the previous changes.

We considered maintaining the existing outlier threshold amount for FY 2019. However, analysis of updated FY 2019 data indicates that estimated outlier payments would be higher than 3 percent of total estimated payments for FY 2019, by approximately 0.1 percent, unless we updated the outlier threshold amount. Consequently, we are adjusting the outlier threshold amount in this final rule to reflect a 0.1 percent decrease thereby setting the total outlier payments equal to 3 percent, instead of 3.1 percent, of aggregate estimated payments in FY 2019.

We considered not removing the FIM™ instrument and associated Function Modifiers from the IRF–PAI in this final rule. However, in light of recently available data located in the Quality Indicators section of the IRF–PAI, we believe that removal of the FIM™ instrument and associated Function Modifiers is appropriate at this time. As the data items located in the Quality Indicators section of the IRF–PAI are now collected for all IRFs, we believe that the collection of the FIM data is duplicative and creates undue burden on providers. Consequently, we are removing these data items from the IRF–PAI beginning with FY 2020. Additionally, the removal of the FIM™ Instrument and associated Function Modifiers necessitates the incorporation of the data items from the Quality Indicators section of the IRF–PAI into the CMG classification system. To ensure that the CMGs, relative weights, and average length of stay values are as reflective as possible of recent changes in IRF utilization and case-mix, we believe that it is appropriate to incorporate the data items from the Quality Indicators section of the IRF–PAI into the development of the CMGs beginning with FY 2020.

We considered not revising certain IRF PPS requirements, or revising them partially, in order to reduce burden in this final rule. Specifically, we considered not combining the post-admission physician evaluation with the required face-to-face physician visits, and continuing to require documentation of the post-admission physician evaluation and all three face-to-face physician visits in the IRF medical record in the first week of the patient's IRF stay. However, through the request for information, it was suggested that we focus on removing documentation and administrative burden in IRFs and we wanted to assist by combining two documentation requirements into one, thus reducing

the medical record documentation requirements that the rehabilitation physician would need to meet. Additionally, we also considered not removing the admission order requirement from the IRF medical record. However, we felt that the requirement was duplicative and could be met by other requirements that are currently in place. Lastly, we considered not allowing rehabilitation physicians to lead the interdisciplinary team meeting remotely via other forms of communication without additional documentation of this in the IRF medical record. We also considered only relaxing this requirement for rural IRFs, as some of the commenters suggested. However, we believe that this policy change is appropriate and beneficial for all IRFs, not just rural, so we decided to finalize the policy as proposed. As we believe that rehabilitation physicians rarely conduct interdisciplinary team meetings remotely, we do not believe that this policy has significant financial implications for IRFs. However, we believe that it does advance the Agency's goal of placing patients over paperwork.

Therefore, after the response that we received from providers regarding the RFI solicitation and comments that we received from the FY 2019 IRF PPS proposed rule, we believed that these specific coverage requirements were areas in which we could reduce unnecessary regulatory and administrative burden on IRF providers, while ensuring that IRF patients would continue to receive adequate care.

E. Regulatory Review Costs

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this final rule, 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 FY 2019 IRF PPS proposed rule will be the number of reviewers of this final rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this final rule. It is possible that not all commenters reviewed the FY 2019 IRF PPS proposed rule in detail, and it is also possible that some reviewers chose not to comment on the proposed rule. For these reasons we thought that the number of past commenters would be a fair estimate of the number of reviewers of this rule.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this final rule, and therefore for the purposes of our estimate we assume that each reviewer reads approximately 50 percent of the rule. We sought comments on this assumption.

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 $107.38 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes_nat.htm*). Assuming an average reading speed, we estimate that it would take approximately 2 hours for the staff to review half of this final rule. For each IRF that reviews the rule, the estimated cost is $214.76 (2 hours × $107.38). Therefore, we estimate that the total cost of reviewing this regulation is $23,408.84 ($214.76 × 109 reviewers).

F. Accounting Statement and Table

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in Table 15, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. Table 15 provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the updates presented in this final rule based on the data for 1,126 IRFs in our database. In addition, Table 15 presents the costs associated with the new IRF quality reporting program requirements for FY 2019.

TABLE 15—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURE

Change in Estimated Transfers from FY 2018 IRF PPS to FY 2019 IRF PPS	
Category	Transfers
Annualized Monetized Transfers	$105 million.
From Whom to Whom?	Federal Government to IRF Medicare Providers.
Change in Estimated Costs	
Category	Costs
Annualized monetized cost in FY 2019 for IRFs due to the removal of certain IRF coverage requirements.	Reduction of $20.5 million.
Annualized monetized cost in FY 2020 for IRFs due to the removal of FIM™ instrument and associated Function Modifiers from the IRF-PAI.	Reduction of $10.5 million.
Annualized monetized cost in FY 2019 for IRFs due to new quality reporting program requirements.	Reduction of $2.5 million.

G. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2019 are projected to increase by 1.3 percent, compared with the estimated payments in FY 2018, as reflected in column 7 of Table 14.

IRF payments per discharge are estimated to increase by 1.3 percent in urban areas and 1.1 percent in rural areas, compared with estimated FY 2018 payments. Payments per discharge to rehabilitation units are estimated to increase 1.2 percent in urban areas and 1.0 percent in rural areas. Payments per discharge to freestanding rehabilitation hospitals are estimated to increase 1.3 percent in urban areas and increase 1.6 percent in rural areas.

Overall, IRFs are estimated to experience a net increase in payments as a result of the policies in this final rule. The largest payment increase is estimated to be a 3.2 percent increase for rural IRFs located in the New England region. The analysis above, together with the remainder of this preamble, provides a Regulatory Impact Analysis.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 42 CFR chapter IV as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

§ 412.606 [Amended]

■ 2. Section 412.606 is amended by—
■ a. Removing paragraph (a); and
■ b. Redesignating paragraphs (b) and (c) as paragraphs (a) and (b).

■ 3. Section 412.622 is amended by—
■ a. Revising paragraph (a)(3)(iv);
■ b. Redesignating paragraphs (a)(5)(A) through (C) as paragraphs (a)(5)(i) through (iii); and
■ c. Revising newly redesignated paragraph (a)(5)(i).

The revisions read as follows:

§ 412.622 Basis of payment.

(a) * * *

(3) * * *

(iv) Requires physician supervision by a rehabilitation physician, defined as a licensed physician with specialized training and experience in inpatient rehabilitation. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. The post-admission physician evaluation described in paragraph (a)(4)(ii) of this section may count as one of the face-to-face visits.

* * * * *

(5) * * *

(i) The team meetings are led by a rehabilitation physician as defined in paragraph (a)(3)(iv) of this section, and further consist of a registered nurse with specialized training or experience in rehabilitation; a social worker or case manager (or both); and a licensed or certified therapist from each therapy discipline involved in treating the patient. All team members must have current knowledge of the patient's medical and functional status. The rehabilitation physician may lead the interdisciplinary team meeting remotely via a mode of communication such as video or telephone conferencing.

* * * * *

■ 4. Section 412.624 is amended by revising paragraph (c)(4)(i) and adding paragraph (c)(4)(iii) to read as follows:

§ 412.624 Methodology for calculating the Federal prospective payment rates.

* * * * *

(c) * * *

(4) * * *

(i) In the case of an IRF that is paid under the prospective payment system specified in § 412.1(a)(3) that does not submit quality data to CMS in accordance with § 412.634, the applicable increase factor specified in paragraph (a)(3) of this section, after application of subparagraphs (C)(iii) and (D) of section 1886(j)(3) of the Act, is reduced by 2 percentage points.

* * * * *

(iii) The 2 percentage point reduction described in paragraph (c)(4)(i) of this section may result in the applicable increase factor specified in paragraph (a)(3) of this section being less than 0.0 for a fiscal year, and may result in payment rates under the prospective payment system specified in § 412.1(a)(3) for a fiscal year being less than such payment rates for the preceding fiscal year.

* * * * *

■ 5. Section 412.634 is amended by revising paragraphs (b), (d)(1) and (5) to read as follows:

§ 412.634 Requirements under the Inpatient Rehabilitation Facility (IRF) Quality Reporting Program (QRP).

* * * * *

(b) *Submission requirements.* (1) IRFs must submit to CMS data on measures specified under sections 1886(j)(7)(D), 1899B(c)(1), 1899B(d)(1) of the Act, and standardized patient assessment data required under section 1899B(b)(1) of the Act, as applicable. Such data must be submitted in the form and manner, and at a time, specified by CMS.

(2) CMS may remove a quality measure from the IRF QRP based on one or more of the following factors:

(i) Measure performance among IRFs is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made;

(ii) Performance or improvement on a measure does not result in better patient outcomes;

(iii) A measure does not align with current clinical guidelines or practice;

(iv) The availability of a more broadly applicable (across settings, populations, or conditions) measure for the particular topic;

(v) The availability of a measure that is more proximal in time to desired patient outcomes for the particular topic;

(vi) The availability of a measure that is more strongly associated with desired patient outcomes for the particular topic;

(vii) The collection or public reporting of a measure leads to negative unintended consequences other than patient harm;

(viii) The costs associated with a measure outweigh the benefit of its continued use in the program.

* * * * *

(d) * * *

(1) IRFs that do not meet the requirement in paragraph (b) of this section for a program year will receive a written notification of non-compliance through at least one of the following methods: Quality Improvement and Evaluation System Assessment Submission and Processing (QIES ASAP) system, the United States Postal Service, or via an email from the Medicare Administrative Contractor (MAC).

* * * * *

(5) CMS will notify IRFs, in writing, of its final decision regarding any reconsideration request through at least one of the following methods: QIES ASAP system, the United States Postal Service, or via an email from the Medicare Administrative Contractor (MAC).

* * * * *

Dated: July 26, 2018.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: July 26, 2018.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2018–16517 Filed 7–31–18; 4:15 pm]

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Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; FY 2019 Inpatient Psychiatric Facilities Prospective Payment System and Quality Reporting Updates for Fiscal Year Beginning October 1, 2018 (FY 2019); Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1690–F]

RIN 0938–AT32

Medicare Program; FY 2019 Inpatient Psychiatric Facilities Prospective Payment System and Quality Reporting Updates for Fiscal Year Beginning October 1, 2018 (FY 2019)

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the prospective payment rates for Medicare inpatient hospital services provided by inpatient psychiatric facilities (IPFs), which include psychiatric hospitals and excluded psychiatric units of an acute care hospital or critical access hospital. These changes are effective for IPF discharges occurring during the fiscal year (FY) beginning October 1, 2018 through September 30, 2019 (FY 2019). This final rule also updates the IPF labor-related share, the IPF wage index for FY 2019, and the International Classification of Diseases 10th Revision, Clinical Modification (ICD–10–CM) codes for FY 2019. It also makes technical corrections to the IPF regulations, and updates quality measures and reporting requirements under the Inpatient Psychiatric Facility Quality Reporting (IPFQR) Program. In addition, it updates providers on the status of IPF PPS refinements.

DATES: These regulations are effective on October 1, 2018.

FOR FURTHER INFORMATION CONTACT: The IPF Payment Policy mailbox at *IPFPaymentPolicy@cms.hhs.gov* for general information.

Mollie Knight (410) 786–7948 or Hudson Osgood (410) 786–7897, for information regarding the market basket update or the labor related share.

Theresa Bean (410) 786–2287 or James Hardesty (410) 786–2629, for information regarding the regulatory impact analysis.

James Poyer (410) 786–2261 or Jeffrey Buck (410) 786–0407, for information regarding the inpatient psychiatric facility quality reporting program.

SUPPLEMENTARY INFORMATION:

Availability of Certain Tables Exclusively Through the Internet on the CMS Website

Tables setting forth the final fiscal year (FY) 2019 Wage Index for Urban Areas Based on Core-Based Statistical Area (CBSA) Labor Market Areas and the FY 2019 Wage Index Based on CBSA Labor Market Areas for Rural Areas are available exclusively through the internet, on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/IPFPPS/WageIndex.html.*

In addition, tables showing the complete listing of final ICD–10 Clinical Modification (CM) and Procedure Coding System (PCS) codes underlying the FY 2019 Inpatient Psychiatric Facilities (IPF) Prospective Payment System (PPS) for the IPF comorbidity adjustment, code first, and electroconvulsive therapy (ECT) are available online at: *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.* Addenda B–1 to B–4 to this final rule show the tables of the ICD–10–CM/PCS codes, which affect FY 2019 IPF PPS comorbidity categories, code first, and non-specific codes with regards to laterality.

I. Executive Summary

A. Purpose

This final rule updates the prospective payment rates, the outlier threshold, and the wage index for Medicare inpatient hospital services provided by Inpatient Psychiatric Facilities (IPFs) for discharges occurring during the Fiscal Year (FY) beginning October 1, 2018 through September 30, 2019. Additionally, this final rule makes technical corrections to the IPF regulations and updates the Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program.

B. Summary of the Major Provisions

1. Inpatient Psychiatric Facilities Prospective Payment System (IPF PPS)

In this final rule, we update the IPF PPS, as specified in 42 CFR 412.428. The updates include the following:

- Effective for the FY 2019, we adjusted the final 2012-based IPF market basket update of 2.9 percent by a reduction for economy-wide productivity of 0.8 percentage point as required by section 1886(s)(2)(A)(i) of the Social Security Act (the Act). We reduced the 2012-based IPF market basket update by 0.75 percentage point as required by section 1886(s)(2)(A)(ii) of the Act, resulting in a final IPF payment rate update of 1.35 percent for FY 2019.
- The 2012-based IPF market basket results in a labor-related share of 74.8 percent for FY 2019.
- We updated the IPF PPS federal per diem base rate from $771.35 to $782.78.
- Providers who failed to report quality data for FY 2019 payment will receive a FY 2019 federal per diem base rate of $767.33.
- We updated the electroconvulsive therapy (ECT) payment per treatment from $332.08 to $337.00.
- Providers who failed to report quality data for FY 2019 payment will receive a FY 2019 ECT payment per treatment of $330.35.
- We updated the labor-related share of 74.8 percent (based on the 2012-based IPF market basket) and core base statistical area (CBSA) rural and urban wage indices for FY 2019, and provided a wage index budget-neutrality adjustment of 1.0013.
- We updated the fixed dollar loss threshold amount from $11,425 to $12,865 to maintain estimated outlier payments at 2 percent of total estimated aggregate IPF PPS payments.
- We implemented minor technical corrections to IPF regulations.

2. Inpatient Psychiatric Facility Quality Reporting (IPFQR) Program

We are adopting several proposals related to measures and one proposal related to data submission for the IPFQR Program. Specifically, we proposed the removal of eight (8) measures beginning with the FY 2020 payment determination.

1. Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431);
2. Alcohol Use Screening, SUB–1 (NQF #1661);
3. Assessment of Patient Experience of Care;
4. Use of an Electronic Health Record;
5. Tobacco Use Screening, TOB–1 (NQF #1651);
6. Hours of Physical Restraint Use (NQF #0640);
7. Hours of Seclusion Use (NQF #0641); and
8. Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge, TOB–3 and TOB–3a (NQF #1656).

We are finalizing the removal of five of these eight measures:

1. Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431);
2. Alcohol Use Screening, SUB–1 (NQF #1661);
3. Assessment of Patient Experience of Care;
4. Use of an Electronic Health Record; and

5. Tobacco Use Screening, TOB–1 (NQF #1651).

In addition, we proposed to no longer require facilities to submit the sample size count for measures for which sampling is performed beginning with the FY 2020 Payment Determination (that is, data reported during summer of CY 2019) and are finalizing this policy as proposed.

3. Summary of Impacts

Provision description	Total transfers and cost reductions
FY 2019 IPF PPS payment update	The overall economic impact of this final rule is an estimated $50 million in increased payments to IPFs during FY 2019.
Updated IPFQR Program requirements	The total reduction in costs beginning in FY 2018 calculated in 2018 dollars for IPFs as a result of the updates to quality reporting requirements is estimated to be $20 million.

II. Background

A. Overview of the Legislative Requirements

Section 124 of the Medicare, Medicaid, and State Children's Health Insurance Program Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113) required the establishment and implementation of an IPF PPS. Specifically, section 124 of the BBRA mandated that the Secretary of the Department of Health and Human Services (the Secretary) develop a per diem PPS for inpatient hospital services furnished in psychiatric hospitals and excluded psychiatric units including an adequate patient classification system that reflects the differences in patient resource use and costs among psychiatric hospitals and excluded psychiatric units. ''Excluded'' psychiatric unit means a psychiatric unit in an acute care hospital that is excluded from the Inpatient Prospective Payment System (IPPS), or a psychiatric unit in a Critical Access Hospital (CAH) that is excluded from the CAH payment system. These excluded psychiatric units would be paid under the IPF PPS.

Section 405(g)(2) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) extended the IPF PPS to psychiatric distinct part units of CAHs.

Sections 3401(f) and 10322 of the Patient Protection and Affordable Care Act (Pub. L. 111–148) as amended by section 10319(e) of that Act and by section 1105(d) of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (hereafter referred to jointly as ''the Affordable Care Act'') added subsection (s) to section 1886 of the Social Security Act (the Act).

Section 1886(s)(1) of the Act titled ''Reference to Establishment and Implementation of System,'' refers to section 124 of the BBRA, which relates to the establishment of the IPF PPS.

Section 1886(s)(2)(A)(i) of the Act requires the application of the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act to the IPF PPS for the rate year (RY) beginning in 2012 (that is, a RY that coincides with a fiscal year (FY)) and each subsequent RY. As noted in our FY 2018 IPF PPS notice, published in the **Federal Register** on August 7, 2017 (82 FR 36771 through 36789), for the RY beginning in 2017, the productivity adjustment currently in place is equal to 0.6 percentage point.

Section 1886(s)(2)(A)(ii) of the Act requires the application of an ''other adjustment'' that reduces any update to an IPF PPS base rate by percentages specified in section 1886(s)(3) of the Act for the RY beginning in 2010 through the RY beginning in 2019. As noted in the FY 2018 IPF PPS notice, for the RY beginning in 2017, section 1886(s)(3)(D) of the Act requires that the reduction currently in place be equal to 0.75 percentage point.

Sections 1886(s)(4)(A) and 1886(s)(4)(B) of the Act require that for RY 2014 and each subsequent RY, IPFs that fail to report required quality data with respect to such a RY shall have their annual update to a standard federal rate for discharges reduced by 2.0 percentage points. This may result in an annual update being less than 0.0 for a RY, and may result in payment rates for the upcoming RY being less than such payment rates for the preceding RY. Any reduction for failure to report required quality data shall apply only to the RY involved, and the Secretary shall not take into account such reduction in computing the payment amount for a subsequent RY. We refer readers to section II.B of this final rule for an explanation of the IPF RY. More information about the specifics of the current IPFQR Program is available in the FY 2018 IPPS/Long-Term Care Hospital (LTCH) PPS final rule (82 FR 38461 through 38474).

To implement and periodically update these provisions, we have published various proposed and final rules and notices in the **Federal Register**. For more information regarding these documents, see the Center for Medicare & Medicaid (CMS) website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/index.html?redirect=/InpatientPsychFacilPPS/.*

B. Overview of the IPF PPS

The November 2004 IPF PPS final rule (69 FR 66922) established the IPF PPS, as required by section 124 of the BBRA and codified at 42 CFR part 412 Subpart N. The November 2004 IPF PPS final rule set forth the federal per diem base rate for the implementation year (the 18-month period from January 1, 2005 through June 30, 2006), and provided payment for the inpatient operating and capital costs to IPFs for covered psychiatric services they furnish (that is, routine, ancillary, and capital costs, but not costs of approved educational activities, bad debts, and other services or items that are outside the scope of the IPF PPS). Covered psychiatric services include services for which benefits are provided under the fee-for-service Part A (Hospital Insurance Program) of the Medicare program.

The IPF PPS established the federal per diem base rate for each patient day in an IPF derived from the national average daily routine operating, ancillary, and capital costs in IPFs in FY 2002. The average per diem cost was updated to the midpoint of the first year under the IPF PPS, standardized to account for the overall positive effects of the IPF PPS payment adjustments, and adjusted for budget-neutrality.

The federal per diem payment under the IPF PPS is comprised of the federal per diem base rate described previously and certain patient- and facility-level payment adjustments that were found in the regression analysis to be associated with statistically significant per diem cost differences.

The patient-level adjustments include age, Diagnosis-Related Group (DRG) assignment, and comorbidities; additionally, there are variable per diem adjustments to reflect higher per diem costs at the beginning of a patient's IPF stay. Facility-level adjustments include adjustments for the IPF's wage index, rural location, teaching status, a cost-of-living adjustment for IPFs located in Alaska and Hawaii, and an adjustment

for the presence of a qualifying emergency department (ED).

The IPF PPS provides additional payment policies for outlier cases, interrupted stays, and a per treatment payment for patients who undergo electroconvulsive therapy (ECT). During the IPF PPS mandatory 3-year transition period, stop-loss payments were also provided; however, since the transition ended as of January 1, 2008, these payments are no longer available.

A complete discussion of the regression analysis that established the IPF PPS adjustment factors can be found in the November 2004 IPF PPS final rule (69 FR 66933 through 66936).

Section 124 of the BBRA did not specify an annual rate update strategy for the IPF PPS and was broadly written to give the Secretary discretion in establishing an update methodology. Therefore, in the November 2004 IPF PPS final rule, we implemented the IPF PPS using the following update strategy:

- Calculate the final federal per diem base rate to be budget-neutral for the 18-month period of January 1, 2005 through June 30, 2006.
- Use a July 1 through June 30 annual update cycle.
- Allow the IPF PPS first update to be effective for discharges on or after July 1, 2006 through June 30, 2007.

In RY 2012, we proposed and finalized switching the IPF PPS payment rate update from a RY that begins on July 1 and ends on June 30, to one that coincides with the federal FY that begins October 1 and ends on September 30. In order to transition from one timeframe to another, the RY 2012 IPF PPS covered a 15-month period from July 1, 2011 through September 30, 2012. Therefore, the IPF RY has been equivalent to the October 1 through September 30 federal FY since RY 2013. For further discussion of the 15-month market basket update for RY 2012 and changing the payment rate update period to coincide with a FY period, we refer readers to the RY 2012 IPF PPS proposed rule (76 FR 4998) and the RY 2012 IPF PPS final rule (76 FR 26432).

C. Annual Requirements for Updating the IPF PPS

In November 2004, we implemented the IPF PPS in a final rule that published on November 15, 2004 in the **Federal Register** (69 FR 66922). In developing the IPF PPS, and to ensure that the IPF PPS is able to account adequately for each IPF's case-mix, we performed an extensive regression analysis of the relationship between the per diem costs and certain patient and facility characteristics to determine those characteristics associated with statistically significant cost differences on a per diem basis. For characteristics with statistically significant cost differences, we used the regression coefficients of those variables to determine the size of the corresponding payment adjustments.

In that final rule, we explained the reasons for delaying an update to the adjustment factors, derived from the regression analysis, including waiting until we have IPF PPS data that yields as much information as possible regarding the patient-level characteristics of the population that each IPF serves. We indicated that we did not intend to update the regression analysis and the patient-level and facility-level adjustments until we complete that analysis. Until that analysis is complete, we stated our intention to publish a notice in the **Federal Register** each spring to update the IPF PPS (69 FR 66966).

On May 6, 2011, we published a final rule in the **Federal Register** titled, ''Inpatient Psychiatric Facilities Prospective Payment System—Update for Rate Year Beginning July 1, 2011 (RY 2012)'' (76 FR 26432), which changed the payment rate update period to a RY that coincides with a FY update. Therefore, final rules are now published in the **Federal Register** in the summer to be effective on October 1. When proposing changes in IPF payment policy, a proposed rule would be issued in the spring and the final rule in the summer to be effective on October 1. For further discussion on changing the IPF PPS payment rate update period to a RY that coincides with a FY, we refer readers to our RY 2012 IPF PPS final rule (76 FR 26434 through 26435). For a detailed list of updates to the IPF PPS, we refer readers to our regulations at 42 CFR 412.428.

Our most recent IPF PPS annual update was published in a notice with comment period on August 7, 2017 in the **Federal Register** titled, ''Medicare Program; FY 2018 Inpatient Psychiatric Facilities Prospective Payment System—Rate Update'' (82 FR 36771), which updated the IPF PPS payment rates for FY 2018. That notice with comment period updated the IPF PPS federal per diem base rates that were published in the FY 2017 IPF PPS notice (81 FR 50502) in accordance with our established policies.

III. Provisions of the FY 2019 IPF PPS Final Rule and Responses to Comments

On May 8, 2018, we published a proposed rule in the **Federal Register** (83 FR 21104) entitled Medicare Program: FY 2019 Inpatient Psychiatric Facilities Prospective Payment System and Quality Reporting Updates for Fiscal Year Beginning October 1, 2018 (FY 2019). The May 8, 2018 proposed rule (herein referred to as the FY 2019 IPF PPS proposed rule) proposed updates to the prospective payment rates for Medicare inpatient hospital services provided by inpatient psychiatric facilities. In addition to the updates, we proposed to make minor technical corrections to several IPF regulations, and proposed updates to the IPF Quality Reporting program.

We received a total of 88 comments on these proposals from 44 providers, 21 industry groups or associations, 6 advocacy groups, 10 individuals, and 4 anonymous sources. Of the 88 comments, 9 focused on payment policies, 85 focused on the quality reporting proposals, and 12 focused on the RFI. A summary of the proposals, the comments and our responses follows.

A. Update to the FY 2019 Market Basket for the IPF PPS

1. Background

The input price index that was used to develop the IPF PPS was the ''Excluded Hospital with Capital'' market basket. This market basket was based on 1997 Medicare cost reports for Medicare participating inpatient rehabilitation facilities (IRFs), IPFs, LTCHs, cancer hospitals, and children's hospitals. Although ''market basket'' technically describes the mix of goods and services used in providing health care at a given point in time, this term is also commonly used to denote the input price index (that is, cost category weights and price proxies) derived from that market basket. Accordingly, the term market basket, as used in this document, refers to an input price index.

Since the IPF PPS inception, the market basket used to update IPF PPS payments has been rebased and revised to reflect more recent data on IPF cost structures. We last rebased and revised the IPF market basket in the FY 2016 IPF PPS rule, where we adopted a 2012-based IPF market basket, using Medicare cost report data for both Medicare participating psychiatric hospitals and excluded psychiatric units. We refer readers to the FY 2016 IPF PPS final rule for a detailed discussion of the 2012-based IPF PPS Market Basket and its development (80 FR 46656 through 46679). The FY 2016 IPS PPS final rule also includes references to the historical market baskets used to update IPF PPS payments since PPS implementation.

2. FY 2019 IPF Market Basket Update

For FY 2019 (beginning October 1, 2018 and ending September 30, 2019), we used an estimate of the 2012-based IPF market basket increase factor to update the IPF PPS base payment rate. Consistent with historical practice, we estimated the market basket update for the IPF PPS based on IHS Global, Inc.'s (IGI) forecast. IGI is a nationally recognized economic and financial forecasting firm that contracts with the CMS to forecast the components of the market baskets and multifactor productivity (MFP). For the proposed rule, based on IGI's first quarter 2018 forecast with historical data through the fourth quarter of 2017, the 2012-based IPF market basket increase factor for FY 2019 was 2.8 percent. As stated in the proposed rule (89 FR 21107), if more recent data subsequently became available, we would use such data, if appropriate, to determine the FY 2019 IPF market basket update and MFP adjustment for the final rule. Based on IGI's most recent second quarter 2018 forecast with historical data through the first quarter of 2018, the final 2012-based IPF market basket increase factor for FY 2019 is 2.9 percent.

Section 1886(s)(2)(A)(i) of the Act requires the application of the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act to the IPF PPS for the RY beginning in 2012 (a RY that coincides with a FY) and each subsequent RY. For this FY 2019 IPF PPS rule, based on IGI's second quarter 2018 forecast, the MFP adjustment for FY 2019 (the 10-year moving average of MFP for the period ending FY 2019) is projected to be 0.8 percent. We reduced the 2.9 percent IPF market basket update by this 0.8 percentage point productivity adjustment, as mandated by the Act. We note that the MFP adjustment did not change from the 0.8 percentage point that was proposed (89 FR 21107). For more information on the productivity adjustment, we refer reader to the discussion in the FY 2016 IPF PPS final rule (80 FR 46675).

In addition, for FY 2019 the 2012-based IPF PPS market basket update is further reduced by 0.75 percentage point as required by sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act. This results in an estimated FY 2019 IPF PPS payment rate update of 1.35 percent (2.9 − 0.8 − 0.75 = 1.35).

3. IPF Labor-Related Share

Due to variations in geographic wage levels and other labor-related costs, we continue to adjust the payment rates under the IPF PPS by a geographic wage index, which applies to the labor-related portion of the federal per diem base rate (hereafter referred to as the labor-related share).

The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market.

Based on our definition of the labor-related share and the cost categories in the 2012-based IPF market basket, we continue to include in the labor-related share the sum of the relative importance of Wages and Salaries; Employee Benefits; Professional Fees: Labor-Related; Administrative and Facilities Support Services; Installation, Maintenance, and Repair; All Other: Labor-related Services; and a portion (46 percent) of the Capital-Related cost weight from the 2012-based IPF market basket. The relative importance reflects the different rates of price change for these cost categories between the base year (FY 2012) and FY 2019. Using IGI's second quarter 2018 forecast for the 2012-based IPF market basket, the IPF labor-related share for FY 2019 is the sum of the FY 2019 relative importance of each labor-related cost category. For more information on the labor-related share and its calculation, we refer readers to the FY 2016 IPF PPS final rule (80 FR 46676 through 46679). For FY 2019, the update to the labor-related share based on IGI's second quarter 2018 forecast of the 2012-based IPF PPS market basket is 74.8 percent.

Comment: A few commenters appreciated the increase to the rates from the market basket update, but were concerned about the required reductions to the market basket update. One noted that these small increases don't keep up with the cost of care and that the updates need to account properly for inflation. Another commenter noted that the Department of Health and Human Service (HHS) is obligated to negatively adjust the market base rate as stipulated by the Act. The commenter also stated that the mandated adjustment fails to recognize the negative impacts that decreased payments can have on the ability of psychiatrists and IPFs to provide services, and recommend CMS to look at avenues to increase reimbursement for psychiatrists and mental and behavioral health (MBH) services in order to incentivize an expansion of access and treatment.

Response: The IPF market basket was developed to be specific to IPFs and their cost structures. Therefore, we believe it properly accounts for the inflation associated with providing IPF services. For more details on how that IPF-specific market basket was developed, we refer readers to the FY 2016 IPF Final rule (80 FR 46656 through 46679).

We appreciate the commenters' support for our increases to the payments, and their recognition that HHS (specifically, CMS) is obligated to reduce the market basket update in accordance with the Social Security Act. We note that section 1886(s)(3)(E) of the Act was amended by the Affordable Care Act at 3401(f)(3) and required an ''other adjustment'' for each RY beginning in 2010 through 2019. This section of the Act currently requires the ''other adjustment'' of 0.75 percentage point to be in place for only one more FY (the FY beginning in October 2019, which is FY 2020).

The IPF PPS is designed to account for provider resource use, including patient-level and facility-level differences in costs. We believe the IPF payment system supports and encourages access to IPFs.

Payments for professional services of psychiatrists are outside the scope of this IPF PPS rule.

B. Updates to the IPF PPS Rates for FY Beginning October 1, 2018

The IPF PPS is based on a standardized federal per diem base rate calculated from the IPF average per diem costs and adjusted for budget-neutrality in the implementation year. The federal per diem base rate is used as the standard payment per day under the IPF PPS and is adjusted by the patient-level and facility-level adjustments that are applicable to the IPF stay. A detailed explanation of how we calculated the average per diem cost appears in the November 2004 IPF PPS final rule (69 FR 66926).

1. Determining the Standardized Budget-Neutral Federal per Diem Base Rate

Section 124(a)(1) of the BBRA required that we implement the IPF PPS in a budget-neutral manner. In other words, the amount of total payments under the IPF PPS, including any payment adjustments, must be projected to be equal to the amount of total payments that would have been made if the IPF PPS were not implemented. Therefore, we calculated the budget-neutrality factor by setting the total estimated IPF PPS payments to be equal to the total estimated payments that would have been made under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248) methodology had the IPF PPS not been

implemented. A step-by-step description of the methodology used to estimate payments under the TEFRA payment system appears in the November 2004 IPF PPS Final rule (69 FR 66926).

Under the IPF PPS methodology, we calculated the final federal per diem base rate to be budget-neutral during the IPF PPS implementation period (that is, the 18-month period from January 1, 2005 through June 30, 2006) using a July 1 update cycle. We updated the average cost per day to the midpoint of the IPF PPS implementation period (October 1, 2005), and this amount was used in the payment model to establish the budget-neutrality adjustment.

Next, we standardized the IPF PPS federal per diem base rate to account for the overall positive effects of the IPF PPS payment adjustment factors by dividing total estimated payments under the TEFRA payment system by estimated payments under the IPF PPS. Additional information concerning this standardization can be found in the November 2004 IPF PPS final rule (69 FR 66932) and the RY 2006 IPF PPS final rule (71 FR 27045). We then reduced the standardized federal per diem base rate to account for the outlier policy, the stop loss provision, and anticipated behavioral changes. A complete discussion of how we calculated each component of the budget-neutrality adjustment appears in the November 2004 IPF PPS final rule (69 FR 66932 through 66933) and in the RY 2007 IPF PPS final rule (71 FR 27044 through 27046). The final standardized budget-neutral federal per diem base rate established for cost reporting periods beginning on or after January 1, 2005 was calculated to be $575.95.

The federal per diem base rate has been updated in accordance with applicable statutory requirements and § 412.428 through publication of annual notices or proposed and final rules. A detailed discussion on the standardized budget-neutral federal per diem base rate and the electroconvulsive therapy (ECT) payment per treatment appears in the FY 2014 IPF PPS update notice (78 FR 46738 through 46739). These documents are available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/index.html.*

IPFs must include a valid procedure code for ECT services provided to IPF beneficiaries in order to bill for ECT services, as described in our Medicare Claims Processing Manual, Chapter 3, Section 190.7.3 (available at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c03.pdf.*) There were no changes to the ECT procedure codes used on IPF claims as a result of the final update to the ICD–10–PCS code set for FY 2019.

Comment: A commenter appreciated our maintaining the ICD–10 codes for ECT.

Response: We appreciate the commenter's support.

2. Update of the Federal per Diem Base Rate and Electroconvulsive Therapy Payment per Treatment

The current (FY 2018) federal per diem base rate is $771.35 and the ECT payment per treatment is $332.08. For the FY 2019 federal per diem base rate, we applied the payment rate update of 1.35 percent (that is, the 2012-based IPF market basket increase for FY 2019 of 2.9 percent less the productivity adjustment of 0.8 percentage point, and further reduced by the 0.75 percentage point required under section 1886(s)(3)(E) of the Act), and the wage index budget-neutrality factor of 1.0013 (as discussed in section III.D.1.e of this rule) to the FY 2018 federal per diem base rate of $771.35, yielding a federal per diem base rate of $782.78 for FY 2019. Similarly, we applied the 1.35 percent payment rate update and the 1.0013 wage index budget-neutrality factor to the FY 2018 ECT payment per treatment, yielding an ECT payment per treatment of $337.00 for FY 2019.

Section 1886(s)(4)(A)(i) of the Act requires that for RY 2014 and each subsequent RY, in the case of an IPF that fails to report required quality data with respect to such rate year, the Secretary shall reduce any annual update to a standard federal rate for discharges during the RY by 2.0 percentage points. Therefore, we are applying a 2.0 percentage point reduction to the federal per diem base rate and the ECT payment per treatment as follows:

- For IPFs that fail requirements under the Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program, we applied a −0.65 percent payment rate update (that is, the IPF market basket increase for FY 2019 of 2.9 percent less the productivity adjustment of 0.8 percentage point, further reduced by the 0.75 percentage point for an update of 1.35 percent, and further reduced by 2 percentage points in accordance with section 1886(s)(4)(A)(ii) of the Act, which results in a negative update percentage) and the wage index budget-neutrality factor of 1.0013 to the FY 2018 federal per diem base rate of $771.35, yielding a federal per diem base rate of $767.33 for FY 2019.
- For IPFs that fail to meet requirements under the IPFQR Program, we applied the −0.65 percent annual payment rate update and the 1.0013 wage index budget-neutrality factor to the FY 2018 ECT payment per treatment of $332.08, yielding a ECT payment per treatment of $330.35 for FY 2019.

C. Updates to the IPF PPS Patient-Level Adjustment Factors

1. Overview of the IPF PPS Adjustment Factors

The IPF PPS payment adjustments were derived from a regression analysis of 100 percent of the FY 2002 Medicare Provider and Analysis Review (MedPAR) data file, which contained 483,038 cases. For a more detailed description of the data file used for the regression analysis, see the November 2004 IPF PPS final rule (69 FR 66935 through 66936). We continue to use the existing regression-derived adjustment factors established in 2005 for FY 2019. However, we have used more recent claims data to simulate payments to finalize the outlier fixed dollar loss threshold amount and to assess the impact of the IPF PPS updates.

2. IPF PPS Patient-Level Adjustments

The IPF PPS includes payment adjustments for the following patient-level characteristics: Medicare Severity Diagnosis Related Groups (MS–DRGs) assignment of the patient's principal diagnosis, selected comorbidities, patient age, and the variable per diem adjustments.

a. Update to MS–DRG Assignment

We believe it is important to maintain for IPFs the same diagnostic coding and Diagnosis Related Group (DRG) classification used under the Inpatient Prospective Payment System (IPPS) for providing psychiatric care. For this reason, when the IPF PPS was implemented for cost reporting periods beginning on or after January 1, 2005, we adopted the same diagnostic code set (ICD–9–CM) and DRG patient classification system (MS–DRGs) that were utilized at the time under the IPPS. In the RY 2009 IPF PPS notice (73 FR 25709), we discussed CMS' effort to better recognize resource use and the severity of illness among patients. CMS adopted the new MS–DRGs for the IPPS in the FY 2008 IPPS final rule with comment period (72 FR 47130). In the RY 2009 IPF PPS notice (73 FR 25716), we provided a crosswalk to reflect changes that were made under the IPF PPS to adopt the new MS–DRGs. For a detailed description of the mapping changes from the original DRG

adjustment categories to the current MS–DRG adjustment categories, we refer readers to the RY 2009 IPF PPS notice (73 FR 25714).

The IPF PPS includes payment adjustments for designated psychiatric DRGs assigned to the claim based on the patient's principal diagnosis. The DRG adjustment factors were expressed relative to the most frequently reported psychiatric DRG in FY 2002, that is, DRG 430 (psychoses). The coefficient values and adjustment factors were derived from the regression analysis. Mapping the DRGs to the MS–DRGs resulted in the current 17 IPF MS–DRGs, instead of the original 15 DRGs, for which the IPF PPS provides an adjustment. For FY 2019, we did not propose any changes to the IPF MS–DRG adjustment factors but proposed to maintain the existing IPF MS–DRG adjustment factors.

In the FY 2015 IPF PPS final rule published August 6, 2014 in the **Federal Register** titled, ''Inpatient Psychiatric Facilities Prospective Payment System—Update for FY Beginning October 1, 2014 (FY 2015)'' (79 FR 45945 through 45947), we finalized conversions of the ICD–9–CM-based MS–DRGs to ICD–10–CM/PCS-based MS–DRGs, which were implemented on October 1, 2015. Further information on the ICD–10–CM/PCS MS–DRG conversion project can be found on the CMS ICD–10–CM website at *https://www.cms.gov/Medicare/Coding/ICD10/ICD-10-MS-DRG-Conversion-Project.html.*

For FY 2019, we continue to make the existing payment adjustment for psychiatric diagnoses that group to one of the existing 17 IPF MS–DRGs listed in Addendum A. Addendum A is available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.* Psychiatric principal diagnoses that do not group to one of the 17 designated MS–DRGs will still receive the federal per diem base rate and all other applicable adjustments, but the payment will not include an MS–DRG adjustment.

The diagnoses for each IPF MS–DRG will be updated as of October 1, 2018, using the final IPPS FY 2019 ICD–10–CM/PCS code sets. The FY 2019 IPPS rule includes tables of the changes to the ICD–10–CM/PCS code sets which underlie the FY 2019 IPF MS–DRGs. Both the FY 2019 IPPS rule and the tables of changes to the ICD–10–CM/PCS code sets which underlie the FY 2019 MS–DRGs are available on the IPPS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/index.html.*

Code First

As discussed in the ICD–10–CM Official Guidelines for Coding and Reporting, certain conditions have both an underlying etiology and multiple body system manifestations due to the underlying etiology. For such conditions, the ICD–10–CM has a coding convention that requires the underlying condition be sequenced first followed by the manifestation. Wherever such a combination exists, there is a ''use additional code'' note at the etiology code, and a ''code first'' note at the manifestation code. These instructional notes indicate the proper sequencing order of the codes (etiology followed by manifestation). In accordance with the ICD–10–CM Official Guidelines for Coding and Reporting, when a primary (psychiatric) diagnosis code has a ''code first'' note, the provider would follow the instructions in the ICD–10–CM text. The submitted claim goes through the CMS processing system, which will identify the primary diagnosis code as non-psychiatric and search the secondary codes for a psychiatric code to assign a DRG code for adjustment. The system will continue to search the secondary codes for those that are appropriate for comorbidity adjustment.

For more information on the code first policy, see our November 2004 IPF PPS final rule (69 FR 66945) and see sections I.A.13 and I.B.7 of the FY 2019 ICD–10–CM Coding Guidelines, available at *https://www.cdc.gov/nchs/icd/icd10cm.htm#FY%202019%20release%20of%20ICD-10-CM.* In the FY 2015 IPF PPS final rule, we provided a code first table for reference that highlights the same or similar manifestation codes where the code first instructions apply in ICD–10–CM that were present in ICD–9–CM (79 FR 46009). From FY 2018 to FY 2019, there were no changes to the final ICD–10–CM/PCS codes in the IPF Code First table. The final FY 2019 Code First table is shown in Addendum B–2 on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

Comment: A commenter appreciated our consistency in maintaining the IPF MS–DRGs.

Response: We appreciate the commenter's support.

b. Payment for Comorbid Conditions

The intent of the comorbidity adjustments is to recognize the increased costs associated with comorbid conditions by providing additional payments for certain existing medical or psychiatric conditions that are expensive to treat. In our RY 2012 IPF PPS final rule (76 FR 26451 through 26452), we explained that the IPF PPS includes 17 comorbidity categories and identified the new, revised, and deleted ICD–9–CM diagnosis codes that generate a comorbid condition payment adjustment under the IPF PPS for RY 2012 (76 FR 26451).

Comorbidities are specific patient conditions that are secondary to the patient's principal diagnosis and that require treatment during the stay. Diagnoses that relate to an earlier episode of care and have no bearing on the current hospital stay are excluded and must not be reported on IPF claims. Comorbid conditions must exist at the time of admission or develop subsequently, and affect the treatment received, length of stay (LOS), or both treatment and LOS.

For each claim, an IPF may receive only one comorbidity adjustment within a comorbidity category, but it may receive an adjustment for more than one comorbidity category. Current billing instructions for discharge claims, on or after October 1, 2015, require IPFs to enter the complete ICD–10–CM codes for up to 24 additional diagnoses if they co-exist at the time of admission, or develop subsequently and impact the treatment provided.

The comorbidity adjustments were determined based on the regression analysis using the diagnoses reported by IPFs in FY 2002. The principal diagnoses were used to establish the DRG adjustments and were not accounted for in establishing the comorbidity category adjustments, except where ICD–9–CM code first instructions applied. In a code first situation, the submitted claim goes through the CMS processing system, which will identify the principal diagnosis code as non-psychiatric and search the secondary codes for a psychiatric code to assign an MS–DRG code for adjustment. The system will continue to search the secondary codes for those that are appropriate for comorbidity adjustment.

As noted previously, it is our policy to maintain the same diagnostic coding set for IPFs that is used under the IPPS for providing the same psychiatric care. The 17 comorbidity categories formerly defined using ICD–9–CM codes were converted to ICD–10–CM/PCS in our FY 2015 IPF PPS final rule (79 FR 45947 through 45955). The goal for converting the comorbidity categories is referred to as replication, meaning that the payment adjustment for a given patient

encounter is the same after ICD–10–CM implementation as it would be if the same record had been coded in ICD–9–CM and submitted prior to ICD–10–CM/PCS implementation on October 1, 2015. All conversion efforts were made with the intent of achieving this goal. For FY 2019, we are finalizing our proposal to use the same comorbidity adjustment factors in effect in FY 2018, which are found in Addendum A, available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

We have updated the ICD–10–CM/PCS codes which are associated with the existing IPF PPS comorbidity categories, based upon the final FY 2019 update to the ICD–10–CM/PCS code set. The FY 2019 ICD–10–CM/PCS updates included ICD–10–CM/PCS codes added to the Drug and/or Alcohol Abuse, Gangrene, Oncology Treatment, and Poisoning comorbidity categories, and codes deleted from the Oncology Treatment comorbidity category. These updates are detailed in Addenda B–1 and B–3 of this final rule, which is available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

In accordance with the policy established in the FY 2015 IPF PPS final rule (79 FR 45949 through 45952), we reviewed all FY 2019 ICD–10–CM codes to remove site unspecified codes from the FY 2019 ICD–10–CM/PCS codes in instances where more specific codes are available. As we stated in the FY 2015 IPF PPS final rule, we believe that specific diagnosis codes that narrowly identify anatomical sites where disease, injury, or condition exist should be used when coding patients' diagnoses whenever these codes are available. We finalized that we would remove site unspecified codes from the IPF PPS ICD–10–CM/PCS codes in instances in which more specific codes are available, as the clinician should be able to identify a more specific diagnosis based on clinical assessment at the medical encounter. Therefore, we are removing 3 site unspecified codes from the list of Oncology Treatment Diagnosis codes. See Addendum B–4 to this rule for a listing of the 3 ICD–10–CM/PCS site unspecified codes to be removed. Addendum B–4 is available on our website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

c. Patient Age Adjustments

As explained in the November 2004 IPF PPS final rule (69 FR 66922), we analyzed the impact of age on per diem cost by examining the age variable (range of ages) for payment adjustments. In general, we found that the cost per day increases with age. The older age groups are more costly than the under 45 age group, the differences in per diem cost increase for each successive age group, and the differences are statistically significant. For FY 2019, we are finalizing our proposal to continue to use the patient age adjustments currently in effect in FY 2018, as shown in Addendum A of this rule (see *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html*).

d. Variable per Diem Adjustments

We explained in the November 2004 IPF PPS final rule (69 FR 66946) that the regression analysis indicated that per diem cost declines as the length of stay (LOS) increases. The variable per diem adjustments to the federal per diem base rate account for ancillary and administrative costs that occur disproportionately in the first days after admission to an IPF. We used a regression analysis to estimate the average differences in per diem cost among stays of different lengths. As a result of this analysis, we established variable per diem adjustments that begin on day 1 and decline gradually until day 21 of a patient's stay. For day 22 and thereafter, the variable per diem adjustment remains the same each day for the remainder of the stay. However, the adjustment applied to day 1 depends upon whether the IPF has a qualifying ED. If an IPF has a qualifying ED, it receives a 1.31 adjustment factor for day 1 of each stay. If an IPF does not have a qualifying ED, it receives a 1.19 adjustment factor for day 1 of the stay. The ED adjustment is explained in more detail in section III.D.4 of this rule.

Final Decision: For FY 2019, we are finalizing our proposal to continue to use the variable per diem adjustment factors currently in effect as shown in Addendum A of this rule (available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html*). A complete discussion of the variable per diem adjustments appears in the November 2004 IPF PPS final rule (69 FR 66946).

D. Updates to the IPF PPS Facility-Level Adjustments

The IPF PPS includes facility-level adjustments for the wage index, IPFs located in rural areas, teaching IPFs, cost of living adjustments for IPFs located in Alaska and Hawaii, and IPFs with a qualifying ED.

1. Wage Index Adjustment

a. Background

As discussed in the RY 2007 IPF PPS final rule (71 FR 27061), RY 2009 IPF PPS (73 FR 25719) and the RY 2010 IPF PPS notices (74 FR 20373), in order to provide an adjustment for geographic wage levels, the labor-related portion of an IPF's payment is adjusted using an appropriate wage index. Currently, an IPF's geographic wage index value is determined based on the actual location of the IPF in an urban or rural area, as defined in § 412.64(b)(1)(ii)(A) and (C).

b. Updated Wage Index for FY 2019

Since the inception of the IPF PPS, we have used the pre-floor, pre-reclassified acute care hospital wage index in developing a wage index to be applied to IPFs, because there is not an IPF-specific wage index available. We believe that IPFs compete in the same labor markets as acute care hospitals, so the pre-floor, pre-reclassified hospital wage index should reflect IPF labor costs. As discussed in the RY 2007 IPF PPS final rule (71 FR 27061 through 27067) for RY 2007, under the IPF PPS, the wage index is calculated using the IPPS wage index for the labor market area in which the IPF is located, without taking into account geographic reclassifications, floors, and other adjustments made to the wage index under the IPPS. For a complete description of these IPPS wage index adjustments, we refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53365 through 53374). For FY 2019, we will continue to apply the most recent hospital wage index (the FY 2018 pre-floor, pre-reclassified hospital wage index, which is the most appropriate index as it best reflects the variation in local labor costs of IPFs in the various geographic areas) using the most recent hospital wage data (data from hospital cost reports for the cost reporting period beginning during FY 2014) without any geographic reclassifications, floors, or other adjustments. We will apply the FY 2019 IPF wage index to payments beginning October 1, 2018.

We will apply the wage index adjustment to the labor-related portion of the federal rate, which will change from 75.0 percent in FY 2018 to 74.8 percent in FY 2019. This percentage reflects the labor-related share of the final 2012-based IPF market basket for FY 2019 (see section III.A.3 of this rule).

c. Office of Management and Budget Bulletins

Office of Management and Budget (OMB) publishes bulletins regarding Core-Based Statistical Area (CBSA)

changes, including changes to CBSA numbers and titles. In the RY 2007 IPF PPS final rule (71 FR 27061 through 27067), we adopted the changes discussed in the OMB Bulletin No. 03–04 (June 6, 2003), which announced revised definitions for Metropolitan Statistical Areas (MSAs), and the creation of Micropolitan Statistical Areas and Combined Statistical Areas. In adopting the OMB CBSA geographic designations in RY 2007, we did not provide a separate transition for the CBSA-based wage index since the IPF PPS was already in a transition period from TEFRA payments to PPS payments.

In the RY 2009 IPF PPS notice, we incorporated the CBSA nomenclature changes published in the most recent OMB bulletin that applies to the hospital wage index used to determine the current IPF wage index and stated that we expect to continue to do the same for all the OMB CBSA nomenclature changes in future IPF PPS rules and notices, as necessary (73 FR 25721). The OMB bulletins may be accessed online at *https://www.whitehouse.gov/omb/bulletins/.*

In accordance with our established methodology, we have historically adopted any CBSA changes that are published in the OMB bulletin that corresponds with the hospital wage index used to determine the IPF wage index. For the FY 2015 IPF wage index, we used the FY 2014 pre-floor, pre-reclassified hospital wage index to adjust the IPF PPS payments. On February 28, 2013, OMB issued OMB Bulletin No. 13–01, which established revised delineations for MSAs, Micropolitan Statistical Areas, and Combined Statistical Areas, and provided guidance on the use of the delineations of these statistical areas. A copy of this bulletin may be obtained at *https://www.whitehouse.gov/omb/bulletins/.*

Because the FY 2014 pre-floor, pre-reclassified hospital wage index was finalized before the issuance of this Bulletin, the FY 2015 IPF wage index, which was based on the FY 2014 pre-floor, pre-reclassified hospital wage index, did not reflect OMB's new area delineations based on the 2010 Census. According to OMB, ''[t]his bulletin provides the delineations of all Metropolitan Statistical Areas, Metropolitan Divisions, Micropolitan Statistical Areas, Combined Statistical Areas, and New England City and Town Areas in the United States and Puerto Rico based on the standards published on June 28, 2010, in the **Federal Register** (75 FR 37246 through 37252) and Census Bureau data.'' These OMB Bulletin changes are reflected in the FY 2015 pre-floor, pre-reclassified hospital wage index, upon which the FY 2016 IPF wage index was based. We adopted these new OMB CBSA delineations in the FY 2016 IPF wage index and subsequent IPF wage indexes.

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 minor 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 the attachment to 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 OMB Bulletin No. 15–01. A copy of this bulletin may be obtained at *https://www.whitehouse.gov/omb/bulletins/.*

OMB Bulletin No. 15–01 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.

In accordance with our longstanding policy, the IPF PPS continues to use the latest labor market area delineations available as soon as is reasonably possible to maintain a more accurate and up-to-date payment system that reflects the reality of population shifts and labor market conditions. As discussed in the FY 2017 IPPS/LTCH PPS final rule (81 FR 56913), the updated labor market area definitions from OMB Bulletin 15–01 were implemented under the IPPS beginning on October 1, 2016 (FY 2017). Therefore, we implemented these revisions for the IPF PPS beginning October 1, 2017 (FY 2018), consistent with our historical practice of modeling IPF PPS adoption of the labor market area delineations after IPPS adoption of these delineations.

In summary, the FY 2018 pre-floor, pre-reclassified hospital wage index, which is used to determine the FY 2019 IPF wage index, has no changes to its OMB designations and already includes changes adopted in previous FYs.

The final FY 2019 IPF wage index is located on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/WageIndex.html.*

We received the following comments related to the IPF wage index.

Comment: Three commenters suggested changes to the IPF wage index. One commenter indicated that IPFs are subject to wage index protocols that differ from those applied to other post-acute care providers, which result in providers in the same labor market being subject to inconsistent wage index adjustments. Specifically, the commenter stated that the IPF PPS uses the prior year pre-classified acute care inpatient PPS wage index values, even though this 1-year lag is not applied for long term acute care hospitals or skilled nursing facilities. This commenter also stated that given all of the post-acute care settings are on a track that may result in payment under a single, combined system, there was a lack of justification for this unique treatment of IPFs. The commenter requested that CMS explore harmonizing the different wage methodologies across all post-acute care settings to ensure consistency for all providers.

Two commenters agreed with CMS' statement in the proposed rule that IPFs compete in the same labor markets as acute care hospitals. However, these commenters noted that under the IPF PPS, the wage index is calculated using the IPPS wage index for the labor market area in which the IPF is located, without taking into account geographic reclassifications, floors, and other adjustments made to the wage index under the IPPS. Because the IPF PPS wage index uses the pre-floor, pre-reclassified IPPS wage index as its basis, these commenters indicated that IPFs are at a severe disadvantage when competing with general acute care hospitals, since their payments under the IPF PPS simply do not reflect the economic conditions of these labor markets. The commenters stated that this issue is particularly acute in the ''frontier states,'' so named by the Affordable Care Act provision that established a floor on the area wage indexes in particularly rural states. The commenters noted that under the Affordable Care Act provision, states with a high share of low population-density counties have a ''floor'' on their area wage index. The commenters added that in accordance section 10324(a) of the Affordable Care Act, the frontier state adjustment is not subject to budget neutrality. They indicated that

because CMS does not take this floor into account when applying the IPPS wage index to IPFs, the wage index for an acute hospital can be up to 30 percent higher than an IPF in the same labor market. Consequently, IPFs in a frontier state are underpaid relative to general acute care hospitals in the same geographic areas, even though they compete directly for the same employees. These commenters recommended CMS not to disregard the frontier state ''floor'' of 1.0 when it applies the acute care hospital wage index to IPFs, including the non-application of budget neutrality, which is consistent with the IPPS payment methodology.

Response: We thank the commenters for their input on these wage index issues. Regarding the comment to harmonize the IPF wage index with those of other post-acute care (PAC) providers, we are not sure if the commenter is referring to the FY 2019 President's Budget proposal to reform PAC payment and consolidate into one payment system (consistent with a recommendation made by the Medicare Payment Advisory Commission [1]), or if the commenter is referring to a demonstration project of PAC payment reform (*https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Reports/Research-Reports-Items/PAC_Payment_Reform_Demo_Final.html*). Regardless, IPFs are not included in either the President's FY 2019 Budget proposal or the PAC payment reform demonstration project.

We also note that other Medicare providers (for example, Inpatient Rehabilitation Facilities and hospices) also have a 1-year lag in their wage index. This lag was established at a time when computerized data systems were not as agile as at present, and the preparation of the hospital wage index (which is the basis of the IPF wage index) was more time-consuming. By using the prior FY's hospital wage index for developing the IPF wage index, IPFs are able to use the most reliable wage index data. Any errors in the prior year's hospital wage index would have been identified and corrected prior to using it for developing the IPF wage index.

Regarding the comments requesting us to consider the ''frontier'' floor, we will take the commenters' suggestions into consideration.

[1] Medicare Payment Advisory Commission. Report to the Congress. Medicare and the Health Care Delivery System, Chapter 3, ''Mandated Report: Developing a unified payment system for post-acute care,'' pages 57–105. June 2016.

d. Adjustment for Rural Location

In the November 2004 IPF PPS final rule, we provided a 17 percent payment adjustment for IPFs located in a rural area. This adjustment was based on the regression analysis, which indicated that the per diem cost of rural facilities was 17 percent higher than that of urban facilities after accounting for the influence of the other variables included in the regression. For FY 2019, we are finalizing our proposal to continue to apply a 17 percent payment adjustment for IPFs located in a rural area as defined at § 412.64(b)(1)(ii)(C). A complete discussion of the adjustment for rural locations appears in the November 2004 IPF PPS final rule (69 FR 66954).

Comment: One commenter supported CMS' maintaining the 17 percent IPF rural adjustment.

Response: We appreciate the commenter's support for our IPF rural adjustment.

e. Budget Neutrality Adjustment

Changes to the wage index are made in a budget-neutral manner so that updates do not increase expenditures. Therefore, for FY 2019, we are finalizing our proposal to continue to apply a budget-neutrality adjustment in accordance with our existing budget-neutrality policy. This policy requires us to update the wage index in such a way that total estimated payments to IPFs for FY 2019 are the same with or without the changes (that is, in a budget-neutral manner) by applying a budget neutrality factor to the IPF PPS rates. We use the following steps to ensure that the rates reflect the update to the wage indexes (based on the FY 2014 hospital cost report data) and the labor-related share in a budget-neutral manner:

Step 1. Simulate estimated IPF PPS payments, using the FY 2018 IPF wage index values (available on the CMS website) and labor-related share (as published in the FY 2018 IPF PPS notice with comment period (82 FR 35771)).

Step 2. Simulate estimated IPF PPS payments using the FY 2019 IPF wage index values (available on the CMS website) and FY 2019 labor-related share (based on the latest available data as discussed previously).

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the FY 2019 budget-neutral wage adjustment factor of 1.0013.

Step 4. Apply the FY 2019 budget-neutral wage adjustment factor from step 3 to the FY 2018 IPF PPS federal per diem base rate after the application of the market basket update described in section III.A.2 of this rule, to determine the FY 2019 IPF PPS federal per diem base rate.

2. Teaching Adjustment

In the November 2004 IPF PPS final rule, we implemented regulations at § 412.424(d)(1)(iii) to establish a facility-level adjustment for IPFs that are, or are part of teaching hospitals. The teaching adjustment accounts for the higher indirect operating costs experienced by hospitals that participate in graduate medical education (GME) programs. The payment adjustments are made based on the ratio of the number of full-time equivalent (FTE) interns and residents training in the IPF and the IPF's average daily census (ADC).

Medicare makes direct GME payments (for direct costs such as resident and teaching physician salaries, and other direct teaching costs) to all teaching hospitals including those paid under a PPS, and those paid under the TEFRA rate-of-increase limits. These direct GME payments are made separately from payments for hospital operating costs and are not part of the IPF PPS. The direct GME payments do not address the estimated higher indirect operating costs teaching hospitals may face.

The results of the regression analysis of FY 2002 IPF data established the basis for the payment adjustments included in the November 2004 IPF PPS final rule. The results showed that the indirect teaching cost variable is significant in explaining the higher costs of IPFs that have teaching programs. We calculated the teaching adjustment based on the IPF's ''teaching variable,'' which is (1 + (the number of FTE residents training in the IPF/the IPF's ADC)). The teaching variable is then raised to 0.5150 power to result in the teaching adjustment. This formula is subject to the limitations on the number of FTE residents, which are described later in this section of this rule.

We established the teaching adjustment in a manner that limited the incentives for IPFs to add FTE residents for the purpose of increasing their teaching adjustment. We imposed a cap on the number of FTE residents that may be counted for purposes of calculating the teaching adjustment. The cap limits the number of FTE residents that teaching IPFs may count for the purpose of calculating the IPF PPS teaching adjustment, not the number of residents teaching institutions can hire or train. We calculated the number of FTE residents that trained in the IPF during a ''base year'' and used that FTE

resident number as the cap. An IPF's FTE resident cap is ultimately determined based on the final settlement of the IPF's most recent cost report filed before November 15, 2004 (publication date of the IPF PPS final rule). A complete discussion of the temporary adjustment to the FTE cap to reflect residents added due to hospital closure and by residency program appears in the RY 2012 IPF PPS proposed rule (76 FR 5018 through 5020) and the RY 2012 IPF PPS final rule (76 FR 26453 through 26456).

In the regression analysis, the logarithm of the teaching variable had a coefficient value of 0.5150. We converted this cost effect to a teaching payment adjustment by treating the regression coefficient as an exponent and raising the teaching variable to a power equal to the coefficient value. We note that the coefficient value of 0.5150 was based on the regression analysis holding all other components of the payment system constant. A complete discussion of how the teaching adjustment was calculated appears in the November 2004 IPF PPS final rule (69 FR 66954 through 66957) and the RY 2009 IPF PPS notice (73 FR 25721). As with other adjustment factors derived through the regression analysis, we do not plan to rerun the teaching adjustment factors in the regression analysis until we more fully analyze IPF PPS data as part of the IPF PPS refinement we discuss in section V.

Therefore, in this FY 2019 rule, we are finalizing our proposal to continue to retain the coefficient value of 0.5150 for the teaching adjustment to the federal per diem base rate.

Comment: One commenter took no position on the IPF teaching adjustment, but encouraged CMS to lift the graduate medical education (GME) cap on psychiatric residents.

Response: The IPF PPS teaching adjustment is associated with indirect medical education (IME) rather than with GME. GME policies are outside the scope of this rule.

3. Cost of Living Adjustment for IPFs Located in Alaska and Hawaii

The IPF PPS includes a payment adjustment for IPFs located in Alaska and Hawaii based upon the area in which the IPF is located. As we explained in the November 2004 IPF PPS final rule, the FY 2002 data demonstrated that IPFs in Alaska and Hawaii had per diem costs that were disproportionately higher than other IPFs. Other Medicare prospective payment systems (for example: the IPPS and LTCH PPS) adopted a cost of living adjustment (COLA) to account for the cost differential of care furnished in Alaska and Hawaii.

We analyzed the effect of applying a COLA to payments for IPFs located in Alaska and Hawaii. The results of our analysis demonstrated that a COLA for IPFs located in Alaska and Hawaii would improve payment equity for these facilities. As a result of this analysis, we provided a COLA in the November 2004 IPF PPS final rule.

A COLA for IPFs located in Alaska and Hawaii is made by multiplying the non-labor-related portion of the federal per diem base rate by the applicable COLA factor based on the COLA area in which the IPF is located.

The COLA factors through 2009 are published on the Office of Personnel Management (OPM) website (*https://www.opm.gov/oca/cola/rates.asp*).

We note that the COLA areas for Alaska are not defined by county as are the COLA areas for Hawaii. In 5 CFR 591.207, the OPM established the following COLA areas:

- City of Anchorage, and 80-kilometer (50-mile) radius by road, as measured from the federal courthouse.
- City of Fairbanks, and 80-kilometer (50-mile) radius by road, as measured from the federal courthouse.
- City of Juneau, and 80-kilometer (50-mile) radius by road, as measured from the federal courthouse.
- Rest of the State of Alaska.

As stated in the November 2004 IPF PPS final rule, we update the COLA factors according to updates established by the OPM. However, sections 1911 through 1919 of the Nonforeign Area Retirement Equity Assurance Act, as contained in subtitle B of title XIX of the National Defense Authorization Act (NDAA) for FY 2010 (Pub. L. 111–84, October 28, 2009), transitions the Alaska and Hawaii COLAs to locality pay. Under section 1914 of NDAA, locality pay was phased in over a 3-year period beginning in January 2010, with COLA rates frozen as of the date of enactment, October 28, 2009, and then proportionately reduced to reflect the phase-in of locality pay.

When we published the proposed COLA factors in the RY 2012 IPF PPS proposed rule (76 FR 4998), we inadvertently selected the FY 2010 COLA rates, which had been reduced to account for the phase-in of locality pay. We did not intend to propose the reduced COLA rates because that would have understated the adjustment. Since the 2009 COLA rates did not reflect the phase-in of locality pay, we finalized the FY 2009 COLA rates for RY 2010 through RY 2014.

In the FY 2013 IPPS/LTCH final rule (77 FR 53700 through 53701), we established a new methodology to update the COLA factors for Alaska and Hawaii, and adopted this methodology for the IPF PPS in the FY 2015 IPF final rule (79 FR 45958 through 45960). We adopted this new COLA methodology for the IPF PPS because IPFs are hospitals with a similar mix of commodities and services. We think it is appropriate to have a consistent policy approach with that of other hospitals in Alaska and Hawaii. Therefore, the IPF COLAs for FY 2015 through FY 2017 were the same as those applied under the IPPS in those years. As finalized in the FY 2013 IPPS/LTCH PPS final rule (77 FR 53700 and 53701), the COLA updates are determined every 4 years, when the IPPS market basket labor-related share is updated during rebasing. Because the labor-related share of the IPPS market basket was updated for FY 2018, the COLA factors were updated in FY 2018 IPPS/LTCH rulemaking (82 FR 38529). As such, we also updated the IPF PPS COLA factors for FY 2018 (82 FR 36780 through 36782) to reflect the updated COLA factors finalized in the FY 2018 IPPS/LTCH rulemaking.

Final Decision: For FY 2019, we are finalizing our proposal to continue to use the COLA factors established for the IPF PPS in FY 2018 to adjust the nonlabor-related portion of the per diem amount for IPFs located in Alaska and Hawaii. These factors are shown in Table 1. For comparison purposes, we also are showing the FY 2015 through FY 2017 COLA factors.

TABLE 1—COMPARISON OF IPF PPS COST-OF-LIVING ADJUSTMENT FACTORS: IPFS LOCATED IN ALASKA AND HAWAII

Area	FY 2015 through 2017	FY 2018 and FY 2019
Alaska:		
City of Anchorage and 80-kilometer (50-mile) radius by road	1.23	1.25
City of Fairbanks and 80-kilometer (50-mile) radius by road	1.23	1.25
City of Juneau and 80-kilometer (50-mile) radius by road	1.23	1.25

TABLE 1—COMPARISON OF IPF PPS COST-OF-LIVING ADJUSTMENT FACTORS: IPFS LOCATED IN ALASKA AND HAWAII—Continued

Area	FY 2015 through 2017	FY 2018 and FY 2019
Rest of Alaska	1.25	1.25
Hawaii:		
City and County of Honolulu	1.25	1.25
County of Hawaii	1.19	1.21
County of Kauai	1.25	1.25
County of Maui and County of Kalawao	1.25	1.25

The IPF PPS COLA factors for FY 2019 are also shown in Addendum A of this rule, available at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientPsychFacilPPS/tools.html.*

4. Adjustment for IPFs With a Qualifying Emergency Department (ED)

The IPF PPS includes a facility-level adjustment for IPFs with qualifying EDs. We provide an adjustment to the federal per diem base rate to account for the costs associated with maintaining a full-service ED. The adjustment is intended to account for ED costs incurred by a psychiatric hospital with a qualifying ED or an excluded psychiatric unit of an acute care hospital or a CAH, for preadmission services otherwise payable under the Medicare Hospital Outpatient Prospective Payment System (OPPS), furnished to a beneficiary on the date of the beneficiary's admission to the hospital and during the day immediately preceding the date of admission to the IPF (see § 413.40(c)(2)), and the overhead cost of maintaining the ED. This payment is a facility-level adjustment that applies to all IPF admissions (with one exception described below), regardless of whether a particular patient receives preadmission services in the hospital's ED.

The ED adjustment is incorporated into the variable per diem adjustment for the first day of each stay for IPFs with a qualifying ED. Those IPFs with a qualifying ED receive an adjustment factor of 1.31 as the variable per diem adjustment for day 1 of each patient stay. If an IPF does not have a qualifying ED, it receives an adjustment factor of 1.19 as the variable per diem adjustment for day 1 of each patient stay.

The ED adjustment is made on every qualifying claim except as described in this section of the rule. As specified in § 412.424(d)(1)(v)(B), the ED adjustment is not made when a patient is discharged from an acute care hospital or CAH and admitted to the same hospital's or CAH's excluded psychiatric unit. We clarified in the November 2004 IPF PPS final rule (69 FR 66960) that an ED adjustment is not made in this case because the costs associated with ED services are reflected in the DRG payment to the acute care hospital or through the reasonable cost payment made to the CAH.

Therefore, when patients are discharged from an acute care hospital or CAH and admitted to the same hospital's or CAH's excluded psychiatric unit, the IPF receives the 1.19 adjustment factor as the variable per diem adjustment for the first day of the patient's stay in the IPF. For FY 2019, we will continue to retain the 1.31 adjustment factor for IPFs with qualifying EDs. A complete discussion of the steps involved in the calculation of the ED adjustment factor in our November 2004 IPF PPS final rule (69 FR 66959 through 66960) and the RY 2007 IPF PPS final rule (71 FR 27070 through 27072).

Final Decision: We did not receive any comments on the ED adjustment. Therefore, we are finalizing this section as proposed.

E. Other Payment Adjustments and Policies

1. Outlier Payment Overview

The IPF PPS includes an outlier adjustment to promote access to IPF care for those patients who require expensive care and to limit the financial risk of IPFs treating unusually costly patients. In the November 2004 IPF PPS final rule, we implemented regulations at § 412.424(d)(3)(i) to provide a per-case payment for IPF stays that are extraordinarily costly. Providing additional payments to IPFs for extremely costly cases strongly improves the accuracy of the IPF PPS in determining resource costs at the patient and facility level. These additional payments reduce the financial losses that would otherwise be incurred in treating patients who require more costly care and; therefore, reduce the incentives for IPFs to under-serve these patients. We make outlier payments for discharges in which an IPF's estimated total cost for a case exceeds a fixed dollar loss threshold amount (multiplied by the IPF's facility-level adjustments) plus the federal per diem payment amount for the case.

In instances when the case qualifies for an outlier payment, we pay 80 percent of the difference between the estimated cost for the case and the adjusted threshold amount for days 1 through 9 of the stay (consistent with the median LOS for IPFs in FY 2002), and 60 percent of the difference for day 10 and thereafter. We established the 80 percent and 60 percent loss sharing ratios because we were concerned that a single ratio established at 80 percent (like other Medicare PPSs) might provide an incentive under the IPF per diem payment system to increase LOS in order to receive additional payments.

After establishing the loss sharing ratios, we determined the current fixed dollar loss threshold amount through payment simulations designed to compute a dollar loss beyond which payments are estimated to meet the 2 percent outlier spending target. Each year when we update the IPF PPS, we simulate payments using the latest available data to compute the fixed dollar loss threshold so that outlier payments represent 2 percent of total projected IPF PPS payments.

2. Update to the Outlier Fixed Dollar Loss Threshold Amount

In accordance with the update methodology described in § 412.428(d), we are updating the fixed dollar loss threshold amount used under the IPF PPS outlier policy. Based on the regression analysis and payment simulations used to develop the IPF PPS, we established a 2 percent outlier policy, which strikes an appropriate balance between protecting IPFs from extraordinarily costly cases while ensuring the adequacy of the federal per diem base rate for all other cases that are not outlier cases.

Based on an analysis of the latest available data (the March 2018 update of FY 2017 IPF claims) and rate increases, we believe it is necessary to update the fixed dollar loss threshold

amount to maintain an outlier percentage that equals 2 percent of total estimated IPF PPS payments. We will update the IPF outlier threshold amount for FY 2019 using FY 2017 claims data and the same methodology that we used to set the initial outlier threshold amount in the RY 2007 IPF PPS final rule (71 FR 27072 and 27073), which is also the same methodology that we used to update the outlier threshold amounts for years 2008 through 2018. Based on an analysis of these updated data, we estimate that IPF outlier payments as a percentage of total estimated payments are approximately 2.24 percent in FY 2018 (compared to approximately 2.27 percent in the proposed rule). Therefore, we are updating the outlier threshold amount to $12,865 to maintain estimated outlier payments at 2 percent of total estimated aggregate IPF payments for FY 2019. This final rule update is a decrease from the proposed threshold of $12,935.

Comment: A commenter was appreciative of our updating the outlier threshold, and noted that it is critical to receive reimbursement that allows IPFs to accept high cost patients.

Response: We thank the commenter for their support of our outlier policy.

3. Update to IPF Cost-to-Charge Ratio Ceilings

Under the IPF PPS, an outlier payment is made if an IPF's cost for a stay exceeds a fixed dollar loss threshold amount plus the IPF PPS amount. In order to establish an IPF's cost for a particular case, we multiply the IPF's reported charges on the discharge bill by its overall cost-to-charge ratio (CCR). This approach to determining an IPF's cost is consistent with the approach used under the IPPS and other PPSs. In the FY 2004 IPPS final rule (68 FR 34494), we implemented changes to the IPPS policy used to determine CCRs for acute care hospitals, because we became aware that payment vulnerabilities resulted in inappropriate outlier payments. Under the IPPS, we established a statistical measure of accuracy for CCRs to ensure that aberrant CCR data did not result in inappropriate outlier payments.

As we indicated in the November 2004 IPF PPS final rule (69 FR 66961), we believe that the IPF outlier policy is susceptible to the same payment vulnerabilities as the IPPS; therefore, we adopted a method to ensure the statistical accuracy of CCRs under the IPF PPS. Specifically, we adopted the following procedure in the November 2004 IPF PPS final rule:

- Calculated two national ceilings, one for IPFs located in rural areas and one for IPFs located in urban areas.
- Computed the ceilings by first calculating the national average and the standard deviation of the CCR for both urban and rural IPFs using the most recent CCRs entered in the CY 2018 Provider Specific File.

For FY 2019, we will continue to follow this methodology.

To determine the rural and urban ceilings, we multiplied each of the standard deviations by 3 and added the result to the appropriate national CCR average (either rural or urban). The upper threshold CCR for IPFs in FY 2019 is 2.0068 for rural IPFs, and 1.6862 for urban IPFs, based on CBSA-based geographic designations. If an IPF's CCR is above the applicable ceiling, the ratio is considered statistically inaccurate, and we assign the appropriate national (either rural or urban) median CCR to the IPF.

We apply the national CCRs to the following situations:

- New IPFs that have not yet submitted their first Medicare cost report. We continue to use these national CCRs until the facility's actual CCR can be computed using the first tentatively or final settled cost report.
- IPFs whose overall CCR is in excess of three standard deviations above the corresponding national geometric mean (that is, above the ceiling).
- Other IPFs for which the Medicare Administrative Contractor (MAC) obtains inaccurate or incomplete data with which to calculate a CCR.

We will continue to update the FY 2019 national median and ceiling CCRs for urban and rural IPFs based on the CCRs entered in the latest available IPF PPS Provider Specific File. Specifically, for FY 2019, to be used in each of the three situations listed previously, using the most recent CCRs entered in the CY 2018 Provider Specific File, we provide an estimated national median CCR of 0.5890 for rural IPFs and a national median CCR of 0.4365 for urban IPFs. These calculations are based on the IPF's location (either urban or rural) using the CBSA-based geographic designations.

A complete discussion regarding the national median CCRs appears in the November 2004 IPF PPS final rule (69 FR 66961 through 66964).

IV. Technical Corrections to the IPF Regulations

We proposed to make minor technical corrections to the IPF payment regulations at § 412.27(a), § 412.402 and § 412.428 to update, correct, or clarify existing regulations text. We note that these are technical corrections and they do not affect or change any existing policies.

Excluded Psychiatric Units: Additional Requirements (§ 412.27)

At § 412.27, we set forth additional requirements for excluded psychiatric units. In paragraph (a) we detail admission requirements and state that eligible patients must have a psychiatric principal diagnosis that is listed in the Fourth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) or Chapter Five (''Mental Disorders'') of the International Classification of Diseases, Ninth Revision, Clinical Modification. This language has been in place since 2006, but there have since been updates to the versions of these code sets.

In a final rule published on September 5, 2012 (77 FR 54664), the Secretary adopted ICD–10–CM and ICD–10–PCS, in place of ICD–9–CM, as standard medical data code sets under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This change is reflected in the HIPAA regulations at 45 CFR 162.1002(c). In the August 4, 2014 final rule (79 FR 45128), the Secretary set October 1, 2015 as the compliance date for HIPAA covered entities to use the ICD–10 code sets. Because we are required to use the HIPAA standards, in the FY 2015 IPF PPS final rule published August 6, 2014 in the **Federal Register** titled, ''Inpatient Psychiatric Facilities Prospective Payment System—Update for FY Beginning October 1, 2014 (FY 2015)'' (79 FR 45945 through 45947), we finalized conversions of the ICD–9–CM-based MS–DRGs to ICD–10–CM/PCS-based MS–DRGs. However, we neglected to make a conforming change to § 412.27(a). Therefore, we proposed to correct § 412.27(a) to state that eligible patients must have a psychiatric principal diagnosis that is listed in ICD–10–CM.

The revision to § 412.27(a) will simply continue our longstanding policy of recognizing psychiatric diagnoses that are DSM diagnosis codes. We note that the DSM diagnosis codes map to ICD–10–CM codes, but the mapping is not exclusive to chapter 5 of the ICD–10–CM, as it was with ICD–9–CM; rather, they map to other chapters in ICD–10–CM as well. Therefore, the correction to § 412.27(a) will no longer reference the DSM and would not specifically mention chapter 5 of ICD–10–CM.

Comment: A commenter supported the continued technical updates that represent psychiatric principal diagnoses based on current editions of

the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) and the International Classification of Diseases. Another commenter made an out-of-scope suggestion that we change the regulation at § 412.27 so that the 190-day lifetime maximum on inpatient days at psychiatric hospitals would also apply to psychiatric units. In addition, this commenter also commented on a proposal in the FY 2019 IPPS proposed rule.

Response: We appreciate the support for the technical correction we proposed, and note that the DSM codes are encompassed in the ICD–10–CM code set. We are not responding to the comments related to applying the 190-day lifetime maximum on inpatient psychiatric hospital days to IPF units or to the IPPS proposed rule because they are out of scope of this rulemaking.

Final Decision: We are finalizing the proposed update to § 412.27(a) with no change.

Definitions § 412.402

At § 412.402, there is a typographical error in the definition of ''Principal Diagnosis.'' We inadvertently repeat the language that a principal diagnosis is also referred to as a primary diagnosis.

Final Decision: We received no comments on this proposal. Therefore, we are finalizing our proposal to correct this error by removing the duplicate language.

Publication of Changes to the Inpatient Psychiatric Facility Prospective Payment System (§ 412.428)

In the FY 2016 IPF PPS regulations, we proposed and finalized an IPF-specific market basket for updating the annual IPF payment rates (80 FR 46656 through 46679). This new IPF-specific market basket replaced the Rehabilitation, Psychiatric, and Long-Term Care (RPL) market basket, which had been in place for discharges occurring from July 1, 2006 through September 30, 2015. However, in our FY 2016 IPF PPS final rule, we did not update the regulations text at § 412.428 to reflect the adoption of the IPF-specific market basket. Therefore, we are updating § 412.428 to indicate that the use of the RPL market basket ended as of September 30, 2015, and that the IPF market basket was implemented for use in updating IPF PPS payment rates for discharges occurring on or after October 1, 2015. In addition, we are making other technical changes to this section for clarification and consistency.

Final Decision: We received no comments on this proposal. Therefore, we are finalizing these changes as proposed.

V. Update on IPF PPS Refinements and Comment Solicitation

For RY 2012, we identified several areas of concern for future refinement, and we invited comments on these issues in the RY 2012 IPF PPS proposed and final rules. For further discussion of these issues and to review the public comments, we refer readers to the RY 2012 IPF PPS proposed rule (76 FR 4998) and final rule (76 FR 26432).

We have delayed making refinements to the IPF PPS until we have completed a thorough analysis of IPF PPS data on which to base those refinements. Specifically, we will delay updating the adjustment factors derived from the regression analysis until we have IPF PPS data that include as much information as possible regarding the patient-level characteristics of the population that each IPF serves. We have begun and will continue the necessary analysis to better understand IPF industry practices so that we may refine the IPF PPS in the future, as appropriate. Our preliminary analysis has also revealed variation in cost and claim data, particularly related to labor costs, drugs costs, and laboratory services. Some providers have very low labor costs, or very low or missing drug or laboratory costs or charges, relative to other providers. In the proposed rule, we solicited comments about differences in the IPF labor mix, differences in IPF patient mix, and differences in provision of drugs and laboratory services. We anticipated that these comments would better inform our refinement process.

As we noted in the FY 2016 IPF PPS final rule (80 FR 46693 through 46694), our preliminary analysis of 2012 to 2013 IPF data found that over 20 percent of IPF stays reported no ancillary costs, such as laboratory and drug costs, in their cost reports, or laboratory or drug charges on their claims. Because we expect that most patients requiring hospitalization for active psychiatric treatment will need drugs and laboratory services, we again remind providers that the IPF PPS federal per diem base rate includes the cost of all ancillary services, including drugs and laboratory services. OnNovember 17, 2017, we issued Transmittal 12, which made changes to the hospital cost report form CMS–2552–10 (OMB No. 0938–0050), and included cost report Level I edit 10710S, effective for cost reporting periods ending on or after August 31, 2017. Edit 10710S now requires that cost reports from psychiatric hospitals include certain ancillary costs, or the cost report will be rejected. On January 30, 2018, we issued Transmittal 13, which changed the implementation date for Transmittal 12 to be for cost reporting periods ending on or after September 30, 2017. For details, we refer readers to see these Transmittals, which are available on the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/index.html*. CMS suspended edit 10710S effective April 27, 2018, pending evaluation of the application of the edit to all-inclusive-rate providers.

We pay only the IPF for services furnished to a Medicare beneficiary who is an inpatient of that IPF (except for certain professional services), and payments are considered to be payments in full for all inpatient hospital services provided directly or under arrangement (see 42 CFR 412.404(d)), as specified in 42 CFR 409.10.

We will continue to analyze data from claims and cost reports that do not include ancillary charges or costs, and will be sharing our findings with CMS Office of the Center for Program Integrity and CMS Office of Financial Management for further investigation, as the results warrant. Our refinement analysis is dependent on recent precise data for costs, including ancillary costs. We will continue to collect these data and analyze them for both timeliness and accuracy with the expectation that these data will be used in a future refinement. It is currently our intent to explore refinements to the adjustments in future rulemaking. Since we are not making refinements in this rule, for FY 2019 we will continue to use the existing adjustment factors.

We did not receive any comments on our solicitation; however, we did receive three comments related to missing ancillary costs or charges.

Comment: We received a few comments related to missing ancillary charges, and costs on the Medicare cost report. Two commenters stated that because these ancillary costs often represent a relatively low portion of their member hospitals' costs, they typically do not make a separate charge for ancillary services. The commenters stated that costs associated with ancillary services are typically reported in the routine cost center in the Medicare cost report. In addition, they stated that laboratory and drug costs represent approximately 1 percent and 4 percent respectively, of the costs of IPF services and these commenters did not consider these costs sufficiently significant to justify a separate calculation of costs.

A third commenter stated that a number of State psychiatric hospitals complete the Medicare Cost Report utilizing an all-inclusive rate

methodology and as a result may not separately report these ancillary costs. This commenter suggested that CMS review the data analysis to identify correlation between the reporting of ancillary costs and all-inclusive rate providers. The commenter also suggested that the cost report edit related to ancillary costs should probably not be applied to all-inclusive rate providers.

Response: We agree that CMS Pub. 15–1, chapter 22, section 2208.1.A, states that all-inclusive-rate providers' ancillary services may not be considered sufficiently significant to justify a separate calculation of costs for Medicare and non-Medicare patients. Therefore, we agree that the edit related to ancillary costs should not apply to the all-inclusive-rate providers. CMS will exclude all-inclusive rate providers from the application of the edit. We are aware that some providers are not identifying as an all-inclusive-rate provider on Worksheet S–2, Part I, line 115, and are reporting ancillary services costs that represent a low portion of the hospital's cost in the routine cost center on the Medicare cost report. The providers are using section 2208 to justify not reporting the ancillary costs. Providers that are approved as all-inclusive rate but that do not identify as all-inclusive rate on the Medicare cost report will not benefit from the exclusion from the edit and will be required to report ancillary services accordingly.

VI. Inpatient Psychiatric Facilities Quality Reporting (IPFQR) Program

A. Background and Statutory Authority

Section 1886(s)(4) of the Act, as added and amended by sections 3401(f) and 10322(a) of the Patient Protection and Affordable Care Act, requires the Secretary to implement a quality reporting program for inpatient psychiatric hospitals and psychiatric units. Section 1886(s)(4)(A)(i) of the Act requires that, for FY 2014 [2] and each subsequent FY, the Secretary must reduce any annual update to a standard federal rate for discharges occurring during the FY by 2.0 percentage points in the case of a psychiatric hospital or psychiatric unit that does not comply with quality data submission requirements with respect to an applicable FY.

As provided in section 1886(s)(4)(A)(ii) of the Act, the application of the reduction for failure to report under section 1886(s)(4)(A)(i) of the Act may result in an annual update of less than 0.0 percent for a FY, and may result in payment rates under section 1886(s)(1) of the Act being less than the payment rates for the preceding year. In addition, section 1886(s)(4)(B) of the Act requires that the application of the reduction to a standard federal rate update be noncumulative across FYs. Thus, any reduction applied under section 1886(s)(4)(A) of the Act will apply only with respect to the FY rate involved and the Secretary may not take into account the reduction in computing the payment amount under the system described in section 1886(s)(1) of the Act for subsequent years.

Section 1886(s)(4)(C) of the Act requires that, for FY 2014 and each subsequent FY, each psychiatric hospital and psychiatric unit must submit to the Secretary data on quality measures as specified by the Secretary. The data must be submitted in a form and manner and at a time specified by the Secretary. Under section 1886(s)(4)(D)(i) of the Act, unless the exception of subclause (ii) applies, measures selected for the quality reporting program must have been endorsed by the entity with a contract under section 1890(a) of the Act. The National Quality Forum (NQF) currently holds this contract.

Section 1886(s)(4)(D)(ii) of the Act provides an exception to the requirement for NQF endorsement of measures: in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary.

Section 1886(s)(4)(E) of the Act requires the Secretary to establish procedures for making public the quality measure data submitted by inpatient psychiatric hospitals and psychiatric units under the IPFQR Program. These procedures must ensure that an inpatient psychiatric facility or unit has the opportunity to review its data before the data are made public. The Secretary must report quality measures that relate to services furnished in inpatient settings and psychiatric hospitals and units on the CMS website.

B. Covered Entities

In the FY 2013 IPPS/LTCH PPS final rule (77 FR 53645), we established that the IPFQR Program's quality reporting requirements cover those psychiatric hospitals and psychiatric units paid under Medicare's IPF PPS (§ 412.404(b)). Generally, psychiatric hospitals and psychiatric units within acute care and critical access hospitals that treat Medicare patients are paid under the IPF PPS. Consistent with previous regulations, we continue to use the term ''inpatient psychiatric facility'' (IPF) to refer to both inpatient psychiatric hospitals and psychiatric units. This usage follows the terminology in our IPF PPS regulations at § 412.402. For more information on covered entities, we refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53645).

C. Previously Finalized Measures and Administrative Procedures

The current IPFQR Program includes 18 measures. For more information on these measures, we refer readers to the following final rules:

- The FY 2013 IPPS/LTCH PPS final rule (77 FR 53646 through 53652);
- The FY 2014 IPPS/LTCH PPS final rule (78 FR 50889 through 50897);
- The FY 2015 IPF PPS final rule (79 FR 45963 through 45975);
- The FY 2016 IPF PPS final rule (80 FR 46695 through 46714); and
- The FY 2017 IPPS/LTCH PPS final rule (81 FR 57238 through 57247).

For more information on previously adopted procedural requirements, we refer readers to the following rules:

- The FY 2013 IPPS/LTCH PPS final rule (77 FR 53653 through 53660);
- The FY 2014 IPPS/LTCH PPS final rule (78 FR 50897 through 50903;
- The FY 2015 IPF PPS final rule (79 FR 45975 through 45978);
- The FY 2016 IPF PPS final rule (80 FR 46715 through 46719);
- The FY 2017 IPPS/LTCH PPS final rule (81 FR 57248 through 57249); and
- The FY 2018 IPPS/LTCH PPS final rule (82 FR 38471 through 38474)

[2] The statute uses the term ''rate year'' (RY). However, beginning with the annual update of the inpatient psychiatric facility prospective payment system (IPF PPS) that took effect on July 1, 2011 (RY 2012), we aligned the IPF PPS update with the annual update of the ICD codes, effective on October 1 of each year. This change allowed for annual payment updates and the ICD coding update to occur on the same schedule and appear in the same **Federal Register** document, promoting administrative efficiency. To reflect the change to the annual payment rate update cycle, we revised the regulations at 42 CFR 412.402 to specify that, beginning October 1, 2012, the RY update period would be the 12-month period from October 1 through September 30, which we refer to as a ''fiscal year'' (FY) (76 FR 26435). Therefore, with respect to the IPFQR Program, the terms ''rate year,'' as used in the statute, and ''fiscal year'' as used in the regulation, both refer to the period from October 1 through September 30. For more information regarding this terminology change, we refer readers to section III. of the RY 2012 IPF PPS final rule (76 FR 26434 through 26435).

D. Accounting for Social Risk Factors

In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38462 through 38463), we discussed the importance of improving beneficiary outcomes including reducing health disparities. We also discussed our commitment to ensuring that medically complex patients, as well as those with social risk factors, receive excellent care. We discussed how studies show that social risk factors, such as being near or below the poverty level as determined by HHS, belonging to a racial or ethnic minority group, or living with a disability, can be associated with poor health outcomes and how some of this disparity is related to the quality of health care.[3] Among our core objectives, we aim to improve health outcomes, attain health equity for all beneficiaries, and ensure that complex patients as well as those with social risk factors receive excellent care. Within this context, reports by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) and the National Academy of Medicine have examined the influence of social risk factors in CMS value-based purchasing programs.[4] As we noted in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38404), ASPE's report to the Congress found that, in the context of value-based purchasing programs, dual eligibility (that is, eligibility for both Medicare and Medicaid) was the most powerful predictor of poor health care outcomes among those social risk factors that they examined and tested. In addition, as we noted in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38241), the National Quality Forum (NQF) undertook a 2-year trial period in which certain new measures and measures undergoing maintenance review have been assessed to determine if risk adjustment for social risk factors is appropriate for these measures.[5] The trial period ended in April 2017 and a final report is available at: *http://www.qualityforum.org/SES_Trial_Period.aspx.* The trial concluded that ''measures with a conceptual basis for adjustment generally did not demonstrate an empirical relationship'' between social risk factors and the outcomes measured. This discrepancy may be explained in part by the methods used for adjustment and the limited availability of robust data on social risk factors. NQF has extended the socioeconomic status (SES) trial,[6] allowing further examination of social risk factors in outcome measures.

In the FY 2018 and CY 2018 proposed rules for our quality reporting and value-based purchasing programs, we solicited feedback on which social risk factors provide the most valuable information to stakeholders and the methodology for illuminating differences in outcomes rates among patient groups within a hospital or provider that would also allow for a comparison of those differences, or disparities, across providers. Feedback we received across our quality reporting programs included encouraging CMS to explore whether factors that could be used to stratify or risk adjust the measures (beyond dual eligibility); considering the full range of differences in patient backgrounds that might affect outcomes; exploring risk adjustment approaches; and to offer careful consideration of what type of information display would be most useful to the public. We also sought public comment on confidential reporting and future public reporting of some of our measures stratified by patient dual eligibility. In general, commenters stated that stratified measures could serve as tools for hospitals to identify gaps in outcomes for different groups of patients, improve the quality of health care for all patients, and empower consumers to make informed decisions about health care. Commenters encouraged us to stratify measures by other social risk factors such as age, income, and educational attainment. With regard to value-based purchasing programs, commenters also cautioned to balance fair and equitable payment while avoiding payment penalties that mask health disparities or discourage the provision of care to more medically complex patients. Commenters also noted that value-based payment program measure selection, domain weighting, performance scoring, and payment methodology must account for social risk.

As a next step, we are considering options to improve health disparities among patient groups within and across hospitals by increasing the transparency of disparities as shown by quality measures. We also are considering how this work applies to other CMS quality programs in the future. We refer readers to the FY 2018 IPPS/LTCH PPS final rule (82 FR 38403 through 38409) and the FY 2019 IPPS/LTCH PPS Proposed Rule (83 FR 20495 through 20496) published in the May 7, 2018 **Federal Register** for more details, where we discuss the potential stratification of certain Hospital IQR Program outcome measures. Furthermore, we continue to consider options to address equity and disparities in our value-based purchasing programs.

We plan to continue working with ASPE, the public, and other key stakeholders on this important issue to identify policy solutions that achieve the goals of attaining health equity for all beneficiaries and minimizing unintended consequences.

Comment: Several commenters supported CMS's ongoing evaluation of social risk factors. One commenter recommended evaluating social risk factors specific to the IPF setting and analyzing factors such as facilities with high numbers of specialty populations (such as geriatric or diagnosis-specific) as well as stratifying outcomes for locked versus unlocked facilities. Another commenter expressed support for stratification by race, ethnicity, geographic area, sex, and disability, and recommended evaluation of stratification by primary language.

Response: We thank these commenters for their support and will consider these topics in our future analyses of social risk factors.

E. Improving Patient Outcomes and Reducing Burden Through Meaningful Measures

Regulatory reform and reducing regulatory burden are high priorities for CMS. To reduce the regulatory burden on the healthcare industry, lower health care costs, and enhance patient care, in October 2017, we launched the Meaningful Measures Initiative.[7] This initiative is one component of our agency-wide Patients Over Paperwork Initiative,[8] which is aimed at evaluating and streamlining regulations with a goal to reduce unnecessary cost and burden,

[3] See, for example United States Department of Health and Human Services. ''Healthy People 2020: Disparities. 2014.'' Available at: *http://www.healthypeople.gov/2020/about/foundation-health-measures/Disparities;* or National Academies of Sciences, Engineering, and Medicine. Accounting for Social Risk Factors in Medicare Payment: Identifying Social Risk Factors. Washington, DC: National Academies of Sciences, Engineering, and Medicine 2016.

[4] Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation (ASPE), ''Report to Congress: Social Risk Factors and Performance Under Medicare's Value-Based Purchasing Programs.'' December 2016. Available at: *https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicares-value-based-purchasing-programs.*

[5] Available at: *http://www.qualityforum.org/SES_Trial_Period.aspx.*

[6] Available at: *http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=86357.*

[7] Meaningful Measures web page: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/MMF/General-info-Sub-Page.html.*

[8] Remarks by Administrator Seema Verma at the Health Care Payment Learning and Action Network (LAN) Fall Summit, as prepared for delivery on October 30, 2017. Available at: *https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-10-30.html.*

increase efficiencies, and improve beneficiary experience. The Meaningful Measures Initiative is aimed at identifying the highest priority areas for quality measurement and quality improvement in order to assess the core quality of care issues that are most vital to advancing our work to improve patient outcomes. The Meaningful Measures Initiative represents a new approach to quality measures that fosters operational efficiencies, and will reduce costs including collection and reporting burden while producing quality measurement that is more focused on meaningful outcomes.

The Meaningful Measures Framework has the following objectives:

- Address high-impact measure areas that safeguard public health;
- Patient-centered and meaningful to patients;
- Outcome-based where possible;
- Fulfill each program's statutory requirements;
- Minimize the level of burden for health care providers (for example, through a preference for EHR-based measures where possible, such as electronic clinical quality measures);
- Significant opportunity for improvement;
- Address measure needs for population based payment through alternative payment models and,
- Align across programs and/or with other payers.

In order to achieve these objectives, we have identified 19 Meaningful Measures areas and mapped them to six overarching quality priorities as shown in Table 2:

TABLE 2—MAPPING OF MEANINGFUL MEASURES AREAS TO QUALITY PRIORITIES

Quality priority	Meaningful measure area
Making Care Safer by Reducing Harm Caused in the Delivery of Care	Healthcare-Associated Infections. Preventable Healthcare Harm.
Strengthen Person and Family Engagement as Partners in Their Care	Care is Personalized and Aligned with Patient's Goals. End of Life Care according to Preferences. Patient's Experience of Care. Patient Reported Functional Outcomes.
Promote Effective Communication and Coordination of Care	Medication Management. Admissions and Readmissions to Hospitals. Transfer of Health Information and Interoperability.
Promote Effective Prevention and Treatment of Chronic Disease	Preventive Care. Management of Chronic Conditions. Prevention, Treatment, and Management of Mental Health. Prevention and Treatment of Opioid and Substance Use Disorders.
Work with Communities to Promote Best Practices of Healthy Living	Risk Adjusted Mortality. Equity of Care. Community Engagement.
Make Care Affordable	Appropriate Use of Healthcare. Patient-focused Episode of Care. Risk Adjusted Total Cost of Care.

By including Meaningful Measures in our programs, we believe that we can also address the following cross-cutting measure considerations:

- Eliminating disparities;
- Tracking measurable outcomes and impact;
- Safeguarding public health;
- Achieving cost savings;
- Improving access for rural communities; and,
- Reducing burden.

We believe that the Meaningful Measures Initiative will improve outcomes for patients, families, and health care providers while reducing burden and costs for clinicians and providers, as well as promoting operational efficiencies.

Comment: Several commenters expressed support for the Meaningful Measures Initiative and the associated effort to assess measures, align programs and reduce burden. One commenter further recommended that CMS collaborate with other entities (such as accreditation agencies and states) to further reduce burden.

Response: We thank these commenters for their support and will consider additional ways to put patients first through our measures and reduce burden.

F. Removal or Retention of IPFQR Program Measures

1. Considerations for Removing or Retaining Measures

In the FY 2018 IPPS/LTCH PPS final rule (82 FR 38463 through 38465), we finalized our proposals to adopt considerations for removing or retaining measures within the IPFQR Program. In that final rule, we finalized: (1) Measure removal factors; (2) criteria for determining when a measure is ''topped-out;'' and (3) measure retention factors.

Specifically, the measure removal factors we adopted are:

- Factor 1. Measure performance among IPFs is so high and unvarying that meaningful distinctions and improvements in performance can no longer be made (''topped-out'' measures);
- Factor 2. Measure does not align with current clinical guidelines or practice;
- Factor 3. Measure can be replaced by a more broadly applicable measure (across settings or populations) or a measure that is more proximal in time to desired patient outcomes for the particular topic;
- Factor 4. Measure performance or improvement does not result in better patient outcomes;
- Factor 5. Measure can be replaced by a measure that is more strongly associated with desired patient outcomes for the particular topic;
- Factor 6. Measure collection or public reporting leads to negative unintended consequences other than patient harm; and
- Factor 7. Measure is not feasible to implement as specified.

The ''topped out'' criteria that we adopted are: (1) Statistically indistinguishable performance at the 75th and 90th percentiles; and (2) the truncated coefficient of variation is less than or equal to 0.10.

The measure retention factors that we adopted are:

- Measure aligns with other CMS and HHS policy goals, such as those delineated in the National Quality Strategy or CMS Quality Strategy;

- Measure aligns with other CMS programs, including other quality reporting programs; and
- Measure supports efforts to move IPFs towards reporting electronic measures.

We are not making any changes to these previously finalized measure removal or retention factors, or our criteria for determining when a measure is topped-out. However, we are adding an additional measure removal factor. This is discussed in more detail below.

a. New Removal Factor

We are adopting the following additional factor to consider when evaluating measures for removal from the IPFQR Program measure set: Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program.

As we discussed in section VI.E. of this final rule on our new Meaningful Measures Initiative, we are engaging in efforts to ensure that the IPFQR Program measure set continues to promote improved health outcomes for beneficiaries while minimizing the overall costs associated with the program. We believe these costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program. We have identified several different types of costs, including, but not limited to: (1) Provider and clinician information collection burden and related cost and burden associated with the submitting/reporting of quality measures to CMS; (2) the provider and clinician cost associated with complying with other IPFQR programmatic requirements; (3) the provider and clinician cost associated with participating in multiple quality programs, and tracking multiple similar or duplicative measures within or across those programs; (4) the CMS cost associated with the program oversight of the measure, including maintenance and public display; and/or (5) the provider and clinician cost associated with compliance to other federal and/or State regulations (if applicable).

For example, it may be needlessly costly and/or of limited benefit to retain or maintain a measure which our analyses show no longer meaningfully supports program objectives (for example, informing beneficiary choice or payment scoring). It may also be costly for health care providers to track confidential feedback preview reports, and publicly reported information on a measure where we use the measure in more than one program. CMS may also have to expend unnecessary resources to maintain the specifications for the measure, as well as the tools needed to collect, validate, analyze, and publicly report the measure data. Furthermore, beneficiaries may find it confusing to see public reporting on the same measure in different programs.

When these costs outweigh the evidence supporting the continued use of a measure in the IPFQR Program, we believe it may be appropriate to remove the measure from the program. Although we recognize that one of the main goals of the IPFQR Program is to improve beneficiary outcomes by incentivizing health care providers to focus on specific care issues and making public data related to those issues, we also recognize that those goals can have limited utility where, for example, the publicly reported data are of limited use because they cannot be easily interpreted by beneficiaries to influence their choice of providers. In these cases, removing the measure from the IPFQR Program may better accommodate the costs of program administration and compliance without sacrificing improved health outcomes and beneficiary choice.

We are removing measures based on this factor on a case-by-case basis. We might, for example, decide to retain a measure that is burdensome for health care providers to report if we conclude that the benefit to beneficiaries justifies the reporting burden. Our goal is to move the program forward in the least burdensome manner possible, while maintaining a parsimonious set of meaningful quality measures and continuing to incentivize improvement in the quality of care provided to patients.

We solicited public comments on our proposal to adopt an additional measure removal factor, ''the costs associated with a measure outweigh the benefit of its continued use in the program,'' effective upon publication of the FY 2019 IPF PPS final rule. We refer readers to section VI.F.2.a of this final rule for discussion on removing four IPFQR Program measures based on this removal factor.

Comment: Several commenters expressed support for adoption of the new measure removal factor ''the costs associated with a measure outweigh the benefit of its continued use in the program.''

Response: We thank these commenters for their support.

Comment: Several commenters expressed concern about adoption of the measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program. One commenter expressed concern that this factor is not supported by scientific criteria, and that therefore, adoption of this factor could cause significant harm to patients. Another commenter stated their belief that it is inappropriate to apply a cost-benefit analysis to measures which can save lives and ensure patient safety.

Response: We agree with commenters that it is important to adequately weigh the potential benefits of a measure in determining whether the costs outweigh those benefits. However, we disagree that this can only be achieved by applying scientific criteria. We believe that an appropriate measure set for a specific program is achieved by applying a balanced set of factors to ensure that each measure serves a purpose in the program, and this cost-benefit analysis is one element of that set of factors. Under this analysis, qualitative benefits (that is, benefits that cannot be assigned a specific numerical value) would be weighed against potential costs to ensure that measures that save lives and ensure patient safety are retained when appropriate.

Comment: One commenter urged CMS to retain measures that are high-cost, but continue to serve beneficiaries in cases when the benefits would justify the cost.

Response: We agree with this commenter's suggestion that costs may be outweighed by benefits (especially benefits to beneficiaries), and intend to evaluate measures on a case-by-case basis to achieve this balance.

Comment: Several commenters requested that CMS clarify how it intends to evaluate the costs and benefits of each measure. One commenter observed that costs should include investing resources for quality improvement and tracking performance. Another commenter observed that benefits should prioritize benefits specific to the psychiatric needs that drive admission.

Response: In the FY 2019 IPF PPS proposed rule (83 FR 21118), we expressed that we will evaluate costs and benefits on a case-by-case basis and identified several types of costs to provide examples of costs which we would evaluate in this analysis. We refer readers to section VI.F.1.a. of this final rule and the FY 2019 IPF PPS proposed rule for non-exhaustive examples of the different types of costs we will consider (83 FR 21118). These costs include, but are not limited to: (1) Provider and clinician information collection burden and related cost and burden associated with the submitting/reporting of quality measures to CMS; (2) the provider and clinician cost associated with complying with other

IPFQR programmatic requirements; (3) the provider and clinician cost associated with participating in multiple quality programs, and tracking multiple similar or duplicative measures within or across those programs; (4) the CMS cost associated with the program oversight of the measure, including maintenance and public display; and/or (5) the provider and clinician cost associated with compliance to other federal and/or state regulations (if applicable). We intend to evaluate each measure on a case-by-case basis, while considering input from a variety of stakeholders, including, but not limited to: patients, caregivers, patient and family advocates, providers, provider associations, healthcare researchers, healthcare payers, data vendors, and other stakeholders with insight into the direct and indirect benefits and costs, financial and otherwise, of maintaining the specific measure in the IPFQR Program. We note that we intend to assess the costs and benefits to all program stakeholders, including but not limited to, those listed above. We further note that our assessment of costs is not limited to a strictly quantitative analysis.

The commenter's example of resources for quality improvement is an example of a cost that would be evaluated on a case-by-case basis because we believe that investing resources in quality improvement is an inherent part of delivering high-quality, patient-centered care, and is therefore, generally not considered a part of the quality reporting program requirements. However, there may be cases in which a measure would require such a specific quality improvement initiative that it would be appropriate to consider this cost to be associated with the measure. We also believe that in assessing the benefits of a measure, it is appropriate to consider the patient's whole experience of care, not only the primary reason for admission. Therefore, we believe that the benefits to be evaluated for each measure are specific to the measure and the original reasons for including the measure in the program.

Comment: One commenter recommended that CMS ensure screening measures, including those for vaccinations and substance use, are truly duplicative, topped-out, or part of best practices prior to removing such measures.

Response: Factors regarding a measure's continued ability to achieve program objectives, such as whether the measure is duplicative, topped-out, or part of best practices, are among the factors we will consider when evaluating a measure's continued benefit within the program. We evaluate each measure on a case-by-case basis using the previously established criteria for topped-out status (that is, that a measure is topped-out if there is statistically indistinguishable performance at the 75th and 90th percentiles and the truncated coefficient of variation is less than or equal to 0.10 (82 FR 38463)). To determine whether a measure is duplicative, we evaluate the IPFQR program measure set and measure sets of other programs, if applicable, to ensure that other measures are not capturing the same data. We determine whether a measure is part of best practices in a variety of ways, including but not limited to a review of nationally recognized clinical guidelines and having technical expert panels review the measure. Generally, if we determine that a measure is duplicative, topped-out, or part of best practices we would consider that its benefits have been reduced and therefore this would be a factor to consider in evaluating whether the costs outweigh the benefits. However, there may be times when a screening measure is not duplicative, topped-out, or part of best practices, but that the costs are sufficiently high (or the continued benefit has become reduced by some other means, such as a reduction in the prevalence of the condition being screened for) that the measure would be appropriate to remove. We will continue to evaluate the benefits and costs of each measure on a case-by-case basis. We will also continue to propose measures for removal, including screening measures, through the notice and comment rulemaking process in which we will provide descriptions of the analyses which led us to conclude that measures are appropriate to remove.

Final Decision: After careful consideration of the comments received, we are finalizing our proposal to adopt the new measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program as proposed.

2. Measures for Removal

In the FY 2019 IPF PPS proposed rule (83 FR 21118 through 21123), we proposed to remove eight measures from the IPFQR Program. We developed these proposals after conducting an overall review of the program under the Framework associated with our new Meaningful Measures Initiative, which is discussed in more detail in section VI.E. of this final rule. We believe that the Framework will allow IPFs and patients to continue to obtain meaningful information about IPF performance and incentivize quality improvement, while streamlining the measure sets to reduce program complexity so that the costs do not outweigh the benefits of improving beneficiary care. In addition, we note that in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38464), several commenters requested that we evaluate the current measures in the IPFQR Program using the removal and retention factors that we finalized in that rule.

In evaluating the IPFQR Program measure set under our Meaningful Measures Framework and according to our measure removal and retention factors, we identified eight measures which we believed were appropriate to remove from the IPFQR Program for the FY 2020 payment determination and subsequent years. First, we identified five measures for which the costs associated with each measure outweigh the benefit of its continued use in the program, under new measure removal Factor 8 adopted in section VI.F.1.a of this final rule. Second, we identified three measures that meet our topped-out criteria under measure removal Factor 1. These measures are discussed in more detail below.

a. Measures in Which Costs Outweigh Benefits

i. Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) Measure

In the FY 2019 IPF PPS proposed rule (83 FR 21119 through 21120) we proposed to remove the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure, a National Healthcare Safety Network (NHSN) measure, from the IPFQR Program beginning with FY 2020 payment determination under our measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program. We initially adopted the Influenza Vaccination Coverage Among Healthcare Personnel measure because we recognize that influenza immunization is an important public health issue, especially for vulnerable patients who may have limited access to the healthcare system, such as patients in IPFs.

We adopted the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure in in the FY 2015 IPF PPS final rule (79 FR 45968 through 45970) due to public health concerns regarding influenza virus infection among the IPF population. We believe that the Influenza Vaccination Coverage Among Healthcare Personnel (NQF

#0431) measure addresses this public health concern by assessing influenza vaccination in the IPF among healthcare personnel (HCP), who can serve as vectors for influenza transmission. We also adopted the Influenza Immunization (IMM–2, NQF #1659) measure in the FY 2015 IPF PPS final rule (79 FR 45967 through 45968) to address the same public health concern of influenza virus infection in the IPF patient population by assessing patient screening for and provision of influenza vaccinations.

The information collection burden for the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure is less than the information collection burden for measures that require chart abstraction of patient data because influenza vaccination among healthcare personnel can be calculated through review of records maintained in administrative systems and because facilities have fewer healthcare personnel than patients; therefore, the measure does not require review of as many records; however, this measure does still pose some information collection burden on facilities due to the requirement to identify personnel who have been vaccinated against influenza, and the reason that unvaccinated personnel have not been vaccinated.

Furthermore, as we stated in section VI.F.1.a of this final rule, costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program. For example, it may be costly for health care providers to maintain general administrative knowledge to report these measures. Additionally, CMS must expend resources in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information. In our analysis of the IPFQR Program measure set, we recognized that some facilities face challenges with the administrative requirements of the NHSN for reporting the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure. These administrative requirements (which are unique to the NHSN) include annually completing NHSN system user authentication. Enrolling in NHSN is a five-step process that the CDC estimates takes an average of 263 minutes per facility.[9]

Furthermore, submission via NHSN requires the system security administrator of participating facilities to re-consent electronically, ensure that contact information is kept current, ensure that the IPF has an active facility administrator account, keep Secure Access Management Service (SAMS) credentials active by logging in approximately every 2 months and changing their password, create a monthly reporting plan, and ensure that the facility's CCN information is up-to date. Unlike acute care hospitals which participate in other quality reporting programs which may require NHSN reporting, such as the Hospital IQR Program and HAC Reduction Program, IPFs are only required to participate in NHSN to submit data for this one measure. This may unduly disadvantage smaller IPFs, specifically those that are not part of larger hospital systems, because these IPFs do not have NHSN access for other quality reporting or value-based payment programs. It is our goal to ensure that the IPFQR Program is equitable to all providers and this measure may disproportionately affect small, independent IPFs. Especially for these small, independent IPFs, the incremental costs of this measure over the rest of the IPFQR Program measure set are significant because of the requirements of NHSN participation. As a result, we believe that the costs and burdens associated with this chart-abstracted measure outweigh the benefit of its continued use in the program.

We continue to believe that the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure provides the benefit of protecting IPF patients against influenza; however, we believe that these benefits are offset by other efforts to reduce influenza infection among IPF patients, such as numerous healthcare employer requirements for healthcare personnel to be vaccinated against influenza.[10]

We also believe that by continuing to include the Influenza Immunization (IMM–2, NQF #1659) measure in the IPFQR program, the measure set remains responsive to the public health concern of influenza infection within the IPF population by collecting data on rates of influenza immunization among IPF patients. Further, we believe that while the Influenza Immunization (IMM–2, NQF #1659) measure has information collection burden associated with chart abstracting data, this measure is less costly than the NHSN Participation required for the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure in the IPF context.

We wish to minimize the level of cost of our programs for providers, as discussed under the Meaningful Measures Initiative in section VI.E. of this final rule. In our assessment of the IPFQR measure set, we prioritized measures that align with this Framework, as the most important to the IPF population. Our assessment concluded that while the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure continues to provide benefits, these benefits are diminished by other efforts and are outweighed by the significant costs of reporting this measure.

For these reasons, we proposed to remove the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure from the IPFQR Program for the FY 2020 payment determination and subsequent years.

Comment: Several commenters expressed support for removal of the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure and agreed with CMS's rationale that this measure is unduly burdensome for IPFs whose only requirement for NHSN participation is reporting this measure with already high performance.

Response: We thank these commenters for their support.

Comment: Several commenters recommended that CMS not remove the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure. Some commenters observed that IPFs are high-risk settings for the spread of flu from personnel to patients because of group activities and communal atmospheres expose patients and that this measure is targeted at preventing inpatient outbreaks, which is a different target than the Influenza Immunization (IMM–2, NQF #1659) measure. Several commenters observed that the rationale for removing this measure from the IPFQR Program is contradictory to the rationale for retaining it in the Hospital IQR Program.

Response: We thank these commenters for their input. We agree that influenza vaccination for both patients and healthcare personnel is important in the IPF setting, as well as other healthcare settings, and we believe that these two activities are both intended to address the public health concern of reducing influenza infection. We also believe that patients in the inpatient psychiatric setting may have additional risk of contracting influenza

[9] *https://www.cdc.gov/nhsn/ipfs/enroll.html* (the estimates for time to complete are 2 hours 45 minutes for step 1, 10 minutes for step 2, 16 minutes for step 3a, 35 minutes for step 3b, 32 minutes for step 4, and 5 minutes for step 5; totaling 263 minutes).

[10] CDC, Influenza Vaccination Information for Health Care Workers, Accessed at *https://www.cdc.gov/flu/healthcareworkers.htm.*

due to group activities and a communal setting. However, we do not believe that group activities and a communal setting increase the risk of contracting influenza from healthcare personnel, rather we believe that these increase the risk of contracting influenza from other patients. Therefore, we do not believe that ensuring influenza vaccination coverage among healthcare personnel addresses the increased risk specific to group activities and a communal setting.

We believe that the burden of reporting this measure is greater for IPFs compared to the relative burden for acute care hospitals participating in the Hospital IQR and Hospital-Acquired Condition Reduction Programs. The entire burden of registering for and maintaining access to the CDC's NHSN system for IPFs, especially independent or freestanding IPFs, is due to this one measure; whereas acute care hospitals paid under IPPS, participating in the Hospital IQR Program, the Hospital-Acquired Condition Reduction Program and the Hospital Value-Based Purchasing Program, for example, must register and maintain NHSN access for several healthcare safety measures, not just one. Furthermore, because the topic is addressed in other initiatives, such as state laws [11] and employer programs, we believe that the burden of this measure on IPFs, especially independent or freestanding IPFs, outweighs the benefit of addressing this topic again under the IPFQR Program.

Final Decision: After careful consideration of the comments received, we are finalizing our proposal as proposed to remove the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure from the IPFQR Program for the FY 2020 payment determination and subsequent years.

ii. Alcohol Use Screening (NQF #1661) Measure

In the FY 2019 IPF PPS proposed rule (83 FR 21120), we proposed to remove the Alcohol Use Screening, (SUB–1, NQF #1661) measure from the IPFQR Program beginning with the FY 2020 payment determination under our measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program. We adopted the Alcohol Use Screening (SUB–1, NQF #1661) measure in the FY 2014 IPPS/LTCH PPS final rule (78 FR 50890 through 50892) because we believe it is important to address the common comorbidity of alcohol use among IPF patients. This measure requires facilities to chart-abstract measure data on a sample of IPF patient records, in accordance with established sampling policies (FY 2016 IPF PPS final rule, 80 FR 46717 through 46719). We have previously stated our intent to move away from chart-abstracted measures in order to reduce information collection burden in other CMS quality programs (78 FR 50808; 79 FR 50242; 80 FR 49693).

When we introduced the Alcohol Use Screening (NQF #1661) measure to the IPFQR Program, the benefits of this measure were high, because facility performance was not consistent and therefore the measure provided a means of distinguishing facility performance and incentivized facilities to improve rates of screening for this common comorbidity.

Now, data collected for the FY 2016 through FY 2018 payment determinations show high levels of measure performance, as indicated in Table 3.

TABLE 3—PERFORMANCE ANALYSIS FOR ALCOHOL USE SCREENING

Year	Mean	Median	75th percentile	90th percentile	Truncated coefficient of variation (TCV)
2014 (FY 2016 Payment Determination)	74.8	86.8	97.0	100	.32
2015 (FY 2017 Payment Determination)	88.5	97.5	99.6	100	.13
2016 (FY 2018 Payment Determination)	92.4	98.4	99.7	100	.07

These data further show that there is little room for improvement in the Alcohol Use Screening (NQF #1661) measure, and that the quality improvement benefits from the measure have greatly diminished. Based on these data, we believe that most IPFs routinely provide alcohol use screening, and that IPFs will continue to provide alcohol use screening to patients because it has become an embedded part of their clinical workflows. Therefore, we believe that this measure no longer meaningfully supports the program objectives of informing beneficiary choice and driving improvement in IPF screening for alcohol use.

Furthermore, as we stated in section VI.F.1.a of this final rule, costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program. For example, it may be costly for health care providers to maintain general administrative knowledge to report these measures. Additionally, CMS must expend resources in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information. Here, IPF information collection burden and related costs associated with reporting this measure to CMS is high because the measure is a chart-abstracted measure. Furthermore, CMS incurs costs associated with the program oversight of the measure for public display. As a result, we believe that the costs and burdens associated with this chart-abstracted measure outweigh the benefit of its continued use in the program.

Therefore, we proposed to remove the Alcohol Use Screening (SUB–1, NQF #1661) measure from the IPFQR Program beginning with the FY 2020 payment determination.

Comment: Many commenters supported our proposal to remove the Alcohol Use Screening (SUB–1, NQF #1661) measure. Several commenters agreed that performance on this measure is sufficiently high to indicate that the benefit of including the measure in the IPFQR Program has diminished, and that now the costs of this measure outweigh the benefits of retaining it. Some commenters recommended that CMS remove the Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention (SUB–2/SUB–2a, NQF #1663) measure and the Alcohol and Other Drug Use Disorder Treatment Provided or Offered at

[11] CDC, Menu of State Hospital Influenza Vaccination Laws, Accessed at *https://www.cdc.gov/phlp/docs/menu-shfluvacclaws.pdf.*

Discharge and Alcohol and Other Drug Use Disorder Treatment at Discharge (SUB–3/SUB–3a, NQF #1654) measure as well because the removal of SUB–1 measure, while retaining the rest of the SUB measure set, does not reduce provider burden because the denominators of the SUB–2/SUB–2a and SUB–3/SUB–3a measures require collecting the data for the SUB–1 measure.

Response: We thank these commenters for their support, but disagree that removal of SUB–1 alone does not reduce provider burden. We believe that removal of SUB–1 will reduce provider information collection, abstraction, and reporting burden even while SUB–2/SUB–2a and SUB–3/SUB–3a measures are part of the IPFQR Program measure set. We will evaluate the continued use of SUB–2/SUB–2a and SUB–3/SUB–3a as we continue to analyze the IPFQR Program measure set.

Comment: Many commenters recommended that CMS retain the Alcohol Use Screening (SUB–1, NQF #1661) measure. Some commenters observed that substance use is a common comorbid condition with serious mental illness, and that the societal costs of untreated alcoholism outweigh the costs associated with collecting and reporting this measure. Another commenter expressed that CMS has not provided sufficient evidence that alcohol use screening has become an embedded part of clinical practice. One commenter also observed that there has been an increase in alcoholism among the elderly.

Response: We believe that processes such as screening are supported by the infrastructure and workflows within an IPF. Therefore, we believe the consistently high performance on the Alcohol Use Screening (SUB–1, NQF #1661) measure serves as substantial evidence that most IPFs have built and utilize the appropriate infrastructure to facilitate this screening as part of their workflows. We believe that this evidence is sufficient evidence that alcohol use screening has become an embedded part of clinical practice. We agree with commenters that alcoholism is a common and costly comorbidity with serious mental illness, and that these costs include societal costs, such as lost productivity, treatment for alcohol associated illness, and mortality. We also agree with commenters that there is an increase in alcoholism among the elderly. However, we believe that the high performance on the Alcohol Use Screening (SUB–1, NQF #1661) measure indicates that its continued benefit has diminished which was supported by many commenters who expressed support for our proposal and agreed with our rationale. We note that we are retaining the Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention Provided (SUB–2 and SUB–2a, NQF #1663) measure and the Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and Alcohol and Other Drug Use Disorder Treatment at Discharge (SUB–3 and SUB–3a, NQF #1654) measure because we believe these measures provide significant benefit by encouraging IPFs to provide alcohol use interventions.

Comment: Several commenters expressed concerns regarding the proposal to remove the Alcohol Use Screening (SUB–1, NQF #1661) measure. One commenter requested that CMS provide data showing that screening measures, including alcohol screening, are truly duplicative, topped-out, or part of best practices prior to removing these measures. Another commenter expressed that it is unclear how to identify the need for addiction counseling and referrals without the alcohol use screening measure.

Response: We thank these commenters for this input. We note that we proposed to remove the Alcohol Use Screening (SUB–1, NQF #1661) measure because our data, which were included in the FY 2019 IPF PPS proposed rule (83 FR 21120) and is repeated in Table 3 show that there is little room for improvement on this measure (as of the FY 2018 payment determination, it meets our statistical criteria for ''topped-out'' because the performance at the 75th and 90th percentiles is statistically indistinguishable at 99.7 percent and 100 percent respectively, and the TCV is 0.07 which is less than 0.1). For these reasons, these data indicate that the benefits of maintaining it have been reduced such that they no longer outweigh the costs of including the measure in the program. We recognize that IPFs will still need to continue to screen for alcohol use, through a standardized assessment instrument consistent with their internal procedures, to identify patients who need addiction counseling or referrals to be able to report on the Alcohol Use Brief Intervention Provided or Offered and Alcohol Use Brief Intervention (SUB–2/SUB–2a, NQF #1663) measure and to report on the Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and Alcohol and Other Drug Use Disorder Treatment at Discharge (SUB–3/SUB–3a, NQF #1664) measure. However, due to this measure removal, facilities will no longer be required to abstract and report on the process of performing this screening for purposes of the IPFQR Program.

Final Decision: After careful consideration of the comments we received, we are finalizing our proposal as proposed to remove the Alcohol Use Screening (SUB–1, NQF #1663) measure from the IPFQR program for FY 2020 payment determination and subsequent years.

iii. Assessment of Patient Experience of Care Measure and Use of an Electronic Health Record (EHR) Measure

In the FY 2019 IPF PPS proposed rule (83 FR 21120 through 21121), we proposed to remove two measures: (1) Assessment of Patient Experience of Care measure; and (2) Use of an EHR measure from the IPFQR Program beginning with the FY 2020 payment determination under measure removal Factor 8. The costs associated with a measure outweigh the benefit of its continued use in the program.

We adopted the Assessment of Patient Experience of Care measure as a voluntary information collection in the FY 2014 IPPS/LTCH PPS final rule (78 FR 50896 through 50897) and adopted it as a measure for the IPFQR Program in the FY 2015 IPF PPS final rule (79 FR 45964 through 45965). The Assessment of Patient Experience of Care measure collects data on whether each facility administers a patient experience of care survey. However, it does not provide data on the results of this survey, or the percentage of patients to whom the survey was administered. The measure was adopted in part to inform potential future development of patient experience of care measures. We believe that we have now collected sufficient information to inform development of such a measure and, therefore, the benefit of collecting this measure has been significantly reduced.

Similarly, we adopted the Use of an EHR measure in the FY 2015 IPF PPS final rule (79 FR 45965 through 45967) because of evidence demonstrating the positive effects of EHRs on multiple aspects of medical care. The Use of an EHR measure requires facilities to select between the following three statements:

- The facility most commonly used paper documents or other forms of information exchange (for example, email) not involving the transfer of health information using EHR technology at times of transitions in care;
- The facility most commonly exchanged health information using non-certified EHR technology (that is, not certified under the ONC HIT Certification Program) at times of transitions in care; and

• The facility most commonly exchanged health information using certified EHR technology (certified under the ONC HIT Certification Program) at times of transitions in care.

The measure then requires the facility to provide a ''yes'' or ''no'' answer to the following question: ''Did the transfers of health information at times of transitions in care include the exchange of interoperable health information with a health information service provider (HISP)?''

As discussed in section VI.E of this final rule, one of the goals of the Meaningful Measures Initiative is to reduce costs associated with payment policy, quality measures, documentation requirements, conditions of participation, and health information technology. Another goal of the Meaningful Measures Initiative is to utilize measures that are ''outcome-based where possible.'' As shown above, the Use of an EHR measure is a structural measure that tracks facility-level use of EHR technology, but does not directly measure patient outcomes. Furthermore, performance on this measure has remained relatively static for the past two program years. We believe that we have now collected sufficient data to inform potential future development of measures that more directly target the aspects of medical care addressed using EHRs (for example, care coordination, care transitions, and care provided to individual patients).

While some of the intended objectives of both the Assessment of Patient Experience of Care measure and Use of an EHR measure have been met, keeping both measures in the IPFQR Program's measure set creates administrative cost to hospitals associated with reporting these measures. We believe that removing these measures would alleviate some administrative cost. While the information collection burden associated with these measures is relatively low, as we stated in section VI.F.1.a of this final rule, costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program. For example, it may be costly for health care providers to maintain general administrative knowledge to report these measures. Additionally, CMS must expend resources in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information. In light of the fact that the benefits for both the Assessment of Patient Experience of Care measure and Use of an EHR measure have been significantly reduced, the costs of these measures now outweigh their benefits.

Therefore, in the FY 2019 IPF PPS proposed rule, we proposed to remove: (1) The Assessment of Patient Experience of Care measure; and (2) the Use of an EHR measure from the IPFQR Program beginning with the FY 2020 payment determination and subsequent years.

Comment: Several commenters expressed support for removing the Assessment of Patient Experience of Care measure and the Use of an Electronic Health Record (EHR) measure because the costs of retaining these measures in the IPFQR Program outweigh the benefits.

Response: We thank these commenters for their support.

Comment: Several commenters recommended that CMS retain the Assessment of Patient Experience of Care measure. Some of these commenters expressed that this measure encourages facilities to ensure that patients have an opportunity to express their perspectives and recommended that this measure be retained until we can introduce a better patient experience measure. One commenter expressed concern about removing the Patient Experience of Care measure because understanding consumer experience is important in ensuring a person-centered healthcare system.

Response: We agree with commenters that encouraging facilities to ensure that patients have an opportunity to express their perspectives is an important aspect of patient-centered care, and therefore a measure that encourages this practice has value. However, we note that the Patient Experience of Care measure only collects data on whether each facility administers a patient experience of care survey, not the results of such a survey or the percentage of patients to whom the survey was administered. As a result, this measure does not assess or publicly report data on patients' experience of care within a given IPF.

Comment: One commenter recommended that CMS update the Use of an EHR measure to exclude the option for non-certified EHR use because use of this technology is ineffective.

Response: We believe that the Use of an EHR measure's inclusion of an attestation option for IPFs using non-certified EHRs is appropriate because doing so allows assessment of the degree to which IPFs nationwide employ EHR systems in their service program. Without such an option, IPFs which are either in the process of transitioning to a certified EHR or have encountered other implementation difficulties, such as a lack of resources to adopt a certified EHR, would be inappropriately categorized as not using an EHR at all. We note this measure is not intended to collect data on the effectiveness of an IPF's EHR, only the use of this technology. We further note that, as discussed below, we are finalizing our proposal to remove this measure.

Comment: One commenter opposed removal of the Use of an EHR measure because the data are valuable in understanding the use of EHRs in IPFs and in encouraging IPFs to use this technology.

Response: Because the data on this measure has remained relatively static for the past two years, we believe that the measure is no longer providing value in understanding the use of EHRs in IPFs. Furthermore, we believe that resources invested in continuing to maintain, report, and display data for this measure could be better allocated to measure or improve other aspects of quality.

Comment: Several commenters expressed that these measures have negligible burden and therefore disagreed with the removal factor under which CMS proposed to remove these measures.

Response: We agree with commenters that the reporting burden associated with these measures is small; however, we believe that costs are multi-faceted and include administrative costs to hospitals and costs to CMS in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information to the point that the benefits of these measures have been greatly reduced, and the costs of these measures now outweigh their benefits.

Final Decision: After carefully considering the comments received, we are finalizing our proposal as proposed to remove the Assessment of Patient Experience of Care measure and the Use of an EHR measure for the FY 2020 payment determination and subsequent years.

iv. Tobacco Use Treatment Provided or Offered at Discharge (TOB–3 and TOB–3a, NQF #1656) Measure

In the FY 2019 IPF PPS proposed rule (83 FR 21121 through 21122), we proposed to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure from the IPFQR Program beginning with the FY 2020 payment determination under our measure removal Factor 8. The costs associated with a measure outweigh the

benefit of its continued use in the program.

The Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure assesses whether patients were referred to or refused evidence-based outpatient counseling and received or refused a prescription for FDA-approved cessation medication upon discharge and also identifies those IPF patients who were referred to evidence-based outpatient counseling and received a prescription for FDA-approved cessation medication upon discharge. This measure requires facilities to chart-abstract measure data on a sample of IPF patient records, in accordance with established sampling policies (FY 2016 IPF PPS final rule, 80 FR 46717 through 46719). When we introduced the measure to the IPFQR Program, the benefits of this measure were great, because facility performance was not consistent and the measure provided a means of distinguishing facility performance and incentivizing facilities to improve rates of providing treatment for this common comorbidity.

However, when we proposed to remove this measure we believed the benefit of keeping the Tobacco Use Treatment Provided or Offered at Discharge (TOB–3 and TOB–3a, NQF #1656) measure in the IPFQR Program had become limited because we believed that the same measure data is captured in the data elements required by the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure, which was more recently added to the IPFQR Program (80 FR 46701 through 46706). The transition record created to meet the requirements for inclusion in the numerator of the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure includes elements on major procedures and tests performed during inpatient stay, summary of results, a current medication list, and post-discharge patient instructions. To meet the inclusion criteria for the numerator of this measure, the post-discharge patient instructions must provide information on all recommended actions for the patient after discharge. These post-discharge patient instructions may include tobacco use treatment, if provided, and therefore, we believed they would capture the same information as the numerator of the Tobacco Use Treatment Provided or Offered at Discharge (TOB–3 and TOB–3a, NQF #1656) measure. Additionally, because the transition record created to meet the requirements for inclusion in the numerator of the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure must include a current medication list, we believed this medication list would capture a prescription for an FDA approved cessation medication at discharge, if provided, the second element of tobacco use treatment measured by the Tobacco Use Treatment Provided or Offered at Discharge (TOB–3 and TOB–3a, NQF #1656) measure.

Furthermore, as we stated in section VI.F.1.a of this final rule, costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with implementing and maintaining the program. For example, it may be costly for health care providers to maintain general administrative knowledge to report these measures. Additionally, CMS must expend resources in maintaining information collection systems, analyzing reported data, and providing public reporting of the collected information. For this measure, provider and clinician information collection burden and related cost and burden associated with the submitting of quality measures to CMS is high because it is a chart-abstracted measure. Additionally, CMS incurs costs associated with the program oversight of the measure, including public display.

Therefore, we believed that the benefits provided by the Tobacco Use Treatment Provided or Offered at Discharge (TOB–3 and TOB–3a, NQF #1656) measure had been reduced to the point that they are now outweighed by the costs of the measure. As such, we proposed to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure from the IPFQR Program beginning with the FY 2020 payment determination and subsequent years.

Comment: Several commenters supported the proposal to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a) measure and agreed with CMS's rationale for removing this measure. One commenter further observed that tobacco use is secondary to the reason for the hospitalization and therefore tobacco use treatment should not be a focus of the IPFQR Program. Another commenter observed that because tobacco use is such a common comorbidity in this patient population this care is already embedded in clinical practices.

Response: We continue to believe that addressing a patient's tobacco use is a part of providing high quality care. As stated in previous rules (see for example, the FY 2015 IPF PPS final rule (79 FR 45972) and the FY 2016 IPF PPS final rule (80 FR 46698)) we believe that reporting information regarding tobacco cessation treatment provides meaningful distinctions between IPFs because of the prevalence of tobacco use in this patient population and the increase in premature morbidity and mortality associated with tobacco use. Furthermore, we believe that limiting the program to only measures or conditions that specifically apply to the psychiatric population creates a false demarcation between psychiatric and non-psychiatric care. Data collected for the FY 2018 payment determination show mean performance on Tobacco Use Treatment Provided or Offered at Discharge (TOB–3) to be 40.8 percent and mean performance on Tobacco Use Treatment Provided at Discharge (TOB–3a) to be 9.5 percent. Therefore, we believe that this tobacco use treatment is not currently embedded in clinical procedures. Despite this, we proposed to remove this measure because we believed that equivalent information was captured through the transition measure. However, we no longer believe that this is the case, as discussed below, and therefore, we are not finalizing removal of this measure from the IPFQR Program.

Comment: Numerous commenters expressed that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure is not a sufficient replacement for the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure. Specifically, some commenters observed that the discharge record created as part of the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure does not report data on smoking cessation, so removing the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure may cause some clinicians to cease providing this care. Other commenters observed that data reported for the Transition Record Received by Discharged Patients (Patients

Discharged to Home or Other Site of Care) (NQF #0647) measure does not enable patients and their families to assess facilities with respect to tobacco cessation referrals and treatment at discharge. One commenter further observed that the transition record measure may only capture FDA-approved cessation medications and not evidence based outpatient counseling. Another commenter observed that discharge records often do not include information about tobacco use screening or referral or prescriptions for treatment.

Response: When we proposed to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure from the IPFQR Program, we believed that providers would include referral or prescriptions for tobacco cessation treatment in the transition record developed for the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure, and therefore, this measure would continue to encourage providers to provide tobacco cessation treatment. However, in reviewing the comments we received, we realized that providers will only document this treatment if it is provided, but will consider the transition record to be complete even if no tobacco cessation treatment is provided to patients for whom this treatment is appropriate. Therefore, the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure will not meet the program objective of encouraging IPFs to provide tobacco cessation treatment. Furthermore, this measure will not meet the program objectives of providing information on tobacco cessation treatment to patients and their families because high performance on the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure does not indicate that the appropriate tobacco cessation treatments were provided.

We continue to believe that a prescription for an FDA-approved cessation medication should be included in the medication list, and a referral to evidence-based cessation treatment should be included in post-discharge patient instructions if providers offer these services. We note that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure continues to meet its originally intended objective of assessing whether patients were provided a discharge record. However, the measure design does not provide specific detail on the data provided within this discharge record. Because of this, we now believe that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure may not provide sufficient incentive to providers to offer tobacco cessation care, nor does this measure capture data specific to providing or offering upon discharge tobacco cessation treatment in a way that is meaningful for patients and their caregivers. Because of this, we do not believe the measure encourages providers to provide tobacco cessation treatment or provides information for consumers to identify whether this treatment was provided. Thus, the benefits of the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure are greater than we initially believed when we proposed to remove this measure in the proposed rule. With this new understanding of the continued benefits of the TOB–3 and TOB–3a (NQF #1656) measure in the IPFQR Program, we now believe that the benefits outweigh the costs of the measure.

Comment: Many commenters opposed the removal of Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure. Many commenters expressed concern that psychiatric patients are over-represented in the population using tobacco and that these patients die earlier and more frequently from tobacco-related illness, and therefore this program should ensure they are offered resources to quit.

Response: We agree with commenters that psychiatric patients are over-represented in the population of tobacco users and that these patients die earlier and more frequently from tobacco-related illness. Furthermore, we agree with commenters that it is appropriate for the IPFQR Program to encourage IPFs to offer tobacco cessation resources to patients who use tobacco. When we proposed to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure from the IPFQR Program we believed that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure would continue to encourage IPFs to provide these resources. However, as described above we now recognize that the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure may not adequately encourage IPFs to offer tobacco cessation resources to patients who use tobacco and see greater value of the TOB–3 and TOB–3a (NQF #1656) measure.

Comment: One commenter observed that the removal of the Tobacco Use Screening (TOB–1, NQF #1651) measure from the IPFQR Program broadens the potential denominator for the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure (by not requiring screening on the day of admission) and therefore makes this measure more meaningful by encouraging IPFs to offer tobacco cessation treatment and referrals to a greater number of patients who use tobacco and therefore increases the importance of retaining TOB–3 and TOB–3a (NQF #156).

Response: We thank the commenter for their input and share the commenter's interest in encouraging IPFs to offer tobacco cessation treatment and referrals to as many tobacco users as possible through the potentially expanded denominator of TOB–3 and TOB–3a (NQF #1656).

Comment: One commenter expressed concerns that CMS may expand the requirements of the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure to better replace Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge measure (TOB–3 and TOB–3a, NQF #1656).

Response: We wish to clarify that we did not intend for the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure to act as a replacement for Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure. In the FY 2019 IPF PPS Proposed Rule (83 FR 21121 through 21122), we stated that because the transition record created to meet the requirements of the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure includes elements on major procedures and tests performed during inpatient stay, summary of results, a current

medication list, and post-discharge instructions, it would include any prescriptions for FDA-approved cessation medications and tobacco use treatment in the latter two sections, if appropriate. We further stated that because we believed this data was being captured by another measure that the benefit of TOB–3 and TOB–3a had been reduced. We did not state that it was our intent to expand the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure's requirements based on the proposal to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure. However, as discussed below, we are not finalizing our proposal to remove Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure.

Comment: One commenter expressed concern that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure is not NQF endorsed, and therefore the commenter does not have the same confidence regarding measure specifications and testing as with respect to Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure.

Response: We acknowledge that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure has been NQF-endorsed in the past and recently lost that endorsement status. We note that this measure was NQF-endorsed at the time of adoption into the IPFQR Program. The NQF standing committee that assessed the measure for continuing endorsement assessed that the measure did not meet the performance gap subcriterion for maintaining endorsement.[12] However, information regarding this measure including information on the measure specifications and testing that was performed to obtain NQF-endorsement continues to be available at: *http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=69980.* Even though the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure is no longer NQF endorsed, we believe that it provide valuable information for patients regarding care coordination, discharge planning, and communication from providers. We note that in the FY 2017 IPPS/LTCH PPS final rule, we reiterated a listserv announcement which delayed implementation of this measure until the FY 2019 payment determination (81 FR 57238). Therefore, we do not have sufficient data to identify whether NQF's finding of lack of evidence of a performance gap applies to the IPF setting.

For these reasons, we believe that the measure is a valuable component of the IPFQR Program measure set; however, as discussed above, we are not finalizing removal of the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure as proposed because we no longer believe that the Transition Record Received by Discharged Patients (Patients Discharged to Home or Other Site of Care) (NQF #0647) measure reduces the benefits of the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure to a level such that these benefits are outweighed by the costs.

Comment: Many commenters observed that the high societal costs of healthcare and mortality associated with smoking outweigh the burden of collecting this measure data. One commenter expressed the belief that providing tobacco cessation prescriptions and referrals at discharge is less expensive than CMS's estimated cost of this measure.

Response: We note that our estimate of the costs associated with the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure provided in the proposed rule focused primarily on the information collection burden or other reporting costs related to participating in the program, not the cost of providing care to the patient. However, we agree that data indicate that the societal costs associated with tobacco use are very high.[13] For reasons discussed above, we are not finalizing removal of the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure. This will allow us to continue to encourage providers to provide tobacco cessation treatment at discharge through the IPFQR Program measure set, thereby addressing this common and costly comorbidity.

Comment: Another commenter observed that this measure is a recent addition to the IPFQR Program and therefore there has not been sufficient time to track progress on this measure.

Response: We acknowledge that the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure is a relatively recent addition to the IPFQR Program measure set, adopted in the FY 2016 IPF PPS final rule beginning with the FY 2018 payment determination (80 FR 46696 through 46699). As discussed above, we are not finalizing removal of the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure as proposed. This will allow us to continue evaluating the benefit of maintaining this measure in the IPFQR Program, as well as enabling us to more accurately establish historical measure performance trends.

Final Decision: After careful consideration of the comments we received, we are not finalizing our proposal to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656) measure from the IPFQR Program. This measure will continue to be part of the IPFQR Program measure set for FY 2019 payment determination and subsequent years.

b. Topped-Out Measures

In the FY 2018 IPPS/LTCH PPS final rule, we finalized criteria for evaluating whether measures within the IPFQR Program measure set are topped-out (82 FR 38463). We stated that a measure is topped-out if there is statistically indistinguishable performance at the 75th and 90th percentiles and the TCV is less than or equal to 0.10. Based on our analysis of IPFQR Program measure data for January 1, 2015 through December 31, 2015, IPF performance on the following three measures is topped-out.

i. Tobacco Use Screening (TOB–1, NQF #1651) Measure

In the FY 2019 IPF PPS proposed rule (83 FR 21122), we proposed to remove

[12] NQF, Care Coordination Measures Technical Report, Pages 24–26, Available at: *http://www.qualityforum.org/Projects/c-d/Care_Coordination_2016-2017/Final_Report.aspx.*

[13] Centers for Disease Control and Prevention. Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004.'' Morb Mortal Wkly Rep. 2008. 57(45): 1226–1228. Available at: *http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.* 29Fiore.

the Tobacco Use Screening (TOB–1, NQF #1651) measure from the IPFQR Program beginning with FY 2020 payment determination under our previously finalized measure removal Factor 1. Measure performance among IPFs is so high and unvarying that meaningful distinctions and improvements in performance can no longer be made (''topped-out'' measures). Based on our analysis of IPFQR Program measure data for January 1, 2015 through December 31, 2015 (that is, FY 2017 payment determination data), IPF performance on Tobacco Use Screening (TOB–1, NQF #1651) measure is statistically indistinguishable at the 75th and 90th percentiles and the TCV is less than or equal to 0.10. This analysis is captured in Table 4:

TABLE 4—TOPPED-OUT ANALYSIS RESULTS FOR TOBACCO USE SCREENING

Measure	Mean	Median	75th Percentile	90th Percentile	TCV	Topped-out
TOB–1	93.32	98.79	100	100	0.066	Yes.

The Tobacco Use Screening (TOB–1, NQF #1651) measure meets both of the statistical criteria for topped-out status. Our analysis shows that tobacco use screening is widely in practice and there is little room for improvement. We believe that IPFs will continue this practice even after the measure is removed because we believe that the high performance on this measure shows that this practice has become an embedded part of clinical workflows. For these reasons, we believe that the utility of the Tobacco Use Screening (TOB–1, NQF #1651) measure in the program is limited because measure performance among IPFs is so high and unvarying that meaningful distinctions and improvements in performance can no longer be made. Therefore, we proposed to remove the Tobacco Use Screening (TOB–1) measure from the IPFQR Program beginning with the FY 2020 payment determination.

Comment: Several commenters supported the proposal to remove Tobacco Use Screening (TOB–1, NQF #1651) measure.

Response: We thank these commenters for their support.

Comment: Several commenters recommended also removing the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention Provided (TOB–2 and TOB–2a, NQF #1654) measure because it cannot be effectively collected without the data from the Tobacco Use Screening (TOB–1, NQF #1651) measure; and therefore, removing the Tobacco Use Screening (TOB–1, NQF #1651) measure does not reduce provider burden. Another commenter supported the proposal to remove the Tobacco Use Screening (TOB–1, NQF #1651) measure without removing the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention Provided (TOB–2 and TOB–2a, NQF #1654) measure.

Response: We proposed to remove the Tobacco Use Screening (TOB–1, NQF #1651) measure because it is topped-out, which indicates the majority of facilities are conducting this screening. The Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention Provided (TOB–2 and TOB–2a, NQF #1654) measure, by contrast, is not topped-out. As a result, we believe there is continued benefit to collecting and publicly reporting data on facility performance on TOB–2 and TOB–2a.

The cost reduction associated with removing the Tobacco Use Screening (TOB–1, NQF #1651) measure is associated with no longer requiring facilities to abstract and report data, which decreases the information collection burden and the administrative costs for CMS and facilities, as well as potentially reduces inconvenience to patients by allowing screening at a time when it is most clinically appropriate to do so, even if that is not within one day of admission. Further, we note that screening patients for tobacco use remains a part of clinical best practice because of the high prevalence of tobacco use in this patient population and the associated morbidity and mortality. Therefore, we believe it is appropriate for providers to continue to provide tobacco use screening which will ensure that the data necessary to collect and report the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention Provided (TOB–2 and TOB–2a, NQF #1654) measure will still be available.

Comment: Many commenters opposed removing the Tobacco Use Screening (TOB–1, NQF #1651) measure because of the high prevalence of tobacco use in this patient population. These commenters expressed that tobacco use screening is an important part of psychiatric care and expressed concern that removal of the Tobacco Use Screening (TOB–1, NQF #1651) measure may cause facility performance to decline. Some commenters cited a recent CDC report that says only approximately 50 percent of mental health facilities screen for tobacco use.

Response: We agree with commenters that tobacco use is high in this patient population, and that this has a high societal cost, as well as a high burden of morbidity and mortality for these patients. However, we disagree that the cited CDC report which indicates that only approximately 50 percent of mental health facilities screen for tobacco use indicates that the Tobacco Use Screening (TOB–1, NQF #1651) measure is not topped-out. This report, available at *https://www.cdc.gov/mmwr/volumes/67/wr/mm6718a3.htm?s_cid=mm6718a3_w* assesses the use of tobacco screening in all mental health facilities, whereas the Tobacco Use Screening (TOB–1, NQF #1651) measure only assesses screening at admission within inpatient facilities. Therefore, we believe that the data accurately indicate this measure is topped-out are accurate, and that the measure has served its purpose to encourage facilities to institute policies and procedures that ensure patients are screened for tobacco use.

Comment: Some commenters stated the cost of healthcare associated with tobacco-related illness is lower than the cost of reporting this measure. Another commenter asserted that the administrative costs to CMS do not outweigh the benefits of this measure.

Response: We note that we proposed to remove this measure due to its topped-out status. Our topped-out analysis shows that tobacco screening use is widely in practice, and we believe that IPFs will continue to perform these screenings even after the measure is removed because we believe that the high performance on this measure shows that this practice has become an embedded part of clinical workflows—the foundation laid by this measure will continue. Therefore, we believe that removing this measure will not affect the benefit to IPF patients associated with tobacco use screening in the IPF setting.

Comment: One commenter supported the proposal to remove the Tobacco Use

Screening (TOB–1, NQF #1651) measure because the commenter believes that this measure's restriction to screening within the first day of admission lessens the efficacy of the Tobacco Use Screening (TOB–1, NQF #1651) measure and therefore, removes some patients who may benefit from tobacco use interventions from the denominator of the Tobacco Use Brief Intervention Provided or Offered and Tobacco Use Brief Intervention Provided (TOB–2 and TOB–2a, NQF #1654) measure. One commenter suggested that CMS modify the measure to capture more accurate or complete tobacco use screening data.

Response: We thank the commenter for support of our proposal to remove the Tobacco Use Screening (TOB–1, NQF #1651) measure from the IPFQR Program. We agree that there may be other ways to capture tobacco use screening data which would capture more accurate or complete tobacco use screening data, or which would eliminate restrictions which may affect the denominator of the measure. We welcome suggestions for new measures. We also encourage commenters with suggestions for improving measure specifications (available for this measure at *http://www.qualityforum.org/QPS/1651*) reach out directly to the appropriate measure steward.

Comment: One commenter recommended that CMS ensure screening measures, including those for tobacco use, are really duplicative, topped-out, or part of best practices prior to removing such measures.

Response: Based on our analysis of the data as provided in section VI.F.2.b.i of this final rule and in the FY 2019 IPF PPS proposed rule (83 FR 21122), this measure meets our criteria for ''topped-out'' status. As stated above, based on our analysis of IPFQR Program measure data for January 1, 2015 through December 31, 2015 (that is, FY 2017 payment determination data), IPF performance on the Tobacco Use Screening (TOB–1, NQF #1651) measure is statistically indistinguishable at the 75th and 90th percentiles and the TCV is less than or equal to 0.10. Furthermore, for reasons described above, we believe that this process has become embedded in clinical workflows and supporting infrastructure and therefore is also part of widespread best practice.

Final Decision: After careful consideration of the comments we received, we are finalizing our proposal as proposed to remove the Tobacco Use Screening (TOB–1, NQF #1651) measure for FY 2020 payment determination and subsequent years.

ii. Hours of Physical Restraint Use (HBIPS–2, NQF #0640) Measure and Hours of Seclusion Use (HBIPS–3, NQF #0641) Measure

In the FY 2019 IPF PPS proposed rule (83 FR 21122 through 21123), we proposed to remove two measures: (1) The Hours of Physical Restraint Use, (HBIPS–2) (NQF #0640) measure; and (2) the Hours of Seclusion Use (HBIPS–3) (NQF #0641) measure from the IPFQR Program for the FY 2020 payment determination and subsequent years under our previously finalized measure removal Factor 1. Measure performance among IPFs is so high and unvarying that meaningful distinctions and improvements in performance can no longer be made (''topped-out'' measures). Our finalized policy states that a measure is topped out if there is statistically indistinguishable performance at the 75th and 90th percentiles and the TCV is less than or equal to 0.10. This policy is designed to compare performance at the 75th and 90th percentile of top performing facilities. Because lower results are better for the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and Hours of Seclusion Use (HBIPS–3, NQF #0641) measure, the top performing facilities are those at the 25th and 10th percentile. Therefore, we evaluated the 25th and 10th percentile of measure results, which is equivalent to the 75th and 90th percentile of facility performance.

Due to the design of these measures—that lower results are better—we could not apply the second criterion, a TCV that is less than or equal to 0.10. The coefficient of variation is calculated by dividing the standard deviation by the mean. Because the mean is near zero for these measures, this leads to division by a number near zero, which results in a large coefficient of variation, and therefore a large TCV. This means that for measures with a target performance of zero, the second topped-out criterion ''the truncated coefficient of variation is less than or equal to 0.10'' is not applicable. While different than our established topped-out criteria, we believe that our approach for evaluating data for these measures is appropriate because it applies the relevant criterion in a way that assesses performance among the top performing facilities.

Our analysis for Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure is captured in Table 5:

TABLE 5—TOPPED-OUT ANALYSIS RESULTS FOR HOURS OF PHYSICAL RESTRAINT USE

Payment determination year	Mean	Median	25th Percentile measure results (75th percentile of facility performance)	10th Percentile measure results (90th percentile of facility performance)	TCV	Topped-out
2014	2.2	0.0	0.0	0.0	N/A	Yes.
2015	1.8	0.1	0.0	0.0	N/A	Yes.
2016	0.9	0.1	0.0	0.0	N/A	Yes.
2017	1.4	0.1	0.0	0.0	N/A	Yes.
2018	0.6	0.1	0.0	0.0	N/A	Yes.

Our analysis for Hours of Seclusion Use (HBIPS–3, NQF #0641) measure is captured in Table 6.

TABLE 6—TOPPED-OUT ANALYSIS RESULTS FOR HOURS OF SECLUSION USE

Payment determination year	Mean	Median	25th Percentile measure results (75th percentile of facility performance)	10th Percentile measure results (90th percentile of facility performance)	TCV	Topped-out
2014	0.8	0.0	0.0	0.0	N/A	Yes.
2015	1.1	0.0	0.0	0.0	N/A	Yes.
2016	0.5	0.0	0.0	0.0	N/A	Yes.
2017	1.1	0.0	0.0	0.0	N/A	Yes.
2018	0.4	0.0	0.0	0.0	N/A	Yes.

We continue to believe that the use of physical restraints and seclusion as clinical interventions are important patient safety issues because of the severity of these interventions. However, we note that Hours of Physical Restraint Use (HBIPS–2) measure and Hours of Seclusion Use (HBIPS–3) measure have only been one element of the coordinated approach to minimizing the use of physical restraint and seclusion. They are not the primary method by which CMS monitors or assesses the appropriateness of their use. IPFs are subject to the Conditions of Participation (COP) concerning patient's rights, which include an extensive section on the use of seclusion and restraints (42 CFR 482.13(e), (f), and (g)). Unannounced surveys by state surveyors and surveys by CMS-approved accreditation organizations (for example, The Joint Commission (TJC)) for deeming purposes are the primary means by which CMS enforces these provisions, which assess compliance with these requirements on a case-by-case basis. This focus on the appropriate use of these interventions has led to consistently high performance on these measures for several years. Our ''topped-out'' analyses of the measures shows that meaningful distinctions and improvements in performance can no longer be made through continued use of these measures in the IPFQR Program, and thus, utility in the program is limited. However, we believe that the continued monitoring of the use of seclusion and restraint by surveyors will continue to protect against patient harm related to inappropriate use of seclusion and restraint.

Therefore, we proposed to remove from the IPFQR Program beginning with the FY 2020 payment determination both measures: (1) The Hours of Physical Restraint Use (HBIPS–2) measure; and (2) the Hours of Seclusion use (HBIPS–3) measure.

Comment: Several commenters supported the removal of the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and the Hours of Seclusion Use (HBIPS–3, NQF #0641) measure and agreed with CMS's rationale that sufficient standards remain in place to ensure continued performance. One commenter expressed that these measures are difficult to report and therefore very burdensome.

Response: We appreciate the support for removing these measures.

Comment: One commenter requested that CMS provide more data on how it determined these measures were topped-out and develop and publicize a ''lifecycle'' for removing topped-out measures similar to that in use in the MIPS QPP. Another commenter recommended that CMS develop measures that address these topics and allow comparison across and within facilities by accounting for risk factors rather than removing HBIPS–2 and HBIPS–3 without replacing these measures. Some commenters recommended that CMS make the data collected from facilities and then published by CMS regarding these interventions more meaningful by stratifying the data.

Response: We thank these commenters for their comments. We refer readers to Tables 5 and 6, which demonstrate the calculations we used to identify that these measures meet the applicable statistical criteria for being topped-out—that is, there is statistically indistinguishable difference in performance between the 75th and 90th percentiles of facilities. We believe that the commenter is referring to the four year timeline which requires a measure to be identified as topped-out for three consecutive years prior to proposal for removal through notice and comment rulemaking in the fourth year in the MIPS QPP (82 FR 53637 through 53640). We do not have a similar ''lifecycle'' policy in the IPFQR Program for removing topped-out measures or other measures that we have determined are no longer appropriate for the IPFQR Program. Instead, according to IPFQR Program policy, which aligns with policies in other quality reporting programs,[14] we evaluate each measure according to the measure removal and retention factors in order to make case-by-case decisions about the appropriate course of action for each measure. We will consider the suggestion for a ''lifecycle'' and for the refinement of existing measures and/or development of new measures that address use of physical restraints and use of seclusion within the IPF setting as we continue planning for the IPFQR Program.

We note that as described in section VI.D of this final rule regarding social risk factors, we continue to seek to identify ways to account for social risk within the IPFQR Program. We will consider the suggestions for stratifying data regarding these measures as part of this analysis.

Comment: Numerous commenters opposed the removal of the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and the Hours of Seclusion Use (HBIPS–3, NQF #0641) measure because they are critical patient safety measures of interventions that can traumatize already vulnerable patients. Many commenters expressed concern that removing these measures would result in a deterioration in facility performance on these topics which could harm patients. Some commenters expressed that because these are patient safety measures, any variation in these measures provides meaningful data, and therefore, the topped-out criteria are not applicable.

Response: We thank these commenters for their input. We do not have data indicating that removing these measures will cause a deterioration in IPF performance in use of seclusion and/or restraints. We initially believed the topped-out status of these measures justified their removal from the IPFQR Program, despite our continued belief that use of physical restraints and seclusion are critical patient safety issues and that it is important for CMS

[14] For example, the Hospital IQR Program also evaluates measures on a case-by-case basis using finalized measure removal factors (79 FR 50203) and (80 FR 49641 through 49642).

to encourage IPFs to minimize their use of these interventions. After reviewing comments (the vast majority of which, from a diverse group of stakeholders, opposed removing these measures) we decided to keep these measures, despite their topped-out status, in order to allow these critical patient data to continue to be publicly reported for use by patients and their families/caregivers in selecting an IPF for their care and by IPFs in quality improvement activities. We further believe retaining these measures will better ensure IPFs continue to proactively track and continually strive for performance improvement on these measures.

Comment: Other commenters observed that these measures remind providers of the importance of these topics and provide more ability to directly monitor performance than COP surveys. Some commenters expressed that COP surveys serve a different purpose (that is, ensure compliance with regulations) than quality measures, which serve to incentivize high performance and that provide consumer information.

Response: While we continue to believe that surveys ensuring adherence to the COPs are an important tool in achieving and maintaining low rates of seclusion and restraint use, we agree with commenters that these COP surveys do not provide benchmark data, information to consumers, or a continual reminder of the importance of maintaining low rates, of the same way the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and the Hours of Seclusion Use (HBIPS–3, NQF #0641) measure do.

We would like to clarify that the IFPQR Program, as a pay-for-reporting quality program, does not provide direct incentives (that is, payment impacts) for high or low performance on program measures. However, we agree that use of the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and Hours of Seclusion Use (HBIPS–3, NQF #0641) measure in the IPFQR Program provides indirect incentives to strive for high performance on these measures because the program publicly reports measure rates for all participating IPFs, which allows patients, their caregivers, and IPFs to compare performance across IPFs. As stated above, we have decided to keep these measures in the program despite their topped-out status.

Comment: Some commenters recommend that CMS retain these measures because these measures allow hospitals to compare their performance to other hospitals.

Response: As stated above, we have decided to keep these measures in the program despite their topped-out status. We agree with these commenters that public reporting of these measures allows hospitals to compare their performance to other commenters. This is a valuable function of these quality measures that is not achieved by COP surveys, for example.

Final Decision: After careful consideration of the comments we received, we are not finalizing our proposal to remove the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure and the Hours of Seclusion Use (HBIPS–3, NQF #0641) measure from the IPFQR Program. These two measures will continue to be part of the IPFQR Program measure set for the FY 2019 payment determination and subsequent years.

G. Previously Finalized and Newly Finalized Measure Sets for the FY 2020 Payment Determination and Subsequent Years

1. Previously Finalized Measures for the FY 2020 Payment Determination and Subsequent Years

We previously finalized 18 measures for the FY 2020 payment determination and subsequent years. These measures are set forth in Table 7.

TABLE 7—PREVIOUSLY FINALIZED MEASURES FOR THE FY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

NQF No.	Measure ID	Measure
0640	HBIPS–2	Hours of Physical Restraint Use.
0641	HBIPS–3	Hours of Seclusion Use.
560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.
576	FUH	Follow-up After Hospitalization for Mental Illness.
1661	SUB–1	Alcohol Use Screening.
1663	SUB–2 and SUB–2a	Alcohol Use Brief Intervention Provided or Offered and SUB–2a Alcohol Use Brief Intervention.
1664	SUB–3 and SUB–3a	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and SUB–3a Alcohol and Other Drug Use Disorder Treatment at Discharge.
1651	TOB–1	Tobacco Use Screening.
1654	TOB–2 and TOB–2a	Tobacco Use Treatment Provided or Offered and TOB–2a Tobacco Use Treatment.
1656	TOB–3 and TOB–3a	Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge.
1659	IMM–2	Influenza Immunization.
0431	N/A	Influenza Vaccination Coverage Among Healthcare Personnel.
647	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).
648	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).
N/A	N/A	Screening for Metabolic Disorders.
2860	N/A	Thirty-Day All-Cause Unplanned Readmission Following Psychiatric Hospitalization in an Inpatient Psychiatric Facility.
N/A	N/A	Assessment of Patient Experience of Care.
N/A	N/A	Use of an Electronic Health Record.

2. Measure Set for the FY 2020 Payment Determination and Subsequent Years

With the measure removals we are finalizing in section VI.F.2 of this final rule, five of the previously finalized measures described in Table 7 will be removed for the FY 2020 payment determination and subsequent years. The remaining thirteen measures are set forth in Table 8.

TABLE 8—MEASURE SET FOR THE FY 2020 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

NQF No.	Measure ID	Measure
0640	HBIPS–2	Hours of Physical Restraint Use.
0641	HBIPS–3	Hours of Seclusion Use.
560	HBIPS–5	Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification.
576	FUH	Follow-up After Hospitalization for Mental Illness.
1663	SUB–2 and SUB–2a	Alcohol Use Brief Intervention Provided or Offered and SUB–2a Alcohol Use Brief Intervention.
1664	SUB–3 and SUB–3a	Alcohol and Other Drug Use Disorder Treatment Provided or Offered at Discharge and SUB–3a Alcohol and Other Drug Use Disorder Treatment at Discharge.
1654	TOB–2 and TOB–2a	Tobacco Use Treatment Provided or Offered and TOB–2a Tobacco Use Treatment.
1656	TOB–3 and TOB–3a	Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge.
1659	IMM–2	Influenza Immunization.
647	N/A	Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).
648	N/A	Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care).
N/A	N/A	Screening for Metabolic Disorders.
2860	N/A	Thirty-Day All-Cause Unplanned Readmission Following Psychiatric Hospitalization in an Inpatient Psychiatric Facility.

H. Possible IPFQR Program Measures and Measure Topics for Future Consideration

As we have previously indicated (79 FR 45974 through 45975), 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 IPF setting. We are considering development of process and outcomes measures related to treatment and management of depression. In our assessment of the current IPFQR measure set under the Meaningful Measures Initiative, described in section VI.E of this final rule, we recognized the importance of developing a measure that fits into the meaningful measure areas of Prevention, Treatment, and Management of Mental Health and Patient Experience and Functional Outcomes, as we believe that the lack of such a measure indicates a gap in the current IPFQR Program measure set.

Specifically, we are considering: (1) Future development and adoption of a process measure that measures administration of a standardized depression assessment instrument (for example, the Patient Health Questionnaire (PHQ)–9) [15] at admission and discharge for patients admitted with depression; and (2) future development and adoption of a patient reported outcome measure, which assesses change in patient reported function based on the change in results on the standardized depression assessment instrument between admission and discharge.

We ultimately wish to adopt a patient reported outcome measure related to treatment and management of depression; however, such a measure would require consistent administration of a standardized assessment instrument at admission and discharge. To ensure that facilities are consistently using a standardized assessment instrument, we believe that it may be necessary to first adopt a process measure that assesses facility administration of a standardized depression assessment, such as the PHQ–9, at both admission and discharge for adult inpatient admissions, thereby, encouraging facilities that do not currently consistently use such an instrument to use one. In the future, we could replace this measure with a patient reported outcome measure that we would develop to compare the patient's responses to the standardized depression assessment instrument at admission with the patient's results on the same assessment instrument at discharge. We believe this potential future patient reported outcome measure for patients with depression would address the meaningful measure areas of Prevention, Treatment, and Management of Mental Health, and Patient Experience and Functional Outcomes.

We solicited public comments on: (1) Future development and adoption of a process measure that measures the number of facilities that administer a standardized assessment instrument; (2) future development and adoption of an outcome measure related to treatment and management of depression; and (3) any other possible new measures or new measure topics.

Comment: Several commenters supported the concept of developing a measure or measures for evaluation of treatment of depression; these commenters also provided suggestions for development of such measures. One suggestion was to coordinate with other measure developers to ensure alignment of measures. Some commenters expressed that IPFs already use standardized depression instruments and therefore a process measure to assess this would be topped-out almost immediately. Other commenters observed that the measure would need to be well-specified to ensure that it is clear which patients would be included and when a depression screening would be appropriate. Another commenter suggested development of an attestation

[15] The PHQ–9 is publicly available at: *http://www.phqscreeners.com/sites/g/files/g10016261/f/201412/PHQ-9_English.pdf.*

measure to determine any outcome measurement techniques already in use by facilities. Another commenter requested that CMS ensure that any assessment instrument selected for use in a measure program be available to all IPFs without imposing additional costs on IPFs. Some commenters recommended that CMS develop a depression measure that allows providers to select between several standardized depression assessment instruments to best meet the clinical needs of their specific patient population or to tailor the instrument to sub-populations. Some commenters recommended that CMS survey IPFs to determine the most appropriate assessment instrument, without using a process measure to collect this data. One commenter observed that there are several issues with the depression patient reported outcome measure that CMS described. These issues are: (1) There may not be sufficient time between admission and discharge for improvement of symptoms, therefore CMS should consider a minimum duration in the denominator; (2) discharge is a stressful time for patients which may lead to biased data, therefore CMS should consider a low burden method to collect data 2–4 weeks post-discharge; and (3) high acuity patients may not be able to be screened at admission therefore excluding data from a highly applicable patient population. These commenters therefore recommended that CMS should assess how to include patients with psychosis, agitation, and cognitive difficulties in any future measures for the evaluation of treatment of depression.

Response: We thank these commenters and will consider their recommendations if we develop a process measure or a patient reported outcome measure for depression management. If we do develop such measures, we will follow our standard measure development process including seeking input through a technical expert panel (TEP), seeking public comment, placing the measure on the Measures Under Consideration (MUC) list to receive input from the Measure Application Partnership (MAP), and proposing the measure through notice and comment rulemaking.

Comment: Commenters provided several recommendations regarding measures that would be appropriate to develop or adopt for the IPFQR Program. The topics suggested by commenters included:

- Sexual assault screening;
- Family and caregiver engagement;
- Patient experience of care;
- Clinical improvement outcomes;
- Access to care;
- Inpatient assaults and violence;
- Suicide evaluation and reduction;
- Additional indicators to decrease use of seclusion and physical restraints (such as patient surveys and assessment of staff ability to de-escalate);
- eCQM versions of the tobacco use screening and treatment measures;
- eCQM versions of the alcohol use screening and treatment measures;
- eCQM version of Influenza Immunization measure (IMM–2);
- Patient reported outcome measures that address specific conditions, comorbidities, or lengths of stay;
- Safety planning for patients with suicidal ideation and/or impulsive self-destructive tendencies;
- Immunization focused measures including an immunization composite measure and a measure of Pneumococcal Vaccination for Older Adults; and
- Measures that encourage facilities to identify community supports and help patients become more accountable for their own health.

One commenter observed that CMS could expedite adoption of a standardized patient experience of care survey by collecting this data through a voluntary data collection prior to adopting such a measure in the program. Another commenter recommended that CMS not adopt structural measures in the future. Some commenters requested the CMS only adopt measures that have been endorsed by the NQF specifically for the IPF setting and that specifically address psychiatric care. One commenter also recommended that CMS engage in a collaborative measure development process, preferably modeled on the one undertaken in developing the HBIPS measures.

Response: We thank these commenters for their recommendations and will consider this input as we develop and refine the IPFQR Program measure set.

I. Public Display and Review Requirements

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53653 through 53654), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50897 through 50898), and the FY 2017 IPPS/LTCH PPS final rule (81 FR 57248 through 57249). In this final rule, we are not making any changes to these policies. However, we note that in section VI.D of this final rule, we discuss potential considerations to provide stratified data by patient dual eligibility status in IPF confidential feedback reports and considerations to make stratified data publicly available on the Hospital Compare website (*https://www.medicare.gov/hospitalcompare/psych-measures.html*) in the future.

J. Form, Manner, and Timing of Quality Data Submission for the FY 2020 Payment Determination and Subsequent Years

1. Procedural Requirements for the FY 2020 Payment Determination and Subsequent Years

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53654 through 53655), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50898 through 50899), and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38471 through 38472) for our previously finalized procedural requirements. We did not propose any changes to these policies in the FY 2019 IPF PPS proposed rule.

2. Data Submission Requirements for the FY 2020 Payment Determination and Subsequent Years

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53655 through 53657), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50899 through 50900), and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38472 through 38473) for our previously finalized data submission requirements. We did not propose any changes to the data submission requirements in the FY 2019 IPF PPS proposed rule.

3. Reporting Requirements for the FY 2020 Payment Determination and Subsequent Years

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53656 through 53657), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50900 through 50901), and the FY 2015 IPF PPS final rule (79 FR 45976 through 45977) for our previously finalized reporting requirements. In this final rule, we are not making any changes to these policies; however, we requested public comment on our consideration to potentially require patient-level measure data in the future. This is discussed in more detail below.

In the FY 2013 IPPS/LTCH PPS final rule (77 FR 53655 through 53656), we finalized that for the FY 2014 payment determination and subsequent years, IPFs must submit aggregated numerator and denominator data for all age groups for all measures on an annual basis, and that the data input forms on the QualityNet website for such submission will require aggregate data for each separate quarter. In the FY 2016 IPF PPS final rule (80 FR 46715 through 46717), we finalized that for the FY 2017

payment determination and subsequent years, facilities would only be required to report data for chart-abstracted measures on an aggregate basis by year, rather than by quarter. In addition, we finalized that facilities would no longer be required to report by age group.

Although we are not making any changes to these requirements in this final rule, we recognize that reporting aggregate measure data increases the possibility of human error, such as making typographical errors while entering data, which cannot be detected by CMS or by data submission systems. Unlike patient-level data reporting, aggregate measure data reporting does not allow for data accuracy validation (77 FR 53655 through 53656). Therefore, the ability to detect error is lower for aggregate measure data reporting than for patient-level data reporting. For this reason, we are considering requiring patient-level data reporting (that is, data regarding each patient included in a measure and whether the patient was included in each the numerator and denominator of the measure) of IPFQR Program measure data in the future. We note that in the FY 2013 IPPS/LTCH PPS final rule, we previously indicated that we would consider requiring patient-level data in the future and that we would use notice and comment rulemaking to establish any requirements (77 FR 53656).

In the FY 2019 IPF PPS proposed rule (83 FR 21125) we solicited public comments on the consideration for requiring patient-level measure data in the future.

Comment: Several commenters expressed support for patient-level data collection because it provides greater confidence in the data's validity and reliability. Some commenters suggested that, as CMS explores patient-level data reporting, CMS should use a system that has already been tested and used for IPF data reporting to avoid creating additional burden. Another commenter recommended that CMS collaborate with IPFs to ensure that the system used to report patient-level data is not burdensome.

Response: We thank these commenters for their support and recommendations. We will consider these suggestions as we explore patient-level data reporting for the IPFQR Program.

4. Quality Measure Sampling Requirements

In the FY 2013 IPPS/LTCH PPS final rule (77 FR 53657 through 53658), we finalized that participating IPFs must meet specific population, sample size, and minimum reporting case threshold requirements for individual measures as specified in TJC's Specifications Manual [16] for the FY 2014 payment determination and subsequent years. The Specifications Manual is updated at least twice a year (and may be updated more often as necessary), and IPFs must follow the requirements in the most recent manual. We finalized that the target population for the measures includes all patients, not solely Medicare beneficiaries, to improve quality of care. We believe it is important to require IPFs to submit measures on all patients because quality improvement is of industry-wide importance and should not be focused exclusively on a certain subset of patients. We noted that the Specifications Manual gives IPFs the option of sampling their data quarterly or monthly. We also finalized our policy that IPFs that have no data to report for a given measure must enter zero for the population and sample counts. For example, an IPF that has no hours of physical restraint use to report for a given quarter is still required to submit a zero for its quarterly aggregate population for the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure in order to meet the reporting requirement. We note that at the time we finalized this policy, the only measures in the IPFQR Program were HBIPS measures (77 FR 53652).

In the FY 2014 IPPS/LTCH PPS final rule (78 FR 50901 through 50902), we stated that for the existing HBIPS measures, we continue to apply our finalized policies for population, sampling, and minimum case threshold as discussed above. However, in that rule, we finalized a new policy for new measures. For new measures finalized for the FY 2016 payment determination and subsequent years, we finalized that IPFs must follow sampling and population requirements as specified by the appropriate measure steward (78 FR 50901 through 50902).

In that rule, we also made clear that the Follow-Up After Hospitalization for Mental Illness (FUH, NQF #0576) measure is not eligible for sampling because CMS calculates the measure using administrative claims data, and sampling is not applicable to claims-based measures. We finalized that IPFs must follow the population requirements outlined at: *http://www.ncqa.org/portals/0/Follow-Up%20After%20Hospitalization%20for%20Mental%20Illness.pdf*.

In the FY 2014 IPPS/LTCH PPS final rule, some commenters noted that different sampling requirements in the measures could increase burden on facilities because these differences will require IPFs to have varying policies and procedures in place for each measure (78 FR 50901). Therefore, in the FY 2016 IPF PPS final rule (80 FR 46717 through 46719), in order to provide facilities greater flexibility, we expanded our sampling policy to allow sampling either through: (1) Previously finalized requirements for individual measures as discussed above; or (2) through the use of a uniform sampling methodology beginning with the FY 2018 payment determination. We finalized a uniform sampling methodology that could be applied to both measures that allow sampling and for certain other measures (specifically measures not previously included in TJC's Specifications Manuals, such as Screening for Metabolic Disorders, Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification, HBIPS–5). Specifically, we finalized use of The Joint Commission/CMS Global Initial Patient Population sampling methodology found at: *https://www.qualitynet.org/dcs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1228890321190&blobheader=multipart%2Foctet-stream&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3Bfilename%3D2+9_Global_v4_4.pdf&blobcol=urldata&blobtable=MungoBlobs*. This uniform sampling methodology allows IPFs to utilize one sampling methodology and apply it to all IPFQR Program measures for which sampling is allowed. The Joint Commission/CMS Global Initial Patient Population sampling methodology, as developed, ensures that enough data are represented in the sample to determine accurate measure rates (80 FR 46718).

Therefore currently, IPFs can choose from two options to sample quality measures: (1) Sampling and population requirements as specified by the appropriate measure steward; or (2) a uniform sampling methodology (that is, The Joint Commission/CMS Global Initial Patient Population methodology). These population and sampling options currently apply to the following measures in the IPFQR Program measure set:

- Patients Discharged on Multiple Antipsychotic Medications with Appropriate Justification (HBIPS–5, NQF #0560).
- Alcohol Use Screening (SUB–1, NQF #1661) (removed in this final rule).
- Alcohol Use Screening and Brief Intervention Provided or Offered and

[16] *https://manual.jointcommission.org/releases/TJC2017B2/*.

Alcohol Use Brief Intervention (SUB–2 and SUB–2a, NQF #1663).

- Alcohol & Other Drug Use Disorder Treatment Provided or Offered at Discharge and Alcohol & Other Drug Use Disorder Treatment at Discharge (SUB–3 and SUB–3a, NQF #1664).
- Tobacco Use Screening (TOB–1, NQF #1651) (removed in this final rule).
- Tobacco Use Treatment Provided or Offered and Tobacco Use Treatment Provided (TOB–2 and TOB–2a, NQF #1654).
- Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment at Discharge (TOB–3 and TOB–3a, NQF #1656).
- Influenza Immunization (IMM–2, NQF #1659).
- Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647).
- Timely Transmission of Transition Record (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0648).
- Screening for Metabolic Disorders.

We did not propose any changes to our quality measure sampling policies in the FY 2019 IPF PPS proposed rule.

5. Non-Measure Data Collection

In the FY 2015 IPF PPS final rule (79 FR 45973), we finalized that IPFs must submit aggregate population counts for Medicare and non-Medicare discharges by age group, diagnostic group, and quarter for the FY 2017 payment determination and subsequent years. We also finalized that IPFs must report the sample size counts (that is, number of patients included in the sample) for measures for which sampling is performed. Because these data (that is, (1) the aggregate population counts for Medicare and non-Medicare discharges by age group, diagnostic group, and quarter, as well as (2) sample size count for sampled measures) relate to the IPF's entire patient population, rather than the IPF's performance on specific measures, we refer to this data collectively as ''non-measure data.'' When adopting this requirement we expressed our belief that it is vital for IPFs to accurately determine and submit this non-measure data to CMS in order for CMS to assess IPFs' data reporting completeness for their total population, both Medicare and non-Medicare (79 FR 45973). We also stated that in addition to helping to better assess the quality and completeness of measure data, we expected that this information would improve our ability to assess the relevance and impact of potential future measures.

In the FY 2016 IPF PPS final rule (80 FR 46717), we finalized a change to the frequency with which we collect this non-measure data, such that beginning with the FY 2017 payment determination and subsequent years, we require non-measure data to be submitted as an aggregate, yearly count rather than by quarter. Therefore, there are currently five components to the non-measure data that facilities are required to submit on an annual basis: (1) Total annual discharges; (2) annual discharges stratified by age; (3) annual discharges stratified by diagnostic category; (4) annual discharges stratified by Medicare versus non-Medicare payer; (5) the sample size counts for measures for which sampling is performed.

However, the requirement to submit the sample size counts has created confusion for some facilities (for example, for facilities that used more than one sampling methodology such as applying the global sample to some measures and measure specific sampling procedures to others). In an effort to reduce confusion and information collection burden, and in line with our Meaningful Measures and Patients over Paperwork Initiatives, we proposed to no longer require facilities to report the sample size counts for measures for which sampling is performed (that is, item (5) listed above) beginning with the FY 2020 payment determination and subsequent years.

Our data indicate that most facilities avail themselves of the global sampling option (as discussed in section VI.J.4 of this final rule). We believe that for most facilities which use sampling, the size of the global sample can be compiled by other means, since information on the global sample size can still be inferred from the denominator values that are already reported as part of measure data submission. This is because for measures in which the denominator represents the entire patient population (except for any denominator exclusions) the denominator is a good approximation for the global sample size count. Any denominator exclusions represent only a small proportion of the patient population and would not significantly affect the global sample size approximation. Since the global sample applies to all measures for which sampling is performed, the global sample size is consistent across all measures for which sampling is performed, and therefore, can be inferred from the denominator of any measure for which the denominator represents the entire patient population (such as the Transition Record with Specified Elements Received by Discharged Patients (Discharges from an Inpatient Facility to Home/Self Care or Any Other Site of Care) (NQF #0647) measure. We note that this proposal does not in any way change or affect our requirements concerning quality measure sampling outlined in section VI.J.4 of this final rule and would only change the information that IPFs report to CMS on the size of samples used.

Therefore, we proposed to no longer require facilities to report sample size counts for measures for which sampling is performed as discussed above for the FY 2020 payment determination and subsequent years.

Comment: One commenter supported our proposal to no longer require facilities to report sample size counts.

Response: We thank this commenter for the support.

Final Decision: After careful consideration of the comment we received, we are finalizing our proposal to no longer require facilities to report sample size counts for measures for which sampling is performed as discussed above for the FY 2020 payment determination and subsequent years.

6. Data Accuracy and Completeness Acknowledgement (DACA) Requirements

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53658) for our previously finalized DACA requirements. We did not propose any changes to the DACA requirements in the FY 2019 IPF PPS proposed rule.

K. Reconsideration and Appeals Procedures

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53658 through 53659) and the FY 2014 IPPS/LTCH PPS final rule (78 FR 50903) for our previously finalized reconsideration and appeals procedures. We did not propose any changes to these procedures in the FY 2019 IPF PPS proposed rule.

L. Extraordinary Circumstances Exceptions (ECE) Policy

We refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53659 through 53660), the FY 2014 IPPS/LTCH PPS final rule (78 FR 50903), the FY 2015 IPF PPS final rule (79 FR 45978), and the FY 2018 IPPS/LTCH PPS final rule (82 FR 38473 through 38474) for our previously finalized ECE policies. We did not propose any changes to these policies in the FY 2019 IPF PPS proposed rule.

VII. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), we are required to publish a 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval.

To fairly evaluate whether an information collection should be approved by OMB, PRA section 3506(c)(2)(A) 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 burden estimates.
- The quality, utility, and clarity of the information to be collected.
- Our effort to minimize the information collection burden on the affected public, including the use of automated collection techniques.

We solicited public comment on each of the PRA section 3506(c)(2)(A)-required issues for the following information collection requirements (ICRs).

We did not receive such comments. We note that we are updating the information collection estimates based on the policies we are finalizing in this final rule, specifically (1) the adoption of a new measure removal factor, (2) the removal of five (5) measures, and (3) the removal of the requirement that facilities report sample size counts. This differs from the policies proposed in the FY 2019 IPF PPS proposed rule, in which we proposed to remove eight (8) measures.

A. Collection of Information Requirements for the IPFQR Program

1. Wage Estimates

Consistent with the FY 2017 IPPS/LTCH PPS final rule (81 FR 57265 through 57266) and our FY 2016 IPF PPS final rule (80 FR 46720), to derive average costs, we used data from the United States Bureau of Labor Statistics (BLS) National Occupational Employment and Wage Estimates for all salary estimates (in this case the May 2016 report) and applied this wage rate to the year in which the savings would accrue (in this case FY 2018).[17] The BLS is ''the principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy.'' [18] Acting as an independent agency, the BLS provides objective information for not only the government, but also for the public. The BLS describes Medical Records and Health Information Technicians as those responsible for organizing and managing health information data. We believe it is reasonable to assume that these individuals would be tasked with abstracting clinical data for these measures. The most recent data from the BLS reflects a median hourly wage of $18.29 for a Medical Records and Health Information Technician.[19] We note that we have already incorporated this updated wage data into other quality reporting programs, for example the Hospital Inpatient Quality Reporting (IQR) Program uses this wage to calculate its burden estimates (82 FR 38501). Therefore, in the FY 2019 IPF PPS proposed rule (83 FR 21127), we updated our wage estimate to reflect this hourly wage for the IPFQR Program.

Table 9 presents the median hourly wage, the cost of fringe benefits and overhead (calculated at 100 percent of salary), and the adjusted hourly wage.

TABLE 9—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

Occupation title	Occupation code	Median hourly wage ($/hr)	Fringe benefits and overhead ($/hr)	Adjusted hourly wage ($/hr)
Medical Records and Health Information Technician	29–2071	18.29	18.29	36.58

Under OMB Circular A–76, in calculating direct labor, agencies should not only include salaries and wages, but also ''other entitlements'' such as fringe benefits.[20] As indicated in Table 9 and consistent with our past approach, we have chosen to calculate the cost of overhead at 100 percent of the median hourly wage (81 FR 57266). This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer, and methods of estimating these costs vary widely from study to study. We believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

2. ICRs Regarding the IPFQR Program

For a detailed discussion of the information collection burden for the program requirements that we have previously adopted, we refer readers to the burden approved under OMB control number 0938–1171 (CMS–10432) and the following rules:

- The FY 2013 IPPS/LTCH PPS final rule (77 FR 53673);
- The FY 2014 IPPS/LTCH PPS final rule (78 FR 50964);
- The FY 2015 IPF PPS final rule (79 FR 45978 through 45980);
- The FY 2016 IPF PPS final rule (80 FR 46720 through 46721);
- The FY 2017 IPPS/LTCH PPS final rule (81 FR 57265 through 57266); and
- The FY 2018 IPPS/LTCH PPS final rule (82 FR 38507 through 38508).

The requirements and burden estimates were submitted to OMB for approval under control number 0938–1171 (CMS–10432). We solicited public comments for the information collection in its entirety in the FY 2019 IPF PPS proposed rule (83 FR 21128). That is, we solicited comments both for the proposed rule's changes and for the requirements and burden that are currently approved under the 0938–1171 control number. Both can be found in the 0938–1171 PRA package's Supporting Statement.

In this final rule, we discuss only the changes in burden resulting from the provisions we are finalizing in this final rule. We will attribute the costs associated with the provisions in this final rule to the FY in which these costs begin; for the purposes of all of the provisions included here, that year is FY 2018. All of these provisions we discuss in section VI. of this final rule apply to data collected in CY 2018 and reported in FY 2019 for the FY 2020 payment determination.

a. Adoption of a New Measure Removal Factor

In section VI.F.1. of this final rule, we are adopting a new measure removal factor, Factor 8, ''the costs associated with a measure outweigh the benefit of its continued use in the program.'' As discussed in the FY 2018 IPPS/LTCH

[17] *http://www.bls.gov/oes/current/oes_nat.htm.*

[18] *http://www.bls.gov/bls/infohome.htm.*

[19] *https://www.bls.gov/oes/current/oes292071.htm.*

[20] *http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction.*

PPS final rule (82 FR 38507 through 38508), the adoption of measure removal factors does not affect the data submission requirements for IPFs. These factors are intended to improve transparency of our measure review and evaluation process, and have no effect on the data collection or submission requirements for IPFs. Therefore, we do not believe that there is any change of burden associated with the new measure removal factor.

We solicited PRA-related comments in the FY 2019 IPF PPS proposed rule (83 FR 21128). We did not receive any comments on this estimate. Consequently we are finalizing our PRA-related estimates as proposed.

b. Removal of Five Measures

In the FY 2019 IPF PPS proposed rule (83 FR 21128 through 21129) we estimated the information collection burden for our proposals to remove eight measures. However, in section VI.F.2. of this final rule, we are only finalizing the removal of five measures. We are not finalizing our proposal to remove the Tobacco Use Treatment Provided or Offered at Discharge and Tobacco Use Treatment Provided at Discharge (TOB–3 and TOB–3a, NQF #1656) measure because the benefits of this measure are greater than we initially believed when we proposed to remove it. We are not finalizing our proposal to remove the Hours of Physical Restraint Use (HBIPS–2, NQF #0640) measure, and the Hours of Seclusion Use (HBIPS–3, NQF #0641) measure to allow these critical patient data to continue to be publicly reported for use by patients and their families/caregivers in selecting an IPF for their care and by IPFs in quality improvement activities. Therefore here, we are updating our estimates for change in information collection burden to reflect our final policies.

In section VI.F.2 of this final rule, we are finalizing our proposals to remove the following five measures for FY 2020 payment determination and subsequent years:

- Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431);
- SUB–1—Alcohol Use Screening (NQF #1661);
- Assessment of Patient Experience of Care;
- Use of an Electronic Health Record; and
- TOB–1—Tobacco Use Screening (NQF #1651).

For the FY 2020 payment determination, CY 2018 data would be reported during the summer of CY 2019. Therefore, for the FY 2020 payment determination, we are correlating the burden reduction to the FY 2018 burden calculation. We believe that approximately 1,734 [21] IPFs will participate in the IPFQR Program for requirements occurring in FY 2018 and subsequent years. Based on data from CY 2017, we believe that each IPF will submit measure data based on approximately 1,213 [22] discharges per year.

i. Chart-Abstracted Measures

We previously estimated that the reporting burden for chart-abstracted measures is 15 minutes (0.25 hours) per measure per case (81 FR 57265). We based this estimate on data collected by other quality reporting programs (81 FR 57265) and this data continues to indicate that the time required to chart-abstract data is approximately 15 minutes (0.25 hours) per measure per case; therefore, we continue to use that time estimate to calculate the burden pertaining to this final rule. Of the measures we are removing from the program, the following two are chart-abstracted:

- Alcohol Use Screening (SUB–1, NQF #1661) measure; and.
- Tobacco Use Screening (TOB–1, NQF #1651) measure.

Both measures fall under our previously finalized ''global sample'' (80 FR 46717 through 46718) under which, we allow facilities to apply the same sampling methodology to all measures eligible for sampling. In the FY 2016 IPF PPS final rule (80 FR 46718), we finalized that facilities with between 609 and 3,056 cases and choose to participate in the global sample would be required to report data for 609 cases. Because facilities are only required to submit data on a number specified by the global sampling methodology, rather than abstracting data for all patients or applying measure specific sampling methodologies, we believe that the number of cases under the global sample is a good approximation of facility burden associated with these measures. Therefore, for the average IPF discharge rate of 1,213 discharges, the global sample requires abstraction of 609 records. We estimate that removing these two measures will result in a decrease of 304.5 hours per IPF (2 measures × 609 cases/measure × 0.25 hours/case) or 528,003 hours across all IPFs (304.5 hours/IPF × 1,734 IPFs). The decrease in costs is approximately $11,138 per IPF ($36.58/hour × 304.5 hours) or $19,314,350 across all IPFs ($11,138/IPF × 1,734 IPFs).

We solicited PRA-related comments in the FY 2019 IPF PPS proposed rule (83 FR 21128). We did not receive any comments. Consequently, we are finalizing our amended estimates based on finalized policies (that is, based on removal of two chart-abstracted measures as opposed to five chart abstracted measures).

ii. National Healthcare Safety Network (NHSN) Measure

We previously estimated that the reporting burden for the one IPFQR measure for which data is collected via the NHSN, the Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431) measure, is 15 minutes (0.25 hours) per measure per case and that the average IPF will report on 40 cases per year (79 FR 45979). Therefore, we estimate that removing this measure will result in a decrease in burden of 10 hours per IPF (40 cases × 0.25 hours/case) or 17,340 hours across all IPFs (40 cases × 0.25 hours/case × 1,734 IPFs). The decrease in costs is approximately $366 per IPF (10 hours × $36.58/hour) or $634,297 across all IPFs ($366/IPF × 1,734 IPFs).

We also anticipate cost reduction unrelated to the information collection burden associated with these proposals, and refer readers to section IX.C.5.b of this final rule for a discussion of these costs.

We solicited PRA-related comments in the FY 2019 IPF PPS proposed rule (83 FR 21128 through 21129). We did not receive any comments. Consequently, we are finalizing these estimates as proposed.

iii. Attestation Measures

We previously estimated that the Assessment of Patient Experience of Care measure and the Use of an Electronic Health Record (EHR) measure have no measurable information collection burden because both of these measures require only attestation (79 FR 45979). Therefore, we do not anticipate a reduction in IPF information collection burden associated with the removal of these measures. However, we anticipate cost reduction unrelated to the information collection burden associated with these provisions, and refer readers to section IX.C.5.b of this final rule for a discussion.

We solicited PRA-related comment in the FY 2019 IPF PPS proposed rule (83 FR 21129). We did not receive any comments. Consequently, we are finalizing these estimates as proposed.

[21] In the FY 2017 IPPS/LTCH PPS final rule we estimated 1,684 IPFs and are adjusting that estimate by +50 to account for more recent data.

[22] In the FY 2017 IPPS/LTCH PPS final rule we estimated 848 discharges per year and are adjusting that estimate by +365 to account for more recent data.

iv. Burden Related to the Removal of Five Measures

In summary, the information collection burden reduction associated with the removal of these five measures would be 545,343 hours at a cost of $19,948,647 (total) or $11,504 (per IPF) as summarized in Table 10.

TABLE 10—TOTAL INFORMATION COLLECTION BURDEN REDUCTION ASSOCIATED WITH THE REMOVAL OF FIVE MEASURES

Measure(s)	Hourly burden reduction per IPF	Total hourly burden reduction	Cost burden reduction per IPF	Total cost burden reduction
• (1) Alcohol Use Screening (NQF #1661)	304.5	528,003	$11,138	$19,314,350
• (2) Tobacco Use Screening (NQF #1651).	.....	.....	.....	.....
• (3) Influenza Vaccination Coverage Among Healthcare Personnel (NQF #0431)	10	17,340	366	634,297
• (4) Remove Assessment of Patient Experience of Care	0	0	0	0
• (5) Use of an Electronic Health Record (EHR).	.....	.....	.....	.....
Total Burden Reduction	314.5	545,343	11,504	19,948,647

We did not receive comments on this burden reduction estimate.

c. Removal of Sample Size Count Requirement

In section VI.J.4 of this final rule, we are removing the requirement to report the sample size count for measures for which sampling is performed beginning with the FY 2020 payment determination and subsequent years (that is, data collected during CY 2018 and reported during summer of CY 2019). Previously, we estimated that the total burden of reporting non-measure data to be 2.5 hours per IPF (79 FR 45979 through 45980). As discussed in section VI.J.5 of this final rule, the non-measure data encompasses five reporting requirements: (1) Total annual discharges; (2) annual discharges stratified by age; (3) annual discharges stratified by diagnostic category; (4) annual discharges stratified by Medicare versus non-Medicare payer; and (5) the sample size count for measures for which sampling is performed.

We estimate that, because the sample size count is one-fifth of the non-measure data collection, removing this requirement will reduce the non-measure collection burden by one-fifth, (that is, 20 percent) or 0.5 hours per facility (0.20×2.5 hours). This results in a reduction of information collection burden of 867 hours across all IPFs (0.5 hours per IPF $\times$ 1,734 IPFs). The decrease in costs is approximately $18 per IPF (0.5 hours $\times$ $36.58/hour) or $31,715 across all IPFs ($18 per IPF $\times$ 1,734 IPFs).

We solicited public comments on the information collection burden reduction estimate of 867 hours and $31,714.86 across all IPFs related to our proposal to no longer require facilities to report sample size counts beginning with the FY 2020 payment determination.

We did not receive comments on this estimate.

d. Summary of Annual Information Collection Burden Estimates for Requirements

Our policies to adopt a new measure removal factor, to remove five measures from the IPFQR Program, and to no longer require IPFs to report the size of their sample lead to a burden reduction of approximately 546,210 hours and $19,980,362, as described in Table 11.

Table 11: Reduction in Total IPFQR Program Information Collection Burden

Preamble Section(s)	Action	Respondents	Responses (per respondent)	Total Responses	Burden per Response (hours)*	Total Annual Burden (hours)	Labor Cost of Reporting ($/hr)	Total Cost ($)
VI.F.2	Remove Alcohol Use Screening and Tobacco Use Screening	1,734	609 per measure	2,112,012	0.25	528,003 (2 measures x 609 cases x 0.25 hr/case x 1,734 IPFs)	$36.58	$19,314,350
VI.F.2	Remove Influenza Vaccination Coverage Among Healthcare Personnel	1,734	40	69,360	0.25	17,340 (1 measure x 40 cases x 0.25 hr/case x 1,734 IPFs)	$36.58	$634,297
VI.F.2	Remove Assessment of Patient Experience of Care and Use of an Electronic Health Record (EHR)	1,734	1	1,734	0	0	$36.58	0
Subtotal (removing 5 measures)		*1,734*	*650*	*2,183,106*	*Varies*	*545,343*	*$36.58*	*$19,948,647*
VI.F.1	Adopt a new measure removal factor	N/A	N/A	N/A	N/A	0	N/A	0
VI.J.4	No longer require reporting of sample size counts	1,734	1	1,734	0.5	867	$36.58	$31,715
	Total	1734	651	2,184,840	Varies	546,210	$36.58	$19,980,362

VIII. Regulatory Impact Analysis

A. Statement of Need

This final rule finalizes updates to the prospective payment rates for Medicare inpatient hospital services provided by IPFs for discharges occurring during FY 2019 (October 1, 2018 through September 30, 2019). We are finalizing our proposal to apply the 2012-based IPF market basket increase of 2.9 percent, less the productivity adjustment of 0.8 percentage point as required by 1886(s)(2)(A)(i) of the Act, and further reduced by 0.75 percentage point as required by sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act, for a final total FY 2019 payment rate update of 1.35 percent. In this final rule, we are updating the IPF labor-related share and updating the IPF wage index for FY 2019. We are also finalizing our proposals to provide minor technical corrections to three IPF regulations, and making updates to the IPFQR Program.

B. Overall Impact

We have examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)) and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also

referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This final rule is not economically significant under Executive Order 12866.

We estimate that the total impact of these changes for FY 2019 payments compared to FY 2018 payments will be a net increase of approximately $50 million. This reflects a $60 million increase from the update to the payment rates (+$130 million from the second quarter 2018 IGI forecast of the 2012-based IPF market basket of 2.9 percent, −$40 million for the productivity adjustment of 0.8 percentage point, and −$30 million for the ''other adjustment'' of 0.75 percentage point), as well as a $10 million decrease as a result of the update to the outlier threshold amount. Outlier payments are estimated to decrease from 2.24 percent in FY 2018 to 2.00 percent of total estimated IPF payments in FY 2019. We also estimate a total decrease in burden of 315 hours per IPF or 546,210 hours across all IPFs (315 hours per IPF × 1,734 IPFs), resulting in a total decrease in financial burden of $11,522.70 per IPF (315 hours × $36.58) or $19,980,362 across all IPFs ($11,522.70 per IPF × 1,734 IPFs).

C. Anticipated Effects

In this section, we discuss the historical background of the IPF PPS and the impact of this final rule on the Federal Medicare budget and on IPFs.

1. Budgetary Impact

As discussed in the November 2004 and RY 2007 IPF PPS final rules, we applied a budget neutrality factor to the federal per diem base rate and ECT payment per treatment to ensure that total estimated payments under the IPF PPS in the implementation period would equal the amount that would have been paid if the IPF PPS had not been implemented. The budget neutrality factor includes the following components: Outlier adjustment, stop-loss adjustment, and the behavioral offset. As discussed in the RY 2009 IPF PPS notice (73 FR 25711), the stop-loss adjustment is no longer applicable under the IPF PPS.

As discussed in section III.D.1 of this rule, we are using the wage index and labor-related share in a budget neutral manner by applying a wage index budget neutrality factor to the federal per diem base rate and ECT payment per treatment. Therefore, the budgetary impact to the Medicare program of this rule will be due to the market basket update for FY 2019 of 2.9 percent (see section III.A.2 of this final rule) less the productivity adjustment of 0.8 percentage point required by section 1886(s)(2)(A)(i) of the Act; further reduced by the ''other adjustment'' of 0.75 percentage point under sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act; and the update to the outlier fixed dollar loss threshold amount.

We estimate that the FY 2019 impact will be a net increase of $50 million in payments to IPF providers. This reflects an estimated $60 million increase from the update to the payment rates and a $10 million decrease due to the update to the outlier threshold amount to set total estimated outlier payments at 2.0 percent of total estimated payments in FY 2019. This estimate does not include the implementation of the required 2.0 percentage point reduction of the market basket increase factor for any IPF that fails to meet the IPF quality reporting requirements (as discussed in section VI.A. of this final rule).

The RFA requires agencies to analyze options for regulatory relief of small entities if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IPFs and most other providers and suppliers are small entities, either by nonprofit status or having revenues of $7.5 million to $38.5 million or less in any 1 year, depending on industry classification (for details, refer to the SBA Small Business Size Standards found at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf*). Individuals and states are not included in the definition of a small entity.

Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IPFs or the proportion of IPFs' revenue derived from Medicare payments. Therefore, we assume that all IPFs are considered small entities.

The Department of Health and Human Services generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 12, we estimate that the overall revenue impact of this final rule on all IPFs is to increase estimated Medicare payments by approximately 1.10 percent. As a result, since the estimated impact of this final rule is a net increase in revenue across almost all categories of IPFs, the Secretary has determined that this final rule will have a positive revenue impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. As discussed in section VIII.C.1. of this final rule, the rates and policies set forth in this final rule will not have an adverse impact on the rural hospitals based on the data of the 269 rural excluded psychiatric units and 67 rural psychiatric hospitals in our database of 1,622 IPFs for which data were available. Therefore, the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2018 that threshold is approximately $150 million. This final rule does not impose spending costs on state, local, or tribal governments in the aggregate, or by the private sector of $150 million or more.

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 requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. This final rule will not have a substantial effect on state and local governments.

2. Impact on Providers

To show the impact on providers of the changes to the IPF PPS discussed in this final rule, we compare estimated payments under the IPF PPS rates and factorsfor FY 2019 versus those under FY 2018. We determined the percent change of estimated FY 2019 IPF PPS payments compared to FY 2018 IPF PPS payments for each category of IPFs. In

addition, for each category of IPFs, we have included the estimated percent change in payments resulting from the update to the outlier fixed dollar loss threshold amount; the updated wage index data including the updated labor-related share; and the market basket update for FY 2019, as adjusted by the productivity adjustment according to section 1886(s)(2)(A)(i) of the Act, and the ''other adjustment'' according to sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act.

To illustrate the impacts of the FY 2019 changes in this final rule, our analysis begins with a FY 2018 baseline simulation model based on FY 2017 IPF payments inflated to the midpoint of FY 2018 using IHS Global Inc.'s most recent forecast of the market basket update (see section III.A.2 of this final rule); the estimated outlier payments in FY 2018; the FY 2017 pre-floor, pre-reclassified hospital wage index; the FY 2018 labor-related share; and the FY 2018 percentage amount of the rural adjustment. During the simulation, total outlier payments are maintained at 2 percent of total estimated IPF PPS payments.

Each of the following changes is added incrementally to this baseline model in order for us to isolate the effects of each change:

- The final update to the outlier fixed dollar loss threshold amount.
- The FY 2018 pre-floor, pre-reclassified hospital wage index and the final FY 2019 labor-related share.
- The final market basket update for FY 2019 of 2.9 percent less the productivity adjustment of 0.8 percentage point in accordance with section 1886(s)(2)(A)(i) of the Act and further reduced by the ''other adjustment'' of 0.75 percentage point in accordance with sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act, for a final payment rate update of 1.35 percent.

Our final column comparison in Table 12 illustrates the percent change in payments from FY 2018 (that is, October 1, 2017, to September 30, 2018) to FY 2019 (that is, October 1, 2018, to September 30, 2019) including all the payment policy changes in this final rule.

Table 12: IPF Impacts for FY 2019

[Percent Change in columns 3 through 6]

Facility by Type	Number of Facilities	Outlier	CBSA Wage Index & Labor Share	Payment Update[1]	Total Percent Change[2]
(1)	(2)	(3)	(4)	(5)	(6)
All Facilities	1,622	-0.24	0.00	1.35	1.10
Total Urban	1,286	-0.24	0.04	1.35	1.14
Total Rural	336	-0.25	-0.27	1.35	0.83
Urban unit	815	-0.36	0.04	1.35	1.03
Urban hospital	471	-0.09	0.03	1.35	1.29
Rural unit	269	-0.31	-0.23	1.35	0.80
Rural hospital	67	-0.07	-0.35	1.35	0.92
By Type of Ownership:					
Freestanding IPFs					
Urban Psychiatric Hospitals					
Government	126	-0.25	0.13	1.35	1.23
Non-Profit	94	-0.09	0.08	1.35	1.34
For-Profit	251	-0.06	0.00	1.35	1.29
Rural Psychiatric Hospitals					
Government	32	-0.15	0.51	1.35	1.71
Non-Profit	16	-0.20	-0.21	1.35	0.94
For-Profit	19	-0.01	-0.81	1.35	0.53
IPF Units					
Urban					
Government	116	-0.63	-0.01	1.35	0.70
Non-Profit	529	-0.35	0.04	1.35	1.04
For-Profit	170	-0.22	0.08	1.35	1.21
Rural					
Government	71	-0.38	-0.12	1.35	0.84
Non-Profit	141	-0.30	-0.29	1.35	0.76

For-Profit	57	-0.28	-0.24	1.35	0.83
By Teaching Status:					
Non-teaching	1,429	-0.20	0.02	1.35	1.17
Less than 10% interns and residents to beds	109	-0.38	-0.12	1.35	0.84
10% to 30% interns and residents to beds	62	-0.59	-0.14	1.35	0.61
More than 30% interns and residents to beds	22	-0.51	-0.24	1.35	0.59
By Region:					
New England	105	-0.26	-0.05	1.35	1.04
Mid-Atlantic	234	-0.33	0.05	1.35	1.06
South Atlantic	246	-0.13	-0.05	1.35	1.16
East North Central	271	-0.20	-0.19	1.35	0.96
East South Central	162	-0.24	-0.07	1.35	1.04
West North Central	125	-0.34	0.38	1.35	1.39
West South Central	243	-0.23	0.10	1.35	1.22
Mountain	106	-0.15	0.07	1.35	1.27
Pacific	130	-0.34	-0.01	1.35	1.00
By Bed Size:					
Psychiatric Hospitals					
Beds: 0-24	87	-0.13	-0.31	1.35	0.90
Beds: 25-49	76	-0.05	0.03	1.35	1.33
Beds: 50-75	88	-0.14	-0.37	1.35	0.84
Beds: 76 +	287	-0.08	0.12	1.35	1.40
Psychiatric Units					
Beds: 0-24	624	-0.37	0.01	1.35	0.99
Beds: 25-49	287	-0.33	0.16	1.35	1.17
Beds: 50-75	114	-0.32	-0.12	1.35	0.90
Beds: 76 +	59	-0.39	-0.20	1.35	0.75

[1]This column reflects the payment update impact of the final IPF market basket update for FY 2019 of 2.9 percent, a 0.8 percentage point reduction for the productivity adjustment as required by section 1886(s)(2)(A)(i) of the Act, and a 0.75 percentage point reduction in accordance with sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act.

[2]Percent changes in estimated payments from FY 2018 to FY 2019 include all of the changes presented in this final rule. Note, the products of these impacts may be different from the percentage changes shown here due to rounding effects.

By Region:					
New England	105	-0.26	-0.05	1.35	1.04
Mid-Atlantic	234	-0.33	0.05	1.35	1.06
South Atlantic	246	-0.13	-0.05	1.35	1.16
East North Central	271	-0.20	-0.19	1.35	0.96
East South Central	162	-0.24	-0.07	1.35	1.04
West North Central	125	-0.34	0.38	1.35	1.39
West South Central	243	-0.23	0.10	1.35	1.22
Mountain	106	-0.15	0.07	1.35	1.27
Pacific	130	-0.34	-0.01	1.35	1.00
By Bed Size:					
Psychiatric Hospitals					
Beds: 0-24	87	-0.13	-0.31	1.35	0.90
Beds: 25-49	76	-0.05	0.03	1.35	1.33
Beds: 50-75	88	-0.14	-0.37	1.35	0.84
Beds: 76 +	287	-0.08	0.12	1.35	1.40
Psychiatric Units					
Beds: 0-24	624	-0.37	0.01	1.35	0.99
Beds: 25-49	287	-0.33	0.16	1.35	1.17
Beds: 50-75	114	-0.32	-0.12	1.35	0.90
Beds: 76 +	59	-0.39	-0.20	1.35	0.75

[1]This column reflects the payment update impact of the final IPF market basket update for FY 2019 of 2.9 percent, a 0.8 percentage point reduction for the productivity adjustment as required by section 1886(s)(2)(A)(i) of the Act, and a 0.75 percentage point reduction in accordance with sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act.

[2]Percent changes in estimated payments from FY 2018 to FY 2019 include all of the changes presented in this final rule. Note, the products of these impacts may be different from the percentage changes shown here due to rounding effects.

3. Impact Results

Table 12 displays the results of our analysis. The table groups IPFs into the categories listed here based on characteristics provided in the Provider of Services (POS) file, the IPF provider specific file, and cost report data from the Healthcare Cost Report Information System:

- Facility Type.
- Location.
- Teaching Status Adjustment.
- Census Region.
- Size.

The top row of the table shows the overall impact on the 1,622 IPFs included in this analysis. In column 3, we present the effects of the update to the outlier fixed dollar loss threshold amount. We estimate that IPF outlier payments as a percentage of total IPF payments are 2.24 percent in FY 2018. Thus, we are adjusting the outlier threshold amount in this final rule to set total estimated outlier payments equal to 2.0 percent of total payments in FY 2019. The estimated change in total IPF payments for FY 2019, therefore, includes an approximate 0.24 percent decrease in payments because the outlier portion of total payments is expected to decrease from approximately 2.24 percent to 2.0 percent.

The overall impact of this outlier adjustment update (as shown in column 3 of Table 12), across all hospital groups, is to decrease total estimated payments to IPFs by 0.24 percent. The largest decrease in payments is estimated to be 0.63 percent for urban government IPF units.

In column 4, we present the effects of the budget-neutral update to the IPF wage index and the Labor-Related Share (LRS). This represents the effect of using the most recent wage data available and taking into account the updated OMB delineations. That is, the impact represented in this column reflects the update from the FY 2018 IPF wage index to the final FY 2019 IPF wage index, which includes updating the LRS from 75.0 percent in FY 2018 to 74.8 percent in FY 2019. We note that there is no projected change in aggregate payments to IPFs, as indicated in the first row of column 4, however, there will be distributional effects among different categories of IPFs. For example, we estimate the largest increase in payments to be 0.51 percent for rural government psychiatric hospitals, and the largest decrease in payments to be 0.81 percent for for-profit rural psychiatric hospitals.

In column 5, we present the estimated effects of the final update to the IPF PPS payment rates of 1.35 percent, which are based on the final FY 2019 IPF market basket update of 2.9 percent, less the productivity adjustment of 0.8 percentage point in accordance with section 1886(s)(2)(A)(i) of the Act, and further reduced by 0.75 percentage point in accordance with sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act.

Finally, column 6 compares our estimates of the total final changes reflected in this final rule for FY 2019 to the estimates for FY 2018 (without these changes). The average estimated increase for all IPFs is approximately 1.10 percent. This estimated net increase includes the effects of the final 2.9 percent market basket update reduced by the productivity adjustment of 0.8 percentage point, as required by section 1886(s)(2)(A)(i) of the Act and further reduced by the ''other adjustment'' of 0.75 percentage point, as required by sections 1886(s)(2)(A)(ii) and 1886(s)(3)(E) of the Act. It also includes the overall estimated 0.24 percent decrease in estimated IPF outlier payments as a percent of total payments from the final update to the outlier fixed dollar loss threshold amount.

IPF payments are estimated to increase by 1.14 percent in urban areas and 0.83 percent in rural areas. Overall, IPFs are estimated to experience a net increase in payments as a result of the updates in this final rule. The largest payment increase is estimated at 1.71 percent for rural government psychiatric hospitals.

4. Effect on Beneficiaries

Under the IPF PPS, IPFs will receive payment based on the average resources consumed by patients for each day. We do not expect changes in the quality of care or access to services for Medicare beneficiaries under the FY 2019 IPF PPS, but we continue to expect that paying prospectively for IPF services will enhance the efficiency of the Medicare program.

5. Effects of Updates to the IPFQR Program

As discussed in section VI. of this final rule and in accordance with section 1886(s)(4)(A)(i) of the Act, we will implement a 2 percentage point reduction in the FY 2020 annual update to the standard Federal rate for IPFs that have failed to comply with the IPFQR Program requirements for FY 2020. In section VI of this final rule, we discuss how the 2 percentage point reduction will be applied. For FY 2018, of the 1,758 IPFs eligible for the IPFQR Program, 59 IPFs (3.4 percent) did not receive the full market basket update for failure to meet program requirements; of those 59, 24 chose not to participate in the program. We anticipate that even fewer IPFs would receive the reduction for FY 2020 as IPFs become more familiar with the requirements. Thus, we estimate that the policy to apply a 2 percentage point reduction to the annual update for the IPFs that have failed to comply with IPFQR Program requirements will have a negligible impact on overall IPF payments for FY 2020. We believe that there will be additional effects of the policies related to cost reduction for providers and data simplification for beneficiaries. We discuss these effects in more detail in the following sections.

a. Effects Related to Information Collection Burden

Based on the proposals finalized in this final rule, we estimate the total decrease in information collection burden to be 315 hours per IPF or 546,210 hours across all IPFs, resulting in a total decrease in financial burden of $11,522.70 per IPF or $19,980,362 across all IPFs. As discussed in section VII of this final rule, we will attribute the savings associated with the proposals to the year in which these savings begin; for the purposes of all the proposals in this proposed rule, that year is FY 2018. Further information on these estimates can be found in section VII. of this final rule.

b. Effects Other Than Burden Related to Information Collection

As stated in section VI.F.1.a and VII.A of this final rule, we anticipate that in addition to the reduction in information collection burden discussed above, there will be unrelated cost reduction associated with some of our proposals. One example of this cost reduction is that IPFs will no longer have to register with and maintain accounts with NHSN. Because of the administrative complexity of NHSN participation, we believe this will be a substantial reduction in costs. Furthermore, we believe that costs related to reviewing and tracking measure information in feedback reports will be reduced.

Finally, we believe that by no longer maintaining data submission mechanisms, public reporting infrastructure, and program materials for measures which are no longer providing significant benefit, we will be able to better utilize CMS's resources to support quality reporting and quality improvement initiatives among IPFs.

We intend to closely monitor the effects of this quality reporting program on IPFs and help facilitate successful reporting outcomes through ongoing stakeholder education, national trainings, and a technical help desk.

6. Regulatory Review Costs

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this final rule, 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 final rule, we assume that the total number of unique commenters on the most recent IPF proposed rule from FY 2019 will be the number of reviewers of this final rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this final rule. It is possible that not all commenters reviewed the FY 2019 IPF proposed rule in detail, and it is also possible that some reviewers chose not to comment on that proposed rule. For these reasons we thought that the number of past commenters would be a fair estimate of the number of reviewers of this final rule. We did not receive any comments on this assumption.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this final rule; therefore, for the purposes of our estimate, we assume that each reviewer reads approximately 50 percent of the final rule. We did not receive any comments on this assumption.

Using the May, 2017 mean (average) wage information from the BLS for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this final rule is $107.38 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes119111.htm*). Assuming an average reading speed of 250 words per minute, we estimate that it would take approximately 1.39 hours for the staff to review half of this final rule. For each IPF that reviews the final rule, the estimated cost is (1.39 hours × $107.38) or $149.26. Therefore, we estimate that the total cost of reviewing this final rule is $13,135 ($149.26 × 88 reviewers).

D. Alternatives Considered

The statute does not specify an update strategy for the IPF PPS and is broadly written to give the Secretary discretion in establishing an update methodology. Therefore, we are updating the IPF PPS using the methodology published in the November 2004 IPF PPS final rule; applying the final FY 2019 2012-based IPF PPS market basket update of 2.9

percent, reduced by the statutorily required multifactor productivity adjustment of 0.8 percentage point and the ''other adjustment'' of 0.75 percentage point, along with the final wage index budget neutrality adjustment to update the payment rates; finalizing a FY 2019 IPF wage index which is fully based upon the latest OMB CBSA designations; and implementing changes to the IPFQR Program.

E. Accounting Statement

As required by OMB Circular A–4 (available at *www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*), in Table 13, we have prepared an accounting statement showing the classification of the expenditures associated with the final updates to the IPF wage index and payment rates in this final rule. Table 13 provides our best estimate of the decrease in provider costs and the increase in Medicare payments under the IPF PPS as a result of the changes presented in this final rule and based on the data for 1,622 IPFs in our database.

TABLE 13—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

Category	Costs
Change in Estimated Impacts from FY 2018 IPF PPS to FY 2019 IPF PPS	
Annualized Monetized Costs	−$20 million.
Category	Transfers
Annualized Monetized Transfers	$50 million.
From Whom to Whom?	Federal Government to IPF Medicare Providers.

F. Regulatory Reform Analysis Under Executive Order 13771

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. This final rule is considered an Executive Order 13771 deregulatory action. We estimate that this final rule generates $17.5 million in annualized cost savings, discounted at 7 percent relative to year 2016, over a perpetual time horizon. This $17.5 million is equal to the estimated $20.0 million in annual cost savings which would begin in 2018, discounted to 2016 for Executive Order 13771 accounting purposes using a 7 percent discount rate. Details on the estimated costs of this final rule can be found in the preceding analysis, as shown in Table 11.

G. Conclusion

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

IX. Request for Information on Promoting Interoperability and Electronic Healthcare Information Exchange Through Possible Revisions to the CMS Patient Health and Safety Requirements for Hospitals and Other Medicare- and Medicaid-Participating Providers and Suppliers

In the FY 2019 IPF PPS proposed rule, we included a Request for Information (RFI) related to promoting interoperability and electronic healthcare information exchange (83 FR 21135 through 21138). We received 12 comments on this RFI, and appreciate the input provided by commenters.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, and Reporting and recordkeeping requirements.

For reasons stated in the preamble of this document, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 412.27 is amended by revising paragraph (a) to read as follows:

§ 412.27 Excluded psychiatric units: Additional requirements.

* * * * *

(a) Admit only patients whose admission to the unit is required for active treatment, of an intensity that can be provided appropriately only in an inpatient hospital setting, of a psychiatric principal diagnosis that is listed in the International Classification of Diseases, Tenth Revision, Clinical Modification.

* * * * *

■ 3. Section 412.402 is amended by revising the definition of ''Principal diagnosis'' to read as follows:

§ 412.402 Definitions.

* * * * *

Principal diagnosis means the condition established after study to be chiefly responsible for occasioning the admission of the patient to the inpatient psychiatric facility. Principal diagnosis is also referred to as the primary diagnosis.

* * * * *

■ 4. Section 412.428 is amended by revising the section heading, the introductory text, and paragraphs (a) and (b) to read as follows:

§ 412.428 Publication of changes to the inpatient psychiatric facility prospective payment system.

CMS will issue annually in the **Federal Register** information pertaining to changes to the inpatient psychiatric facility prospective payment system. This information includes:

(a) A description of the methodology and data used to calculate the federal per diem base payment amount for the subsequent fiscal year.

(b)(1) For discharges occurring on or after January 1, 2005 but before July 1, 2006, the update, described in § 412.424(a)(2)(iii), for the federal portion of the inpatient psychiatric facility's payments is based on the 1997-based excluded hospital with capital market basket under the applicable percentage increase methodology described in section 1886(b)(3)(B)(ii) of the Act for each year.

(2)(i) For discharges occurring on or after July 1, 2006 but before October 1, 2015, the update for the federal portion of the inpatient psychiatric facility's payment is based on the rehabilitation, psychiatric, and long-term care market basket.

(ii) For discharges occurring on or after October 1, 2015, the update of the inpatient psychiatric facility's payment is based on the inpatient psychiatric facility market basket.

(3) For discharges occurring on or after January 1, 2005 but before October

1, 2005, the update, described in § 412.424(a)(2)(iii), for the reasonable cost portion of the inpatient psychiatric facility's payment is based on the 1997-based excluded hospital with capital market basket under the updated methodology described in section 1886(b)(3)(B)(ii) of the Act for each year.

(4) For discharges occurring on or after October 1, 2005 but before July 1, 2008, the update for the reasonable cost portion of the inpatient psychiatric facility's payment is based on the 2002-based excluded hospital market basket.

* * * * *

Dated: July 26, 2018.

Seema Verma,

Administrator,Centers for Medicare & Medicaid Services.

Dated: July 27, 2018.

Alex M. Azar II,

Secretary,Department of Health and Human Services.

[FR Doc. 2018–16518 Filed 7–31–18; 4:15 pm]

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Part V

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 418

Medicare Program; FY 2019 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 418

[CMS–1692–F]

RIN 0938–AT26

Medicare Program; FY 2019 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule updates the hospice wage index, payment rates, and cap amount for fiscal year (FY) 2019. The rule also makes conforming regulations text changes to recognize physician assistants as designated hospice attending physicians effective January 1, 2019. Finally, the rule includes changes to the Hospice Quality Reporting Program.

DATES: These regulations are effective on October 1, 2018.

FOR FURTHER INFORMATION CONTACT:

Debra Dean-Whittaker, (410) 786–0848 for questions regarding the CAHPS® Hospice Survey.

Cindy Massuda, (410) 786–0652 for questions regarding the hospice quality reporting program.

For general questions about hospice payment policy, send your inquiry via email to: *hospicepolicy@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose

This final rule updates the hospice payment rates for fiscal year (FY) 2019, as required under section 1814(i) of the Social Security Act (the Act). This rule also revises the hospice regulations as a result of section 51006 of the Bipartisan Budget Act of 2018, which amended section 1861(dd)(3)(B) of the Act such that, effective January 1, 2019, physician assistants (PAs) will be recognized as designated hospice attending physicians in addition to physicians and nurse practitioners. Finally, this rule includes changes to the hospice quality reporting program (HQRP), consistent with the requirements of section 1814(i)(5) of the Act. In accordance with section 1814(i)(5)(A) of the Act, hospices that fail to meet quality reporting requirements receive a 2 percentage point reduction to their payments.

B. Summary of the Major Provisions

Section III.B.1 of this rule updates the hospice wage index with updated wage data and makes the application of the updated wage data budget neutral for all four levels of hospice care. In section III.B.2 of this final rule, we discuss the FY 2019 hospice payment update percentage of 1.8 percent. Sections III.B.3 and III.B.4 of this final rule update the hospice payment rates and hospice cap amount for FY 2019 by the hospice payment update percentage discussed in section III.B.2 of this final rule. We also include regulations text changes in section III.C and section III.D pertaining to the definition of ''attending physician'' and ''cap period.''

Finally, in section III.E of this rule, we discuss updates to the HQRP, including: Data review and correction timeframes for data submitted using the HIS; extension of the Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Hospice Survey participation requirements, exemption criteria and public reporting policies to future years; procedures to announce quality measure readiness for public reporting and public reporting timelines; removal of routine public reporting of the 7 HIS measures; and public display of public use file data on the Hospice Compare website.

C. Summary of Impacts

The overall economic impact of this final rule is estimated to be $340 million in increased payments to hospices during FY 2019.

D. Improving Patient Outcomes and Reducing Burden Through Meaningful Measures

Regulatory reform and reducing regulatory burden are high priorities for CMS. To reduce the regulatory burden on the healthcare industry, lower health care costs, and enhance patient care, in October 2017, we launched the Meaningful Measures Initiative.[1] This initiative is one component of our agency-wide Patients Over Paperwork Initiative,[2] which is aimed at evaluating and streamlining regulations with a goal to reduce unnecessary cost and burden, increase efficiencies, and improve beneficiary experience. The Meaningful Measures Initiative is aimed at identifying the highest priority areas for quality measurement and quality improvement in order to assess the core quality of care issues that are most vital to advancing our work to improve patient outcomes. The Meaningful Measures Initiative represents a new approach to quality measures that fosters operational efficiencies, and it will reduce costs, including collection and reporting burden, while producing quality measurement that is more focused on meaningful outcomes.

The Meaningful Measures Framework has the following objectives:

- Address high-impact measure areas that safeguard public health;
- Patient-centered and meaningful to patients;
- Outcome-based where possible;
- Fulfill each program's statutory requirements;
- Minimize the level of burden for health care providers (for example, through a preference for EHR-based measures where possible, such as electronic clinical quality measures [3]);
- Significant opportunity for improvement;
- Address measure needs for population based payment through alternative payment models; and
- Align across programs and/or with other payers.

In order to achieve these objectives, we have identified 19 Meaningful Measures areas and mapped them to six overarching quality priorities as shown in the Table 1 below.

[1] Meaningful Measures web page: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/MMF/General-info-Sub-Page.html.*

[2] See Remarks by Administrator Seema Verma at the Health Care Payment Learning and Action Network (LAN) Fall Summit, as prepared for delivery on October 30, 2017: *https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-10-30.html.*

[3] See section VIII.A.8.c. of the preamble of this final rule where we solicited comments on the potential future development and adoption of eCQMs.

TABLE 1—MEANINGFUL MEASURES

Quality priority	Meaningful measure area
Making Care Safer by Reducing Harm Caused in the Delivery of Care	Healthcare-Associated Infections. Preventable Healthcare Harm.
Strengthen Person and Family Engagement as Partners in Their Care	Care is Personalized and Aligned with Patient's Goals. End of Life Care according to Preferences. Patient's Experience of Care. Patient Reported Functional Outcomes.
Promote Effective Communication and Coordination of Care	Medication Management. Admissions and Readmissions to Hospitals. Transfer of Health Information and Interoperability.
Promote Effective Prevention and Treatment of Chronic Disease	Preventive Care. Management of Chronic Conditions. Prevention, Treatment, and Management of Mental Health. Prevention and Treatment of Opioid and Substance Use Disorders.
Work with Communities to Promote Best Practices of Healthy Living	Risk Adjusted Mortality. Equity of Care. Community Engagement.
Make Care Affordable	Appropriate Use of Healthcare. Patient-focused Episode of Care. Risk Adjusted Total Cost of Care.

By including Meaningful Measures in our programs, we believe that we can also address the following cross-cutting measure criteria:

- Eliminating disparities;
- Tracking measurable outcomes and impact;
- Safeguarding public health;
- Achieving cost savings;
- Improving access for rural communities; and
- Reducing burden.

We believe that the Meaningful Measures Initiative will improve outcomes for patients, their families, and health care providers while reducing burden and costs for clinicians and providers as well as promoting operational efficiencies.

We received numerous supportive comments from stakeholders regarding the Meaningful Measures Initiative and the impact of its implementation in CMS' quality programs. Many of these comments pertained to specific program proposals, and are discussed in the appropriate program-specific sections of this final rule. Commenters also provided insights and recommendations for the ongoing development of the Meaningful Measures Initiative. We look forward to continuing to work with stakeholders to refine and further implement the Meaningful Measures Initiative, and will take commenters' insights and recommendations into account moving forward.

E. Advancing Health Information Exchange

The Department of Health and Human Services (HHS) has a number of initiatives designed to encourage and support the adoption of interoperable health information technology and to promote nationwide health information exchange to improve health care. The Office of the National Coordinator for Health Information Technology (ONC) and CMS work collaboratively to advance interoperability across settings of care.

The Improving Medicare Post-Acute Care Transformation Act of 2014 (Pub. L. 113 185) (IMPACT Act) requires assessment data to be standardized and interoperable to allow for exchange of the data among post-acute providers and other providers. To further progress toward the goal of interoperability, we are developing a Data Element Library to serve as a publically available centralized, authoritative resource for standardized data elements and their associated mappings to health IT standards. These interoperable data elements can reduce provider burden by allowing the use and reuse of healthcare data, support provider exchange of electronic health information for care coordination, person-centered care, and support real-time, data driven, clinical decision making. Once available, standards in the Data Element Library can be referenced on the CMS website and in the ONC Interoperability Standards Advisory (ISA).

The 2018 Interoperability Standards Advisory (ISA) is available at: *https://www.healthit.gov/standards-advisory.*

Most recently, the 21st Century Cures Act (Pub. L. 114–255), enacted in 2016, requires HHS to take new steps to enable the electronic sharing of health information, ensuring interoperability for providers and settings across the care continuum. Specifically, the Congress directed ONC to ''develop or support a trusted exchange framework, including a common agreement among health information networks nationally.'' This framework (*https://beta.healthit.gov/topic/interoperability/trusted-exchange-framework-and-common-agreement*) sets out a common set of principles for trusted exchange and minimum terms and conditions for trusted exchange in order to enable interoperability across disparate health information networks. In another important provision, the Congress established new authority for HHS to discourage ''information blocking'', defined as practices likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information. We suggested that hospice providers learn more about these important developments and how they are likely to affect hospices.

II. Background

A. Hospice Care

Hospice care is a comprehensive, holistic approach to treatment that recognizes that the impending death of an individual, upon his or her choice, warrants a change in the focus from curative care to palliative care for relief of pain and for symptom management. Medicare regulations define ''palliative care'' as patient and family-centered care that optimizes quality of life by anticipating, preventing, and treating suffering. Palliative care throughout the continuum of illness involves addressing physical, intellectual, emotional, social, and spiritual needs and to facilitate patient autonomy, access to information, and choice (42 CFR 418.3). Palliative care is at the core of hospice philosophy and care practices, and is a critical component of the Medicare hospice benefit.

The goal of hospice care is to help terminally ill individuals continue life

with minimal disruption to normal activities while remaining primarily in the home environment. A hospice uses an interdisciplinary approach to deliver medical, nursing, social, psychological, emotional, and spiritual services through a collaboration of professionals and other caregivers, with the goal of making the beneficiary as physically and emotionally comfortable as possible. Hospice is compassionate beneficiary and family/caregiver-centered care for those who are terminally ill.

As referenced in our regulations at § 418.22(b)(1), to be eligible for Medicare hospice services, the patient's attending physician (if any) and the hospice medical director must certify that the individual is ''terminally ill,'' as defined in section 1861(dd)(3)(A) of the Act and our regulations at § 418.3; that is, the individual's prognosis is for a life expectancy of 6 months or less if the terminal illness runs its normal course. The regulations at § 418.22(b)(3) require that the certification and recertification forms include a brief narrative explanation of the clinical findings that support a life expectancy of 6 months or less.

Under the Medicare hospice benefit, the election of hospice care is a patient choice and once a terminally ill patient elects to receive hospice care, a hospice interdisciplinary group is essential in the seamless provision of services. These hospice services are provided primarily in the individual's home. The hospice interdisciplinary group works with the beneficiary, family, and caregivers to develop a coordinated, comprehensive care plan; reduce unnecessary diagnostics or ineffective therapies; and maintain ongoing communication with individuals and their families about changes in their condition. The beneficiary's care plan will shift over time to meet the changing needs of the individual, family, and caregiver(s) as the individual approaches the end of life.

While the goal of hospice care is to allow the beneficiary to remain in his or her home, circumstances during the end of life may necessitate short-term inpatient admission to a hospital, skilled nursing facility (SNF), or hospice facility for necessary pain control or acute or chronic symptom management that cannot be managed in any other setting. These acute hospice care services ensure that any new or worsening symptoms are intensively addressed so that the beneficiary can return to his or her home. Limited, short-term, intermittent, inpatient respite care (IRC) is also available because of the absence or need for relief of the family or other caregivers. Additionally, an individual can receive continuous home care (CHC) during a period of crisis in which an individual requires continuous care to achieve palliation or management of acute medical symptoms so that the individual can remain at home. Continuous home care may be covered for as much as 24 hours a day, and these periods must be predominantly nursing care, in accordance with our regulations at § 418.204. A minimum of 8 hours of nursing care, or nursing and aide care, must be furnished on a particular day to qualify for the continuous home care rate (§ 418.302(e)(4)).

Hospices are expected to comply with all civil rights laws, including the provision of auxiliary aids and services to ensure effective communication with patients and patient care representatives with disabilities consistent with section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Additionally, they must provide language access for such persons who are limited in English proficiency, consistent with Title VI of the Civil Rights Act of 1964. Further information about these requirements may be found at *http://www.hhs.gov/ocr/civilrights.*

B. Services Covered by the Medicare Hospice Benefit

Coverage under the Medicare Hospice benefit requires that hospice services must be reasonable and necessary for the palliation and management of the terminal illness and related conditions. Section 1861(dd)(1) of the Act establishes the services that are to be rendered by a Medicare-certified hospice program. These covered services include: Nursing care; physical therapy; occupational therapy; speech-language pathology therapy; medical social services; home health aide services (now called hospice aide services); physician services; homemaker services; medical supplies (including drugs and biologicals); medical appliances; counseling services (including dietary counseling); short-term inpatient care in a hospital, nursing facility, or hospice inpatient facility (including both respite care and procedures necessary for pain control and acute or chronic symptom management); continuous home care during periods of crisis, and only as necessary to maintain the terminally ill individual at home; and any other item or service which is specified in the plan of care and for which payment may otherwise be made under Medicare, in accordance with Title XVIII of the Act.

Section 1814(a)(7)(B) of the Act requires that a written plan for providing hospice care to a beneficiary who is a hospice patient be established before care is provided by, or under arrangements made by, that hospice program; and that the written plan be periodically reviewed by the beneficiary's attending physician (if any), the hospice medical director, and an interdisciplinary group (described in section 1861(dd)(2)(B) of the Act). The services offered under the Medicare hospice benefit must be available to beneficiaries as needed, 24 hours a day, 7 days a week (section 1861(dd)(2)(A)(i) of the Act).

Upon the implementation of the hospice benefit, the Congress also expected hospices to continue to use volunteer services, though these services are not reimbursed by Medicare (see section 1861(dd)(2)(E) of the Act). As stated in the FY 1983 Hospice Wage Index and Rate Update proposed rule (48 FR 38149), the hospice interdisciplinary group should comprise paid hospice employees as well as hospice volunteers, and that ''the hospice benefit and the resulting Medicare reimbursement is not intended to diminish the voluntary spirit of hospices.'' This expectation supports the hospice philosophy of community based, holistic, comprehensive, and compassionate end-of-life care.

C. Medicare Payment for Hospice Care

Sections 1812(d), 1813(a)(4), 1814(a)(7), 1814(i), and 1861(dd) of the Act, and our regulations in 42 CFR part 418, establish eligibility requirements, payment standards and procedures; define covered services; and delineate the conditions a hospice must meet to be approved for participation in the Medicare program. Part 418, subpart G, provides for a per diem payment in one of four prospectively-determined rate categories of hospice care (routine home care (RHC), CHC, IRC, and general inpatient care (GIP)), based on each day a qualified Medicare beneficiary is under hospice care (once the individual has elected). This per diem payment is to include all of the hospice services and items needed to manage the beneficiary's care, as required by section 1861(dd)(1) of the Act. There has been little change in the hospice payment structure since the benefit's inception. The per diem rate based on level of care was established in 1983, and this payment structure remains today with some adjustments, as noted below.

1. Omnibus Budget Reconciliation Act of 1989

Section 6005(a) of the Omnibus Budget Reconciliation Act of 1989 (Pub.

L. 101–239) amended section 1814(i)(1)(C) of the Act and provided changes in the methodology concerning updating the daily payment rates based on the hospital market basket percentage increase applied to the payment rates in effect during the previous federal fiscal year.

2. Balanced Budget Act of 1997

Section 4441(a) of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) established that updates to the hospice payment rates beginning FY 2002 and subsequent FYs be the hospital market basket percentage increase for the FY.

3. FY 1998 Hospice Wage Index Final Rule

The FY 1998 Hospice Wage Index final rule (62 FR 42860), implemented a new methodology for calculating the hospice wage index and instituted an annual Budget Neutrality Adjustment Factor (BNAF) so aggregate Medicare payments to hospices would remain budget neutral to payments calculated using the 1983 wage index.

4. FY 2010 Hospice Wage Index Final Rule

The FY 2010 Hospice Wage Index and Rate Update final rule (74 FR 39384) instituted an incremental 7-year phase-out of the BNAF beginning in FY 2010 through FY 2016. The BNAF phase-out reduced the amount of the BNAF increase applied to the hospice wage index value, but was not a reduction in the hospice wage index value itself or in the hospice payment rates.

5. The Affordable Care Act

Starting with FY 2013 (and in subsequent FYs), the market basket percentage update under the hospice payment system referenced in sections 1814(i)(1)(C)(ii)(VII) and 1814(i)(1)(C)(iii) of the Act is subject to annual reductions related to changes in economy-wide productivity, as specified in section 1814(i)(1)(C)(iv) of the Act. In FY 2013 through FY 2019, the market basket percentage update under the hospice payment system will be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions specified in section 1814(i)(1)(C)(v) of the Act).

In addition, sections 1814(i)(5)(A) through (C) of the Act, as added by section 3132(a) of the Patient Protection and Affordable Care Act (PPACA) (Pub. L. 111–148), require hospices to begin submitting quality data, based on measures to be specified by the Secretary of the Department of Health and Human Services (the Secretary), for FY 2014 and subsequent FYs. Beginning in FY 2014, hospices that fail to report quality data will have their market basket percentage increase reduced by 2 percentage points.

Section 1814(a)(7)(D)(i) of the Act, as added by section 3132(b)(2) of the PPACA, requires, effective January 1, 2011, that a hospice physician or nurse practitioner have a face-to-face encounter with the beneficiary to determine continued eligibility of the beneficiary's hospice care prior to the 180th-day recertification and each subsequent recertification, and to attest that such visit took place. When implementing this provision, we finalized in the FY 2011 Hospice Wage Index final rule (75 FR 70435) that the 180th-day recertification and subsequent recertifications would correspond to the beneficiary's third or subsequent benefit periods. Further, section 1814(i)(6) of the Act, as added by section 3132(a)(1)(B) of the PPACA, authorizes the Secretary to collect additional data and information determined appropriate to revise payments for hospice care and other purposes. The types of data and information suggested in the PPACA could capture accurate resource utilization, which could be collected on claims, cost reports, and possibly other mechanisms, as the Secretary determined to be appropriate. The data collected could be used to revise the methodology for determining the payment rates for RHC and other services included in hospice care, no earlier than October 1, 2013, as described in section 1814(i)(6)(D) of the Act. In addition, we were required to consult with hospice programs and the Medicare Payment Advisory Commission (MedPAC) regarding additional data collection and payment revision options.

6. FY 2012 Hospice Wage Index Final Rule

In the FY 2012 Hospice Wage Index final rule (76 FR 47308 through 47314) we announced that beginning in 2012, the hospice aggregate cap would be calculated using the patient-by-patient proportional methodology, within certain limits. We allowed existing hospices the option of having their cap calculated through the original streamlined methodology, also within certain limits. As of FY 2012, new hospices have their cap determinations calculated using the patient-by-patient proportional methodology. If a hospice's total Medicare payments for the cap year exceed the hospice aggregate cap, then the hospice must repay the excess back to Medicare.

7. FY 2015 Hospice Wage Index and Payment Rate Update Final Rule

The FY 2015 Hospice Wage Index and Rate Update final rule (79 FR 50452) finalized a requirement that requires the Notice of Election (NOE) be filed within 5 calendar days after the effective date of hospice election. If the NOE is filed beyond this 5-day period, hospice providers are liable for the services furnished during the days from the effective date of hospice election to the date of NOE filing (79 FR 50474). Similar to the NOE, the claims processing system must be notified of a beneficiary's discharge from hospice or hospice benefit revocation within 5 calendar days after the effective date of the discharge/revocation (unless the hospice has already filed a final claim) through the submission of a final claim or a Notice of Termination or Revocation (NOTR).

The FY 2015 Hospice Wage Index and Rate Update final rule (79 FR 50479) also finalized a requirement that the election form include the beneficiary's choice of attending physician and that the beneficiary provide the hospice with a signed document when he or she chooses to change attending physicians.

Hospice providers are required to begin using a Hospice Experience of Care Survey for informal caregivers of hospice patients as of 2015. The FY 2015 Hospice Wage Index and Rate Update final rule (79 FR 50496) provided background, eligibility criteria, survey respondents, and implementation of the Hospice Experience of Care Survey for informal caregivers, that hospices are required to use as of 2015.

Finally, the FY 2015 Hospice Wage Index and Rate Update final rule required providers to complete their aggregate cap determination not sooner than 3 months after the end of the cap year, and not later than 5 months after, and remit any overpayments. Those hospices that fail to timely submit their aggregate cap determinations will have their payments suspended until the determination is completed and received by the Medicare contractor (79 FR 50503).

8. IMPACT Act of 2014

The Improving Medicare Post-Acute Care Transformation Act of 2014 (IMPACT Act) (Pub. L. 113–185) became law on October 6, 2014. Section 3(a) of the IMPACT Act mandated that all Medicare certified hospices be surveyed every 3 years beginning April 6, 2015 and ending September 30, 2025. In

addition, section 3(c) of the IMPACT Act requires medical review of hospice cases involving beneficiaries receiving more than 180 days care in select hospices that show a preponderance of such patients; section 3(d) of the IMPACT Act contains a new provision mandating that the cap amount for accounting years that end after September 30, 2016, and before October 1, 2025 be updated by the hospice payment update rather than using the consumer price index for urban consumers (CPI–U) for medical care expenditures.

9. FY 2016 Hospice Wage Index and Payment Rate Update Final Rule

In the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47172), we created two different payment rates for RHC that resulted in a higher base payment rate for the first 60 days of hospice care and a reduced base payment rate for subsequent days of hospice care. We also created a Service Intensity Add-on (SIA) payment payable for services during the last 7 days of the beneficiary's life, equal to the CHC hourly payment rate multiplied by the amount of direct patient care provided by a registered nurse (RN) or social worker that occurs during the last 7 days (80 FR 47177).

In addition to the hospice payment reform changes discussed, the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47186) implemented changes mandated by the IMPACT Act, in which the cap amount for accounting years that end after September 30, 2016 and before October 1, 2025 is updated by the hospice payment update percentage rather than using the CPI–U. This was applied to the 2016 cap year, starting on November 1, 2015 and ending on October 31, 2016. In addition, we finalized a provision to align the cap accounting year for both the inpatient cap and the hospice aggregate cap with the fiscal year for FY 2017 and thereafter. Finally, the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47144) clarified that hospices must report all diagnoses of the beneficiary on the hospice claim as a part of the ongoing data collection efforts for possible future hospice payment refinements.

10. FY 2017 Hospice Wage Index and Payment Rate Update Final Rule

In the FY 2017 Hospice Wage Index and Rate Update final rule (81 FR 52160), we finalized several new policies and requirements related to the HQRP. First, we codified our policy that if the National Quality Forum (NQF) made non-substantive changes to specifications for HQRP measures as part of the NQF's re-endorsement process, we would continue to utilize the measure in its new endorsed status, without going through new notice-and-comment rulemaking. We would continue to use rulemaking to adopt substantive updates made by the NQF to the endorsed measures we have adopted for the HQRP; determinations about what constitutes a substantive versus non-substantive change would be made on a measure-by-measure basis. Second, we finalized two new quality measures for the HQRP for the FY 2019 payment determination and subsequent years: Hospice Visits when Death is Imminent Measure Pair and Hospice and Palliative Care Composite Process Measure-Comprehensive Assessment at Admission (81 FR 52173). The data collection mechanism for both of these measures is the HIS, and the measures were effective April 1, 2017. Regarding the CAHPS® Hospice Survey, we finalized a policy that hospices that receive their CMS Certification Number (CCN) after January 1, 2017 for the FY 2019 Annual Payment Update (APU) and January 1, 2018 for the FY 2020 APU will be exempted from the Hospice Consumer Assessment of Healthcare Providers and Systems (CAHPS®) requirements due to newness (81 FR 52182). The exemption is determined by CMS and is for 1 year only.

D. Trends in Medicare Hospice Utilization

Since the implementation of the hospice benefit in 1983, and especially within the last decade, there has been substantial growth in hospice benefit utilization. The number of Medicare beneficiaries receiving hospice services has grown from 513,000 in FY 2000 to nearly 1.5 million in FY 2017. Similarly, Medicare hospice expenditures have risen from $2.8 billion in FY 2000 to approximately $17.7 billion in FY 2017. Our Office of the Actuary (OACT) projects that hospice expenditures are expected to continue to increase, by approximately 8 percent annually, reflecting an increase in the number of Medicare beneficiaries, more beneficiary awareness of the Medicare hospice benefit for end-of-life care, and a growing preference for care provided in home and community-based settings.

There have also been changes in the diagnosis patterns among Medicare hospice enrollees. While in 2002, lung cancer was the top principal diagnosis, neurologically based diagnoses have topped the list for the past 5 years. Additionally, in FY 2013, ''debility'' and ''adult failure to thrive'' were the first and sixth most common hospice claims-reported diagnoses, respectively, accounting for approximately 14 percent of all diagnoses; however, effective October 1, 2014, these diagnoses are no longer permitted as principal diagnosis codes on hospice claims. As a result of this, the most common hospice claims-reported diagnoses have changed from primarily cancer diagnoses to neurological and organ-based failure diagnoses. The top 20 most frequently hospice claims-reported diagnoses for FY 2017 are in Table 2 below.

TABLE 2—THE TOP TWENTY PRINCIPAL HOSPICE DIAGNOSES, FY 2017

Rank	ICD–10/reported principal diagnosis	Count	Percentage
1	G30.9 Alzheimer's disease, unspecified	155,066	10
2	J44.9 Chronic obstructive pulmonary disease	77,758	5
3	I50.9 Heart failure, unspecified	69,216	4
4	G31.1 Senile degeneration of brain, not elsewhere classified	66,309	4
5	C34.90 Malignant Neoplasm Of Unsp Part Of Unsp Bronchus Or Lung	53,137	3
6	G20 Parkinson's disease	40,186	3
7	G30.1 Alzheimer's disease with late onset	38,710	2
8	I25.10 Atherosclerotic heart disease of native coronary art without angina pectoris	34,761	2
9	J44.1 Chronic obstructive pulmonary disease with (acute) exacerbation	33,547	2
10	I67.2 Cerebral atherosclerosis	30,146	2
11	C61 Malignant neoplasm of prostate	25,215	2
12	I63.9 Cerebral infarction, unspecified	22,825	1
13	N18.6 End stage renal disease	21,549	1
14	C18.9 Malignant neoplasm of colon, unspecified	21,543	1
15	C25.9 Malignant neoplasm of pancreas, unspecified	20,851	1

TABLE 2—THE TOP TWENTY PRINCIPAL HOSPICE DIAGNOSES, FY 2017—Continued

Rank	ICD–10/reported principal diagnosis	Count	Percentage
16	I51.9 Heart disease, unspecified	18,794	1
17	I11.0 Hypertensive heart disease with heart failure	18,345	1
18	I67.9 Cerebrovascular disease, unspecified	18,234	1
19	I13.0 Hypertensive heart and chronic kidney disease with heart failure and stage 1 through stage 4 chronic kidney disease, or unspecified chronic kidney disease.	15,632	1
20	A41.9 Sepsis, unspecified organism	14,012	1

Note(s): The frequencies shown represent beneficiaries that had a least one claim with the specific ICD–10 code reported as the principal diagnosis. Beneficiaries could be represented multiple times in the results if they have multiple claims during that time period with different principal diagnoses.

Source: FY 2017 hospice claims data from the CCW, accessed and merged with ICD–10 codes on January 10, 2018.

In the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47201), we clarified that hospices will report *all* diagnoses identified in the initial and comprehensive assessments on hospice claims, whether related or unrelated to the terminal prognosis of the individual, effective October 1, 2015. Analysis of FY 2017 hospice claims show that 100 percent of hospices reported more than one diagnosis, 89 percent submitted at least two diagnoses, and 81 percent included at least three diagnoses.

III. Provisions of the Final Rule

On May 8, 2018, we published the FY 2019 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements proposed rule in the **Federal Register** (83 FR 20934 through 20970) and provided a 60-day comment period. In that proposed rule, we proposed to update the hospice wage index, payment rates, and cap amount for fiscal year (FY) 2019. In addition, we proposed regulations text changes to recognize physician assistants as designated hospice attending physicians effective January 1, 2019. Finally, we proposed changes to the Hospice Quality Reporting Program. We received 56 public comments on the proposed rule, including comments from hospice agencies, national provider associations, patient organizations, nurses, and advocacy groups.

Below we provide a summary of each proposed provision, a summary of the public comments received and our responses to them, and the policies we are finalizing in the FY 2019 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements final rule.

A. Monitoring for Potential Impacts—Affordable Care Act Hospice Reform

In the FY 2019 Hospice Wage Index and Payment Rate Update proposed rule (83 FR 20934), we provided a summary of analysis conducted on hospice length of stay, live discharge rates, skilled visits in the last days of life, and non-hospice spending. Additionally, we discussed initial analyses of data from recently revised cost reports. We will continue to monitor the impact of future payment and policy changes and will provide the industry with periodic updates on our analysis in future rulemaking and/or announcements on the Hospice Center web page at: *https://www.cms.gov/Center/Provider-Type/Hospice-Center.html.*

We received comments on the hospice monitoring analysis and CMS's plans for future monitoring efforts with regard to hospice payment reform outlined in the proposed rule. The comments and our responses are described below:

Comment: Commenters expressed continued support for our plans to monitor the impact of hospice payment reform and suggested the use of monitoring results in order to better target program integrity efforts. One commenter suggested that providers would benefit from CMS providing data assessing the impact of the payment changes that occurred in early 2016 and the degree to which they are on track with the re-distributional impact that CMS anticipated as a part of its modeling. A commenter suggested that CMS focus on short lengths of stays in hospice rather than long length of stays as long length of stays, which could be an indicator of problematic behavior, noting that the median length of stay has remained constant at 18 days, and the commenter suggested that the focus of analysis should be on beneficiary access to hospice services. One commenter recommended that CMS revisit and clarify what should be covered under the hospice per diem, noting that clarification would enhance care for patients and families, allow for easier comparison of programs, and allow for increased program integrity efforts based on this data point. Finally, a few commenters noted concerns with increased scrutiny of claims for GIP care and the variability of costs for GIP care depending on whether the hospice provides the care in a facility or contracts with another entity. Commenters suggested that CMS provide further education and clarification of acceptable GIP utilization for hospice providers as a means of encouraging them to provide the most appropriate level of care for the patient.

Response: We appreciate the comments provided regarding the ongoing analysis presented, and we plan continue to monitor hospice trends and vulnerabilities within the hospice benefit, while also investigating the means by which we can educate the provider community regarding the hospice benefit and appropriate billing practices. We will also consider these suggestions for future monitoring efforts, program integrity, and for potential policy or payment refinements. Additionally, we refer readers to sections 1812(d), 1813(a)(4), 1814(a)(7), 1814(i), and 1861(dd) of the Act, our regulations in the Code of Federal Regulations (CFR) 42 CFR part 418, which establish eligibility requirements, payment standards, and procedures; define covered services; and delineate the conditions a hospice must meet to be approved for participation in the Medicare program and the CMS Hospice Center web page for more information (*https://www.cms.gov/Center/Provider-Type/Hospice-Center.html*).

Comment: Several commenters recommended that CMS move to implement additional Level 1 edits for the hospice cost reports in order to address existing gaps in data collection to meet minimum standards of accuracy. In addition, many commenters suggested that CMS should wait until the latest cost report changes (including imposition of additional Level 1 edits) are reflected in the data to ensure greater accuracy of data inputs.

Response: We appreciate support of the Level 1 edits to further address accuracy in cost reporting. As several commenters noted, on April 13, 2018, CMS issued Transmittal 3 revising the Medicare Provider Reimbursement

Manual—Part 2, Provider Cost Reporting Forms and Instructions, Chapter 43, Form CMS–1984–14. Transmittal 3 made several changes to the Hospice Cost Report, including the imposition of Level 1 and Level 2 edits (*https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2018Downloads/R3P243.pdf*). These changes are effective for cost reporting periods ending on or after December 31, 2017. We will continue to analyze Medicare hospice cost report data as it becomes available in determining whether additional hospice payment reform changes are needed to better align hospice payments with costs.

B. FY 2019 Hospice Wage Index and Rate Update

1. FY 2019 Hospice Wage Index

The hospice wage index is used to adjust payment rates for hospice agencies under the Medicare program to reflect local differences in area wage levels, based on the location where services are furnished. The hospice wage index utilizes the wage adjustment factors used by the Secretary for purposes of section 1886(d)(3)(E) of the Act for hospital wage adjustments. Our regulations at § 418.306(c) require each labor market to be established using the most current hospital wage data available, including any changes made by Office of Management and Budget (OMB) to the Metropolitan Statistical Areas (MSAs) definitions.

We use the previous FY's hospital wage index data to calculate the hospice wage index values. For FY 2019, the hospice wage index will be based on the FY 2018 hospital pre-floor, pre-reclassified wage index. This means that the hospital wage data used for the hospice wage index are not adjusted to take into account any geographic reclassification of hospitals including those in accordance with section 1886(d)(8)(B) or 1886(d)(10) of the Act. The appropriate wage index value is applied to the labor portion of the payment rate based on the geographic area in which the beneficiary resides when receiving RHC or CHC. The appropriate wage index value is applied to the labor portion of the payment rate based on the geographic location of the facility for beneficiaries receiving GIP or IRC.

In the FY 2006 Hospice Wage Index final rule (70 FR 45135), we adopted the policy that, for urban labor markets without a hospital from which hospital wage index data could be derived, all of the Core-Based Statistical Areas (CBSAs) within the state would be used to calculate a statewide urban average pre-floor, pre-reclassified hospital wage index value to use as a reasonable proxy for these areas. For FY 2019, the only CBSA without a hospital from which hospital wage data can be derived is 25980, Hinesville-Fort Stewart, Georgia.

In the FY 2008 Hospice Wage Index final rule (72 FR 50214), we adopted a policy for instances where there are rural areas without rural hospital wage data. In such instances, we use the average pre-floor, pre-reclassified hospital wage index data from all contiguous CBSAs, to represent a reasonable proxy for the rural area. The term ''contiguous'' means sharing a border (72 FR 50217). Currently, the only rural area without a hospital from which hospital wage data could be derived is Puerto Rico. However, for rural Puerto Rico, we would not apply this methodology due to the distinct economic circumstances that exist there (for example, due to the close proximity to one another of almost all of Puerto Rico's various urban and non-urban areas, this methodology would produce a wage index for rural Puerto Rico that is higher than that in half of its urban areas); instead, we would continue to use the most recent wage index previously available for that area. For FY 2019, we proposed to continue to use the most recent pre-floor, pre-reclassified hospital wage index value available for Puerto Rico, which is 0.4047, subsequently adjusted by the hospice floor.

As described in the August 8, 1997 Hospice Wage Index final rule (62 FR 42860), the pre-floor and pre-reclassified hospital wage index is used as the raw wage index for the hospice benefit. These raw wage index values are subject to application of the hospice floor to compute the hospice wage index used to determine payments to hospices. Pre-floor, pre-reclassified hospital wage index values below 0.8 are adjusted by a 15 percent increase subject to a maximum wage index value of 0.8. For example, if County A has a pre-floor, pre-reclassified hospital wage index value of 0.3994, we would multiply 0.3994 by 1.15, which equals 0.4593. Since 0.4593 is not greater than 0.8, then County A's hospice wage index would be 0.4593. In another example, if County B has a pre-floor, pre-reclassified hospital wage index value of 0.7440, we would multiply 0.7440 by 1.15 which equals 0.8556. Because 0.8556 is greater than 0.8, County B's hospice wage index would be 0.8.

On February 28, 2013, OMB issued OMB Bulletin No. 13–01, announcing revisions to the delineation of MSAs, Micropolitan Statistical Areas, and Combined Statistical Areas, and guidance on uses of the delineation in these areas. In the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47178), we adopted the OMB's new area delineations using a 1-year transition. In that final rule, we stated that beginning October 1, 2016, the wage index for all hospice payments would be fully based on the new OMB delineations.

On August 15, 2017, OMB issued bulletin No. 17–01, which is available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/bulletins/2017/b-17-01.pdf*. In this bulletin, OMB announced that one Micropolitan Statistical Area, Twin Falls, Idaho, now qualifies as a Metropolitan Statistical Area. The new CBSA (46300) comprises the principal city of Twin Falls, Idaho in Jerome County, Idaho and Twin Falls County, Idaho. The FY 2019 hospice wage index value for CBSA 46300, Twin Falls, Idaho, will be 0.8000.

The hospice wage index applicable for FY 2019 (October 1, 2018 through September 30, 2019) is available on our website at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/index.html.*

A summary of the comments we received regarding the wage index and our responses to those comments appear below:

Comment: A commenter stated that in FY 2018, the wage index for Spokane, WA had increased, which helped increase wages for employees and reduced turnover. However, the commenter noted that in the FY 2019 proposed rule, this increase is reversing. The commenter stated that using older wage index data, not allowing reclassification, and not accounting for outward migration speaks to the need for wage index reform for the hospice payment system. One commenter stated that in rural Kentucky and Indiana, the costs of providing hospice care exceed Medicare payments. The commenter further asserted that a lower reimbursement rate for rural areas when compared to urban areas is not sensible, given that urban areas have infrastructure that facilitates access to care. Another commenter expressed concern with the continued use of the pre-floor, pre-reclassified hospital wage index to adjust the hospice payment rates and stated that this causes continued volatility of the hospice wage index from one year to the next. The commenter stated that the volatility is often based on inaccurate or incomplete hospital cost report data.

Response: The annual changes in the wage index reflect real variations in costs of providing care in various

geographic locations. We utilize efficient means to ensure and review the accuracy of the hospital cost report data and resulting wage index. The hospice wage index is derived from the pre-floor, pre-reclassified wage index, which is calculated based on cost report data from hospitals. All Inpatient Prospective Payment System (IPPS) hospitals must complete the wage index survey (Worksheet S–3, Parts II and III) as part of their Medicare cost reports. Cost reports will be rejected if Worksheet S–3 is not completed. In addition, our Medicare contractors perform desk reviews on all hospitals' Worksheet S–3 wage data, and we run edits on the wage data to further ensure the accuracy and validity of the wage data. Our review processes result in an accurate reflection of the applicable wages for the areas given. In addition, we finalized a hospice wage index standardization factor in FY 2017 to ensure overall budget neutrality when updating the hospice wage index with more recent hospital wage data. Applying a wage index standardization factor to hospice payments will eliminate the aggregate effect of annual variations in hospital wage data. Our policy of utilizing a hospice wage index standardization factor provides a safeguard to the Medicare program as well as to hospices because it will mitigate fluctuations in the wage index by ensuring that wage index updates and revisions are implemented in a budget neutral manner.

We note that the current statute and regulations that govern the hospice payment system do not currently provide a mechanism for allowing hospices to seek geographic reclassification. The reclassification provision is found in section 1886(d)(10)(C)(i) of the Act, which states, ''The Board shall consider the application of any subsection (d) hospital requesting that the Secretary change the hospital's geographic classification . . . '' This provision is only applicable to hospitals as defined in section 1886(d) of the Act. In addition, we do not believe that using hospital reclassification data would be appropriate, as these data are specific to the requesting hospitals and they may or may not apply to a given hospice.

Comment: One commenter expressed concern that the proposed FY 2019 hospice wage index will be based on the OMB geographic area wage delineations. The commenter was particularly concerned with the New York City CBSA and the fact that the CBSA contains counties from New Jersey where labor costs are lower.

Response: The OMB's CBSA designations reflect the most recent available geographic classifications and are a reasonable and appropriate method of defining geographic areas for the purposes of wage adjusting the hospice payment rates.

Comment: One commenter expressed concern that hospices in Montgomery County, Maryland, which are included in CBSA 43524 (Silver Spring-Frederick-Rockville, MD), are reimbursed at a lower rate than hospices in the greater Washington DC area that are included in CBSA 47894 (Washington-Arlington-Alexandria, DCVA-MD-WV). The commenters request that CMS reconsider CBSA 43524 (Silver Spring-Frederick-Rockville, MD).

Response: CBSA delineations are determined by the OMB. The OMB reviews its Metropolitan Area definitions preceding each decennial census to reflect recent population changes. The OMB's CBSA designations reflect the most recent available geographic classifications and were a reasonable and appropriate way to define geographic areas for purposes of wage index values. Ten years ago, in our FY 2006 Hospice Wage Index final rule (70 FR 45130), we finalized the adoption of the revised labor market area definitions as discussed in the OMB Bulletin No. 03–04 (June 6, 2003). In the December 27, 2000 **Federal Register** (65 FR 82228 through 82238), OMB announced its new standards for defining metropolitan and micropolitan statistical areas. According to that notice, OMB defines a CBSA, beginning in 2003, as ''a geographic entity associated with at least one core of 10,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties. The general concept of the CBSAs is that of an area containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus. The purpose of the standards is to provide nationally consistent definitions for collecting, tabulating, and publishing federal statistics for a set of geographic areas. CBSAs include adjacent counties that have a minimum of 25 percent commuting to the central counties of the area. This is an increase over the minimum commuting threshold for outlying counties applied in the previous MSA definition of 15 percent. Based on the OMB's current delineations, Montgomery County (along with Frederick County, Maryland) belongs in a separate CBSA from the areas defined in the Washington-Arlington-Alexandria, DC-VA CBSA. Unlike IPPS, inpatient rehabilitation facility (IRF), and SNF, where each provider uses a single CBSA, hospice agencies may be reimbursed based on more than one wage index. Payments are based upon the location of the beneficiary for routine and continuous home care or the location of the agency for respite and general inpatient care. It is very likely that hospices in Montgomery County, Maryland provide RHC and CHC to patients in the ''Washington-Arlington-Alexandria, DC-VA'' CBSA in addition to serving patients in the ''Baltimore-Columbia-Towson, Maryland'' CBSA.

While CMS and other stakeholders have explored potential alternatives to the current CBSA-based labor market system (we refer readers to our website: *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Reform.html*), no consensus has been achieved regarding how best to implement a replacement system. As discussed in the FY 2005 IPPS final rule (69 FR 49027), ''While we recognize that MSAs are not designed specifically to define labor market areas, we believe they do represent a useful proxy for this purpose.'' We further believe that using the most current OMB delineations will increase the integrity of the hospice wage index by creating a more accurate representation of geographic variation in wage levels. We recognize that the OMB cautions that the delineations should not be used to develop and implement federal, state, and local nonstatistical programs and policies without full consideration of the effects of using these delineations for such purposes. As discussed in the OMB Bulletin No. 03–04 (June 6, 2003), The OMB stated that, ''In cases where there is no statutory requirement and an agency elects to use the Metropolitan, Micropolitan, or Combined Statistical Area definitions in nonstatistical programs, it is the sponsoring agency's responsibility to ensure that the definitions are appropriate for such use. When an agency is publishing for comment a proposed regulation that would use the definitions for a nonstatistical purpose, the agency should seek public comment on the proposed use.'' [4] While we recognize that OMB's geographic area delineations are not designed specifically for use in nonstatistical programs or for program purposes, including the allocation of federal funds, we continue to believe that the

[4] *https://www.whitehouse.gov/wp-content/uploads/2017/11/bulletins_b03-04.pdf.*

OMB's geographic area delineations represent a useful proxy for differentiating between labor markets and that the geographic area delineations are appropriate for use in determining Medicare hospice payments. In implementing the use of CBSAs for hospice payment purposes in our FY 2006 rule (70 FR 45130), we considered the effects of using these delineations. We have used CBSAs for determining hospice payments for 10 years (since FY 2006). In addition, other provider types, such as IPPS hospital, home health, SNF, IRF), and the ESRD program, have used CBSAs to define their labor market areas for the last decade.

Final Decision: After considering the comments received in response to the proposed rule and for the reasons discussed above, we are finalizing our proposal to use the pre-floor, pre-reclassified hospital inpatient wage index as the wage adjustment to the labor portion of the hospice rates. For FY 2019, the updated wage data are for hospital cost reporting periods beginning on or after October 1, 2013 and before October 1, 2014 (FY 2014 cost report data).

The wage index applicable for FY 2019 is available on our website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice/index.html.* The hospice wage index for FY 2019 will be effective October 1, 2018 through September 30, 2019.

2. FY 2019 Hospice Payment Update Percentage

Section 4441(a) of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) amended section 1814(i)(1)(C)(ii)(VI) of the Act to establish updates to hospice rates for FYs 1998 through 2002. Hospice rates were to be updated by a factor equal to the inpatient hospital market basket percentage increase set out under section 1886(b)(3)(B)(iii) of the Act, minus 1 percentage point. Payment rates for FYs since 2002 have been updated according to section 1814(i)(1)(C)(ii)(VII) of the Act, which states that the update to the payment rates for subsequent FYs must be the inpatient market basket percentage increase for that FY. The Act historically required us to use the inpatient hospital market basket as the basis for the hospice payment rate update.

Section 3401(g) of the PPACA mandated that, starting with FY 2013 (and in subsequent FYs), the hospice payment update percentage would be annually reduced by changes in economy-wide productivity as specified in section 1886(b)(3)(B)(xi)(II) of the Act. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP). In addition to the MFP adjustment, section 3401(g) of the ACA also mandated that in FY 2013 through FY 2019, the hospice payment update percentage would be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions specified in section 1814(i)(1)(C)(v) of the Act).

The hospice payment update percentage for FY 2019 is based on the inpatient hospital market basket update of 2.9 percent (based on IHS Global Inc.'s second-quarter 2018 forecast with historical data through the first-quarter 2018). Due to the requirements at sections 1886(b)(3)(B)(xi)(II) and 1814(i)(1)(C)(v) of the Act, the inpatient hospital market basket update for FY 2019 of 2.9 percent must be reduced by a MFP adjustment as mandated by the PPACA (0.8 percentage point for FY 2019). The inpatient hospital market basket update for FY 2019 is reduced further by 0.3 percentage point, as mandated by the PPACA. In effect, the hospice payment update percentage for FY 2019 is 1.8 percent.

Currently, the labor portion of the hospice payment rates is as follows: for RHC, 68.71 percent; for CHC, 68.71 percent; for General Inpatient Care, 64.01 percent; and for Respite Care, 54.13 percent. The non-labor portion is equal to 100 percent minus the labor portion for each level of care. Therefore, the non-labor portion of the payment rates is as follows: for RHC, 31.29 percent; for CHC, 31.29 percent; for General Inpatient Care, 35.99 percent; and for Respite Care, 45.87 percent. Beginning with cost reporting periods starting on or after October 1, 2014, freestanding hospice providers are required to submit cost data using CMS Form 1984–14 (*https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing-Items/CMS-1984-14.html*). We are currently analyzing this data for possible use in updating the labor portion of the hospice payment rates. Any changes to the labor portions would be proposed in future rulemaking and would be subject to public comments.

A summary of the comments we received regarding the payment update percentage and our responses to those comments appear below:

Comment: Several commenters noted their support of the hospice payment update percentage.

Response: We appreciate the comments in support of the hospice payment update percentage.

Comment: Several commenters stated that the FY 2019 payment update of 1.8 percent is inadequate. One commenter stated that the payment update is insufficient to sustainably cover the broad range of services and high-quality care that their members provide regardless of diagnosis, location and payment source. Another commenter suggested that the multifactor productivity (MFP) adjustment is not related to hospice care productivity, but instead, is a uniform adjustment factor that is being applied to all proposed prospective payment rate increases for 2019. The commenter suggests that CMS should identify and report specific productivity performances for each unique healthcare category. Another commenter expressed concern that the 1.8 percent increase would not cover the 2 percent decrease in reimbursement that would be imposed should sequestration be required in 2019.

Response: The hospice payment update percentage and the application of the MFP are required by statute, as previously described in detail in this section, and we do not have regulatory authority to alter the update. Likewise, sequestration is determined outside of CMS' authority and the hospice payment updates are statutory.

Final Decision: We are implementing the hospice payment update percentage as discussed in the proposed rule. Based on IHS Global Insight, Inc.'s updated forecast, the hospice payment update percentage for FY 2019 will be 1.8 percent for hospices that submit the required quality data and −0.2 percent (FY 2019 hospice payment update of 1.8 percent minus 2 percentage points) for hospices that do not submit the required quality data.

3. FY 2019 Hospice Payment Rates

There are four payment categories that are distinguished by the location and intensity of the services provided. The base payments are adjusted for geographic differences in wages by multiplying the labor share, which varies by category, of each base rate by the applicable hospice wage index. A hospice is paid the RHC rate for each day the beneficiary is enrolled in hospice, unless the hospice provides CHC, IRC, or GIP. CHC is provided during a period of patient crisis to maintain the patient at home; IRC is short-term care to allow the usual caregiver to rest and be relieved from

caregiving; and GIP is to treat symptoms that cannot be managed in another setting.

As discussed in the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47172), we implemented two different RHC payment rates, one RHC rate for the first 60 days and a second RHC rate for days 61 and beyond. In addition, in that final rule, we implemented a Service Intensity Add-on (SIA) payment for RHC when direct patient care is provided by a RN or social worker during the last 7 days of the beneficiary's life. The SIA payment is equal to the CHC hourly rate multiplied by the hours of nursing or social work provided (up to 4 hours total) that occurred on the day of service, if certain criteria are met. In order to maintain budget neutrality, as required under section 1814(i)(6)(D)(ii) of the Act, the new RHC rates were adjusted by a SIA budget neutrality factor.

As discussed in the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47177), we will continue to make the SIA payments budget neutral through an annual determination of the SIA budget neutrality factor (SBNF), which will then be applied to the RHC payment rates. The SBNF will be calculated for each FY using the most current and complete utilization data available at the time of rulemaking. For FY 2019, we calculated the SBNF using FY 2017 utilization data. For FY 2019, the SBNF that would apply to days 1 through 60 is calculated to be 0.9991. The SBNF that would apply to days 61 and beyond is calculated to be 0.9998.

In the FY 2017 Hospice Wage Index and Rate Update final rule (81 FR 52156), we initiated a policy of applying a wage index standardization factor to hospice payments in order to eliminate the aggregate effect of annual variations in hospital wage data. In order to calculate the wage index standardization factor, we simulate total payments using the FY 2019 hospice wage index and compare it to our simulation of total payments using the FY 2018 hospice wage index. By dividing payments for each level of care using the FY 2019 wage index by payments for each level of care using the FY 2018 wage index, we obtain a wage index standardization factor for each level of care (RHC days 1 through 60, RHC days 61+, CHC, IRC, and GIP). The wage index standardization factors for each level of care are shown in the tables below.

The FY 2019 RHC rates are shown in Table 3. The FY 2019 payment rates for CHC, IRC, and GIP are shown in Table 4.

TABLE 3—FY 2019 HOSPICE RHC PAYMENT RATES

Code	Description	FY 2018 payment rates	SIA budget neutrality factor	Wage index standardization factor	FY 2019 hospice payment update	FY 2019 payment rates
651	Routine Home Care (days 1–60) ..	$192.78	× 0.9991	× 1.0009	× 1.018	$196.25
651	Routine Home Care (days 61+)	151.41	× 0.9998	× 1.0007	× 1.018	154.21

TABLE 4—FY 2019 HOSPICE CHC, IRC, AND GIP PAYMENT RATES

Code	Description	FY 2018 payment rates	Wage index standardization factor	FY 2019 hospice payment update	FY 2019 payment rates
652	Continuous Home Care; Full Rate = 24 hours of care; $41.56 = FY 2019 hourly rate.	$976.42	× 1.0034	× 1.018	$997.38
655	Inpatient Respite Care	172.78	× 1.0007	× 1.018	176.01
656	General Inpatient Care	743.55	× 1.0015	× 1.018	758.07

Sections 1814(i)(5)(A) through (C) of the Act require that hospices submit quality data, based on measures to be specified by the Secretary. In the FY 2012 Hospice Wage Index final rule (76 FR 47320 through 47324), we implemented a Hospice Quality Reporting Program (HQRP) as required by section 3004 of the PPACA. Hospices were required to begin collecting quality data in October 2012, and submit that quality data in 2013. Section 1814(i)(5)(A)(i) of the Act requires that beginning with FY 2014 and each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements with respect to that FY. The FY 2019 rates for hospices that do not submit the required quality data would be updated by the FY 2019 hospice payment update percentage of 1.8 percent minus 2 percentage points. These rates are shown in Tables 5 and 6.

TABLE 5—FY 2019 HOSPICE RHC PAYMENT RATES FOR HOSPICES THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

Code	Description	FY 2018 payment rates	SIA budget neutrality factor	Wage index standardization factor	FY 2019 hospice payment update of 1.8% minus 2 percentage points = −0.2%	FY 2019 payment rates
651	Routine Home Care (days 1–60) ..	$192.78	× 0.9991	× 1.0009	× 0.998	$192.39
651	Routine Home Care (days 61+)	151.41	× 0.9998	× 1.0007	× 0.998	151.18

TABLE 6—FY 2019 HOSPICE CHC, IRC, AND GIP PAYMENT RATES FOR HOSPICES THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

Code	Description	FY 2018 payment rates	Wage index standardization factor	FY 2019 hospice payment update of 1.8% minus 2 percentage points = −0.2%	FY 2019 payment rates
652	Continuous Home Care; Full Rate = 24 hours of care; $40.74 = FY 2019 hourly rate.	$976.42	× 1.0034	× 0.998	$977.78
655	Inpatient Respite Care	172.78	× 1.0007	× 0.998	172.56
656	General Inpatient Care	743.55	× 1.0015	× 0.998	743.18

A summary of the comments we received regarding the payment rates and our responses to those comments appear below:

Comment: Several commenters mentioned the SIA payment and stated that CMS should allow visits by Licensed Practical Nurses (LPNs) in the last 7 days of life to be eligible for SIA payment due to short length of stays and clinical demands of hospice patients.

Response: We finalized the SIA payment policy in the FY 2016 Hospice Wage Index and Payment Update final rule (80 FR 47141) and we did not solicit comments on a proposal to modify these policy parameters in the FY 2019 Hospice Wage Index and Payment Rate update proposed rule (83 FR 20934). However, we will continue to consider and monitor for potential refinements to this policy, including current monitoring efforts that were described in the FY 2019 Hospice Wage Index and Payment Rate Update proposed rule (83 FR 20934) in response to these policy changes, and we will take these comments into account as we continue to do so.

Final Decision: We are implementing the updates to hospice payment rates as discussed in the proposed rule.

4. Hospice Cap Amount for FY 2019

As discussed in the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47183), we implemented changes mandated by the IMPACT Act of 2014 (Pub. L. 113–185). Specifically, for accounting years that end after September 30, 2016 and before October 1, 2025, the hospice cap is updated by the hospice payment update percentage rather than using the consumer price index for urban consumers (CPI–U). The hospice cap amount for the 2019 cap year will be $29,205.44, which is equal to the 2018 cap amount ($28,689.04) updated by the FY 2019 hospice payment update percentage of 1.8 percent.

A summary of the comments we received regarding the hospice cap amount and our responses to those comments appear below:

Comment: One commenter suggested resetting and lowering the cap amount by an additional 10 to 15 percent, which the commenter stated will help to keep intact the original intent of the hospice philosophy and shift the narrative back towards the spirit of the community.

Response: We appreciate the commenter's suggestion that CMS should reset and lower the annual cap amount. However, the restriction set forth in section 1814(i)(2)(B) of the Act, as amended by section 3(d) of the IMPACT Act, does not give us discretion to adjust the cap amount.

Final Decision: We are implementing the changes to the hospice cap amount as discussed in the proposed rule.

C. Request for Information Update—Comments Related to Hospice Claims Processing

In the FY 2018 Hospice Wage Index and Rate Update proposed rule (82 FR 20789), we solicited public comments to start a national conversation about improvements that can be made to the health care delivery system that reduce unnecessary burdens for clinicians, other providers, and patients and their families. We specifically stated that we would not respond to the comment submissions in the FY 2018 final rule. Instead, we would review the submitted request for information comments and actively consider them as we develop future regulatory proposals or future sub-regulatory policy guidance. After reviewing all submitted responses to our requests for information in the FY 2018 proposed rule, one recommendation in particular warranted a revision to our current policy. Commenters suggested that CMS remove the requirement to report detailed drug data on the hospice claim as a way to reduce burden for hospices. We initially began asking for this information via Hospice Change Request 8358 in support of hospice payment reform (*https://www.cms.gov/Medicare/Medicare-Fee-for-Service Payment/Hospice/Downloads/R2747CP.pdf).*

In the FY 2019 Hospice Wage Index and Rate Update proposed rule, (83 FR 20953), we provided an update that effective October 1, 2018, we proposed to no longer require the reporting of detailed drug data on the hospice claim as this information is not currently used for quality, payment, or program integrity purposes. Rescinding this requirement could result in a significant reduction of burden to Medicare hospices, potentially reducing the number of line items on hospice claims by approximately 21.5 million, in aggregate. Therefore, in the FY 2019 proposed rule, we stated that we would allow hospice two options for reporting hospice drug information: (1) Hospice providers would have the option to continue reporting infusion pumps and drugs, with corresponding NDC information, on separate line items on hospice claims, though it is no longer mandatory to report it this way; or (2) Hospice providers can submit total aggregate DME and drug charges on the claim.

While the majority of commenters were supportive of this proposal and agreed that it would help to reduce regulatory burden, we did receive some comments primarily asking for more clarification regarding the options for reporting. A summary of the comments we received regarding this change in drug reporting and our responses to those comments appear below:

Comments: Several commenters wanted to know if they needed to choose one option, and others requested clarification regarding options for submission. Some commenters asked if the reporting method could be determined on a case by case basis or if all claims had to be submitted using the same reporting option, meaning whether some claims could be reported with detailed line item information while others reported in the aggregate. One commenter suggested that it could be easier to report in the aggregate, depending on the responsiveness of the

physician or pharmacy that was involved in the patient's care. One commenter requested clarification if the claim would include all DME or just infusion pumps and drugs that were an item of DME. One commenter asked if this process would account for potential delay from receiving invoices from pharmacies. Several commenters raised concerns about the costs associated with retraining personnel to accurately capture claims data and vendor activities to build software and reports. Several commenters also noted concerns regarding whether there would be sufficient time for training and software revisions and testing prior to implementation.

Response: We appreciate the commenters' feedback regarding this sub-regulatory change. We will allow hospices two options for reporting hospice drug information. Providers will have the option to continue to report infusion pumps and drugs, with corresponding NDC information, on the hospice claim as separate line items. This submission option will no longer be mandatory. Alternatively, hospices can submit total, aggregate DME and drug charges on the claim. At this time, there is no claims processing edit prohibiting providers to submit both separate line item drug data and aggregate drug data on the claim. However, we encourage providers to select one consistent mechanism for reporting this data. In order to implement this change, we have issued a detailed sub-regulatory change request, effective October 1, 2018, that provides further guidance. Change Request 10573 and related educational materials are available for review at the following URL: *https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2018Downloads/R4035CP.pdf.*

We received several comments that were outside the scope of the CY 2019 Hospice Wage Index and Rate Update proposed rule. We received comments regarding the timely posting of beneficiary's hospice status in the Medicare system and the communication process between the CWF and the Part D MarX system, sequential billing, feedback on working with the Quality Improvement Organizations (QIOs) on beneficiary appeals of hospice discharges, the role of recreational therapy under the Medicare hospice benefit, and utilization of CHC and the midnight-midnight rule.

We thank commenters for their feedback and we will consider these suggestions for potential policy refinements. As we stated in the FY 2018 proposed rule, we will actively consider all input as we develop future regulatory proposals or future sub-regulatory policy guidance.

D. Regulations Text Changes in Recognition of Physician Assistants as Designated Attending Physicians

When electing the Medicare hospice benefit, the beneficiary agrees to forgo the right to have Medicare payment made for services related to the beneficiary's terminal illness and related conditions, except when such services are provided by the designated hospice and the beneficiary's designated attending physician as outlined in section 1812(d)(2)(A) of the Act. The designated attending physician plays an important role in the care of a Medicare hospice beneficiary. If a beneficiary designates an attending physician, the beneficiary or his or her representative acknowledges that the identified attending physician was his or her choice and that the attending physician identified by the beneficiary, at the time he or she elects to receive hospice care, has the most significant role in the determination and delivery of the individual's medical care. The designated attending physician is required to certify that the beneficiary is terminally ill and participates as a member of the hospice IDG that establishes and/or or updates the individual's plan of care, ensuring that the Medicare beneficiary receives high quality hospice care.

Under the current regulations at § 418.3, the attending physician is defined as a doctor of medicine or osteopathy who is legally authorized to practice medicine or surgery by the state in which he or she performs that function, or a nurse practitioner, and is identified by the individual as having the most significant role in the determination and delivery of the individual's medical care. In the FY 2019 Hospice Wage Index and Rate Update proposed rule (83 FR 20953), we stated that section 51006 of the Bipartisan Budget Act of 2018 (Pub. L. 115–123) amended section 1861(dd)(3)(B) of the Social Security Act such that, effective January 1, 2019, physician assistants (PAs) will be recognized as designated hospice attending physicians, in addition to physicians and nurse practitioners. We proposed to change the definition of ''attending physician'' under § 418.3 to include physician assistants (PAs).

In the proposed rule, we also stated that, effective January 1, 2019, Medicare will pay for medically reasonable and necessary services provided by PAs to Medicare beneficiaries who have elected the hospice benefit and who have selected a PA as their attending physician. PAs are paid 85 percent of the fee schedule amount for their services as attending physicians. Attending physician services provided by PAs may be separately billed to Medicare only if the PA is the beneficiary's designated attending physician, services are medically reasonable and necessary, services would normally be performed by a physician in the absence of the PA, whether or not the PA is directly employed by the hospice, and services are not related to the certification of terminal illness. Since PAs are not physicians, as defined in 1861(r)(1) of the Act, they may not act as medical directors or physicians of the hospice or certify the beneficiary's terminal illness and hospices may not contract with a PA for their attending physician services as described in section 1861(dd)(2)(B)(i)(III) of the Act, which sets out the requirements of the interdisciplinary group as including at least one physician, employed by or under contract with the agency or organization. All of these provisions apply to PAs without regard to whether they are hospice employees. We also proposed to amend 42 CFR 418.304 (Payment for physician and nurse practitioner services) in the regulations to include the details outlined above regarding Medicare payment for designated hospice attending physician services provided by physician assistants.

We solicited comments on the above proposals to expand the definition of ''attending physician'' at § 418.3 to include physician assistants (PA), and to amend the regulations at § 418.304 to allow payment for PA attending physician services. A summary of the comments and our responses to those comments are provided below:

Comment: Many commenters expressed support and appreciation for the inclusion of physician assistants as designated hospice attending physicians, as commenters noted that PAs have an important role in providing hospice care, including supplying care to rural areas, and believe that this change will increase access to hospice services for Medicare beneficiaries.

Response: We thank commenters for their support. Inclusion of PAs in the definition of attending physician for the Medicare hospice benefit will lead to more flexibility for hospice beneficiaries and providers alike.

Comment: Several commenters suggested aligning the nurse practitioner and physician assistant rules in regards to hospice face-to-face encounters and

certifying terminal illness. One commenter stated that the exclusion of PAs from being able to provide the face-to-face encounter falls short of the goals of expanding the number of providers assisting this vulnerable population. This commenter stated that allowing PAs to conduct the face-to-face encounter and to certify terminal illness ensures greater continuity of care and prevent patients from having to engage with another healthcare professional for this encounter. One commenter recommended that the regulations at § 418.22, which describe the requirements for the certification of terminal illness, be amended to include PAs. A commenter recommended that the regulations at § 418.22 be amended to add physician assistant.

Response: We appreciate commenters' suggestions that PAs be permitted to both perform hospice face-to-face encounters and certify terminal illness for hospice beneficiaries. As we described in the FY 2019 Hospice Wage Index and Rate Update proposed rule (83 FR 20953), the BBA of 2018 did not make changes to allow PAs to certify terminal illness or perform the face-to-face encounter for Medicare beneficiaries. In regards to the certification of terminal illness, section 51006 of the BBA of 2018 amended section 1814(a)(7)(A)(i)(I) of the Act explicitly to exclude physician assistants from certifying terminal illness. We reiterate that no one other than a medical doctor or doctor of osteopathy can certify or re-certify terminal illness. Additionally, PAs were not authorized by section 51006 of the Bipartisan Budget Act of 2018 (Pub. L. 115–123) to perform the required hospice face-to-face encounter for re-certifications. The hospice face-to-face encounter is required per section 1814(a)(7)(D)(i) of the Act, which continues to state that only a hospice physician or a hospice nurse practitioner can perform the encounter. We wish to note that the regulations at § 418.22 will continue to state that the hospice face-to-face encounter must be performed by a hospice physician or hospice nurse practitioner and that only a medical doctor or doctor of osteopathy can certify or re-certify terminal illness.

Comment: Several commenters suggested developing and supporting appropriate education and training programs for PAs and other clinicians who serve as attending physicians in hospice care to ensure that they have the experience and training needed to deliver quality end-of-life care to beneficiaries.

Response: We appreciate the commenter's interest in the development of educational materials and programs for PAs regarding the role of the attending physician in the Medicare hospice benefit. We expect that providers will appropriately train staff according to the existing rules and regulations that govern Medicare hospice care and remain in compliance with state practice acts.

Comment: A few commenters noted that there may be issues regarding state hospice licensure requirements and the scope of practice of PAs as an individual state. The commenters note that some states may not allow PAs to serve as the hospice patient's attending physician, and these state laws and regulations would apply.

Response: We thank the commenter for noting that the states' scope of practice governance may not permit a PA to serve as a hospice beneficiary's attending physician. We note that hospice providers are responsible for reviewing the state hospice licensure requirements and scope of practice regulations for PAs to ensure that PAs are allowed to serve as a hospice patient's attending physician in accordance with state law and make staffing decisions accordingly.

Comment: One commenter stated that an advanced registered nurse practitioner (ARNP) and a PA cannot be a member of the hospice interdisciplinary group (IDG) other than as the attending physician. The commenter suggested that CMS continue exploring how these credentialed healthcare providers can work at the top of their licenses and assist providers in gaining efficiency and enhancing the members of the IDG.

Response: We thank the commenter for the comment regarding the composition of the IDG. The Condition of participation, ''Interdisciplinary group, care planning, and coordination of services'', described at § 418.56, states that ''the hospice must designate an interdisciplinary group or groups as specified in paragraph (a) of this section which, in consultation with the patient's attending physician, must prepare a written plan of care for each patient.'' Therefore, the attending physician, which could include an NP or a PA, does, in fact, play an essential role in the function of the IDG. Additionally, § 418.56 states ''the interdisciplinary group must include, but is not limited to, individuals who are qualified and competent to practice in the following professional roles: (i) A doctor of medicine or osteopathy (who is an employee or under contract with the hospice). (ii) A registered nurse. (iii) A social worker. (iv) A pastoral or other counselor.'' The required members of the IDG are described in the CoPs, but other professionals, including NPs and PAs, are not excluded from participating in the IDG as appropriate for the beneficiary's plan of care.

Final Decision: Effective for January 1, 2019, we are finalizing statutorily-required updates to the regulations to expand the definition of attending physician at § 418.3 to include physician assistants (PA). We are also finalizing amendments to the regulations at § 418.304 to include the details regarding Medicare payment for designated hospice attending physician services provided by physician assistants.

E. Proposed Technical Correction Regarding Hospice Cap Period Definition

In the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47142), we finalized aligning the cap period, for both the inpatient cap and the hospice aggregate cap, with the federal FY for FY 2017 and later. Therefore, the cap year now begins October 1 and ends on September 30 (80 FR 47186). We proposed to make a technical correction in § 418.3 to reflect the revised timeframes for hospice cap periods. Specifically, we proposed that § 418.3 would specify that the cap period means the twelve-month period ending September 30 used in the application of the cap on overall hospice reimbursement specified in § 418.309.

Additionally, we are making a technical correction in § 418.309 to reflect the revised timeframes for hospice cap periods. Specifically, we are inserting a reference to the definition of ''cap period'' as defined in § 418.3 and removing language setting out specific month and day information. We inadvertently did not propose to amend the regulations at § 418.309, but we now believe it is appropriate to make a technical correction to the regulations text; the specific changes we are making in the regulations simply codify the final policies previously finalized in the FY 2016 Hospice Wage Index and Rate Update final rule (80 FR 47142), and do not reflect any additional substantive changes.

Final Decision: We did not receive any comments on our proposed changes therefore, we are finalizing the changes to the regulations text regarding the hospice cap period as discussed in the proposed rule.

F. Updates to the Hospice Quality Reporting Program (HQRP)

1. Background and Statutory Authority

The Hospice Quality Reporting Program includes HIS and CAHPS. Section 3004(c) of the Affordable Care Act amended section 1814(i)(5) of the Act to authorize a quality reporting program for hospices. Section 1814(i)(5)(A)(i) of the Act requires that beginning with FY 2014 and each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements for that FY. Depending on the amount of the annual update for a particular year, a reduction of 2 percentage points could result in the annual market basket update being less than 0 percent for a FY and may result in payment rates that are less than payment rates for the preceding FY. Any reduction based on failure to comply with the reporting requirements, as required by section 1814(i)(5)(B) of the Act, would apply only for the particular year involved. Any such reduction would not be cumulative nor be taken into account in computing the payment amount for subsequent FYs. Section 1814(i)(5)(C) of the Act requires that each hospice submit data to the Secretary on quality measures specified by the Secretary. The data must be submitted in a form, manner, and at a time specified by the Secretary.

2. General Considerations Used for Selection of Quality Measures for the Hospice QRP

a. Background

The ''Meaningful Measures'' initiative is intended to provide a framework for quality measurement and improvement work at CMS. While this framework serves to focus on those core issues that are most vital to providing high-quality care and improving patient outcomes, it also takes into account opportunities to reduce paperwork and reporting burden on providers associated with quality measurement. To that end, we have begun assessing our programs' quality measures in accordance with the Meaningful Measures framework. We refer readers to the Executive Summary for more information on the ''Meaningful Measures'' initiative.

Comment: CMS received several comments that supported the Meaningful Measures Initiative. Additionally, commenters stated that the ''Strengthen Person and Family Engagement as Partners in Their Care'' Quality Priority, as set out in 83 FR 20935 is an important area that is central to the provision of hospice care delivery. One commenter stated that the following Meaningful Measure Areas are applicable to hospice patients: End of Life Care according to Preferences, Patient's Experience of Care, Patient Reported Functional Outcomes (83 FR 20935). One commenter stated that adverse event reporting in the hospice setting can be challenging due to the variety of levels and settings of care. CMS received a few comments regarding quality measure development processes. Commenters recommended that CMS seek stakeholder input as part of the quality measure development process. Additionally, measure development across all care settings should consider special populations such as those that are terminally ill, and that expected declines in functional status due to advanced illness should not negatively impact the provider. Further, CMS should pursue development of quality measures that are important for hospice patients at the end of life, such as person and family engagement, pain and symptom management, effective communication, care coordination, and care concordant with patients' wishes. Finally, one commenter requested that CMS be transparent in its planning and development of potential HQRP quality measures and inform and engage stakeholders as frequently as possible.

Response: Since no changes were proposed regarding Meaningful Measures or quality measure development processes, comments received are outside the scope of the current rule. We discuss quality development processes in the FY 2018 Hospice final rule (82 FR 36652 through 36654), and we refer readers to that detailed discussion.

b. Accounting for Social Risk Factors in the Hospice QRP

In the FY 2018 Hospice Wage Index final rule (82 FR 36652 through 36654), we discussed the importance of improving beneficiary outcomes including reducing health disparities. We also discussed our commitment to ensuring that medically complex patients, as well as those with social risk factors, receive excellent care. We discussed how studies show that social risk factors, such as being near or below the poverty level, as set out annually in HHS guidelines, *https://www.federalregister.gov/documents/2018/01/18/2018-00814/annual-update-of-the-hhs-poverty-guidelines,* belonging to a racial or ethnic minority group, or living with a disability, can be associated with poor health outcomes and how some of this disparity is related to the quality of health care.[5] Among our core objectives, we aim to improve health outcomes, attain health equity for all beneficiaries, and ensure that complex patients as well as those with social risk factors receive excellent care. Within this context, reports by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) and the National Academy of Medicine have examined the influence of social risk factors in CMS value-based purchasing programs.[6] As we noted in the FY 2018 Hospice Wage Index final rule (82 FR 36652 through 36654), ASPE's report to Congress, which was required by section 2(d) of the IMPACT Act, found that, in the context of value-based purchasing programs, dual eligibility was the most powerful predictor of poor health care outcomes among those social risk factors that they examined and tested. ASPE is continuing to examine this issue in its second report required by the IMPACT Act, which is due to Congress in the fall of 2019. In addition, as we noted in the FY 2018 IPPS/LTCH PPS final rule (82 FR 38428), the National Quality Forum (NQF) undertook a 2-year trial period in which certain new measures and measures undergoing maintenance review have been assessed to determine if risk adjustment for social risk factors is appropriate for these measures.[7] The trial period ended in April 2017 and a final report is available at: *http://www.qualityforum.org/SES_Trial_Period.aspx.* The trial concluded that ''measures with a conceptual basis for adjustment generally did not demonstrate an empirical relationship'' between social risk factors and the outcomes measured. This discrepancy may be explained in part by the ''methods used for adjustment and the limited availability of robust data on social risk factors''. NQF has extended

[5] See, for example United States Department of Health and Human Services. ''Healthy People 2020: Disparities. 2014.'' Available at: *http://www.healthypeople.gov/2020/about/foundation-health-measures/Disparities;* or National Academies of Sciences, Engineering, and Medicine. Accounting for Social Risk Factors in Medicare Payment: Identifying Social Risk Factors. Washington, DC: National Academies of Sciences, Engineering, and Medicine 2016.

[6] Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation (ASPE), ''Report to Congress: Social Risk Factors and Performance Under Medicare's Value-Based Purchasing Programs.'' December 2016. Available at: *https://aspe.hhs.gov/pdf-report/report-congress-social-risk-factors-and-performance-under-medicares-value-based-purchasing-programs.*

[7] Available at: *http://www.qualityforum.org/SES_Trial_Period.aspx.*

the socioeconomic status (SES) trial,[8] allowing further examination of social risk factors in outcome measures.

In the FY 2018/CY 2018 proposed rules for our quality reporting and value-based purchasing programs, we solicited feedback on which social risk factors provide the most valuable information to stakeholders and the methodology for illuminating differences in outcomes rates among patient groups within provider that would also allow for a comparison of those differences, or disparities, across providers. Feedback we received across our quality reporting programs included encouraging CMS to explore whether factors that could be used to stratify or risk adjust the measures (beyond dual eligibility); considering the full range of differences in patient backgrounds that might affect outcomes; exploring risk adjustment approaches; and offering careful consideration of what type of information display would be most useful to the public.

We also sought public comment on confidential reporting and future public reporting of some of our measures stratified by patient dual-eligibility. In general, commenters noted that stratified measures could serve as tools for hospitals to identify gaps in outcomes for different groups of patients, improve the quality of health care for all patients, and empower consumers to make informed decisions about health care. We were encouraged to stratify measures by other social risk factors such as age, income, and educational attainment. With regard to value-based purchasing programs, commenters also cautioned CMS to balance fair and equitable payment while avoiding payment penalties that mask health disparities or discouraging the provision of care to more medically complex patients. Commenters also noted that value-based payment program measure selection, domain weighting, performance scoring, and payment methodology must account for social risk.

As discussed in last year's final rule, 82 FR 36652 through 36654, we are considering options to improve health disparities among patient groups within and across hospitals by increasing the transparency of disparities as shown by quality measures. We also are considering how this work applies to other CMS quality programs in the future. We refer readers to the FY 2018 IPPS/LTCH PPS final rule (82 FR 38403 through 38409) for more details, where we discuss the potential stratification of certain Hospital Inpatient Quality Reporting Program outcome measures. Furthermore, we continue to consider options to address equity and disparities in our value-based purchasing programs.

We plan to continue working with ASPE, the public, and other key stakeholders on this important issue to identify policy solutions that achieve the goals of attaining health equity for all beneficiaries and minimizing unintended consequences.

Comment: CMS received several comments that supported the administration's continued investigation of ways that social risk factors can be applied to quality measure development. Several commenters recommended additional research on the inclusion of social determinants of health in the development of quality measures, especially for those that apply to the seriously and terminally ill population. Commenters also provided several recommendations for possible social risk factors, including native language of the patient, income level, race and ethnicity, adequacy of caregiver support, presence of PTSD, and number of facility-based patients.

Response: We appreciate commenters' continued support of our efforts to attain health equity for all beneficiaries. Since no changes were proposed to the social risk factors, comments received are outside the scope of the current rule. We addressed these issues in the FY 2018 final rule (82 FR 36652 through 36654), and we refer readers to that detailed discussion.

c. New Measure Removal Factor

In the FY 2016 Hospice Final Rule (80 FR 47186), we adopted seven factors for measure removal. We are adopting an eighth factor to consider when evaluating measures for removal from the HQRP measure set: The costs associated with a measure outweighs the benefit of its continued use in the program.

As we discussed in the Executive Summary, we are engaging in efforts to ensure that the HQRP measure set continues to promote improved health outcomes for beneficiaries while minimizing the overall costs associated with the program. These costs are multi-faceted and include not only the burden associated with reporting, but also the costs associated with complying with the program. We have identified several different types of costs, including, but not limited to: (1) Provider and clinician information collection burden and burden associated with the submitting/reporting of quality measures to CMS; (2) the provider and clinician cost associated with complying with other Hospital IQR programmatic requirements; (3) the provider and clinician cost associated with participating in multiple quality programs, and tracking multiple similar or duplicative measures within or across those programs; (4) the cost to CMS associated with the program oversight of the measure including measure maintenance and public display; and/or (5) the provider and clinician cost associated with compliance to other federal and/or state regulations (depending upon the measure). For example, it may be needlessly costly and/or of limited benefit to retain or maintain a measure for which our analyses show no longer meaningfully supports program objectives (for example, informing beneficiary choice or payment scoring). It may also be costly for health care providers to track the confidential feedback and preview reports, as well as publicly reported information on a measure we use in more than one program. We may also have to expend unnecessary resources to maintain the specifications for the measure, including the tools we need to collect, validate, analyze, and publicly report the measure data. Furthermore, beneficiaries may find it confusing to see public reporting on the same measure in different programs. There also may be other burdens associated with a measure that arise on a case-by-case basis.

When these costs outweigh the evidence supporting the continued use of a measure in the HQRP, it may be appropriate to remove the measure from the program. Although we recognize that one of the main goals of the HQRP is to improve beneficiary outcomes by incentivizing health care providers to focus on specific care issues and making public data related to those issues, we also recognize that those goals can have limited utility where, for example, the publicly reported data is of limited use because it cannot be easily interpreted by beneficiaries and used to influence their choice of providers. In these cases, removing the measure from the HQRP may better accommodate the costs of program administration and compliance without sacrificing improved health outcomes and beneficiary choice.

We will remove measures based on this factor on a case-by-case basis. We might, for example, decide to retain a measure that is burdensome for health care providers to report if we conclude that the benefit to beneficiaries justifies the reporting burden. Our goal is to move the program forward in the least burdensome manner possible, while

[8] Available at: *http://www.qualityforum.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=86357.*

maintaining a parsimonious set of meaningful quality measures and continuing to incentivize improvement in the quality of care provided to patients.

We solicited public comment on our proposal to adopt an additional measure removal factor, ''the costs associated with a measure outweighs the benefit of its continued use in the program,'' beginning with the FY 2019 Hospice Wage Index final rule. The vast majority of commenters supported our proposal to adopt an eighth criterion for measure removal. Most commenters were appreciative of CMS acknowledging burden of measures as an important criterion for retaining measures in the HQRP. However, one commenter disagreed with this proposal as discussed further below. A summary of the comments we received on this proposal and our responses to those comments appear below:

Comment: Several commenters raised concerns and provided recommendations. Among those who supported the proposal, several commenters requested CMS seek public input before removing any measure from the HQRP under this criterion. Commenters noted that cost and benefits could be hard to define, and that interested parties may have different perspectives about relative costs versus benefits of a measure. Moreover, one commenter noted that benefits can be difficult to quantify (for example, timely care, good communication, quality of life). Thus, commenters recommended CMS seek public input prior to removing a measure based on this criterion in order to obtain meaningful stakeholder input on benefits of a measure, especially in instances where a measure may be costly, but provides value in distinguishing quality of hospice care. Commenters also recommended that if CMS decides a measure is appropriate for removal based on this criterion, that CMS announce removal of the measure through rulemaking.

Response: We appreciate the commenters input regarding the measure removal factor. We agree with commenters who suggested that CMS seek public input prior to removing measures under this measure removal factor. We value transparency in our processes, and continually seek stakeholder input through education and outreach sessions, other webinars, rulemaking, and other collaborative engagements with stakeholders. We intend to continue to adopt and remove measures through our previously identified processes, which include notice and comment rulemaking for proposed adoption and removal of measures. The only exception to this is that we may immediately remove a measure from the Hospice Program if we identify the measure as having unintended consequences that may adversely affect patient safety.

Comment: The commenter who disagreed with this proposal stated that the existing seven criteria were sufficient for determining removal of a measure from the HQRP, and stated the eighth factor could open the door for providers to argue for dropping a measure they do not want collected for reasons other than true cost versus benefit concerns (for example, arguing to drop a measure they are performing poorly on by stating the measure's costs outweigh the benefits).

Response: We agree that it is possible that providers may recommend removal of measures they do not support based on the case that these measures are costly. However, input from providers is only one element of our case-by-case analysis of measures. We also intend to consider input from other stakeholders, including patients, caregivers, advocacy organizations, healthcare researchers, and other parties as appropriate to each measure. We will weigh the input received from stakeholders with our own analysis of each measure to make a case-by-case determination of whether it's appropriate to remove a measure based on its costs outweighing the benefit of its continued use in the program.

Overall, in our assessment of measure sets across quality reporting and value-based purchasing programs under the Meaningful Measure Initiative, we identified measures that were no longer sufficiently beneficial to justify their costs within their respective programs. However, none of the previously finalized measure removal factors applied to these measures. Therefore, we determined that our measure removal factors were incomplete without this newly identified factor.

Final Decision: After consideration of the comments, we are finalizing our proposal to adopt an additional measure removal factor for the HQRP, ''the costs associated with a measure outweighs the benefit of its continued use in the program,'' for FY 2019 and subsequent years.

3. Previously Adopted Quality Measures for FY 2019 Payment Determination and Future Years

In the FY 2014 Hospice Wage Index final rule (78 FR 48257), and in compliance with section 1814(i)(5)(C) of the Act, we finalized the specific collection of data items that support the following 7 National Quality Forum (NQF)-endorsed measures for hospice:

- NQF #1617 Patients Treated with an Opioid who are Given a Bowel Regimen,
- NQF #1634 Pain Screening,
- NQF #1637 Pain Assessment,
- NQF #1638 Dyspnea Treatment,
- NQF #1639 Dyspnea Screening,
- NQF #1641 Treatment Preferences,
- NQF #1647 Beliefs/Values Addressed (if desired by the patient).

We finalized the following 2 additional measures in the FY 2017 Hospice Wage Index final rule, effective April 1, 2017. Data collected will, if not reported, affect payments for FY 2019 and subsequent years. (81 FR 52163 through 52173):

- Hospice Visits when Death is Imminent,
- Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission.

The Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission measure (hereafter referred to as ''the Hospice Comprehensive Assessment Measure'') underwent an off-cycle review by the NQF Palliative and End-of-Life Standing Committee and successfully received NQF endorsement in July 2017.

Data for the Hospice Visits when Death is Imminent measure pair is being collected using new items added to the HIS V2.00.0, effective April 1, 2017. This one measure comprises a measure pair assessing hospice staff visits to patients at the end of life. Measure 1: Percentage of patients receiving at least one visit from registered nurses, physicians, nurse practitioners, or physician assistants in the last 3 days of life. Measure 2: Percentage of patients receiving at least two visits from medical social workers, chaplains or spiritual counselors, licensed practical nurses or hospice aides in the last 7 days of life. We will need at least 4 quarters of reliable data to conduct the necessary analyses to support submission to NQF. We will also need to assess the quality of data submitted in the first quarter of item implementation to determine whether they can be used in the analyses. We have begun analysis of the data, and, pending analysis, we will submit the Hospice Visits when Death is Imminent measure pair to NQF for endorsement review in accordance with NQF project timelines and call for measures. We will use a similar process to analyze and submit new quality measures to NQF for endorsement in future years. Providers will be notified of measure endorsement

and public reporting through sub-regulatory channels.

In the FY 2015 Hospice Wage Index final rule (79 FR 50491 through 50496), we also finalized the Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Hospice Survey to support quality measures based on patient and family experience of care. We refer readers to section III.F.5 of the FY 2019 final rule for details regarding the CAHPS® Hospice Survey, including public reporting of selected survey measures.

TABLE 7—PREVIOUSLY FINALIZED QUALITY MEASURES AFFECTING THE FY 2019 PAYMENT DETERMINATION AND SUBSEQUENT YEARS

NQF No.	Hospice item set quality measure	Year the measure was first adopted for use in APU determination
1641	Treatment Preferences	FY 2016
1647	Beliefs/Values Addressed (if desired by the patient)	FY 2016
1634	Pain Screening	FY 2016
1637	Pain Assessment	FY 2016
1639	Dyspnea Screening	FY 2016
1638	Dyspnea Treatment	FY 2016
1617	Patients Treated with an Opioid Who are Given a Bowel Regimen	FY 2016
3235	The Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission	FY 2019
TBD	Hospice Visits when Death is Imminent	FY 2019

A summary of the comments we received regarding Hospice Visits and our response to those comments appear below:

Comment: CMS received several comments pertaining to the Hospice Visits when Death is Imminent Measure Pair. Even though commenters supported the Hospice Visits when Death is Imminent Measure Pair, they recommended updates to Measure Pair, such as excluding patients with a length of stay of 7 days or less, aligning the measure pair and the SIA reimbursement structure, and accounting for patient or family refusal of services in measure specifications.

Response: Since no changes were proposed to Hospice Visits when Death is Imminent Measure Pair, comments received are outside the scope of the current rule. We addressed these issues in the FY 2017 final rule (81 FR 52162 through 52169), and we refer the reader to that detailed discussion.

4. Form, Manner, and Timing of Quality Data Submission

a. Background

Section 1814(i)(5)(C) of the Act requires that each hospice submit data to the Secretary on quality measures specified by the Secretary. Such data must be submitted in a form and manner, and at a time specified by the Secretary. Section 1814(i)(5)(A)(i) of the Act requires that beginning with the FY 2014 and for each subsequent FY, the Secretary shall reduce the market basket update by 2 percentage points for any hospice that does not comply with the quality data submission requirements for that FY.

b. Revised Data Review and Correction Timeframes for Data Submitted Using the HIS

In the FY 2015 Hospice Wage Index final rule (79 FR 50486), we finalized our policy requiring that hospices complete and submit HIS records for all patient admissions to hospice on or after July 1, 2014. For each HQRP reporting year, we require that hospices submit data in accordance with the reporting requirements specified in the FY 2015 Hospice final rule (79 FR 50486) for the designated reporting period. Electronic submission is required for all HIS records. For more information about HIS data collection and submission policies and procedures, we refer readers to the FY 2018 Hospice Wage Index final rule (82 FR 36663) and the CMS HQRP website: *http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Hospice-Item-Set-HIS.html.* For more information about CAHPS® Hospice Survey data submission policies and timelines, we refer readers to section III.F.5 of the FY 2019 final rule.

Hospices currently have 36 months to modify HIS records. However, only data modified before the public reporting ''freeze date'' are reflected in the corresponding CMS Hospice Compare website refresh. For more information about the HIS ''freeze date'', see the Public Reporting: Key Dates for Providers page on the CMS HQRP website: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Public-Reporting-Key-Dates-for-Providers.html.*

To ensure that the data reported on Hospice Compare is accurate, we proposed that hospices be provided a distinct period of time to review and correct the data that is to be publically reported. This approach would allow hospices a time frame in which they may analyze their data and make corrections (up until 11:59:59 p.m. ET of the quarterly deadline) prior to receiving their preview reports. Once the preview reports are received, it is infeasible to make corrections to the data underlying the quality measure scores that are to be made public. Therefore, we proposed that for data reported using the HIS that there be a specified time period for data review and a correlating data correction deadline for public reporting at which point the data is frozen for the associated quarter. Similar to the policies outlined in the FY 2016 SNF final rule (81 FR 24271) and the FY 2016 IPPS/LTCH final rule (80 FR 49754), at this deadline for public reporting, we proposed that data from HIS records with target dates within the correlating quarter become a frozen ''snapshot'' of data for public reporting purposes. Any record-level data correction after the date on which the data are frozen will not be incorporated into measure calculation for the purposes of public reporting on the CMS Hospice Compare website. For each calendar quarter of data submitted using the HIS, approximately 4.5 months after the end of each CY quarter we proposed a deadline, or freeze date for the submissions of corrections to records. We note that this new data correction deadline for HIS records is separate and apart from the established 30-day data submission deadline. More information about the data submission deadline can be found at *https://www.cms.gov/Medicare/Quality-*

Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/.

Specifically, each data correction deadline will occur on the 15th of the CY month that is approximately 4.5 months after the end of each CY quarter, and hospices will have up until 11:59:59 p.m. ET on that date to submit corrections or requests for inactivation of their data for the quarter involved. For example, for data reported in CY Q1, the freeze date will be August 15th, for CY Q2 the freeze date will be November 15th and so on. Under this policy, any modification to or inactivation of records that occur after the proposed correction deadline will not be reflected in publicly reported data on the CMS Hospice Compare website. For example, for the data collected during the 1st quarter, that is January 1st through March 31st of a given year, the hospice will have until 11:59:59 p.m. ET on August 15th of that year to ensure all of their data is correct. Any modifications to first quarter data that are submitted to us after August 15th would not be reflected during any subsequent Hospice Compare refresh. We believe that this is a reasonable amount of time to allow providers to make any necessary corrections to submitted data prior to public reporting. This revised policy aligns HQRP with the policies and procedures that exist in our other quality reporting programs including the post-acute care programs, which also enable providers to review their data and make necessary corrections within the specified time frame of approximately 4.5 months following the end of a given CY quarter and prior to the public reporting of such data.

We proposed that beginning January 1, 2019, HIS records with target dates on or after January 1, 2019 will have a data correction deadline for public reporting of approximately 4.5 months after the end of each CY quarter in which the target date falls, and that hospices will have until 11:59:59 p.m. ET on the deadline to submit corrections.

We also proposed that for the purposes of public reporting, the first quarterly freeze date for CY 2019 data corrections will be August 15, 2019. To accommodate those HIS records with target dates prior to January 1, 2019 and still within a target period for public reporting, we also proposed to extend to hospices the opportunity to review their data and submit corrections up until the CY 19 Q1 deadline of 11:59:59 p.m. ET on August 15, 2019. Table 8 presents the proposed data correction deadlines for public reporting beginning in CY 2019.

TABLE 8—DATA CORRECTION DEADLINES FOR PUBLIC REPORTING BEGINNING CY 2019

Data reporting period*	Data correction deadline for public reporting*
Prior to January 1, 2019	August 15, 2019
January 1, 2019–March 31, 2019	August 15, 2019
April 1, 2019–June 30, 2019	November 15, 2019
July 1, 2019–September 30, 2019	February 15, 2020
October 1,2019–December 31, 2019	May 15, 2020

*This CY time period involved is intended to inform both CY 2019 data and to serve as an illustration for the review and correction deadlines that are associated with each calendar year of data reporting quarter.

We received multiple comments pertaining to the revised data review and correction timeframes for data submitted using the HIS. A summary of the comments we received on this proposal and our responses to those comments appear below:

Comment: A majority of the commenters supported the proposed 4.5 month data correction deadline for publicly reported HIS data. Commenters noted that this timeframe was sufficient for providers to review their data and make necessary corrections prior to public reporting. One commenter questioned why CMS would create a shorter, 4.5 month timeframe for data corrections when hospices may submit claims for services up to 12 months from the date of service. This commenter suggested that quality data corrections should be permitted for a similar amount of time. Additionally, CMS received one comment that emphasized the importance of widespread provider education related to the data correction deadline for public reporting of HIS data. This commenter stated that providers may experience challenges submitting and reviewing data in a shorter timeframe due to various circumstances, such as if the hospice is converting to a new EHR or if HIS data collection is not integrated into the hospice's routine assessment.

Response: We appreciate the commenters' support of a 4.5 month data correction deadline for publicly reported HIS data. CMS expects that the data that hospices submit to CMS is as accurate as possible upon the initial submission of that data, and that corrections should not be the rule, but rather the exception here. When a hospice does need to make a modification or inactivation requests, they will continue to be permitted for up to 36 months from the assessment target date. However, HIS data that are submitted more than 4.5 months from the end of the corresponding CY quarter will impact data displayed on Hospice Compare because that data will not be reflected in the hospices measure scores that are displayed on Hospice Compare. More information about modification and inactivation requests can be found in the HIS Manual (Section 3.6) available under the downloads section of the HIS web page on the CMS HQRP website: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Hospice-Item-Set-HIS.html.*

Requiring that data be reviewed and corrected for public reporting purposes within a defined period of time will result in more timely and accurate data on Hospice Compare, ensuring that consumers have access to a resource with consistent and accurate representations of hospice performance. We appreciate the commenter's recommendation to align HQRP and claims policy. Although this new policy will not align HQRP and claims data submission requirements, it will align the HQRP with the policies and procedures that exist in other quality reporting programs including the post-acute care programs. Based on experiences in other settings, this timeframe allows hospices sufficient time to submit, review, and correct their data prior to public reporting of that data.

Finally, we agree that widespread education will be necessary to ensure that providers understand the data correction deadline for public reporting

of HIS data. We will provide future education and outreach activities to educate providers about the data correction deadline for public reporting through HQRP communication channels, which include postings on the CMS HQRP website, announcements in the MLN eNews, and Open Door Forums.

Final Decision: After consideration of the comments, we are finalizing our proposal to implement public reporting data review and correction timeframes for data submitted using the HIS, starting on January 1, 2019.

5. CAHPS® Hospice Survey Participation Requirements for the FY 2023 APU and Subsequent Years

The CAHPS® Hospice Survey of CMS' HQRP is used to collect data on the experiences of hospice patients and the primary caregivers listed in their hospice records. Readers who want more information are referred to our extensive discussion of the Hospice Experience of Care prior to our proposal for the public reporting of measures may refer to 79 FR 50452 and 78 FR 48261.

a. Background and Description of the CAHPS® Hospice Survey

The CAHPS® Hospice Survey is the first standardized national survey available to collect information on patients' and informal caregivers' experience of hospice care. Patient-centered experience measures are a key component of the CMS Quality Strategy, emphasizing patient-centered care by rating experience as a means to empower patients and their caregivers and improving the quality of their care. In addition, the survey introduces standard survey administration protocols that allow for fair comparisons across hospices.

Although the development of the CAHPS® Hospice Survey predates the Meaningful Measures initiative, it used many of the Meaningful Measure principles in its development. The overarching quality priority of ''Strengthen Person and Family Engagement as Partners in Their Care'' includes Meaningful Measure areas such as ''Care is personalized and Aligned with Patient's Goals,'' ''End of Life Care According to Preferences'' and ''Patients Experience of Care.'' The survey questions were developed with input from caregivers of patients who died under hospice care. The survey focuses on topics that are meaningful to caregivers/patients and supports our efforts to put the patient and their family members first.

Details regarding CAHPS® Hospice Survey national implementation, survey administration, participation requirements, exemptions from the survey's requirements, hospice patient and caregiver eligibility criteria, fielding schedules, sampling requirements, survey instruments, and the languages that are available for the survey, are all available on the official CAHPS® Hospice Survey website: *https://www.HospiceCAHPSsurvey.org,* and in the CAHPS® Hospice Survey Quality Assurance Guidelines (QAG), which are posted on the website.

b. Overview of the CAHPS® Hospice Survey Measures

The CAHPS® Hospice Survey is administered after the patient is deceased and queries the decedent's primary, informal caregiver (usually a family member) regarding the patient and family experience of care, unlike the Hospital CAHPS® Survey deployed in 2006 (71 FR 48037 through 48039) and other subsequent CAHPS® surveys. National implementation of the CAHPS® Hospice Survey commenced January 1, 2015 as stated in the FY 2015 Hospice Wage Index and Payment Rate Update final rule (79 FR 50452).

The survey consists of 47 questions and is available (using the mailed version) in English, Spanish, Chinese, Russian, Portuguese, Vietnamese, Polish, and Korean. It covers topics such as access to care, communications, getting help for symptoms, and interactions with hospice staff. The survey also contains 2 global rating questions and asks for self-reported demographic information (race/ethnicity, educational attainment level, languages spoken at home, among others). The CAHPS® Hospice Survey measures received NQF endorsement on October 26th, 2016 (NQF #2651). Measures derived from the CAHPS® Hospice Survey include 6 multi-item (composite) measures and 2 global ratings measures. They received NQF endorsement on October 26, 2016 (NQF #2651). We adopted these 8 survey-based measures for the CY 2018 data collection period and for subsequent years. These 8 measures are reported on Hospice Compare.

Comment: CMS received several comments relating to the range of responses to the CAHPS Survey. One commenter stated that the range of positive versus negative responses is too narrow. Another commented on the validity of a measure ''when the national benchmark scores are all low in one area.'' This commenter also asks if anyone is evaluating these questions.

Response: We are continually analyzing the Hospice CAHPS to ensure there is sufficient variation to justify their inclusion on Hospice Compare. Currently, the data show sufficient variability across hospices to justify their publication on Hospice Compare.

As part of our application for re-endorsement of the CAHPS® Hospice Survey Measures by the NQF next year (2019), the survey data will be fully analyzed again. The measures for the CAHPS® Hospice Survey are reviewed by NQF, the CAHPS Consortium, and the Measures Application Partnership (MAP) which is a joint program through HHS and the NQF.

We are uncertain what the commenter means by scores all being low in one area. We are not sure if this refers to the survey domain or a geographic region. Data may still be valid even if they demonstrate limited variability by domain or geographic area.

Final Decision: After consideration of the comments, we are finalizing our proposal to continue treating the preferred language of the caregiver as a recommended variable.

c. Data Sources

As discussed in the CAHPS® Hospice Survey QAG V4.0 (*http://www.hospiceCAHPSsurvey.org/en/quality-assurance-guidelines/*), the survey has three administration methods: Mail only, telephone only, and mixed mode (mail with telephone follow-up of non-respondents). We previously finalized the participation requirements for the FY 2020, FY 2021, and FY 2022 APUs (82 FR 36673). We proposed to extend the same participation requirements to all future years, for example, the FY 2023, FY 2024 and FY 2025 Annual Payment and subsequent updates. To summarize, to meet the CAHPS® Hospice Survey requirements for the HQRP, we proposed that hospice facilities must contract with a CMS-approved vendor to collect survey data for eligible patients on a monthly basis and report that data to CMS on the hospice's behalf by the quarterly deadlines established for each data collection period. The list of approved vendors is available at: *http://www.hospiceCAHPSsurvey.org/en/approved-vendor-list.*

Hospices are required to provide lists of the patients who died under their care, along with the associated primary caregiver information, to their respective survey vendors to form the samples for the CAHPS® Hospice Survey. We emphasize the importance of hospices providing complete and accurate information to their respective survey vendors in a timely manner.

Comment: One commenter suggested that we change the Quality Assurance Guidelines Manual for the CAHPS®

Hospice Survey so that the ''preferred language'' variable would become a required field for hospices to submit to CMS.

Response: We encourage hospices, with a significant caregiver population that speaks any of the languages the survey offers, to offer the CAHPS® Hospice Survey in all applicable languages. CMS also encourages hospices that serve patient populations that speak languages other than those noted to request that CMS create an official translation of the CAHPS® Hospice Survey in those languages. Send any requests to our technical assistance team at: *hospicecahpssurvey@HCQIS.org* or call them at: 1–844–472–4621. Currently the survey is offered in English and Spanish for the mail and telephone versions of the survey. In addition the mail survey is offered in the following languages: Traditional and simplified Chinese, Russian, Vietnamese, Portuguese, Polish and Korean. Approximately 99 percent of the hospice surveys are completed in English.

Final Decision: After consideration of the comments, we are finalizing our proposal to continue treating the preferred language of the caregiver as a recommended variable.

Hospices must contract with an approved CAHPS® Hospice Survey vendor to conduct the survey on their behalf. Hospices are responsible for making sure their respective survey vendors meet all data submission deadlines. Vendor failures to submit data on time are the responsibility of the hospices. We solicited public comment on this proposal.

Comment: One commenter noted that validating their CAHPS Hospice survey data ''against the files that are submitted to the vendor is a multiple day process, and if discrepancies are identified, often the timeline for survey submission etc. has expired and no way to get those days back.'' This commenter further noted that there appear to be no repercussions for vendors who miss their data submission deadlines. The commenter also suggested that vendors also should have some responsibilities.

Response: We appreciate the commenter's concerns about the process of submitting survey data to their vendor, however, we want to clarify that CMS has no legal authority to directly regulate survey vendors. We do encourage hospices to monitor their vendors by checking data submissions reports regularly to ensure that data are being submitted on time, and to hold their vendors accountable for performance issues.

Comment: Two commenters described expenses associated with participating in the CAHPS Hospice Survey as unfunded burdens. One commenter indicated that providing a reimbursement rate close to the actual market basket rate would ensure the availability of funds to meet the additional administrative burden of the survey. The other commenter indicates the survey places an unfunded burden on hospices and requests that CMS consider including an additional administrative reimbursement mechanism to help cover these costs.

Response: We take a number of steps to reduce the burden of the cost of participating in the CAHPS Hospice Survey. First, we exempt the smallest hospices from participating. Second, we approved a variety of modes of data collection (mail, telephone, and mail with telephone follow-up) which incur different costs. Third, we have approved a wide variety of vendors with different costs and mixed of services, so that hospices can choose the vendor that is most compatible with their needs.

Comment: One commenter suggested fast-tracking studies to compare responses and response rates of alternative modes of conducting the survey, including using tablets, text messages, and other real-time survey options.

Response: We have started examining the possibility of electronic survey options. What we have found out so far is that email or web-based surveys alone often have very low response rates. Electronic surveys would be useful mostly to supplement current survey modes. We are continuing to explore email and web alternatives. We are not currently considering so called ''real-time'' modes of survey administration, such as in-person interviews with tablets. In-person interviewing is very expensive if conducted by a third-party vendor. It runs the risk of significant bias if the survey is conducted by a hospice staff member. For these reasons, we do not believe these are appropriate techniques for the CAHPS® Hospice Survey. Text messaging is mostly useful for very short surveys or to provide a link to a web survey. We do not anticipate shortening our questionnaire to an extent that would be compatible with text messaging without a link. That said, we are continuing to examine the possibilities of using alternative survey methods across all of the CAHPS surveys.

Comment: One commenter suggested that CMS review cover letters and phone script introductions for the CAHPS Hospice Survey. They stated that the current versions require too high a reading level.

Response: The CAHPS Hospice Survey team has recently decided to launch a study of the cover letter and phone script to determine how it can be made more readable to all members of the public. This research will include a review of the grade level of each item and feedback from respondents.

Final Decision: After consideration of the comments, we are finalizing our proposals to continuing to require that hospice providers use CMS-approved vendors to conduct the CAHPS® Hospice Survey using one of the three approved modes, mail, telephone or mixed mode (mail with telephone follow-up).

d. Public Reporting of CAHPS® Hospice Survey Results

We began public reporting of the results of the CAHPS® Hospice Survey on Hospice Compare as of February 2018. The first report of CAHPS® data covered survey results from deaths occurring between Quarter 2, 2015 and Quarter 1, 2017. We report the most recent 8 quarters of data on the basis of a rolling average, with the most recent quarter of data being added and the oldest quarter of data removed from the averages for each data refresh. We detailed the calculation of these measures in 82 FR 36674. We refresh the data 4 times a year in the months of February, May, August, and November. We will not publish CAHPS® data for any hospice that has fewer than 30 completed surveys, due to concerns about statistical reliability. We proposed to use the same public reporting policies in future years.

Comment: A couple of commenters suggested that CMS report more recent data for the CAHPS® Hospice Survey by reducing the number of quarters of data being reported.

Response: Currently, the CAHPS® Hospice Survey reports data on Hospice Compare using a rolling average of the eight most recent quarters of data. We use 8 quarters to maximize the number of hospices that are included on the Compare site. Among the 4,643 hospices on the active agency list for the most recent public reporting period (Q4 2015–Q3 2017), 61 percent (2,832) had 30 completes over 8 quarters (Q4 2015–Q3 2017) and 49 percent (2,262) had 30 completes over 4 quarters (Q4 2016–Q3 2017). For this reason, we plan to continue to report eight quarters of data.

Final Decision: After consideration of the comments, we are finalizing our proposal to continue to report eight quarters of data on Hospice Compare.

e. Volume-Based Exemption for CAHPS® Hospice Survey Data Collection and Reporting Requirements

We previously finalized a volume-based exemption for CAHPS® Hospice Survey Data Collection and Reporting requirements in the FY 2017 final rule (82 FR 36671). We proposed to continue our policy for a volume-based exemption for CAHPS® Hospice Survey Data Collection for FY 2023 and every year thereafter. For example, for the FY 2023 APU, hospices that have fewer than 50 survey eligible decedents/caregivers in the period from January 1, 2020 through December 31, 2020 (reference year) are eligible to apply for an exemption from CAHPS® Hospice Survey data collection and reporting requirements (corresponds to the CY 2021 data collection period). To qualify, hospices must submit an exemption request form for the FY 2023 APU. The exemption request form is available on the official CAHPS® Hospice Survey website: *http://www.hospicecahpssurvey.org.*

Hospices that intend to claim the size exemption are required to submit to CMS their total unique patient count for the period of January 1, 2020 through December 31, 2020 (reference year). The due date for submitting the exemption request form for the FY 2023 APU is December 31, 2021. Exemptions for size are active for 1 year only. If a hospice continues to meet the eligibility requirements for this exemption in future FY APU periods, the organization needs to request the exemption annually for every applicable FY APU period.

For FY 2024 APU, hospices that have fewer than 50 survey eligible decedents/caregivers in the period from January 1, 2021 through December 31, 2021 (reference year) are eligible to apply for an exemption from CAHPS® Hospice Survey data collection and reporting requirements. Hospices that intend to claim the size exemption are required to submit to CMS their total unique patient count for the period of January 1, 2021 through December 31, 2021. The due date for submitting the exemption request form for the FY 2024 APU is December 31, 2022. Exemptions for size are active for 1 year only. If a hospice continues to meet the eligibility requirements for this exemption in future FY APU periods, the organization must request the exemption annually for every applicable FY APU period.

For the FY 2025 APU, hospices that have fewer than 50 survey eligible decedents/caregivers in the period from January 1, 2022 through December 31, 2022 (reference year) are eligible to apply for an exemption from CAHPS® Hospice Survey data collection and reporting requirements for the FY 2025 payment determination. Hospices that intend to claim the size exemption are required to submit to CMS their total unique patient count for the period of January 1, 2022 through December 31, 2022. The due date for submitting the exemption request form for the FY 2025 APU is December 31, 2023. If a hospice continues to meet the eligibility requirements for this exemption in future FY APU periods, the organization must request the exemption annually for every applicable FY APU period.

TABLE 9—SIZE EXEMPTION KEY DATES FY 2023, FY 2024 AND FY 2025

Fiscal year	Data collection year	Reference year (count total number of unique patients in this year)	Size exemption form submission deadline
FY 2023	2021	2020	December 31, 2021.
FY 2024	2022	2021	December 31, 2022.
FY 2025	2023	2022	December 31, 2023.

We received no comments about the size exemption for hospices.

Final Decision: We are finalizing our proposal to exempt to small hospices from data collection for the CAHPS® Hospice Survey through FY 2015 and subsequent years.

f. Newness Exemption for CAHPS® Hospice Survey Data Collection and Reporting Requirements

We previously finalized a one-time newness exemption for hospices that meet the criteria (81 FR 52181). We proposed to continue the newness exemption for FY 2023, FY 2024, FY 2025, and all future years.

Specifically, hospices that are notified about their Medicare CCN after January 1, 2021 are exempted from the FY 2023 APU CAHPS® Hospice Survey requirements due to newness. Likewise, hospices notified about their Medicare CCN after January 1, 2022 are exempted from the FY 2024 APU CAHPS® Hospice Survey requirements due to newness. Hospices notified about their Medicare CCN after January 1, 2023 are exempted from the FY 2025 APU CAHPS® Hospice Survey requirements due to newness. No action is required on the part of the hospice to receive this exemption. The newness exemption is a one-time exemption from the survey. We encourage hospices to keep the letter they receive providing them with their CCN. The letter can be used to show when you received your number.

We proposed that this newness exemption to the CAHPS® Hospice Survey will apply to all future years.

Comment: One commenter stated that they supported a number of the changes being made permanent in this rule, including the ''newness'' exemption from the CAHPS survey, as well as the annual exemption for very small programs.

Response: We appreciate the commenter's support. We have been extending the newness exemption to hospices since data collection started in 2015. Hospices that received their CMS Certification Number (CCN) after the start of the data collection year (January 1) are exempted from data collection for that year. CMS identifies the hospices that qualify for the newness exemption. We plan to continue to offer the newness exemption without change.

Final Decision: After consideration of the comments, we are finalizing our proposal to continue offering the ''newness'' exemption for the CAHPS® Hospice Survey to hospices that receive their CCN number after the data collection year starts.

g. Requirements for the FY 2023 APU

To meet participation requirements for the FY 2023 APU, Medicare-certified hospices must collect CAHPS® Hospice Survey data on an ongoing monthly basis from January 2021 through December 2021 (all 12 months) to receive their full payment for the FY 2023 APU. All data submission deadlines for the FY 2023 APU are in Table 10. CAHPS® Hospice Survey vendors must submit data by the deadlines listed in Table 10 for all APU periods listed in the table and moving

forward. There are no late submissions permitted after the deadlines, except for extraordinary circumstances beyond the control of the provider as discussed above.

TABLE 10—CAHPS® HOSPICE SURVEY DATA SUBMISSION DATES FOR THE APU IN FY 2023, FY 2024, AND FY 2025

Sample months [1] (month of death)	CAHPS Quarterly data submission deadlines [2]
FY 2023 APU	
CY January–March 2021 (Quarter 1)	August 11, 2021.
CY April–June 2021 (Q2)	November 10, 2021.
CY July–September 2021 (Q3)	February 9, 2022.
CY October–December 2021 (Q4)	May 11, 2022.
FY 2024 APU	
CY January–March 2022 (Q1)	August 10, 2022.
CY April–June 2022 (Q2)	November 9, 2022.
CY July–September 2022 (Q3)	February 8, 2023.
CY October–December 2022 (Q4)	May 10, 2023.
FY 2025 APU	
CY January–March 2023 (Q1)	August 9, 2023.
CY April–June 2023 (Q2)	November 8, 2023.
CY July–September 2023 (Q3)	February 14, 2024.
CY October–December 2023 (Q40)	May 8, 2024.

[1] Data collection for each sample month initiates 2 months following the month of patient death (for example, in April for deaths occurring in January).

[2] Data submission deadlines are the second Wednesday of the submission months, which are the months August, November, February, and May.

h. Requirements for the FY 2024 APU

To meet participation requirements for the FY 2024 APU, Medicare-certified hospices must collect CAHPS® Hospice Survey data on an ongoing monthly basis from January 2022 through December 2022 (all 12 months) to receive their full payment for the FY 2024 APU. All data submission deadlines for the FY 2024 APU are in Table 10. CAHPS® Hospice Survey vendors must submit data by the deadlines listed in Table 10 for all APU periods listed in the table and moving forward. There are no late submissions permitted after the deadlines, except for extraordinary circumstances beyond the control of the provider as discussed above.

i. Requirements for the FY 2025 APU

To meet participation requirements for the FY 2025 APU, Medicare-certified hospices must collect CAHPS® Hospice Survey data on an ongoing monthly basis from January 2023 through December 2023 (all 12 months) to receive their full payment for the FY 2025 APU. All data submission deadlines for the FY 2025 APU are in Table 10. CAHPS® Hospice Survey vendors must submit data by the deadlines listed in Table 10 for all APU periods listed in the table and moving forward. There are no late submissions permitted after the deadlines, except for extraordinary circumstances beyond the control of the provider as discussed above.

j. For Further Information About the CAHPS® Hospice Survey

We encourage hospices and other entities to learn more about the survey on: *https://www.hospice CAHPSsurvey.org.* For direct questions, contact the CAHPS® Hospice Survey Team at *hospiceCAHPSsurvey@HCQIS.org* or telephone 1–844–472–4621.

6. Public Display of Quality Measures and Other Hospice Data for the HQRP

Under section 1814(i)(5)(E) of the Act, the Secretary is required to establish procedures for making any quality data submitted by hospices available to the public. These procedures shall ensure that a hospice has the opportunity to review the data that is to be made public prior to such data being made public; the data will be available on our public website.

To meet the PPACA's requirement for making quality measure data public, we launched the Hospice Compare website in August 2017. This website allows consumers, providers, and other stakeholders to search for all Medicare-certified hospice providers and view their information and quality measure scores. Since its release, the CMS Hospice Compare website has reported 7 HIS Measures (NQF #1641, NQF #1647, NQF #1634, NQF #1637, NQF #1639, NQF #1638, and NQF #1617). In February 2018, CAHPS® Hospice Survey measures (NQF #2651) were added to the website.

a. Adding Quality Measures to Publically Available Websites—Procedures To Determine Quality Measure Readiness for Public Reporting

Quality measures are added to Hospice Compare once they meet readiness standards for public reporting, which is determined through the following processes.

First, we assess the reliability and validity of each quality measure to determine the scientific acceptability of each measure. This acceptability analysis is the first step in determining a measure's readiness for public reporting. We evaluate the quality measures using the NQF Measure Evaluation Criteria found on the NQF website here: *http://www.qualityforum.org/Measuring_Performance/Submitting_Standards/Measure_Evaluation_Criteria.aspx#scientific.* Analyses to assess scientific acceptability of new measures are important to determine if the measure produces reliable and credible results when implemented.

Reliability testing demonstrates that a measure is correctly specified by ensuring that ''measure data elements are repeatable, producing the same results a high proportion of time when assessed in the same population in the same time period and/or that the measure score is precise.'' Validity testing demonstrates that measure specifications are consistent with the focus of the measure and that the measure score can accurately distinguish between quality of care provided by providers. Reliability and validity are tested at both the data item and quality measure levels. For example, at the item-level, we examine the missing data rate and cross validate the data elements between the assessment data and Medicare claims to ensure validity of the data elements. At the quality measure level, we conduct split-half analysis, consistency analysis across time, stability analysis, and signal-to-noise analysis to demonstrate the reliability of the measures. We examine the relationships between different quality measures assessing similar quality areas to demonstrate the validity of the quality measures.

To establish reliability and validity of the quality measures, at least 4 quarters of data are analyzed. The first quarter of data after new adoption of, or changes to, standardized data collection tools may reflect the learning curve of the hospices; we first analyze these data separately to determine the appropriateness to use them to establish reliability and validity of quality measures.

To further inform which of the measures are eligible for public reporting, we then examine the distribution of hospice-level denominator size for each quality measure to assess whether the denominator size is large enough to generate the statistically reliable scores necessary for public reporting. The goal of this analysis is to establish the minimum denominator size for public reporting, which is referred to as reportability analysis. Reportability analysis is necessary because, if a hospice QM score is generated from a denominator that is too small, the observed measure score may be a biased assessment of the provider's performance, yielding scores that are statistically unreliable. Thus, we have set a minimum denominator size for public reporting, as well as the data selection period necessary to generate the minimum denominator size for the CMS Hospice Compare website.

This approach to testing reliability, validity, and reportability of quality measures (QMs) is consistent with the approach taken in other CMS quality reporting programs. Further, CMS provides hospices the opportunity to review their measures through their Certification and Survey Provider Enhanced Reports (CASPER) and additionally publishes the methodology related to the calculation of each quality measure in the Hospice Quality Measure User's Manual, which is updated with the addition of each quality measure to the Hospice QRP. Since December 2016, two provider feedback reports have been available to providers: The Hospice-Level Quality Measure Report and the Patient Stay-Level Quality Measure Report. These confidential feedback reports are available to each hospice using the CASPER system, and are part of the class of CASPER reports known as Quality Measure (QM) Reports. These reports are for the purposes of internal provider quality improvement and are available to hospices on-demand. We encourage providers to use the CASPER QM Reports to review their HIS quality measures regularly to ensure submitted quality measure data is correct. For more information on the CASPER QM Reports, we refer readers to the CASPER QM Factsheet on the HQRP website at: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/HQRP-Requirements-and-Best-Practices.html.*

Because we follow the above outlined processes in determining the readiness for a quality measure to be publicly reported, and perform the necessary analysis to determine and demonstrate that our measures meet the NQF measure evaluation criteria prior to publicly reporting provider performance on these quality metrics, we proposed to announce to providers any future intent to publicly report an already-adopted quality measure on Hospice Compare or other CMS website, including timing, through sub-regulatory means.

Conducting these analyses and announcing measure timelines and readiness for public reporting through sub-regulatory channels will allow us to implement measures for public reporting in a more expeditious, yet still transparent manner, benefitting the public by providing QM data as soon as it is determined to meet the minimum standards for public reporting. We will continue to provide updates about public reporting of QMs through the normal CMS HQRP communication channels, including postings and announcements on the CMS HQRP website, MLN eNews communications, national provider association calls, and announcements on Open Door Forums. Note that we are not making any changes to how CMS adopts substantive measures for the HQRP.

We received multiple comments on this proposal to announce to providers any future intent to publicly report a quality measure on Hospice Compare, including timing, through sub-regulatory means. A summary of the comments we received on this topic and our responses to those comments are below:

Comment: CMS received several comments on this proposal. Most commenters supported this proposal. Although commenters appreciated CMS' interest to move measures to public reporting in an expeditious manner, several commenters had concerns about this proposal and several were not supportive of it. Those who conditionally supported this proposal requested CMS develop separate processes for announcing readiness for public reporting and public reporting timelines for NQF- vs. non-NQF-endorsed measures. Some commenters stated that this proposal had the potential to reduce opportunities for public input and decrease transparency. Specific concerns from commenters are addressed in further detail below:

Several commenters had concerns about this proposal; the majority of concerns stemmed from the desire to maintain transparency and opportunity for stakeholder input that CMS has established in the HQRP measure implementation processes to-date. Commenters appreciated CMS' methodical approach to-date and expressed concern that, without proposing public reporting implementation dates through rulemaking, there may not be opportunity for providers to comment, provide input, or give feedback before a public reporting date is set. One commenter stated that a sub-regulatory process may fracture communication channels for conveying information to the public, limiting opportunity for review and input.

Apart from the annual rulemaking cycle, should CMS move forward with a sub-regulatory process, a couple of commenters suggested that CMS develop criteria that would guide CMS' decision regarding which measures are displayed on Hospice Compare, and that regardless of the channel (regulatory or sub-regulatory), CMS consider public comments and feedback on quality measures proposed to be added to Hospice Compare to promote transparency and to solicit provider input.

Among conditionally supportive commenters, some recommended separate processes for NQF- vs non-

NQF-endorsed measures. Commenters stated that a sub-regulatory process would be appropriate for NQF-endorsed measures, as these measures will have undergone a thorough review process and the public will have had ample opportunity to comment on these measures. However, commenters stated that for measures that are not NQF-endorsed, it would be most appropriate for CMS to go through formal rulemaking processes prior to publishing these measures on Hospice Compare and for CMS to continue to submit such measures to public notice through rulemaking prior to any public display. Commenters suggested CMS to receive full stakeholder input through the rulemaking process on quality measures that are not NQF-endorsed.

Other comments received related to this proposal included a statement from one commenter that it is ''too early'' to implement a sub-regulatory process, given the relative newness of the HQRP and Hospice Compare. Additionally, a couple of commenters recommended that in addition to the processes described in the proposed rule for assessing readiness (validity and reliability testing, etc.) and the NQF endorsement processes, CMS implement a user testing process that enables CMS to identify those measures for which performance can be translated into reliable and actionable information for beneficiaries.

Response: We agree with commenters that a transparent process and allowing ample opportunity for public input prior to displaying a measure on Hospice Compare is a vital component of moving a measure from data collection to public reporting. We agree that stakeholder input is invaluable to this process, and our intent is to continue to communicate clearly with providers and continue to solicit their input on all aspects of the measure development lifecycle. As set out at section 1814(i)(5)(E) of the Act, the statutory requirements for public reporting of quality measures (1) allow providers an opportunity to review their data prior to public reporting of any data and (2) require CMS to display measures for public reporting. This is evidenced where the statute states: The ''Secretary shall establish procedures for making data . . . available to the public'' and ''the Secretary shall report quality measures that relate to hospice care provided by hospice program on the internet website of the Medicare & Medicaid Services.'' Now that we have communicated in this rule the procedure for determining readiness for public reporting through rulemaking, we can announce readiness and timelines for publicly reporting measures through sub-regulatory channels. The annual rulemaking cycle is not the only channel by which information can be communicated to the public in a transparent and collaborative manner. Sub-regulatory channels can be equally effective and timelier at communicating information to the public. Therefore, we view this proposal not as a loss of opportunity for dialogue or transparency, but as a way to change the channel by which we communicate with the public to receive input on one specific aspect of the QM development and implementation lifecycle. Moreover, we stated that this process has the potential to improve timeliness of communication with the public as we would no longer have to wait for the annual rulemaking cycle to commence conversations about readiness for public reporting. The commenters' concerns about transparency and public input can be addressed through sub-regulatory channels.

In the context of commenters' concerns—especially those about NQF- vs. non-NQF-endorsed measures—we would like to clarify that this policy does not eliminate opportunities for providers to comment on the public reporting of newly adopted measures through rulemaking. Specifically, several commenters requested CMS ''ensure there is a formal public notice and comment process prior to publishing the measures on Hospice Compare'' and that CMS ''continue to submit such [non-NQF-endorsed] measures to public notice through rulemaking prior to any public display''. We would like to clarify that this policy will not change how measures are adopted in the HQRP, only how we communicate when measures are ready to be displayed on Hospice Compare. New measures to be adopted in the HQRP will have been reviewed and supported by the consensus-based entity Measure Application Partnership, convened by the NQF, and the public can comment on the measures as part of that process. We will continue to propose measures (NQF- or non-NQF-endorsed) for adoption in the HQRP through the annual rulemaking process, which will allow opportunities for providers to comment—through rulemaking—on proposed measures. When measures are proposed for initial adoption through rulemaking, providers have the opportunity to voice concerns about any aspect of the proposed measure, including public reporting. Thus, this policy aligns with commenters who requested that CMS ''ensure a formal public notice and comment process prior to publishing measures on Hospice Compare'' and that CMS ''continue to submit such [non-NQF-endorsed] measures to public notice through rulemaking prior to any public display''.

Regarding comments on the process that CMS uses to determine readiness for Hospice Compare, we direct providers to the text in the proposed rule, 83 FR 20960, which outlines our process for determining readiness for public display (for example, validity and reliability analyses; reportability analysis), which does include a user testing process.

Final Decision: After consideration of the comments, we are finalizing our proposal to announce to providers any future intent to publicly report a quality measure on Hospice Compare or other CMS website, including timing, through sub-regulatory means.

b. Quality Measures To Be Displayed on Hospice Compare in FY 2019

We anticipate that we will begin public reporting of the HIS-based Hospice Comprehensive Assessment Measure (NQF #3235), a composite measure of the 7 original HIS Measures (NQF #1641, NQF #1647, NQF #1634, NQF #1637, NQF #1639, NQF #1638, and NQF #1617), on the CMS Hospice Compare website in Fall 2018. For more information on how this measure is calculated, see the HQRP QM User's Manual v2.00 in the ''Downloads'' section of the Current Measures page on the CMS HQRP website: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Current-Measures.html.* The reporting period for which the measure will be displayed on the CMS Hospice Compare website will align with the currently established procedures for the 7 HIS measures. For more information about reporting periods, see the Public Reporting: Key Dates for Providers page on the CMS HQRP website: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Public-Reporting-Key-Dates-for-Providers.html.* We used the analytic approach described above to determine reliability, validity, and reportability of the HIS-based Hospice Comprehensive Assessment Measure (NQF #3235). Reliability and validity testing found that the Hospice Comprehensive Assessment Measure had high reliability and validity. For more information about the reliability and validity of this measure, see the NQF Palliative and End-of-Life Care Off-Cycle Measure Review 2017 Publication available for

download here: *https://www.qualityforum.org/Publications/2017/09/Palliative_and_End-of-Life_Care_Off-Cycle_Measure_Review_2017.aspx.* Per the approach described above, we then conducted reportability analysis. Based on reportability analysis results, we determined this measure, calculated based on a 12-rolling month data selection period, to be eligible for public reporting with a minimum denominator size of 20 patient stays. A majority of hospices, using rolling 4 quarters of data, have at least 20 patient stays eligible for the calculation and public reporting of the Hospice Comprehensive Assessment Measure. We plan to begin public reporting of the Hospice Comprehensive Assessment Measure with a minimum denominator size of 20.

We also will begin public reporting of the HIS-based Hospice Visits when Death is Imminent Measure Pair in FY 2019. The same analytic approach described above will be applied to determine the reliability, validity, and reportability of the Hospice Visits when Death is Imminent Measure Pair. This measure pair assesses hospice staff visits to patients at the end of life. Draft specifications for the Hospice Visits when Death is Imminent measure pair are available on the CMS HQRP website here: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Current-Measures.html.* With the finalization of our proposal to announce future intentions to publicly display hospice quality measures through sub-regulatory means, the exact timeline for public reporting of this measure pair will be announced through regular sub-regulatory channels once necessary analyses and measure specifications are finalized.

A summary of the comments received and our responses to those comments are below:

Comment: CMS received several supportive comments on the public display of the Hospice Comprehensive Assessment measure and the Hospice Visits when Death is Imminent Measure Pair in FY 2019. Most commenters focused on the Hospice Visits when Death is Imminent Measure Pair and were conditionally supportive of publicly reporting the measure pair. Those who were conditionally supportive asked that the measures be accompanied by text explaining the measures when publicly reported. CMS also received a comment opposing the public display of these measures in FY 2019, which is discussed below.

Response: We appreciate the commenters' support of publicly displaying these two measures in FY 2019. We address commenters' specific concerns with respect to the public display of these measures below.

Comment: CMS received one comment that oppose public display of the Hospice Comprehensive Assessment Measure and Hospice Visits when Death is Imminent Measure Pair in FY 2019. This commenter stated that stakeholders have not had enough feedback data on their own individual measure performance to become comfortable with these measures and take steps to improve their measure performance prior to public reporting. The commenter suggested that CMS finalize policies to ensure hospices are able to review, analyze, and act on measure performance data before they are publicly reported.

Response: As statutorily required by section 1815(i)(5)(E) of the Act, we must ''ensure that a hospice program has the opportunity to review data that is to be made public with respect to the hospice program prior to such data being made public.'' As such, we are not only committed, but statutorily obligated, to ensuring providers have the opportunity to review, analyze, and act on measure performance data before any measure performance data are publicly displayed. In accordance with the statutory requirements of the Act, we implemented the CASPER QM reports and the Provider Preview Reports as the manner by which hospices review their data prior to public reporting. The Preview Reports allow providers the opportunity to view their data exactly as it will be displayed on Hospice Compare, prior to any display. Should a provider find an error in the data to be displayed, the provider can follow the established process to request review of the data inaccuracy; should the inaccuracy be verified, we suppress that provider's data for that quarter. This process provides a safeguard for ensuring that the data reported on Compare are accurate. In addition, the CASPER QM reports allow providers to view their performance prior to Preview reports and prior to any public display, thus giving providers the opportunity to identify areas for improvement and implement performance improvement projects prior to the start of public reporting. For more information about these reports, see section III.F.6a of this final rule. The Hospice Comprehensive Assessment Measure was added to the CASPER QM report in February 2018, allowing providers ample time to assess their performance on the measure and implement performance improvement projects as appropriate. We will also post the Hospice Visits when Death is Imminent Measure, which comprises a pair of measures, to the CASPER QM reports before public reporting of the measures so that providers can become familiar with them. Both measures, the Hospice Comprehensive Assessment Measure and Death is Imminent Measure, will also appear on providers' Preview Reports to ensure the scores to be displayed are accurate. Preview Reports will be released approximately 2 months prior to the Hospice Compare refresh in which measures are released. We will announce the timeline for reporting of these measures on the CASPER QM reports, Provider Preview Reports, and Hospice Compare once determined via the CMS HQRP website, listserv messages via the Post-Acute Care QRP listserv, MLN Connects® National Provider Calls & Events, MLN Connects® Provider eNews and announcements on Open Door Forums and Special Open Door Forums.

Comment: Several commenters stated that the Hospice Visits when Death is Imminent Measure Pair, when publicly reported, may be confusing or misleading for consumers. For example, commenters shared that multiple factors, such as a patient and family's right to refuse visits, may account for lower performance on the measure pair. The commenters recommended that the measures be accompanied by text explaining this nuance when publicly reported.

Response: We are committed to ensuring that all publicly reported data is presented in an appropriate and meaningful manner to the public. As such, we work with our website development contractor to ensure that the Hospice Compare website is regularly tested for usability, readability, and navigation. We complete user access testing (UAT) with each refresh of the Hospice Compare website to ensure that the publicly posted data is accurate and clear. Furthermore, text on the Hospice Compare website complies with the Plain Language Act of 2010. In addition to complying with the Plain Language Act, we also take into account variations in health and general literacy, as well as solicit input from key stakeholders and technical experts in the development and presentation of publicly available data.

As we add more measures to the Hospice Compare website, including the Hospice Comprehensive Assessment Measure and Hospice Visits when Death is Imminent Measure Pair, we will, with consultation from key stakeholders, carefully craft explanatory language to ensure that consumers understand the measure's intent, relationship to quality,

and any necessary measure-specific nuance.

Comment: CMS received several general comments about public reporting of HIS-based measures. A few commenters were concerned that providers could easily change self-reported HIS data to avoid unfavorable scores being publicly reported on the Hospice Compare website. Another commenter stated that CMS should make more timely updates to quality data on Hospice Compare. This commenter stated that the lack of timely updates to the site may disincentive providers from implementing quality improvement efforts because it could take a year or longer to have updated data reflected on the Hospice Compare website. Another commenter stated that the measures currently on the Hospice Compare website were not clear as to if they are process measures, outcome measures, or measures of consumer feedback. Another commenter stated that consumers may misunderstand the current measures' intent and relationship to quality. Finally, CMS received one comment asking that CMS finalize policies so that measures will not be publicly posted based on the first year of performance data.

Response: Because no changes were proposed to validation of HIS data, frequency of updates to Hospice Compare, process for writing text for Hospice Compare, or data eligible for public reporting, comments received are outside the scope of the current rule.

We acknowledge the commenter's concern regarding the validity of self-reported HIS measures. Publicly reported QMs rely on the submission of valid and reliable data at the patient level. Our measure development contractor conducts ongoing testing and validation of the QM data to identify data irregularities and trends.

Furthermore, we are taking steps to ensure that publicly reported data are accurate. See section III.F.4b for more details on our finalized proposal to add a 4.5 month data correction deadline for public reporting for HIS data. This deadline will ensure that providers cannot correct data indefinitely and result in consumers receiving an inconsistent and potentially inaccurate view of hospice performance. By ensuring that data are reviewed and corrected prior to public reporting, data on Hospice Compare will be a consistent and accurate representation of hospice performance.

We are also committed to posting data on the Hospice Compare website that are as timely as possible. However, there will be an inevitable lag between data submission and public reporting on Hospice Compare to allow for sufficient time for us to process the data, including completing any required testing and validation, and for hospices to review and correct any inaccuracies. This lag in public reporting is consistent across Quality Reporting Programs.

In reference to the text posted on Hospice Compare, we agree that it is important for consumers to be able to distinguish between process, outcome, and consumer feedback measures. Therefore, we have decided to separate the data into two sections on the Hospice Compare website: 'Family experience of care' and 'Quality of patient care'. Both sections have accompanying text explaining their data source. The website explains that the 'Family experience of care' data comes from a national survey that asks a family member or friend of a hospice patient about their hospice care experience. The 'Quality of patient care' section explains that this data is reported by hospices using the Hospice Item Set (HIS). Furthermore, we have included text explaining why these measures should be important to consumers.

In response to the commenter's recommendation of finalized policies so that measures will not be publicly posted based on the first year of performance data, we would like to remind readers that quality measures are added to Hospice Compare once they meet NQF readiness standards for public reporting, which is determined through the process outlined in section III.F.6a of this final rule. We analyze at least the first year of performance data to establish reliability and validity of the quality measures. If this data and the resultant quality measure scores are found to be reliable, valid, and scientifically acceptable from comprehensive analyses, we would publicly report this data if they meet NQF readiness standards.

Comment: A few commenters supported adding any new data to the Hospice Compare website. These commenters asked that no new data be added to Hospice Compare until after CMS correct any inaccurate data posted on the website. These commenters stated that the search function was returning inaccurate results and provider demographic data was incorrect on Hospice Compare. Moreover, the commenters stated that the data was updated too frequently, resulting in ''week-to-week'' changes and user confusion.

Response: Because no changes were proposed to the Hospice Compare search functionality or posted demographic data, comments received are outside the scope of the current rule. However these comments made inaccurate statements that we want to correct. We are committed to posting accurate data to the Hospice Compare website, and goes to great lengths to ensure accuracy. Since the launch of the website, we would like to reassure the public of the accuracy of quality measure data on Hospice Compare. Quality measure data accuracy has never been questioned or an issue on Hospice Compare.

The one area we have addressed is improving the accuracy of the demographic data and search function. We have been transparent about addressing these issues with communications provided on both the Hospice Quality Reporting and the Hospice Compare websites. As explained in our communications, the demographic data reflects what hospices have provided. Updates to demographic data need to be made through the hospice provider's MAC. Information about updating hospice demographic data can be found in the How to Update Demographic Data document in the downloads section of the Public Reporting: Background and Announcements page on the CMS HQRP website: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Public-Reporting-Background-and-Announcements.html.* We also recognize that updates to provider's demographic data (for example, address, telephone number, ownership) may take up to 6-months to appear on the Hospice Compare website. The process to update demographic data is independent of updating quality measure data or service areas and is controlled by the Medicare Administrative Contractor (MAC). It is important for hospices to review their HIS and CAHPS® Provider Preview Reports to verify that the demographic data is accurate. If inaccurate or outdated demographic data are included on the Preview Report or on Hospice Compare, hospice providers should follow guidance in the How to Update Demographic Data document in the downloads section of the Public Reporting: Background and Announcements page on the CMS HQRP website: *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Public-Reporting-Background-and-Announcements.html.*

As for the search function, we agree with providers that the accuracy of the search function is integral to the success of any Compare website. The search function, though, relates only to demographic results. The resulting

quality data provided about each hospice is accurate and has always been, including from the launch of Hospice Compare website. The current search function file, uploaded in May 2018, has addressed the accuracy and specificity of the Compare search function, as it is based on three sources of data: Claims, HIS, and geographic data. In response to comments about the accuracy of the Hospice Compare search function, we appreciate commenters' concerns but believe that, since the launch of Compare, the refinements we have made to the data underlying the search function have addressed the accuracy of the search function. We strive to continually improve and will continue to refine methods and data underlying the search function as appropriate. At this time, the search function works well because it is based on the geographic data using Core-Based Statistical Areas (CBSAs) that match to the paid claims and reflect the service areas of the Medicare-certified hospices. Since claims data lag, the CBSA's reflect the service areas at that time. Therefore to add more timely service area data, the unique zip codes from the HIS files are added. Consequently any new zip codes added to a service area likely come from HIS data and thereby update the search function during these quarterly refreshes. This is expected as part of the search function in the same way that updates to HIS and CAHPS quality data are expected quarterly on Hospice Compare. Therefore, in response to the commenter's concern about frequency of data updates on Compare and how that impacts the consistency of the search function, we would like to note that the file used to power the search function is updated quarterly, at the same time we update the quality measure data displayed on Hospice Compare. These quarterly updates to Hospice Compare are the regular refresh timeframes for this website so that Hospice Compare provides users with updated data from HIS and CAHPS® Hospice Surveys, which we believe stakeholders want the most recently available data. These quarterly refreshes also update the database of zip codes used to power the search function with new data collected from the HIS, providing a more comprehensive set of hospice service areas.

c. Updates to the Public Display of HIS Measures

As discussed previously, we strive to put patients first, ensuring they are empowered to make decisions about their own healthcare, along with their clinicians, using data-driven information that are increasingly aligned with a parsimonious set of meaningful quality measures that drive quality improvement. We recognize that the HQRP represents a key component in bringing quality measurement, transparency, and improvement to the hospice care setting. To that end, we have begun analyzing our programs' measures in accordance with the Meaningful Measures framework to ensure high quality care that empowers patients to make decisions about their own healthcare, using consumable, data-driven information.

With this framework in mind, we evaluated our measure set and specifically the measure Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission (NQF #3235) which we intend to publicly display on the Hospice Compare website in FY 2019. Through feedback received, we have learned that while the 7 original HIS measures (NQF #1641, NQF #1647, NQF #1634, NQF #1637, NQF #1639, NQF #1638, and NQF #1617) that represent the individual care processes captured in this composite measure are important, the composite measure provides for consumers a more accessible measure for evaluating the quality of a hospice.

The composite measure is more illustrative than the individual, high performing measures based on analyses. The hospice performance scores on the 7 component measures that comprise the composite measure are high (a score of 90 percent or higher on most component measures); however, analyses also show that, on average, a much lower percentage of patient stays received all seven desirable care processes at admission. Thus, by assessing hospices' performance of a comprehensive assessment through an all-or-none calculation methodology, the composite measure sets a higher standard of care for hospices and reveals a larger performance gap. Meaning, the composite measure holds hospices to a higher standard by requiring them to perform all seven care processes for a given patient admission. The performance gap identified by the composite measure creates opportunities for quality improvement and may motivate providers to conduct a greater number of high priority care processes for as many patients as possible upon admission to hospice.

The table below shows the mean measure score across all hospices for Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment Measure at Admission and the 7 component measures that will no longer be routinely individually displayed on Hospice Compare once the composite measure is displayed.

TABLE 11—MEAN MEASURE SCORE OF THE HOSPICE AND PALLIATIVE CARE COMPOSITE PROCESS MEASURE—COMPREHENSIVE ASSESSMENT MEASURE AT ADMISSION AND 7 ORIGINAL HIS COMPONENT MEASURES

Measure title	Measure score (percent)
Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission (NQF #3235)	71.3
Component Measure: Treatment Preferences (NQF #1641)	98.8
Component Measure: Beliefs/Values (NQF #1647)	95.9
Component Measure: Pain Screening (NQF #1634)	93.2
Component Measure: Pain Assessment (NQF #1637)	72.5
Component Measure: Dyspnea Screening (NQF #1639)	98.5
Component Measure: Dyspnea Treatment (NQF #1638)	92.8
Component Measure: Bowl Regimen (NQF #1617)	97.5

Further, reporting of these 7 component measures alongside the composite measure may be redundant and may result in confusion and burden for users as they attempt to interpret data displayed on the Hospice Compare website. However, we also recognize that the component measures may be useful to some individuals using Hospice Compare. Therefore, while we will no longer directly display the 7 component measures as individual measures on Hospice Compare, once the composite measure is displayed, we will still provide the public the ability to view these component measures in a manner that avoids confusion on Hospice Compare. We plan to achieve this by reformatting the display of the component measures so that they are only viewable in an expandable/collapsible format under the composite measure itself, thus allowing users the opportunity to view the component measure scores that were used to calculate the main composite measure score.

This will change only the display of data on Hospice Compare for the HIS-based measure(s). This will not change any current HIS data collection procedures outlined in the FY 2018 Hospice final rule (82 FR 36663 through 36664). Providers will still collect all

HIS items in the current version of the HIS (HIS V2.00.0), including the 7 aforementioned component measures. Providers will continue to follow the coding guidelines and policies outlined in the HIS Manual V2.00, which can be found under the Downloads section of the HIS page of the HQRP website *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/Hospice-Item-Set-HIS.html*. Therefore, this change to the display of data on Hospice Compare will not impact data collection. Additionally, because the composite measure is composed of the 7 aforementioned component measures, these component measures will still be reported on CASPER QM reports and HIS provider preview reports for providers' internal quality purposes.

We received multiple comments on this proposal to no longer directly display the 7 component measures as individual measures on Hospice Compare, once Hospice Comprehensive Assessment measure is displayed. A summary of the comments we received on this topic and our responses to those comments are below:

Comment: CMS received multiple comments that were supportive of no longer directly displaying the 7 component HIS measures as individual measures on Hospice Compare once the Hospice Comprehensive Assessment measure is publicly reported. Commenters noted that displaying the 7 component measures in an expandable/collapsible format under the Hospice Comprehensive Assessment measure is preferable for consumers. In addition to receiving comments indicating general support, commenters also raised several concerns about the proposed changes to display of HIS data on Compare.

Response: We appreciate commenters' support of no longer directly displaying the 7 component HIS measures as individual measures on Hospice Compare once the Hospice Comprehensive Assessment measure is publicly reported. We address commenters' specific concerns with respect to the public display of the Hospice Comprehensive Assessment measure and its composite of the 7 component original HIS measures below.

Comment: Many commenters stated that, since the Hospice Comprehensive Assessment measure is a composite of the 7 HIS measures, a low score for one of the 7 HIS measures could easily skew providers' scores on the Hospice Comprehensive Assessment measure. One commenter stated that this could be especially problematic for small hospice providers. Commenters stated that the reformatted display of Hospice Compare would make it more difficult for consumers to find or even hide the scores for the 7 component measures hospices were performing well and that may be more easily interpretable to them in favor of directly displaying the one Hospice Comprehensive Assessment measure with less favorable performance.

Response: We agree with commenters that the 7 component HIS measures may be useful to some consumers of the site. Therefore, as stated in the proposed rule, we will not be removing the measures, nor will we obfuscate the display of these measures on Compare. We plan to display the 7 component HIS measures directly under the Hospice Comprehensive Assessment measure in an expandable/collapsible format. We will make it clear that the 7 component measures are available for those who would like more information about provider quality scores. Furthermore, as with the currently displayed HIS measures, we will include text explaining the Hospice Comprehensive Assessment measure and its relation to quality care.

Analyses indicate that the Hospice Comprehensive Assessment measure is more illustrative than the component, high performing measures and, on average, a much lower percentage of patient stays received all 7 desirable care processes at admission. Thus, by assessing hospices' performance of a comprehensive assessment through an all-or-none calculation methodology, the Hospice Comprehensive Assessment measure sets a higher standard of care for hospices and reveals a larger performance gap. This performance gap creates opportunities for quality improvement and may motivate providers to conduct a greater number of high priority care processes for as many patients as possible upon admission to hospice. Furthermore, discussions with key stakeholders indicate that, because of this performance gap, the Hospice Comprehensive Assessment measure is a more indicative measure for consumers when evaluating quality of care provided by a hospice. In summary, by directly displaying only this measure we will: (a) Provide consumers with one measure to easily compare providers on quality of care; and (b) incentivize hospices to conduct a greater number of care processes for as many patients as possible. We also recognize that the 7 component measures are useful to consumers and we are committed to making them easily accessible, while keeping the Hospice Compare site as user-friendly as possible.

As with the currently reported 7 HIS measures, the Hospice Comprehensive Assessment Measure will be reported with a minimum denominator size of 20 patient stays. This minimum denominator size ensures that quality measure scores are based on a large enough denominator to generate a statistically reliable score for public reporting. Therefore, hospices with small denominator sizes (<20 patient stays) for the Hospice Comprehensive Assessment Measure, which may be at higher risk of a skewed score, will not have scores for this measure reported on Hospice Compare.

Comment: Many commenters noted that many providers have high scores on the current seven HIS-based QMs and that the limited range of scores could make it difficult for consumers to differentiate between high- and low-quality providers. One commenter suggested eliminating the seven measures for this reason.

Response: We agree that many hospice providers are performing well on the seven HIS-based QMs. The overall distribution and variability of the scores of the seven HIS QMs that are currently publicly displayed initially indicate that most hospices are completing the important care processes for most hospice patients around hospice admission. However, there is still noticeable room for improvement. Analysis completed by RTI International shows that a low percentage of hospices have perfect scores for most measures and a small percentage of hospices have very low scores. Moreover, interviews with caregivers found that public display of these measures would be useful in avoiding low-performing providers. Additionally, publicly reporting these measures inform consumers of the important care processes that they should expect upon hospice admission. Last but not the least, the seven HIS QMs allow consumers to review the QMs associated with the individual care processes that they feel are particularly applicable to them.

Final Decision: After consideration of the comments, we are finalizing our proposal to no longer directly display the 7 component measures as individual measures on Hospice Compare, once the Hospice Comprehensive Assessment measure is displayed.

d. Display of Public Use File Data and/or Other Publicly Available CMS Data on the Hospice Compare Website

In the FY 2016 Hospice Wage Index final rule (80 FR 47199), we announced that we would make available hospice data in a public data set, the Medicare

Provider Utilization and Payment Data: Physician and Other Supplier Public Use File (PUF), as part of our ongoing efforts to make healthcare more transparent, affordable, and accountable. Hospice data has been available at the provider-level in the Medicare Provider Utilization and Payment Data: Physician and Other Supplier PUF since 2016 and is located at: *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Hospice.html.* The primary data source for the Hospice PUF is the CMS Chronic Condition Data Warehouse (CCW), a database with 100 percent of Medicare enrollment and fee-for-service adjudicated claims data.

These Hospice PUFs serve as a resource for the health care community by providing information on services provided to Medicare beneficiaries by hospice providers. The Hospice PUF contains information on utilization, payment (Medicare payment and standard payment), submitted charges, primary diagnoses, sites of service, and hospice beneficiary demographics organized by CMS Certification Number (6-digit provider identification number) and state. While these files are extensively downloaded by the public and especially researchers, currently the files are not in a format that would be considered user-friendly for many of the consumers who would look for hospice information to support provider selection.

As part of our ongoing efforts to make the Hospice Compare website more informative to our beneficiaries, loved ones, and their families, we proposed to post information from these PUF and/or other publicly available CMS data to the Hospice Compare website in a user-friendly way. We proposed to use information available in these public files to develop a new section of the Hospice Compare website that will provide additional information along with the HIS and CAHPS® quality measures and demographic information already displayed. Other Compare websites, such as the Nursing Home Compare and the End Stage Renal Disease Compare websites, have an information section similar to what we anticipate posting.

Information on the Hospice Compare website for each hospice includes data from the PUF and/or other publicly available CMS data displayed in a consumer-friendly format. This means that we may display the data as shown from the PUF or present the data after additional calculations. For example, the data could be averaged over multiple years, displayed as a percentage rather than the raw number so it has meaning to end-users, or other calculations in a given year or over multiple years. Any calculation will be performed on data exclusively from the source file like the PUF or other publicly available CMS data. The data may be displayed with supporting narrative when needed to make the data more understandable.

Examples, provided for illustration of how CMS could use the PUF or other publicly available CMS data, include:

- Percent of days a hospice provided routine home care (RHC) to patients, averaged over multiple years,
- Percent of primary diagnosis of patients served by the hospice (cancer, dementia, circulatory/heart disease, stroke, respiratory disease) which would be a calculation of the total number of patients by diagnosis and dividing by the total number of patients that the hospice served, and
- Site of service (long term care or non-skilled nursing facility, skilled nursing facility, inpatient hospital) with a notation of yes, based on whether the hospice serves patients in that facility type.

While these types of information are not quality measures, they capture information that many consumers seek during the provider selection process and, therefore, will help them to make an informed decision. For example, information about conditions treated by the hospice could show a patient with dementia if a hospice specializes or is experienced in caring for patients with this condition. Additionally, if a patient has a specific need, like receiving hospice care in a nursing home, information from the PUF could help this patient or their loved ones determine if a provider in their service area has provided care in this setting. Analyses of the PUF data show variation between hospice providers in the data points outlined above, indicating that these data points could be meaningful to consumers in comparing services provided by hospices based on the factors most important to them. PUF data can serve as one more piece of information, along with quality of care metrics from the HIS and CAHPS® Hospice Survey, to help consumers effectively and efficiently compare hospice providers and make an informed decision about their care in a stressful time.

By averaging or trending data over multiple years, the data applies to hospices broadly regardless of size or location or other factors. We anticipate that over time and as appropriate, we may add other items from the PUF or other publicly available CMS data to the Hospice Compare website through sub-regulatory processes and plan to inform the public through regular HQRP communication strategies, such as Open Door Forums, Medicare Learning Network, Spotlight announcements and other opportunities.

We received multiple comments on this proposal to add data from the Hospice PUF to Hospice Compare. A summary of the comments we received and our responses to those comments are below:

Comment: A majority of commenters supported the plan to post information from the PUF and/or other publicly available CMS data on the Hospice Compare website. Commenters stated this information would ''give users additional insight into the industry and the specific provider.'' Of those that were supportive, some were conditionally supportive. Those commenters supported display of PUF data as long as the public is involved in decision-making as to which data points would be posted and how. Those who supported the proposal stated that posting of PUF data could lead to consumer confusion and unintended consequences.

Response: We thank commenters for their support of this plan to post information from the PUF and/or other publicly available CMS data on the Hospice Compare website. We address commenters' specific concerns below.

Comment: In addition to the three data points outlined in the proposal, several commenters suggested CMS add other data points from the PUF to Hospice Compare. Commenters suggested data points such as hospice size and business model.

Response: We support these commenters' suggestions. The purpose of adding information from the PUF or other publically available CMS data is to provide additional useful information to consumers as they consider hospice. We will take these into consideration as we determine which data points will be added to Hospice Compare.

Comment: Many commenters stated that displaying data from the PUF would be misleading for consumers since consumers may misinterpret this data as quality data. For this reason, some commenters supported posting PUF data to Hospice Compare. To mitigate any potential consumer confusion, commenters suggested that CMS solicit input from stakeholders, through rulemaking or other stakeholder engagement activities, to guide decisions on (1) what type of information is displayed on Hospice Compare, (2) what kind of transformations or calculations are done

to the data before it is publicly posted, and (3) how the data that is to be displayed will be explained in a consumer-friendly manner. One commenter also suggested CMS mature the PUF data before use.

Response: We agree that it is important to clearly distinguish between PUF data, which is informational data and quality measure data posted to Hospice Compare. As such, we plan to display data from the PUF in a distinct section of the Hospice Compare website, separate from the sections containing HIS and CAHPS® quality data. This will be similar to the approach taken on other CMS Compare websites. We will also include text to explain the data displayed from the PUF and will make clear this data provides information about hospice characteristics and is not a reflection of the quality of care a hospice provides. As with other data and text currently on Hospice Compare, we will, with consultation from key stakeholders, carefully craft explanatory language to ensure that consumers understand the PUF data and how the data are meant for informational purposes only.

We are committed to soliciting input from providers, key stakeholders, and the public when considering any refinements to Hospice Compare, including addition of PUF and/or other publicly available CMS data. As discussed in our response in section III.F.6a, the annual rulemaking cycle is not the only method by which this information can be communicated to the public and feedback can be solicited. Sub-regulatory channels can be equally or more effective at communicating and collaborating with the public since we can communicate more frequently through sub-regulatory means like Open Door Forums, Special Open Door Forums, and Medicare Learning Network, HQRP Spotlight Page and its other web pages.

In reference to the comment suggesting ''maturing'' of PUF data before public reporting, we would like to clarify that PUF data is based on 100 percent fee-for-service final action claims. Thereby, the PUF reports out the hospices' data from their paid claims using data files that were produced after 24 months of maturity. Therefore, stakeholders have confidence in this data that will be used on Hospice Compare. We would also note that the PUF data are currently reported on our website for the public and that this data will be reported in a more user-friendly format to improve usability by consumers. For more information about the PUF and methodology used to calculate the data, see the Medicare Hospice Utilization & Payment Public Use File: A Methodological Overview here: *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Downloads/Hospice_Methodology.pdf.*

Comment: A few commenters shared that the display of PUF data on Hospice Compare could lead to unintended consequences and, therefore, were unsupportive of displaying this data. Specifically, commenters shared that posting data about primary diagnoses served could lead consumers to falsely assume a hospice does not serve a particular diagnosis group, and that this would disproportionately affect small hospices.

Response: We agree that it is important to prevent unintended consequences of publicly posted data. To mitigate concerns, we plan to (1) average data over multiple years and (2) include text explaining the purpose of these data points and how consumers can use them. By averaging data over multiple years, changes in case mix from year-to-year will be accounted for. Moreover, data for small providers (≤10 hospice beneficiaries in a calendar year) or data points with ≤10 beneficiaries (that is, if a provider had ≤10 beneficiaries with a primary diagnosis of, for example, cancer) are suppressed in the PUF and cannot be displayed on Hospice Compare. We will make clear that information from the PUF is one more resource along with, but separate from, the quality of care data to help consumers make a more informed choice of hospice provider.

Final Decision: After consideration of the comments, we are finalizing our proposal to display data from the Hospice PUF on Hospice Compare.

Comment: CMS received several comments related to the Hospice Evaluation & Assessment Reporting Tool (HEART). Commenters highlighted the importance of developing a tool that reflects the holistic nature of hospice and expressed curiosity related to the timeline for HEART implementation and next steps for HEART development. Additionally, commenters emphasized the importance of using widespread processes to gather provider input related to HEART and ongoing education and support for future HEART implementation. Finally, commenters requested that HEART pilot test findings be broadly disseminated and explored, and that public comment be solicited through traditional rulemaking, prior to industry-wide implementation.

Response: Because no changes were proposed to the potential new hospice data collection mechanism that is preliminarily being called the HEART, comments received are outside the scope of the current rule. We addressed these issues in the FY 2018 Hospice Wage Index final rule (82 FR 36638), and we refer the reader to that detailed discussion and the HQRP web page on HEART at *https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/Hospice-Quality-Reporting/index.html.*

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-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.

We are solicited public comment on each of these issues for the following sections of this document that contain information collection requirements.

A. ICRs Regarding Hospice Item Set

In the FY 2014 Hospice Wage Index final rule (78 FR 48257), and in compliance with section 1814(i)(5)(C) of the Act, we finalized the specific collection of data items that support the following 7 NQF endorsed measures for hospice:

- NQF #1617 Patients Treated with an Opioid who are Given a Bowel Regimen,
- NQF #1634 Pain Screening,
- NQF #1637 Pain Assessment,
- NQF #1638 Dyspnea Treatment,
- NQF #1639 Dyspnea Screening,
- NQF #1641 Treatment Preferences,
- NQF #1647 Beliefs/Values Addressed (if desired by the patient).

We finalized the following two additional measures in the FY 2017 Hospice Wage Index final rule affecting FY 2019 payment determinations (81 FR 52163 through 52173):

- Hospice Visits when Death is Imminent

- Hospice and Palliative Care Composite Process Measure—Comprehensive Assessment at Admission

We received no comments on the ICRs Regarding Hospice Item Set.

In section III.F of this rule, we are reformatting the 7 original HIS measures for purposes of public reporting display on Hospice Compare. This will not change any current HIS data collection procedures outlined in the FY 2018 Hospice final rule (82 FR 36663 through 36664). The HIS V2.00.0 was approved by the OMB on April 17, 2017 under OMB control number 0938–1153 (CMS–10390) for 1 year. The information collection request (ICR) is currently pending OMB approval for 3 years.

B. ICRs Regarding CAHPS® Hospice Survey

National Implementation of the Hospice Experience of Care Survey (CAHPs Hospice Survey) data measures (82 FR 36672) would not impose any new or revised reporting, recordkeeping, or third-party disclosure requirements and therefore, does not require additional OMB review under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The information collection requirements and burden have been approved by OMB through December 31, 2020 under OMB control number 0938–1257 (CMS–10537).

C. Submission of PRA-Related Comments

We have submitted a copy of this final rule to OMB for its review of the rule's information collection and recordkeeping requirements. The requirements are not effective until they have been approved by OMB.

V. Regulatory Impact Analysis

A. Statement of Need

This final rule meets the requirements of our regulations at § 418.306(c), which requires annual issuance, in the **Federal Register**, of the hospice wage index based on the most current available CMS hospital wage data, including any changes to the definitions of Core-Based Statistical Areas (CBSAs), or previously used Metropolitan Statistical Areas (MSAs). This final rule would also update payment rates for each of the categories of hospice care, described in § 418.302(b), for FY 2019 as required under section 1814(i)(1)(C)(ii)(VII) of the Act. The payment rate updates are subject to changes in economy-wide productivity as specified in section 1886(b)(3)(B)(xi)(II) of the Act. In addition, the payment rate updates may be reduced by an additional 0.3 percentage point (although for FY 2014 to FY 2019, the potential 0.3 percentage point reduction is subject to suspension under conditions specified in section 1814(i)(1)(C)(v) of the Act). Lastly, section 3004 of the PPACA amended the Act to authorize a quality reporting program for hospices and this rule discusses changes in the requirements for the hospice quality reporting program in accordance with section 1814(i)(5) of the Act.

B. Overall Impacts

We estimate that the aggregate impact of the payment provisions in this rule will result in an increase of $340 million in payments to hospices, resulting from the hospice payment update percentage of 1.8 percent. The impact analysis of this rule represents the projected effects of the changes in hospice payments from FY 2018 to FY 2019. Using the most recent data available at the time of rulemaking, in this case FY 2017 hospice claims data, we apply the current FY 2018 wage index and labor-related share values to the level of care per diem payments and SIA payments for each day of hospice care to simulate FY 2018 payments. Then, using the same FY 2017 data, we apply the FY 2019 wage index and labor-related share values to simulate FY 2019 payments. Certain events may limit the scope or accuracy of our impact analysis, because such an analysis is susceptible to forecasting errors due to other changes in the forecasted impact time period. The nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon hospices.

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a RIA that, to the best of our ability presents the costs and benefits of the rulemaking.

C. Anticipated Effects

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The great majority of hospitals and most other health care providers and suppliers are small entities by meeting the Small Business Administration (SBA) definition of a small business (in the service sector, having revenues of less than $7.5 million to $38.5 million in any 1 year), or being nonprofit organizations. For purposes of the RFA, we consider all hospices as small entities as that term is used in the RFA. HHS's practice in interpreting the RFA is to consider effects economically ''significant'' only if greater than 5 percent of providers reach a threshold of 3 to 5 percent or more of total revenue or total costs. The effect of the FY 2018 hospice payment update percentage results in an overall increase in estimated hospice payments of 1.8 percent, or $340 million. Therefore, the

Secretary has determined that this rule will not create a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This rule will only affect hospices. Therefore, the Secretary has determined that this rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

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. The 2018 UMRA threshold is $150 million. This rule is not anticipated to have an effect on state, local, or tribal governments, in the aggregate, or on the private sector of $150 million or more.

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 requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. We have reviewed this rule under these criteria of Executive Order 13132, and have determined that it will not impose substantial direct costs on state or local governments.

If regulations impose administrative costs on private entities, such as the time needed to read and interpret this final rule, 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 the published proposed rule will be the number of reviewers of this final rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this final rule. It is possible that not all commenters reviewed the proposed rule in detail, and it is also possible that some reviewers chose not to comment on the proposed rule. For these reasons we thought that the number of comments received on the proposed rule would be a fair estimate of the number of reviewers of this final rule.

Using the wage information from the Bureau of Labor Statistics (BLS) for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is $107.38 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes_nat.htm*). Assuming an average reading speed of 250 words per minute, we estimate that it would take approximately 1 hour for the staff to review half of this rule which consists of approximately 30,000 words. For each hospice that reviews the rule, the estimated cost is $107.38 (1 hour × $107.38). Therefore, we estimate that the total cost of reviewing this regulation is $9,664.20 ($107.38 × 90 reviewers).

D. Detailed Economic Analysis

The FY 2019 hospice payment impacts appear in Table 12. We tabulate the resulting payments according to the classifications in Table 12 (for example, facility type, geographic region, facility ownership), and compare the difference between current and future payments to determine the overall impact.

The first column shows the breakdown of all hospices by urban or rural status, census region, hospital-based or freestanding status, size, and type of ownership, and hospice base. The second column shows the number of hospices in each of the categories in the first column.

The third column shows the effect of the annual update to the wage index. This represents the effect of using the FY 2019 hospice wage index. The aggregate impact of this change is zero percent, due to the hospice wage index standardization factor. However, there are distributional effects of the FY 2019 hospice wage index.

The fourth column shows the effect of the hospice payment update percentage for FY 2019. The 1.8 percent hospice payment update percentage is based on the 2.9 percent inpatient hospital market basket update, reduced by a 0.8 percentage point productivity adjustment and by a 0.3 percentage point adjustment as required by statute, and is constant for all providers.

The fifth column shows the effect of all the changes on FY 2019 hospice payments. It is projected that aggregate payments would increase by 1.8 percent, assuming hospices do not change their service and billing practices.

As illustrated in Table 12, the combined effects of all the proposals vary by specific types of providers and by location.

TABLE 12—IMPACT TO HOSPICES FOR FY 2019

	Number of providers	Updated wage data (%)	FY 2019 hospice payment update (%)	FY 2019 total change (%)
All Hospices	4,440	0.0	1.8	1.8
Urban Hospices	3,550	0.0	1.8	1.8
Rural Hospices	890	0.1	1.8	1.9
Urban Hospices—New England	127	0.0	1.8	1.8
Urban Hospices—Middle Atlantic	250	0.0	1.8	1.8
Urban Hospices—South Atlantic	443	−0.1	1.8	1.7
Urban Hospices—East North Central	399	−0.1	1.8	1.7
Urban Hospices—East South Central	149	0.0	1.8	1.8
Urban Hospices—West North Central	242	0.2	1.8	2.0
Urban Hospices—West South Central	695	0.4	1.8	2.2
Urban Hospices—Mountain	359	−0.3	1.8	1.5
Urban Hospices—Pacific	845	0.1	1.8	1.9
Urban Hospices—Outlying	41	0.4	1.8	2.2
Rural Hospices—New England	27	1.6	1.8	3.4
Rural Hospices—Middle Atlantic	35	0.0	1.8	1.8
Rural Hospices—South Atlantic	108	0.0	1.8	1.8

TABLE 12—IMPACT TO HOSPICES FOR FY 2019—Continued

	Number of providers	Updated wage data (%)	FY 2019 hospice payment update (%)	FY 2019 total change (%)
Rural Hospices—East North Central	138	−0.1	1.8	1.7
Rural Hospices—East South Central	111	0.0	1.8	1.8
Rural Hospices—West North Central	168	0.3	1.8	2.1
Rural Hospices—West South Central	168	0.1	1.8	1.9
Rural Hospices—Mountain	93	−0.4	1.8	1.4
Rural Hospices—Pacific	42	0.1	1.8	1.9
Rural Hospices—Outlying	6	−0.3	1.8	1.5
0–3,499 RHC Days (Small)	999	0.2	1.8	2.0
3,500–19,999 RHC Days (Medium)	2,044	0.1	1.8	1.9
20,000+ RHC Days (Large)	1,397	0.0	1.8	1.8
Non-Profit Ownership	1,028	0.0	1.8	1.8
For Profit Ownership	2,858	0.0	1.8	1.8
Government Ownership	141	0.2	1.8	2.0
Other Ownership	413	−0.1	1.8	1.7
Freestanding Facility Type	3,638	0.0	1.8	1.8
HHA/Facility-Based Facility Type	802	−0.1	1.8	1.7

Source: FY 2017 hospice claims from the Chronic Conditions Data Warehouse (CCW) Research Identifiable Files (RIFs) as of May 29, 2018.
Region Key: New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; Middle Atlantic = Pennsylvania, New Jersey, New York; South Atlantic = Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; East North Central = Illinois, Indiana, Michigan, Ohio, Wisconsin; East South Central = Alabama, Kentucky, Mississippi, Tennessee; West North Central = Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; West South Central = Arkansas, Louisiana, Oklahoma, Texas; Mountain = Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; Pacific = Alaska, California, Hawaii, Oregon, Washington; Outlying = Guam, Puerto Rico, Virgin Islands.

E. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf)*, in Table 13, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this final rule. Table 13 provides our best estimate of the possible changes in Medicare payments under the hospice benefit as a result of the policies in this final rule. This estimate is based on the data for 4,440 hospices in our impact analysis file, which was constructed using FY 2017 claims available in May 2018. All expenditures are classified as transfers to hospices.

TABLE 13—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS AND COSTS, FROM FY 2018 TO FY 2019

Category	Transfers
Annualized Monetized Transfers.	$340 million *
From Whom to Whom?.	Federal Government to Medicare Hospices.

* The net increase of $340 million in transfer payments is a result of the 1.8 percent hospice payment update compared to payments in FY 2018.

F. Regulatory Reform Analysis Under E.O. 13771

Executive Order 13771, entitled ''Reducing Regulation and Controlling Regulatory Costs,'' was issued on January 30, 2017 (82 FR 9339, February 3, 2017) and requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' It has been determined that this rule is an action that primarily results in transfers and does not impose more than *de minimis* costs as described above and thus is not a regulatory or deregulatory action for the purposes of Executive Order 13771.

G. Conclusion

We estimate that aggregate payments to hospices in FY 2019 will increase by $340 million, or 1.8 percent, compared to payments in FY 2018. We estimate that in FY 2019, hospices in urban and rural areas will experience, on average, 1.8 percent and 1.9 percent increases, respectively, in estimated payments compared to FY 2018. Hospices providing services in the urban West South Central and Outlying regions and the rural New England region would experience the largest estimated increases in payments of 2.2 percent and 3.4 percent, respectively. Hospices serving patients in rural areas in the Mountain region would experience, on average, the lowest estimated increase of 1.4 percent in FY 2019 payments.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 418

Health facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 418—HOSPICE CARE

■ 1. The authority citation for part 418 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 418.3 is amended—

■ a. In the definition of ''Attending physician'', by revising paragraph (1); and

■ b. By revising the definition of ''Cap period''.

The revisions read as follows:

§ 418.3 Definitions.

* * * * *

Attending physician * * *

(1)(i) Doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he or she performs that function or action; or

(ii) Nurse practitioner who meets the training, education, and experience requirements as described in § 410.75(b) of this chapter; or

(iii) Physician assistant who meets the requirements of § 410.74(c) of this chapter.

* * * * *

Cap period means the twelve-month period ending September 30 used in the application of the cap on overall hospice reimbursement specified in § 418.309.

* * * * *

■ 3. Section 418.304 is amended by revising the section heading and adding paragraph (f) to read as follows:

§ 418.304 Payment for physician, and nurse practitioner, and physician assistant services.

* * * * *

(f)(1) Effective January 1, 2019, Medicare pays for attending physician services provided by physician assistants to Medicare beneficiaries who have elected the hospice benefit and who have selected a physician assistant as their attending physician. This applies to physician assistants without regard to whether they are hospice employees.

(2) The employer or a contractor of a physician assistant must bill and receive payment for physician assistant services only if the—

(i) Physician assistant is the beneficiary's attending physician as defined in § 418.3;

(ii) Services are medically reasonable and necessary;

(iii) Services are performed by a physician in the absence of the physician assistant and, the physician assistant services are furnished under the general supervision of a physician; and

(iv) Services are not related to the certification of terminal illness specified in § 418.22.

(3) The payment amount for physician assistant services when serving as the attending physician for hospice patients is 85 percent of what a physician is paid under the Medicare physician fee schedule.

■ 4. Section 418.309 is amended by revising paragraph (b)(1) to read as follows:

§ 418.309 Hospice aggregate cap.

* * * * *

(b) * * *

(1) In the case in which a beneficiary received care from only one hospice, the hospice includes in its number of Medicare beneficiaries those Medicare beneficiaries who have not previously been included in the calculation of any hospice cap, and who have filed an election to receive hospice care in accordance with § 418.24 during the cap period as defined in § 418.3, using the best data available at the time of the calculation.

* * * * *

Dated: July 26, 2018.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: July 26, 2018.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2018–16539 Filed 8–1–18; 4:15 pm]

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