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

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## CFR PARTS AFFECTED IN THIS ISSUE

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

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 532

**RIN 3206–AN29**

## Prevailing Rate Systems; Redefinition of the New York, NY, and Philadelphia, PA, Appropriated Fund Federal Wage System Wage Areas

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing a final rule to redefine the geographic boundaries of the New York, NY, and Philadelphia, PA, appropriated fund Federal Wage System (FWS) wage areas. The final rule will address an anomalous situation affecting Joint Base McGuire-Dix-Lakehurst. Portions of the Joint Base are currently defined to the Philadelphia wage area and to the New York wage area. OPM has developed a new criterion for defining wage areas to address this unique situation so that the entire Joint Base is covered by a single wage schedule.

**DATES:** *Effective date:* This regulation is effective on November 30, 2016.

*Applicability date:* This change applies on the first day of the first applicable pay period beginning on or after December 30, 2016.

**FOR FURTHER INFORMATION CONTACT:** Madeline Gonzalez, by telephone at (202) 606–2838 or by email at *pay-leave-policy@opm.gov.*

**SUPPLEMENTARY INFORMATION:** On July 20, 2016, OPM issued a proposed rule (81 FR 47049) to redefine the Joint Base McGuire-Dix-Lakehurst portions of Burlington County, NJ, and Ocean County, NJ, that are currently defined to the Philadelphia, PA, wage area to the New York, NY, wage area so that the entire Joint Base is covered by a single FWS wage schedule. This change is based on a majority recommendation of the Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on the administration of the FWS.

The 30-day comment period ended on August 19, 2016. OPM received comments from several hundred Federal employees, several Members of Congress, and one agency. Public comments supported defining the Joint Base McGuire-Dix-Lakehurst portions of Burlington County and Ocean County currently defined to the Philadelphia wage area to the New York wage area.

Employees stationed at Tobyhanna Army Depot in northeastern Pennsylvania asked that OPM also consider redefining Monroe County, PA, from the Scranton-Wilkes-Barre, PA, wage area to the New York wage area. FPRAC made a separate recommendation by majority vote in January 2016 that OPM redefine Monroe County to the New York wage area. FPRAC's recommendation, and the public comments regarding Tobyhanna Army Depot, is beyond the scope of this rule. The intent of this rule is to address an anomalous situation created when a contiguous Joint Base overlaps two metropolitan areas and two FWS wage areas. The proposed rule's new criterion for defining FWS wage area boundaries has limited applicability and was not intended to address any other situation.

An agency suggested that instead of defining a single contiguous Joint Base that overlaps two wage areas to the wage area with the most favorable payline, OPM should in the future consider basing the wage area definition for a Joint Base on the part of the Joint Base with the largest FWS employment count. The agency expressed concerns that Joint Bases were established in part to save costs and the proposed new criterion would result in higher wage costs. Although OPM considered this option when developing the proposed rule, it was not adopted because the new proposed criterion follows a protocol already established in similar FWS special wage schedule regulations as an equitable method for compensating employees stationed at a small contiguous installation.

In addition, several commenters questioned the effective date of the proposed change recommending retroactive applicability. OPM defines wage areas through regulations in 5 CFR part 532. Changes in OPM's regulations are prospective, not retroactive, following an appropriate period for public comment. This change will apply on the first day of the first applicable pay period beginning on or after 30 days following publication of the final regulations.

### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

### Executive Order 13563 and Executive Order 12866

This final rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 13563 and Executive Order 12866.

### List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

**Beth F. Cobert,**

*Acting Director.*

Accordingly, OPM amends 5 CFR part 532 as follows:

## PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

**Authority:** 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

## Subpart B—Prevailing Rate Determinations

■ 2. Section 532.211 is amended by adding a new paragraph (f) to read as follows:

**§ 532.211 Criteria for establishing appropriated fund wage areas.**

* * * * *

(f) A single contiguous military installation defined as a Joint Base that would otherwise overlap two separate wage areas shall be included in only a single wage area. The wage area of such a Joint Base shall be defined to be the wage area with the most favorable payline based on an analysis of the simple average of the 15 nonsupervisory

second step rates on each one of the regular wage schedules applicable in the otherwise overlapped wage areas.

■ 3. Appendix C to subpart B is amended by revising the wage area listing for the New York, NY, and Philadelphia, PA, wage areas to read as follows:

**Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas**

* * * * *

**NEW YORK**

* * * * *

**New York**

*Survey Area*

New Jersey:
Bergen
Essex
Hudson
Middlesex
Morris
Passaic
Somerset
Union
New York:
Bronx
Kings
Nassau
New York
Orange
Queens
Suffolk
Westchester

*Area of Application. Survey area plus:*

New Jersey:
Burlington (Joint Base McGuire-Dix-Lakehurst portion only)
Hunterdon
Monmouth
Ocean
Sussex
New York:
Dutchess
Putnam
Richmond
Rockland
Pennsylvania:
Pike

* * * * *

**PENNSYLVANIA**

* * * * *

**Philadelphia**

*Survey Area*

New Jersey:
Burlington (Excluding the Joint Base McGuire-Dix-Lakehurst portion)
Camden
Gloucester
Pennsylvania:
Bucks
Chester
Delaware
Montgomery
Philadelphia

*Area of Application. Survey area plus:*

New Jersey:
Atlantic
Cape May
Cumberland
Mercer
Warren
Pennsylvania:
Carbon
Lehigh
Northampton

* * * * *

[FR Doc. 2016–28769 Filed 11–29–16; 8:45 am]

**BILLING CODE 6325–39–P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### 12 CFR Part 34

**[Docket No. OCC–2015–0021]**

**RIN 1557–AD99**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 226

**[Docket No. R–1443]**

**RIN 7100–AD 90**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

### 12 CFR Part 1026

**[Docket No. CFPB–2016–0035]**

**RIN 3170–AA68**

## Appraisals for Higher-Priced Mortgage Loans Exemption Threshold

**AGENCY:** Board of Governors of the Federal Reserve System (Board); Bureau of Consumer Financial Protection (Bureau); and Office of the Comptroller of the Currency, Treasury (OCC).

**ACTION:** Final rules, official interpretations and commentary.

**SUMMARY:** The OCC, the Board, and the Bureau are finalizing amendments to the official interpretations for their regulations that implement section 129H of the Truth in Lending Act (TILA). Section 129H of TILA establishes special appraisal requirements for ''higher-risk mortgages,'' termed ''higher-priced mortgage loans'' or ''HPMLs'' in the agencies' regulations. The OCC, the Board, the Bureau, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA) and the Federal Housing Finance Agency (FHFA) (collectively, the Agencies) issued joint final rules implementing these requirements, effective January 18, 2014. The Agencies' rules exempted, among other loan types, transactions of $25,000 or less, and required that this loan amount be adjusted annually based on any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W). If there is no annual percentage increase in the CPI–W, the OCC, the Board and the Bureau will not adjust this exemption threshold from the prior year. The final rule will memorialize this as well as the agencies' calculation method for determining the adjustment in years following a year in which there is no annual percentage increase in the CPI–W. Based on the CPI–W in effect as of June 1, 2016, the exemption threshold will remain at $25,500 through 2017.

**DATES:** This final rule is effective January 1, 2017.

**FOR FURTHER INFORMATION CONTACT:** *OCC:* MaryAnn Nash, Counsel, Legislative and Regulatory Activities Division, (202) 649–6287; for persons who are deaf and hard of hearing TTY, (202) 649–5597. *Board:* Lorna M. Neill, Senior Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869. *Bureau:* Jaclyn Maier, Counsel, Office of Regulations, Consumer Financial Protection Bureau, at (202) 435–7700.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) amended the Truth in Lending Act (TILA) to add special appraisal requirements for ''higher-risk mortgages.'' [1] In January 2013, the Agencies issued a joint final rule implementing these requirements and adopted the term ''higher-priced mortgage loan'' (HPML) instead of ''higher-risk mortgage'' (the January 2013 Final Rule).[2] In July 2013, the Agencies proposed additional exemptions from the January 2013 Final Rule (the 2013 Supplemental Proposed Rule).[3] In December 2013, the Agencies issued a supplemental final rule with additional exemptions from the January 2013 Final Rule (the December 2013 Supplemental Final Rule).[4] Among other exemptions, the Agencies adopted an exemption from the new HPML appraisal rules for transactions of

[1] Public Law 111–203 section 1471, 124 Stat. 1376 (2010), codified at TILA section 129H, 15 U.S.C. 1639h.

[2] 78 FR 10368 (Feb. 13, 2013).

[3] 78 FR 48548 (Aug. 8, 2013).

[4] 78 FR 78520 (Dec. 26, 2013).

$25,000 or less, to be adjusted annually for inflation.

The Bureau's, the OCC's, and the Board's versions of the January 2013 Final Rule and December 2013 Supplemental Final Rule and corresponding official interpretations are substantively identical. The FDIC, NCUA, and FHFA adopted the Bureau's version of the regulations under the January 2013 Final Rule and December 2013 Supplemental Final Rule.[5]

Section 34.203(b)(2) of subpart G of part 34 of the OCC's regulations, § 226.43(b)(2) of the Board's Regulation Z, and § 1026.35(c)(2)(ii) of the Bureau's Regulation Z, and their accompanying interpretations,[6] provide that the exemption threshold for smaller loans will be adjusted effective January 1 of each year based on any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900. If there is no annual percentage increase in the CPI–W, the OCC, the Board, and the Bureau will not adjust the threshold amounts from the prior year.[7]

## II. Commentary Revision

On August 4, 2016, the OCC, the Board and the Bureau published a proposed rule in the **Federal Register** to memorialize the calculation method used by the agencies each year to adjust the exemption threshold. *See* 81 FR 51394 (Aug. 4, 2016). The proposed commentary stated that if there is no annual percentage increase in the CPI–W, the OCC, the Board and the Bureau will not adjust the exemption threshold from the prior year. The proposed commentary further set forth the calculation method the agencies would use in years following a year in which the exemption threshold was not adjusted because there was no increase in the CPI–W from the previous year. As the OCC, the Board and the Bureau discussed in the proposal, the proposed calculation method would ensure that the values for the exemption threshold keep pace with the CPI–W as contemplated in the December 2013 Supplemental Final Rule.

The comment period closed on September 6, 2016. In response to the proposal, the OCC, the Board and the Bureau received one comment from an individual, one from a State bankers association, and one from a community bank. The individual supported the proposal. The State bankers association requested that the smaller dollar loan exemption be raised to $50,000, and the community bank commenter requested an exemption from the HPML rules for small institutions. Both of these comments are beyond the scope of this rulemaking.

The OCC, the Board, and the Bureau are adopting the commentary revisions as proposed, with some minor clarifying amendments. These changes will be effective on January 1, 2017. The new commentary is substantively identical for § 34.203(b)(2) of subpart G of part 34 of the OCC's regulations, § 226.43(b)(2) of the Board's Regulation Z, and § 1026.35(c)(2)(ii) of the Bureau's Regulation Z. For ease of reference, this ''Commentary Revision'' discussion refers only to the section numbers of the commentary that will be published in the Bureau's Regulation Z at 12 CFR part 1026, supplement I.

Comment 35(c)(2)(ii)–1 to the Bureau's Regulation Z currently provides the threshold amount in effect during a particular period and details the rules the agencies use for rounding the threshold calculation to the nearest $100 or $1,000 increment, as discussed above in part I, ''Background.'' The OCC, the Board and the Bureau are revising comment 35(c)(2)(ii)–1 by moving the text regarding the threshold amount that is in effect during a particular period to a new proposed comment 35(c)(2)(ii)–3. Consistent with the proposal, the discussion of how the agencies round the threshold calculation will remain in comment 35(c)(2)(ii)–1 of the final rule. Additionally, current comments 35(c)(2)(ii)–2 and 35(c)(2)(ii)–3 are re-numbered as comments 35(c)(2)(ii)–4 and 35(c)(2)(ii)–5, respectively.

As the Agencies have stated previously,[8] if there is no annual percentage increase in the CPI–W, the OCC, the Board, and the Bureau will not adjust the exemption threshold from the prior year. This position is consistent with the Board's and the Bureau's approach in adjusting the coverage thresholds for the Consumer Leasing Act (CLA) and TILA, based on section 1100E(b) of the Dodd-Frank Act, which states that the threshold must be adjusted by the ''annual percentage *increase*'' in the CPI–W (emphasis added).[9] The Board and the Bureau are publishing similar amendments to the commentaries to each of their respective regulations implementing the CLA (Regulation M) and TILA (Regulation Z) elsewhere in this issue of the **Federal Register**.

For the HPML appraisal rule exemption for smaller loans, the OCC, the Board, and the Bureau are memorializing this concept in comment 35(c)(2)(ii)–2, which provides that, if the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. For example, if the threshold in effect from January 1, 2019, through December 31, 2019, is $27,500 and the CPI–W in effect on June 1 of 2019, indicates a 1.1 percent decrease from the CPI–W in effect on June 1, 2018, the threshold in effect for January 1, 2020, through December 31, 2020, will remain $27,500.

In the final rule, comment 35(c)(2)(ii)–2 further sets forth the calculation method the agencies would use in years following a year in which the exemption threshold was not adjusted because there was no increase in the CPI–W from the previous year. Specifically, comment 35(c)(2)(ii)–2 provides that, for the years after a year in which the threshold did not change because the CPI–W in effect on June 1 decreased from the CPI–W in effect on June 1 of the previous year, the threshold is calculated by applying the annual percentage change in the CPI–W to the dollar amount that would have resulted, after rounding, if the decreases and any subsequent increases in the CPI–W had been taken into account. Comment 35(c)(2)(ii)–2.i further states that, if the resulting amount, after rounding, is greater than the current threshold, then

[5] *See* NCUA: 12 CFR 722.3; FHFA: 12 CFR part 1222. Although the FDIC adopted the Bureau's version of the regulation, the FDIC did not issue its own regulation containing a cross-reference to the Bureau's version. *See* 78 FR 10368, 10370 (Feb. 13, 2013).

[6] *See* 12 CFR part 34, appendix C to subpart G, comment 203(b)(2)–1 (OCC); 12 CFR part 226, supplement I, comment 43(b)(2)–1 (Board); and 12 CFR part 1026, Supplement I, comment 35(c)(2)(ii)–1 (Bureau).

[7] *See* 78 FR 48548, 48565 (Aug. 8, 2013) (''Thus, under the proposal, if the CPI–W decreases in an annual period, the percentage increase would be zero, and the dollar amount threshold for the exemption would not change.'').

[8] *See* 78 FR 48548, 48565 (Aug. 8, 2013) and 80 FR 73943, 73944 (Nov. 27, 2015).

[9] 76 FR 18354, 18355 n.1 (Apr. 4, 2011) (''[A]n annual period of deflation or no inflation would not require a change in the threshold amount.'').

the threshold effective January 1 the following year will increase accordingly.

For example, assume that the threshold in effect from January 1, 2019, through December 31, 2019, is $27,500 and that, due to a 1.1 percent decrease from the CPI–W in effect on June 1, 2018, to the CPI–W in effect on June 1, 2019, the threshold in effect from January 1, 2020, through December 31, 2020, remains at $27,500. If, however, the threshold had been adjusted downward to reflect the decrease in the CPI–W over that time period, the threshold in effect from January 1, 2020, through December 31, 2020, would have been $27,200, after rounding. Further assume that the CPI–W in effect on June 1, 2020, increased by 1.6 percent from the CPI–W in effect on June 1, 2019. The calculation for the threshold that will be in effect from January 1, 2021, through December 31, 2021, is based on the impact of a 1.6 percent increase in the CPI–W on $27,200, rather than $27,500, resulting in a 2021 threshold of $27,600.

Furthermore, comment 35(c)(2)(ii)–2.ii states that, if the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted, after rounding. To illustrate, assume in the example above that the CPI–W in effect on June 1, 2020, increased by only 0.6 percent from the CPI–W in effect on June 1, 2019. The calculation for the threshold that will be in effect from January 1, 2021, through December 31, 2021, is based on the impact of a 0.6 percent increase in the CPI–W on $27,200. The resulting amount, after rounding, is $27,400, which is lower than $27,500, the threshold in effect from January 1, 2020, through December 31, 2020. Therefore, the threshold in effect from January 1, 2021, through December 31, 2021, will remain $27,500. However, the calculation for the threshold that will be in effect from January 1, 2022, through December 31, 2022, will apply the percentage change in the CPI–W to $27,400, the amount that would have resulted based on the 0.6 percent change from the CPI–W in effect on June 1, 2019, after rounding, to the CPI–W in effect on June 1, 2020.

## III. 2017 Threshold

Based on the calculation method detailed above, the exemption threshold amount for 2017 remains at $25,500. This is based on the CPI–W in effect on June 1, 2016, which was reported on May 17, 2016. The Bureau of Labor Statistics publishes consumer-based indices monthly, but does not report a CPI change on June 1; adjustments are reported in the middle of the month. The CPI–W is a subset of the CPI–U index (based on all urban consumers) and represents approximately 28 percent of the U.S. population. The CPI–W reported on May 17, 2016, reflects a 0.8 percent increase in the CPI–W from April 2015 to April 2016. Because the CPI–W decreased by 0.8 percent from April 2014 to April 2015, the OCC, the Board and the Bureau are calculating the threshold based on the amount that would have resulted had this decrease been taken into account, which is $25,300. A 0.8 percent increase in the CPI–W applied to $25,300 results in $25,500, which is the same threshold amount for 2016. Thus, the exemption threshold amount that will be in effect for 2017 remains at $25,500. The OCC, the Board and the Bureau are revising the commentaries to their respective regulations to add new comments as follows:

- Comment 203(b)(2)–3.iv to 12 CFR part 34, appendix C to subpart G (OCC);
- Comment 43(b)(2)–3.iv to supplement I of 12 CFR part 226 (Board); and
- Comment 35(c)(2)(ii)–3.iv in supplement I of 12 CFR part 1026 (Bureau).

These new comments state that, from January 1, 2017, through December 31, 2017, the threshold amount is $25,500. These revisions are effective January 1, 2017.

## IV. Regulatory Analysis

### *Administrative Procedure Act*

Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the OCC, the Board and the Bureau find that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[10] The 2017 threshold amount for exempt transactions announced in this rule, $25,500, is technical and applies the calculation method set forth elsewhere in this final rule, for which notice and public comment were provided.[11] For these reasons, the OCC, the Board and the Bureau have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment for purposes of the 2017 threshold adjustment are unnecessary. Therefore, the amendments regarding the 2017 threshold amount for exempt transactions are adopted in final form.

[10] 5 U.S.C. 553(b)(B).

[11] *See* 81 FR 51394 (Aug. 4, 2016).

### *Bureau's Dodd-Frank Act Section 1022(b)(2) Analysis*

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[12] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, the Securities and Exchange Commission, the Department of Housing and Urban Development, the Federal Housing Finance Agency, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Bureau has chosen to evaluate the benefits, costs and impacts of the final rule against the current state of the world, which takes into account the current regulatory regime. The Bureau is not aware of any significant benefits or costs to consumers or covered persons associated with the final rule relative to the baseline. The OCC, the Board, and the Bureau previously stated that if there is no annual percentage increase in the CPI–W, then the agencies will not adjust the exemption threshold from the prior year.[13] The final rule memorializes this in official commentary. The final rule also clarifies how the threshold is calculated for years after a year in which the threshold did not change. The Bureau believes that this clarification memorializes the method that the Bureau would be expected to use: This method holds the threshold fixed until a notional threshold calculated using the Bureau's methodology, taking into account both decreases and increases in the CPI–W, exceeds the actual threshold. The Bureau requested, but did not receive, comment on this point. Thus, the Bureau concludes that the final rule will not change the regulatory regime relative to the baseline and will create no significant benefits, costs, or impacts.

The final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act or on rural consumers. The Bureau does not expect this final rule to affect consumers' access to credit.

[12] Specifically, section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas.

[13] 78 FR 48547, 48565 (Aug. 8, 2013) and 80 FR 73943, 73944 (Nov. 27, 2015).

*Regulatory Flexibility Act*

*OCC:* Pursuant to the Regulatory Flexibility Act (RFA), an agency must prepare a regulatory flexibility analysis for all proposed and final rules that describes the impact of the rule on small entities.[14] Under section 605(b) of the RFA, this analysis is not required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule. The OCC has concluded that the final rule does not have a significant economic impact on a substantial number of small entities supervised by the OCC.

As explained in the Commentary Revision section of the preamble, this final rule memorializes the calculation method used by the OCC, the Board, and the Bureau each year to adjust the threshold for exemption from the special appraisal requirements for HPMLs and clarifies the agencies' calculation method for determining the adjustment in the years following a year in which there is no annual percentage increase in the CPI–W. The economic impact of this final rule on small national banks and Federal savings associations is not expected to be significant. Accordingly, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of small OCC-supervised entities. Therefore, pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

*Board:* An initial regulatory flexibility analysis (IRFA) was included in the proposal in accordance with section 3(a) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* (RFA). In the IRFA, the Board requested comments on any approaches, other than the proposed alternatives, that would reduce the burden on small entities. The RFA requires an agency to prepare a final regulatory flexibility analysis (FRFA) unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[15] In accordance with section 3(a) of the RFA, the Board has reviewed the final regulation. Based on its analysis, and for the reasons stated below, the Board believes that the rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the final rule.* The final rule memorializes the calculation method used by the Board each year to adjust the exemption threshold in accordance with Regulation Z, 12 CFR 226.43(b)(2). The final rule also adopts the exemption threshold that will apply from January 1, 2017, through December 31, 2017, based on the calculation method memorialized in the final rule.

2. *Summary of issues raised by comments in response to the IFRA.* The Board did not receive any comments on the IFRA.

3. *Small entities affected by the final rule.* For purposes of the RFA, the Small Business Administration defines small entities to include banking entities with total assets of $550 million or less. Of Board supervised institutions with an asset size of $550 million or less as of March 2016, 223 reported making 5,135 higher-priced mortgage loans in 2015.[16] The Board does not believe that the final rule will have a significant economic impact on the entities that it affects.

4. *Recordkeeping, reporting, and compliance requirements.* The final rule would not impose any recordkeeping, reporting, or compliance requirements.

5. *Other Federal rules.* The Board has not identified any likely duplication, overlap and/or potential conflict between the final rule and any Federal rule.

*Bureau:* The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[17] These analyses must describe the impact of the proposed and final rules on small entities.[18] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[19] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[20]

A FRFA is not required for this final rule because it will not have a significant economic impact on a substantial number of small entities. As discussed in the Bureau's Section 1022(b)(2) Analysis above, this final rule does not introduce costs or benefits to covered persons because it seeks only to clarify the method of threshold adjustment which has already been established in previous Agency rules. Therefore this final rule will not have a significant impact on small entities.

Certification

Accordingly, the Bureau Director, by signing below, certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

*Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995,[21] the agencies reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

*Unfunded Mandates Reform Act*

The OCC has analyzed the final rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation).

The final rule memorializes the calculation method used by the OCC, the Board, and the Bureau each year to adjust the threshold for exemption from the special appraisal requirements for HPMLs and clarifies the agencies' calculation method for determining the adjustment in the years following a year in which there is no annual percentage increase in the CPI–W. Because the final rule is designed to clarify existing rules, and does not introduce any new requirements, the OCC has determined

[14] *See* 5 U.S.C. 601 *et seq.*

[15] *See* 5 U.S.C. 601 *et seq.*

[16] Board supervised institutions include State Member Banks, uninsured State branches and agencies of foreign banks. The number of institutions making higher-priced mortgage loans and the number of higher-priced mortgage loans is based on data reported pursuant to the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. 2801 *et seq.*

[17] 5 U.S.C. 601 *et seq.*

[18] *Id.* at 603(a) and 604(a). For purposes of assessing the impacts of the rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. *Id.* at 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. *Id.* at 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' *Id.* at 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. *Id.* at 601(5).

[19] *Id.* at 605(b).

[20] *Id.* at 609.

[21] 44 U.S.C. 3506; 5 CFR part 1320.

that it would not result in expenditures by State, local, and Tribal governments or by the private sector, of $100 million or more. Accordingly, the OCC has not prepared a written statement to accompany its final rule.

**List of Subjects**

*12 CFR Part 34*

Appraisal, Appraiser, Banks, Banking, Consumer protection, Credit, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

*12 CFR Part 226*

Advertising, Appraisal, Appraiser, Consumer protection, Credit, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

*12 CFR Part 1026*

Advertising, Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

**Department of the Treasury**

**Office of the Comptroller of the Currency**

**Authority and Issuance**

For the reasons set forth in the preamble, the OCC amends 12 CFR part 34 as set forth below:

## PART 34—REAL ESTATE LENDING AND APPRAISALS

■ 1. The authority citation for part 34 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.,* 25b, 29, 93a, 371, 1463, 1464, 1465, 1701j–3, 1828(o), 3331 *et seq.,* 5101 *et seq.,* 5412(b)(2)(B) and 15 U.S.C. 1639h.

### Subpart G—Appraisals for Higher-Priced Mortgage Loans

■ 2. In appendix C to subpart G, under *Section 34.203—Appraisals for Higher-Priced Mortgage Loans,* the entry for Paragraph 34.203(b)(2) is revised to read as follows:

**Appendix C to Subpart G of Part 34—OCC Interpretations**

* * * * *

**Section 34.203—Appraisals for Higher-Priced Mortgage Loans**

* * * * *

*34.203(b) Exemptions*

* * * * *

Paragraph 34.203(b)(2)

1. *Threshold amount.* For purposes of § 34.203(b)(2), the threshold amount in effect during a particular period is the amount stated in comment 203(b)(2)–3 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 203(b)(2)–3 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

2. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

3. *Threshold.* For purposes of § 34.203(b)(2), the threshold amount in effect during a particular period is the amount stated below for that period.

i. From January 18, 2014, through December 31, 2014, the threshold amount is $25,000.

ii. From January 1, 2015, through December 31, 2015, the threshold amount is $25,500.

iii. From January 1, 2016, through December 31, 2016, the threshold amount is $25,500.

iv. From January 1, 2017, through December 31, 2017, the threshold amount is $25,500.

4. *Qualifying for exemption—in general.* A transaction is exempt under § 34.203(b)(2) if the creditor makes an extension of credit at consummation that is equal to or below the threshold amount in effect at the time of consummation.

5. *Qualifying for exemption—subsequent changes.* A transaction does not meet the condition for an exemption under § 34.203(b)(2) merely because it is used to satisfy and replace an existing exempt loan, unless the amount of the new extension of credit is equal to or less than the applicable threshold amount. For example, assume a closed-end loan that qualified for a § 34.203(b)(2) exemption at consummation in year one is refinanced in year ten and that the new loan amount is greater than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of § 34.203 with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan, unless another exemption from the requirements of § 34.203 applies. *See* § 34.203(b) and (d)(7).

* * * * *

**Board of Governors of the Federal Reserve System**

**Authority and Issuance**

For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

## PART 226—TRUTH IN LENDING (REGULATION Z)

■ 3. The authority citation for part 226 continues to read as follows:

**Authority:** 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), 1639(l), and 1639h; Pub. L. 111–24, section 2, 123 Stat. 1734; Pub. L. 111–203, 124 Stat. 1376.

■ 4. In supplement I to part 226, under *Section 226.43—Appraisals for Higher-Risk Mortgage Loans,* the entry for *Paragraph 43(b)(2)* is revised to read as follows:

**Supplement I to Part 226—Official Staff Interpretations**

* * * * *

### Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

**Section 226.43—Appraisals for Higher-Risk Mortgage Loans**

* * * * *

*43(b) Exemptions*

* * * * *

Paragraph 43(b)(2)

1. *Threshold amount.* For purposes of § 226.43(b)(2), the threshold amount in effect during a particular period is the amount stated in comment 43(b)(2)–3 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 43(b)(2)–3 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the

threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

2. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

3. *Threshold.* For purposes of § 226.43(b)(2), the threshold amount in effect during a particular period is the amount stated below for that period.

i. From January 18, 2014, through December 31, 2014, the threshold amount is $25,000.

ii. From January 1, 2015, through December 31, 2015, the threshold amount is $25,500.

iii. From January 1, 2016, through December 31, 2016, the threshold amount is $25,500.

iv. From January 1, 2017, through December 31, 2017, the threshold amount is $25,500.

4. *Qualifying for exemption—in general.* A transaction is exempt under § 226.43(b)(2) if the creditor makes an extension of credit at consummation that is equal to or below the threshold amount in effect at the time of consummation.

5. *Qualifying for exemption—subsequent changes.* A transaction does not meet the condition for an exemption under § 226.43(b)(2) merely because it is used to satisfy and replace an existing exempt loan, unless the amount of the new extension of credit is equal to or less than the applicable threshold amount. For example, assume a closed-end loan that qualified for a § 226.43(b)(2) exemption at consummation in year one is refinanced in year ten and that the new loan amount is greater than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of § 226.43 with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan, unless another exemption from the requirements of § 226.43 applies. *See* § 226.43(b) and (d)(7).

* * * * *

**Bureau of Consumer Financial Protection**

**Authority and Issuance**

For the reasons set forth in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

## PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 5. The authority citation for part 1026 continues to read as follows:

**Authority:** 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

■ 6. In supplement I to part 1026, under *Section 1026.35—Requirements for Higher-Priced Mortgage Loans,* the entry for Paragraph 35(c)(2)(ii) is revised to read as follows:

**Supplement I to Part 1026—Official Interpretations**

* * * * *

**Subpart E—Special Rules for Certain Home Mortgage Transactions**

* * * * *

**Section 1026.35—Requirements for Higher-Priced Mortgage Loans**

* * * * *

*35(c)—Appraisals*

* * * * *

35(c)(2) Exemptions

* * * * *

Paragraph 35(c)(2)(ii)

1. *Threshold amount.* For purposes of § 1026.35(c)(2)(ii), the threshold amount in effect during a particular period is the amount stated in comment 35(c)(2)(ii)–3 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 35(c)(2)(ii)–3 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

2. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

3. *Threshold.* For purposes of § 1026.35(c)(2)(ii), the threshold amount in effect during a particular period is the amount stated below for that period.

i. From January 18, 2014, through December 31, 2014, the threshold amount is $25,000.

ii. From January 1, 2015, through December 31, 2015, the threshold amount is $25,500.

iii. From January 1, 2016, through December 31, 2016, the threshold amount is $25,500.

iv. From January 1, 2017, through December 31, 2017, the threshold amount is $25,500.

4. *Qualifying for exemption—in general.* A transaction is exempt under § 1026.35(c)(2)(ii) if the creditor makes an extension of credit at consummation that is equal to or below the threshold

amount in effect at the time of consummation.

5. *Qualifying for exemption—subsequent changes.* A transaction does not meet the condition for an exemption under § 1026.35(c)(2)(ii) merely because it is used to satisfy and replace an existing exempt loan, unless the amount of the new extension of credit is equal to or less than the applicable threshold amount. For example, assume a closed-end loan that qualified for a § 1026.35(c)(2)(ii) exemption at consummation in year one is refinanced in year ten and that the new loan amount is greater than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of § 1026.35(c) with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan, unless another exemption from the requirements of § 1026.35(c) applies. *See* § 1026.35(c)(2) and (c)(4)(vii).

* * * * *

Dated: November 22, 2016.

**Thomas J. Curry,**

*Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System, November 21, 2016.

**Robert deV. Frierson,**

*Secretary of the Board.*

Dated: November 7, 2016.

**Richard Cordray,**

*Director, Bureau of Consumer Financial Protection.*

[FR Doc. 2016–28699 Filed 11–29–16; 8:45 am]

**BILLING CODE 4810–33–P; 6210–01–P; 4810–AM–P**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 213

**[Docket No. R–1545]**

**RIN 7100 AE–56**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

### 12 CFR Part 1013

**[Docket No. CFPB–2016–0036]**

**RIN 3170–AA66**

### Consumer Leasing (Regulation M)

**AGENCY:** Board of Governors of the Federal Reserve System (Board); and Bureau of Consumer Financial Protection (Bureau).

**ACTION:** Final rules, official interpretations and commentary.

**SUMMARY:** The Board and the Bureau are finalizing amendments to the official interpretations and commentary for the agencies' regulations that implement the Consumer Leasing Act (CLA). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the CLA by requiring that the dollar threshold for exempt consumer leases be adjusted annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W). If there is no annual percentage increase in the CPI–W, the Board and Bureau will not adjust this exemption threshold from the prior year. The final rule memorializes this as well as the agencies' calculation method for determining the adjustment in years following a year in which there is no annual percentage increase in the CPI–W. Based on the CPI–W in effect as of June 1, 2016, the exemption threshold will remain at $54,600 through 2017. The Dodd-Frank Act also requires similar adjustments in the Truth in Lending Act's threshold for exempt consumer credit transactions. Accordingly, the Board and the Bureau are adopting similar amendments to the commentaries to each of their respective regulations implementing the Truth in Lending Act elsewhere in this issue of the **Federal Register**.

**DATES:** This final rule is effective January 1, 2017.

**FOR FURTHER INFORMATION CONTACT:** *Board:* Vivian W. Wong, Senior Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

*Bureau:* Jaclyn Maier, Counsel, Office of Regulations, Consumer Financial Protection Bureau, at (202) 435–7700.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) increased the threshold in the Consumer Leasing Act (CLA) for exempt consumer leases, and the threshold in the Truth in Lending Act (TILA) for exempt consumer credit transactions,[1] from $25,000 to $50,000, effective July 21, 2011.[2] In addition, the Dodd-Frank Act requires that, on and after December 31, 2011, these thresholds be adjusted annually for inflation by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W), as published by the Bureau of Labor Statistics. In April 2011, the Board issued a final rule amending Regulation M (which implements the CLA) consistent with these provisions of the Dodd-Frank Act, along with a similar final rule amending Regulation Z (which implements TILA) (collectively, the Board Final Threshold Rules).[3]

Title X of the Dodd-Frank Act transferred rulemaking authority for a number of consumer financial protection laws from the Board to the Bureau, effective July 21, 2011. In connection with this transfer of rulemaking authority, the Bureau issued its own Regulation M implementing the CLA in an interim final rule, 12 CFR part 1013 (Bureau Interim Final Rule).[4] The Bureau Interim Final Rule substantially duplicated the Board's Regulation M, including the revisions to the threshold for exempt transactions made by the Board in April 2011. In April 2016, the Bureau adopted the Bureau Interim Final Rule as final, subject to intervening final rules published by the Bureau.[5] Although the Bureau has the authority to issue rules to implement the CLA for most entities, the Board retains authority to issue rules under the CLA for certain motor vehicle dealers covered by section 1029(a) of the Dodd-Frank Act, and the Board's Regulation M continues to apply to those entities.[6]

[1] Although consumer credit transactions above the threshold are generally exempt, loans secured by real property or by personal property used or expected to be used as the principal dwelling of a consumer and private education loans are covered by TILA regardless of the loan amount. *See* 12 CFR 226.3(b)(1)(i) (Board) and 12 CFR 1026.3(b)(1)(i) (Bureau).

[2] Public Law 111–203, section 1100E, 124 Stat. 1376 (2010).

[3] 76 FR 18349 (Apr. 4, 2011); 76 FR 18354 (Apr. 4, 2011).

[4] 76 FR 78500 (Dec. 19, 2011).

[5] 81 FR 25323 (April 28, 2016).

[6] Section 1029(a) of the Dodd-Frank Act states: ''Except as permitted in subsection (b), the Bureau may not exercise any rulemaking, supervisory, enforcement, or any other authority * * * over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.'' 12 U.S.C. 5519(a). Section 1029(b) of the Dodd-Frank Act states: ''Subsection (a) shall not apply to any person, to the extent that such person (1) provides consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property; (2) operates a line of business (A) that involves the extension of retail credit or retail leases involving motor vehicles; and (B) in which (i) the extension of retail credit or retail leases are provided directly to consumers; and (ii) the contract governing such extension of retail credit or retail leases is not routinely assigned to an unaffiliated third party finance or leasing source; or (3) offers or provides a consumer financial product or service not involving or related to the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service.'' 12 U.S.C. 5519(b).

Section 213.2(e)(1) of the Board's Regulation M and § 1013.2(e)(1) of the Bureau's Regulation M, and their accompanying commentaries, provide that the exemption threshold will be adjusted annually effective January 1 of each year based on any annual percentage increase in the CPI–W that was in effect on the preceding June 1. They further provide that any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.[7] If there is no annual percentage increase in the CPI–W, the Board and Bureau will not adjust the exemption threshold from the prior year. Since 2011, the Board and the Bureau have adjusted the Regulation M exemption threshold annually, in accordance with these rules.

## II. Commentary Revision

On August 4, 2016, the Board and the Bureau published a proposed rule in the **Federal Register** to memorialize the calculation method used by the agencies each year to adjust the exemption threshold. *See* 81 FR 51400 (Aug. 4, 2016). The proposed commentary stated that if there is no annual percentage increase in the CPI–W, the Board and Bureau will not adjust the exemption threshold from the prior year. The proposed commentary further set forth the calculation method the agencies would use in years following a year in which the exemption threshold was not adjusted because there was no increase in the CPI–W from the previous year. As the Board and the Bureau discussed in the proposal, the proposed calculation method would ensure that the values for the exemption threshold keep pace with the CPI–W as contemplated by section 1100E(b) of the Dodd-Frank Act.

The comment period closed on September 6, 2016. In response to the proposal, the Board and the Bureau received one comment from a consumer supporting the proposal. The Board and the Bureau are adopting the commentary revisions as proposed, with some minor clarifying amendments. These changes will be effective on January 1, 2017.

Specifically, the Board and the Bureau are adopting comment 2(e)–9 as proposed to move the text regarding the threshold amount that is in effect during a particular period to a new comment 2(e)–11. The discussion of how the agencies round the threshold calculation will remain in comment 2(e)–9.

Furthermore, the Board and the Bureau are adopting new comment 2(e)–10 as proposed to provide that if the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year (*i.e.,* the CPI–W in effect on June 1 is either equal to or less than the CPI–W in effect on June 1 of the previous year), the threshold amount effective the following January 1 through December 31 will not change from the previous year. As the Board and the Bureau discussed in the proposal, this position is consistent with section 1100E(b) of the Dodd-Frank Act, which states that the threshold must be adjusted by the ''annual percentage *increase*'' in the CPI–W (emphasis added), and the position the agencies have previously taken.[8] Thus, if the threshold in effect from January 1, 2019, through December 31, 2019, is $55,500 and the CPI–W in effect on June 1 of 2019 indicates a 1.1 percent decrease from the CPI–W in effect on June 1, 2018, the threshold in effect for January 1, 2020, through December 31, 2020, will remain $55,500.

Comment 2(e)–10 also provides that, for the years after a year in which the threshold did not change because the CPI–W in effect on June 1 decreased from the CPI–W in effect on June 1 of the previous year, the threshold is calculated by applying the annual percentage change in the CPI–W to the dollar amount that would have resulted, after rounding, if the decreases and any subsequent increases in the CPI–W had been taken into account. Comment 2(e)–10.i further states that, if the resulting amount, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

For example, assume that the threshold in effect from January 1, 2019, through December 31, 2019, is $55,500 and that, due to a 1.1 percent decrease from the CPI–W in effect on June 1, 2018, to the CPI–W in effect on June 1, 2019, the threshold in effect from January 1, 2020, through December 31, 2020, remains at $55,500. If, however, the threshold had been adjusted downward to reflect the decrease in the CPI–W over that time period, the threshold in effect from January 1, 2020, through December 31, 2020, would have been $54,900, after rounding. Further assume that the CPI–W in effect on June 1, 2020, increased by 1.6 percent from the CPI–W in effect on June 1, 2019. The calculation for the threshold that will be in effect from January 1, 2021, through December 31, 2021, is based on the impact of a 1.6 percent increase in the CPI–W on $54,900, rather than $55,500, resulting in a 2021 threshold of $55,800.

Furthermore, comment 2(e)–10.ii states that, if the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted, after rounding. To illustrate, assume in the example above that the CPI–W in effect on June 1, 2020, increased by only 0.6 percent from the CPI–W in effect on June 1, 2019. The calculation for the threshold that will be in effect from January 1, 2021, through December 31, 2021, is based on the impact of a 0.6 percent increase in the CPI–W on $54,900. The resulting amount, after rounding, is $55,200, which is lower than $55,500, the threshold in effect from January 1, 2020, through December 31, 2020. Therefore, the threshold in effect from January 1, 2021, through December 31, 2021, will remain $55,500. However, the calculation for the threshold that will be in effect from January 1, 2022, through December 31, 2022, will apply the percentage change in the CPI–W to $55,200, the amount that would have resulted based on the 0.6 percent change from the CPI–W in effect on June 1, 2019, after rounding, to the CPI–W in effect on June 1, 2020.

## III. 2017 Threshold

Based on the calculation method detailed above, the exemption threshold amount for 2017 remains at $54,600. This is based on the CPI–W in effect on June 1, 2016, which was reported on May 17, 2016. The Bureau of Labor Statistics publishes consumer-based indices monthly, but does not report a CPI change on June 1; adjustments are reported in the middle of the month. The CPI–W is a subset of the CPI–U index (based on all urban consumers) and represents approximately 28 percent of the U.S. population. The CPI–W reported on May 17, 2016 reflects a 0.8 percent increase in the CPI–W from April 2015 to April 2016. Because the CPI–W decreased from April 2014 to April 2015, the Board and the Bureau are calculating the threshold based on the amount that would have resulted had this decrease been taken into

[7] *See* comments 2(e)–9 in supplements I of 12 CFR parts 213 and 1013.

[8] *See, e.g.,* 76 FR 18354, 18355 n.1 (Apr. 4, 2011) (''[A]n annual period of deflation or no inflation would not require a change in the threshold amount.'').

account, which is $54,200. A 0.8 percent increase in the CPI–W applied to $54,200 results in $54,600, which is the same threshold amount for 2016. Thus, the exemption threshold amount that will be in effect for 2017 remains at $54,600. The Board and the Bureau are revising the commentaries to their respective regulations to add new comment 2(e)–11.viii to state that, from January 1, 2017, through December 31, 2017, the threshold amount is $54,600. These revisions are effective January 1, 2017.

## IV. Regulatory Analysis

*Administrative Procedure Act*

Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Board and the Bureau find that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[9] The 2017 threshold amount for exempt consumer leases announced in this rule, $54,600, is technical and applies the calculation method set forth elsewhere in this final rule, for which notice and public comment were provided.[10] For these reasons, the Board and the Bureau have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment for purposes of the 2017 threshold adjustment are unnecessary. Therefore, the amendments regarding the 2017 threshold amount for exempt consumer leases are adopted in final form.

*Bureau's Dodd-Frank Act Section 1022(b)(2) Analysis*

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[11] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, the Securities and Exchange Commission, the Department of Housing and Urban Development, the Federal Housing Finance Agency, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Bureau has chosen to evaluate the benefits, costs and impacts of the final rule against the current state of the world, which takes into account the current regulatory regime. The Bureau is not aware of any significant benefits or costs to consumers or covered persons associated with the final rule relative to the baseline. The Board previously stated that if there is no annual percentage increase in the CPI–W, then the Board (and now the Bureau) will not adjust the exemption threshold from the prior year.[12] The final rule memorializes this in official commentary. The final rule also clarifies how the threshold is calculated for years after a year in which the threshold did not change. The Bureau believes that this clarification memorializes the method that the Bureau would be expected to use: This method holds the threshold fixed until a notional threshold calculated using the Bureau's methodology, taking into account both decreases and increases in the CPI–W, exceeds the actual threshold. The Bureau requested, but did not receive, comment on this point. Thus, the Bureau concludes that the final rule will not change the regulatory regime relative to the baseline and will create no significant benefits, costs, or impacts.

The final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act or on rural consumers. The Bureau does not expect this final rule to affect consumers' access to credit.

*Regulatory Flexibility Act*

*Board:* An initial regulatory flexibility analysis (IRFA) was included in the proposal in accordance with section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA). In the IRFA, the Board requested comments on any approaches, other than the proposed alternatives, that would reduce the burden on small entities. The RFA requires an agency to prepare a final regulatory flexibility analysis (FRFA) unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. In accordance with section 3(a) of the RFA, the Board has reviewed the final regulation. Based on its analysis, and for the reasons stated below, the Board believes that the rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the final rule.* The final rule memorializes the calculation method used by the Board each year to adjust the exemption threshold in accordance with section 1100E of the Dodd-Frank Act. The final rule also adopts the exemption threshold that will apply from January 1, 2017, through December 31, 2017, based on the calculation method memorialized in this final rule.

2. *Summary of issues raised by comments in response to the initial regulatory flexibility analysis.* The Board did not receive any comments on the initial regulatory flexibility analysis.

3. *Small entities affected by the final rule.* Motor vehicle dealers that are subject to the Board's Regulation M and offer consumer leases that may be exempt from Regulation M under 12 CFR 213.2(e) would be affected. While the total number of small entities likely to be affected by the final rule is unknown, the Board does not believe the final rule will have a significant economic impact on the entities that it affects.

4. *Recordkeeping, reporting, and compliance requirements.* The final rule would not impose any recordkeeping, reporting, or compliance requirements.

5. *Significant alternatives to the final revisions.* The Board has not identified any significant alternatives that would reduce the regulatory burden on small entities associated with this final rule.

*Bureau:* The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[13] These analyses must describe the impact of the proposed and final rules on small entities.[14] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[15] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to

[9] 5 U.S.C. 553(b)(B).

[10] *See* 81 FR 51400 (Aug. 4, 2016).

[11] Specifically, section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas.

[12] 76 FR 18354, 18355 n.1 (Apr. 4, 2011) (''[A]n annual period of deflation or no inflation would not require a change in the threshold amount.'').

[13] 5 U.S.C. 601 *et seq.*

[14] *Id.* at 603(a) and 604(a). For purposes of assessing the impacts of the rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. *Id.* at 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. *Id.* at 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' *Id.* at 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. *Id.* at 601(5).

[15] *Id.* at 605(b).

consult with small business representatives prior to proposing a rule for which an IRFA is required.[16]

A FRFA is not required for this final rule because it will not have a significant economic impact on a substantial number of small entities. As discussed in the Bureau's Section 1022(b)(2) Analysis above, this final rule does not introduce costs or benefits to covered persons because it seeks only to clarify the method of threshold adjustment which has already been established in previous Agency rules. Therefore this final rule will not have a significant impact on small entities.

Certification

Accordingly, the Bureau Director, by signing below, certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995,[17] the agencies reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

**List of Subjects**

*12 CFR Part 213*

Advertising, Consumer leasing, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements.

*12 CFR Part 1013*

Advertising, Consumer leasing, Reporting and recordkeeping requirements, Truth in lending.

**Board of Governors of the Federal Reserve System**

**Authority and Issuance**

For the reasons set forth in the preamble, the Board amends Regulation M, 12 CFR part 213, as set forth below:

## PART 213—CONSUMER LEASING (REGULATION M)

■ 1. The authority citation for part 213 continues to read as follows:

**Authority:** 15 U.S.C. 1604 and 1667f; Public Law 111–203, section 1100E, 124 Stat. 1376.

■ 2. In supplement I to part 213, under *Section 213.2—Definitions,* under *2(e) Consumer lease,* paragraph 9 is revised, and paragraphs 10 and 11 are added, to read as follows:

**Supplement I to Part 213—Official Staff Commentary to Regulation M**

* * * * *

*Section 213.2—Definitions*

* * * * *

2(e) Consumer Lease

* * * * *

9. *Threshold amount.* A consumer lease is exempt from the requirements of this part if the total contractual obligation exceeds the threshold amount in effect at the time of consummation. The threshold amount in effect during a particular time period is the amount stated in comment 2(e)–11 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 2(e)–11 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900. If a consumer lease is exempt from the requirements of this Part because the total contractual obligation exceeds the threshold amount in effect at the time of consummation, the lease remains exempt regardless of a subsequent increase in the threshold amount.

10. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

11. *Threshold.* For purposes of § 213.2(e)(1), the threshold amount in effect during a particular period is the amount stated below for that period.

i. Prior to July 21, 2011, the threshold amount is $25,000.

ii. From July 21, 2011 through December 31, 2011, the threshold amount is $50,000.

iii. From January 1, 2012 through December 31, 2012, the threshold amount is $51,800.

iv. From January 1, 2013 through December 31, 2013, the threshold amount is $53,000.

v. From January 1, 2014 through December 31, 2014, the threshold amount is $53,500.

vi. From January 1, 2015 through December 31, 2015, the threshold amount is $54,600.

vii. From January 1, 2016 through December 31, 2016, the threshold amount is $54,600.

viii. From January 1, 2017 through December 31, 2017, the threshold amount is $54,600.

**Bureau of Consumer Financial Protection**

**Authority and Issuance**

For the reasons set forth in the preamble, the Bureau amends Regulation M, 12 CFR part 1013, as set forth below:

## PART 1013—CONSUMER LEASING (REGULATION M)

■ 3. The authority citation for part 1013 continues to read as follows:

**Authority:** 15 U.S.C. 1604 and 1667f; Public Law 111–203, section 1100E, 124 Stat. 1376.

■ 4. In supplement I to part 1013, under *Section 1013.2—Definitions,* under *2(e)—Consumer Lease,* paragraph 9 is revised, and paragraphs 10 and 11 are added, to read as follows:

**Supplement I to Part 1013—Official Interpretations**

* * * * *

*Section 1013.2—Definitions*

* * * * *

2(e) Consumer Lease

* * * * *

9. *Threshold amount.* A consumer lease is exempt from the requirements of

[16] *Id.* at 609.

[17] 44 U.S.C. 3506; 5 CFR 1320.

this part if the total contractual obligation exceeds the threshold amount in effect at the time of consummation. The threshold amount in effect during a particular time period is the amount stated in comment 2(e)–11 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 2(e)–11 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900. If a consumer lease is exempt from the requirements of this part because the total contractual obligation exceeds the threshold amount in effect at the time of consummation, the lease remains exempt regardless of a subsequent increase in the threshold amount.

10. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

11. *Threshold.* For purposes of § 1013.2(e)(1), the threshold amount in effect during a particular period is the amount stated below for that period.

i. Prior to July 21, 2011, the threshold amount is $25,000.

ii. From July 21, 2011 through December 31, 2011, the threshold amount is $50,000.

iii. From January 1, 2012 through December 31, 2012, the threshold amount is $51,800.

iv. From January 1, 2013 through December 31, 2013, the threshold amount is $53,000.

v. From January 1, 2014 through December 31, 2014, the threshold amount is $53,500.

vi. From January 1, 2015 through December 31, 2015, the threshold amount is $54,600.

vii. From January 1, 2016 through December 31, 2016, the threshold amount is $54,600.

viii. From January 1, 2017 through December 31, 2017, the threshold amount is $54,600.

By order of the Board of Governors of the Federal Reserve System, November 17, 2016.

**Robert deV. Frierson,**

*Secretary of the Board.*

Dated: November 7, 2016.

**Richard Cordray,**

*Director, Bureau of Consumer Financial Protection.*

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 226

**[Docket No. R–1546]**

**RIN 7100 AE–57**

## BUREAU OF CONSUMER FINANCIAL PROTECTION

### 12 CFR Part 1026

**[Docket No. CFPB–2016–0037]**

**RIN 3170–AA67**

### Truth in Lending (Regulation Z)

**AGENCY:** Board of Governors of the Federal Reserve System (Board); and Bureau of Consumer Financial Protection (Bureau).

**ACTION:** Final rules, official interpretations and commentary.

**SUMMARY:** The Board and the Bureau are finalizing amendments to the official interpretations and commentary for the agencies' regulations that implement the Truth in Lending Act (TILA). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended TILA by requiring that the dollar threshold for exempt consumer credit transactions be adjusted annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W). If there is no annual percentage increase in the CPI–W, the Board and Bureau will not adjust this exemption threshold from the prior year. The final rule memorializes this as well as the agencies' calculation method for determining the adjustment in years following a year in which there is no annual percentage increase in the CPI–W. Based on the CPI–W in effect as of June 1, 2016, the exemption threshold will remain at $54,600 through 2017. The Dodd-Frank Act also requires similar adjustments in the Consumer Leasing Act's threshold for exempt consumer leases. Accordingly, the Board and the Bureau are adopting similar amendments to the commentaries to each of their respective regulations implementing the Consumer Leasing Act elsewhere in this issue of the **Federal Register**.

**DATES:** This final rule is effective January 1, 2017.

**FOR FURTHER INFORMATION CONTACT:** *Board:* Vivian W. Wong, Senior Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

*Bureau:* Jaclyn Maier, Counsel, Office of Regulations, Consumer Financial Protection Bureau, at (202) 435–7700.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) increased the threshold in the Truth in Lending Act (TILA) for exempt consumer credit transactions,[1] and the threshold in the Consumer Leasing Act (CLA) for exempt consumer leases, from $25,000 to $50,000, effective July 21, 2011.[2] In addition, the Dodd-Frank Act requires that, on and after December 31, 2011, these thresholds be adjusted annually for inflation by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W), as published by the Bureau of Labor Statistics. In April 2011, the Board issued a final rule

[1] Although consumer credit transactions above the threshold are generally exempt, loans secured by real property or by personal property used or expected to be used as the principal dwelling of a consumer and private education loans are covered by TILA regardless of the loan amount. *See* 12 CFR 226.3(b)(1)(i) (Board) and 12 CFR 1026.3(b)(1)(i) (Bureau).

[2] Public Law 111–203, section 1100E, 124 Stat. 1376 (2010).

amending Regulation Z (which implements TILA) consistent with these provisions of the Dodd-Frank Act, along with a similar final rule amending Regulation M (which implements the CLA) (collectively, the Board Final Threshold Rules).[3]

Title X of the Dodd-Frank Act transferred rulemaking authority for a number of consumer financial protection laws from the Board to the Bureau, effective July 21, 2011. In connection with this transfer of rulemaking authority, the Bureau issued its own Regulation Z implementing TILA in an interim final rule, 12 CFR part 1026 (Bureau Interim Final Rule).[4] The Bureau Interim Final Rule substantially duplicated the Board's Regulation Z, including the revisions to the threshold for exempt transactions made by the Board in April 2011. In April 2016, the Bureau adopted the Bureau Interim Final Rule as final, subject to intervening final rules published by the Bureau.[5] Although the Bureau has the authority to issue rules to implement TILA for most entities, the Board retains authority to issue rules under TILA for certain motor vehicle dealers covered by section 1029(a) of the Dodd-Frank Act, and the Board's Regulation Z continues to apply to those entities.[6]

Section 226.3(b)(1)(ii) of the Board's Regulation Z and § 1026.3(b)(1)(ii) of the Bureau's Regulation Z, and their accompanying commentaries, provide that the exemption threshold will be adjusted annually effective January 1 of each year based on any annual percentage increase in the CPI–W that was in effect on the preceding June 1. They further provide that any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.[7] If there is no annual percentage increase in the CPI–W, the Board and Bureau will not adjust the exemption threshold from the prior year. Since 2011, the Board and the Bureau have adjusted the Regulation Z exemption threshold annually, in accordance with these rules.

## II. Commentary Revision

On August 4, 2016, the Board and the Bureau published a proposed rule in the **Federal Register** to memorialize the calculation method used by the agencies each year to adjust the exemption threshold. *See* 81 FR 51404 (Aug. 4, 2016). The proposed commentary stated that if there is no annual percentage increase in the CPI–W, the Board and Bureau will not adjust the exemption threshold from the prior year. The proposed commentary further set forth the calculation method the agencies would use in years following a year in which the exemption threshold was not adjusted because there was no increase in the CPI–W from the previous year. As the Board and the Bureau discussed in the proposal, the proposed calculation method would ensure that the values for the exemption threshold keep pace with the CPI–W as contemplated by section 1100E(b) of the Dodd-Frank Act.

The comment period closed on September 6, 2016. In response to the proposal, the Board and the Bureau received one comment from a consumer, supporting the proposal. The Board and the Bureau are adopting the commentary revisions as proposed, with some minor clarifying amendments. These changes will be effective on January 1, 2017.

Specifically, the Board and the Bureau are adopting comment 3(b)–1 as proposed to move the text regarding the threshold amount that is in effect during a particular period to a new comment 3(b)–3. The discussion of how the agencies round the threshold calculation will remain in comment 3(b)–1. Current comments 3(b)–2, 3(b)–3, 3(b)–4, 3(b)–5, and 3(b)–6 are renumbered as comments 3(b)–4, 3(b)–5, 3(b)–6, 3(b)–7, and 3(b)–8, respectively, and cross-references to these comments are also renumbered accordingly, as proposed.

Furthermore, the Board and the Bureau are adopting new comment 3(b)–2 as proposed to provide that if the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year (*i.e.,* the CPI–W in effect on June 1 is either equal to or less than the CPI–W in effect on June 1 of the previous year), the threshold amount effective the following January 1 through December 31 will not change from the previous year. As the Board and the Bureau discussed in the proposal, this position is consistent with section 1100E(b) of the Dodd-Frank Act, which states that the threshold must be adjusted by the ''annual percentage *increase*'' in the CPI–W (emphasis added), and the position the agencies have previously taken.[8] Thus, if the threshold in effect from January 1, 2019, through December 31, 2019, is $55,500 and the CPI–W in effect on June 1 of 2019 indicates a 1.1 percent decrease from the CPI–W in effect on June 1, 2018, the threshold in effect for January 1, 2020, through December 31, 2020, will remain $55,500.

Comment 3(b)–2 also provides that, for the years after a year in which the threshold did not change because the CPI–W in effect on June 1 decreased from the CPI–W in effect on June 1 of the previous year, the threshold is calculated by applying the annual percentage change in the CPI–W to the dollar amount that would have resulted, after rounding, if the decreases and any subsequent increases in the CPI–W had been taken into account. Comment 3(b)–2.i further states that, if the resulting amount, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

For example, assume that the threshold in effect from January 1, 2019, through December 31, 2019, is $55,500 and that, due to a 1.1 percent decrease from the CPI–W in effect on June 1, 2018, to the CPI–W in effect on June 1, 2019, the threshold in effect from January 1, 2020, through December 31, 2020, remains at $55,500. If, however, the threshold had been adjusted downward to reflect the decrease in the CPI–W over that time period, the threshold in effect from January 1, 2020, through December 31, 2020, would have

[3] 76 FR 18354 (Apr. 4, 2011); 76 FR 18349 (Apr. 4, 2011).

[4] 76 FR 79768 (Dec. 22, 2011).

[5] 81 FR 25323 (April 28, 2016).

[6] Section 1029(a) of the Dodd-Frank Act states: ''Except as permitted in subsection (b), the Bureau may not exercise any rulemaking, supervisory, enforcement, or any other authority . . . over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.'' 12 U.S.C. 5519(a). Section 1029(b) of the Dodd-Frank Act states: ''Subsection (a) shall not apply to any person, to the extent that such person (1) provides consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property; (2) operates a line of business (A) that involves the extension of retail credit or retail leases involving motor vehicles; and (B) in which (i) the extension of retail credit or retail leases are provided directly to consumers; and (ii) the contract governing such extension of retail credit or retail leases is not routinely assigned to an unaffiliated third party finance or leasing source; or (3) offers or provides a consumer financial product or service not involving or related to the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service.'' 12 U.S.C. 5519(b).

[7] *See* comments 3(b)–1 in supplements I of 12 CFR parts 226 and 1026.

[8] *See, e.g.,* 76 FR 18354, 18355 n.1 (Apr. 4, 2011) (''[A]n annual period of deflation or no inflation would not require a change in the threshold amount.'').

been $54,900, after rounding. Further assume that the CPI–W in effect on June 1, 2020, increased by 1.6 percent from the CPI–W in effect on June 1, 2019. The calculation for the threshold that will be in effect from January 1, 2021, through December 31, 2021, is based on the impact of a 1.6 percent increase in the CPI–W on $54,900, rather than $55,500, resulting in a 2021 threshold of $55,800.

Furthermore, comment 3(b)–2.ii states that, if the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted, after rounding. To illustrate, assume in the example above that the CPI–W in effect on June 1, 2020, increased by only 0.6 percent from the CPI–W in effect on June 1, 2019. The calculation for the threshold that will be in effect from January 1, 2021, through December 31, 2021, is based on the impact of a 0.6 percent increase in the CPI–W on $54,900. The resulting amount, after rounding, is $55,200, which is lower than $55,500, the threshold in effect from January 1, 2020, through December 31, 2020. Therefore, the threshold in effect from January 1, 2021, through December 31, 2021, will remain $55,500. However, the calculation for the threshold that will be in effect from January 1, 2022, through December 31, 2022, will apply the percentage change in the CPI–W to $55,200, the amount that would have resulted based on the 0.6 percent change from the CPI–W in effect on June 1, 2019, after rounding, to the CPI–W in effect on June 1, 2020.

## III. 2017 Threshold

Based on the calculation method detailed above, the exemption threshold amount for 2017 remains at $54,600. This is based on the CPI–W in effect on June 1, 2016, which was reported on May 17, 2016. The Bureau of Labor Statistics publishes consumer-based indices monthly, but does not report a CPI change on June 1; adjustments are reported in the middle of the month. The CPI–W is a subset of the CPI–U index (based on all urban consumers) and represents approximately 28 percent of the U.S. population. The CPI–W reported on May 17, 2016 reflects a 0.8 percent increase in the CPI–W from April 2015 to April 2016. Because the CPI–W decreased from April 2014 to April 2015, the Board and the Bureau are calculating the threshold based on the amount that would have resulted had this decrease been taken into account, which is $54,200. A 0.8 percent increase in the CPI–W applied to $54,200 results in $54,600, which is the same threshold amount for 2016. Thus, the exemption threshold amount that will be in effect for 2017 remains at $54,600. The Board and the Bureau are revising the commentaries to their respective regulations to add new comment 3(b)–3.viii to state that, from January 1, 2017, through December 31, 2017, the threshold amount is $54,600. These revisions are effective January 1, 2017.

## IV. Regulatory Analysis

*Administrative Procedure Act*

Under the Administrative Procedure Act, notice and opportunity for public comment are not required if the Board and the Bureau find that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[9] The 2017 threshold amount for exempt consumer credit transactions announced in this rule, $54,600, is technical and applies the calculation method set forth elsewhere in this final rule, for which notice and public comment were provided.[10] For these reasons, the Board and the Bureau have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment for purposes of the 2017 threshold adjustment are unnecessary. Therefore, the amendments regarding the 2017 threshold amount for exempt consumer credit transactions are adopted in final form.

*Bureau's Dodd-Frank Act Section 1022(b)(2) Analysis*

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[11] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, the Securities and Exchange Commission, the Department of Housing and Urban Development, the Federal Housing Finance Agency, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The Bureau has chosen to evaluate the benefits, costs and impacts of the final rule against the current state of the world, which takes into account the current regulatory regime. The Bureau is not aware of any significant benefits or costs to consumers or covered persons associated with the final rule relative to the baseline. The Board previously stated that if there is no annual percentage increase in the CPI–W, then the Board (and now the Bureau) will not adjust the exemption threshold from the prior year.[12] The final rule memorializes this in official commentary. The final rule also clarifies how the threshold is calculated for years after a year in which the threshold did not change. The Bureau believes that this clarification memorializes the method that the Bureau would be expected to use: This method holds the threshold fixed until a notional threshold calculated using the Bureau's methodology, taking into account both decreases and increases in the CPI–W, exceeds the actual threshold. The Bureau requested, but did not receive, comment on this point. Thus, the Bureau concludes that the final rule will not change the regulatory regime relative to the baseline and will create no significant benefits, costs, or impacts.

The final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act or on rural consumers. The Bureau does not expect this final rule to affect consumers' access to credit.

*Regulatory Flexibility Act*

*Board:* An initial regulatory flexibility analysis (IRFA) was included in the proposal in accordance with section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA). In the IRFA, the Board requested comments on any approaches, other than the proposed alternatives, that would reduce the burden on small entities. The RFA requires an agency to prepare a final regulatory flexibility analysis (FRFA) unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. In accordance with section 3(a) of the RFA, the Board has reviewed the final regulation. Based on its analysis, and for the reasons stated below, the Board believes that the rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the final rule.* The final rule memorializes the calculation

[9] 5 U.S.C. 553(b)(B).

[10] *See* 81 FR 51404 (Aug. 4, 2016).

[11] Specifically, section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas.

[12] 76 FR 18354, 18355 n.1 (Apr. 4, 2011) (''[A]n annual period of deflation or no inflation would not require a change in the threshold amount.'').

method used by the Board each year to adjust the exemption threshold in accordance with section 1100E of the Dodd-Frank Act. The final rule also adopts the exemption threshold that will apply from January 1, 2017, through December 31, 2017, based on the calculation method memorialized in this final rule.

2. *Summary of issues raised by comments in response to the initial regulatory flexibility analysis.* The Board did not receive any comments on the initial regulatory flexibility analysis.

3. *Small entities affected by the final rule.* This rule would affect motor vehicle dealers that are subject to the Board's Regulation Z and offer closed-end or open-end credit that may be exempt from Regulation Z under 12 CFR 226.3(b). While the total number of small entities likely to be affected by the final rule is unknown, the Board does not believe the final rule will have a significant economic impact on the entities that it affects.

4. *Recordkeeping, reporting, and compliance requirements.* The final rule would not impose any recordkeeping, reporting, or compliance requirements.

5. *Significant alternatives to the final revisions.* The Board has not identified any significant alternatives that would reduce the regulatory burden on small entities associated with this final rule.

*Bureau:* The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[13] These analyses must describe the impact of the proposed and final rules on small entities.[14] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[15] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[16]

A FRFA is not required for this final rule because it will not have a significant economic impact on a substantial number of small entities. As discussed in the Bureau's Section 1022(b)(2) Analysis above, this final rule does not introduce costs or benefits to covered persons because it seeks only to clarify the method of threshold adjustment which has already been established in previous Agency rules. Therefore this final rule will not have a significant impact on small entities.

Certification

Accordingly, the Bureau Director, by signing below, certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

*Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995,[17] the agencies reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

**List of Subjects**

*12 CFR Part 226*

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in lending.

*12 CFR Part 1026*

Advertising, Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

**Board of Governors of the Federal Reserve System**

**Authority and Issuance**

For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

## PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 continues to read as follows:

**Authority:** 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l); Public Law 111–24, section 2, 123 Stat. 1734; Public Law 111–203, 124 Stat. 1376.

### Subpart A—General

■ 2. In supplement I to part 226, under *Section 226.3—Exempt Transactions,* the entry for *3(b) Credit over applicable threshold amount* is revised to read as follows:

**Supplement I to Part 226—Official Staff Interpretations**

* * * * *

### Subpart A—General

* * * * *

**Section 226.3—Exemptions**

* * * * *

*3(b) Credit over applicable threshold amount.*

1. *Threshold amount.* For purposes of § 226.3(b), the threshold amount in effect during a particular period is the amount stated in comment 3(b)–3 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 3(b)–3 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

2. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be

[13] 5 U.S.C. 601 *et seq.*

[14] *Id.* at 603(a) and 604(a). For purposes of assessing the impacts of the rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. *Id.* at 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. *Id.* at 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' *Id.* at 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. *Id.* at 601(5).

[15] *Id.* at 605(b).

[16] *Id.* at 609.

[17] 44 U.S.C. 3506; 5 CFR 1320.

calculated based on the amount that would have resulted.

3. *Threshold.* For purposes of § 226.3(b), the threshold amount in effect during a particular period is the amount stated below for that period.

i. Prior to July 21, 2011, the threshold amount is $25,000.

ii. From July 21, 2011 through December 31, 2011, the threshold amount is $50,000.

iii. From January 1, 2012 through December 31, 2012, the threshold amount is $51,800.

iv. From January 1, 2013 through December 31, 2013, the threshold amount is $53,000.

v. From January 1, 2014 through December 31, 2014, the threshold amount is $53,500.

vi. From January 1, 2015 through December 31, 2015, the threshold amount is $54,600.

vii. From January 1, 2016 through December 31, 2016, the threshold amount is $54,600.

viii. From January 1, 2017 through December 31, 2017, the threshold amount is $54,600.

4. *Open-end credit.*

i. *Qualifying for exemption.* An open-end account is exempt under § 226.3(b) (unless secured by any real property, or by personal property used or expected to be used as the consumer's principal dwelling) if either of the following conditions is met:

A. The creditor makes an initial extension of credit at or after account opening that exceeds the threshold amount in effect at the time the initial extension is made. If a creditor makes an initial extension of credit after account opening that does not exceed the threshold amount in effect at the time the extension is made, the creditor must have satisfied all of the applicable requirements of this part from the date the account was opened (or earlier, if applicable), including but not limited to the requirements of § 226.6 (account-opening disclosures), § 226.7 (periodic statements), § 226.52 (limitations on fees), and § 226.55 (limitations on increasing annual percentages rates, fees, and charges). For example:

(1) Assume that the threshold amount in effect on January 1 is $50,000. On February 1, an account is opened but the creditor does not make an initial extension of credit at that time. On July 1, the creditor makes an initial extension of credit of $60,000. In this circumstance, no requirements of this part apply to the account.

(2) Assume that the threshold amount in effect on January 1 is $50,000. On February 1, an account is opened but the creditor does not make an initial extension of credit at that time. On July 1, the creditor makes an initial extension of credit of $50,000 or less. In this circumstance, the account is not exempt and the creditor must have satisfied all of the applicable requirements of this part from the date the account was opened (or earlier, if applicable).

B. The creditor makes a firm written commitment at account opening to extend a total amount of credit in excess of the threshold amount in effect at the time the account is opened with no requirement of additional credit information for any advances on the account (except as permitted from time to time with respect to open-end accounts pursuant to § 226.2(a)(20)).

ii. *Subsequent changes generally.* Subsequent changes to an open-end account or the threshold amount may result in the account no longer qualifying for the exemption in § 226.3(b). In these circumstances, the creditor must begin to comply with all of the applicable requirements of this part within a reasonable period of time after the account ceases to be exempt. Once an account ceases to be exempt, the requirements of this part apply to any balances on the account. The creditor, however, is not required to comply with the requirements of this part with respect to the period of time during which the account was exempt. For example, if an open-end credit account ceases to be exempt, the creditor must within a reasonable period of time provide the disclosures required by § 226.6 reflecting the current terms of the account and begin to provide periodic statements consistent with § 226.7. However, the creditor is not required to disclose fees or charges imposed while the account was exempt. Furthermore, if the creditor provided disclosures consistent with the requirements of this part while the account was exempt, it is not required to provide disclosures required by § 226.6 reflecting the current terms of the account. See also comment 3(b)–6.

iii. *Subsequent changes when exemption is based on initial extension of credit.* If a creditor makes an initial extension of credit that exceeds the threshold amount in effect at that time, the open-end account remains exempt under § 226.3(b) regardless of a subsequent increase in the threshold amount, including an increase pursuant to § 226.3(b)(1)(ii) as a result of an increase in the CPI–W. Furthermore, in these circumstances, the account remains exempt even if there are no further extensions of credit, subsequent extensions of credit do not exceed the threshold amount, the account balance is subsequently reduced below the threshold amount (such as through repayment of the extension), or the credit limit for the account is subsequently reduced below the threshold amount. However, if the initial extension of credit on an account does not exceed the threshold amount in effect at the time of the extension, the account is not exempt under § 226.3(b) even if a subsequent extension exceeds the threshold amount or if the account balance later exceeds the threshold amount (for example, due to the subsequent accrual of interest).

iv. *Subsequent changes when exemption is based on firm commitment.*

A. *General.* If a creditor makes a firm written commitment at account opening to extend a total amount of credit that exceeds the threshold amount in effect at that time, the open-end account remains exempt under § 226.3(b) regardless of a subsequent increase in the threshold amount pursuant to § 226.3(b)(1)(ii) as a result of an increase in the CPI–W. However, see comment 3(b)–8 with respect to the increase in the threshold amount from $25,000 to $50,000. If an open-end account is exempt under § 226.3(b) based on a firm commitment to extend credit, the account remains exempt even if the amount of credit actually extended does not exceed the threshold amount. In contrast, if the firm commitment does not exceed the threshold amount at account opening, the account is not exempt under § 226.3(b) even if the account balance later exceeds the threshold amount. In addition, if a creditor reduces a firm commitment, the account ceases to be exempt unless the reduced firm commitment exceeds the threshold amount in effect at the time of the reduction. For example:

(1) Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 226.3(b) based on the creditor's firm commitment to extend $55,000 in credit. If during year one the creditor reduces its firm commitment to $53,000, the account remains exempt under § 226.3(b). However, if during year one the creditor reduces its firm commitment to $40,000, the account is no longer exempt under § 226.3(b).

(2) Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 226.3(b) based on the creditor's firm commitment to extend $55,000 in credit. If the threshold amount is $56,000 on January 1 of year six as a result of increases in the CPI–W, the account remains exempt. However, if the creditor reduces its firm

commitment to $54,000 on July 1 of year six, the account ceases to be exempt under § 226.3(b).

B. *Initial extension of credit.* If an open-end account qualifies for a § 226.3(b) exemption at account opening based on a firm commitment, that account may also subsequently qualify for a § 226.3(b) exemption based on an initial extension of credit. However, that initial extension must be a single advance in excess of the threshold amount in effect at the time the extension is made. In addition, the account must continue to qualify for an exemption based on the firm commitment until the initial extension of credit is made. For example:

(1) Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 226.3(b) based on the creditor's firm commitment to extend $55,000 in credit. The account is not used for an extension of credit during year one. On January 1 of year two, the threshold amount is increased to $51,000 pursuant to § 226.3(b)(1)(ii) as a result of an increase in the CPI–W. On July 1 of year two, the consumer uses the account for an initial extension of $52,000. As a result of this extension of credit, the account remains exempt under § 226.3(b) even if, after July 1 of year two, the creditor reduces the firm commitment to $51,000 or less.

(2) Same facts as in paragraph iv.B(1) above except that the consumer uses the account for an initial extension of $30,000 on July 1 of year two and for an extension of $22,000 on July 15 of year two. In these circumstances, the account is not exempt under § 226.3(b) based on the $30,000 initial extension of credit because that extension did not exceed the applicable threshold amount ($51,000), although the account remains exempt based on the firm commitment to extend $55,000 in credit.

(3) Same facts as in paragraph iv.B(1) above except that, on April 1 of year two, the creditor reduces the firm commitment to $50,000, which is below the $51,000 threshold then in effect. Because the account ceases to qualify for a § 226.3(b) exemption on April 1 of year two, the account does not qualify for a § 226.3(b) exemption based on a $52,000 initial extension of credit on July 1 of year two.

5. *Closed-end credit.*

i. *Qualifying for exemption.* A closed-end loan is exempt under § 226.3(b) (unless the extension of credit is secured by any real property, or by personal property used or expected to be used as the consumer's principal dwelling; or is a private education loan as defined in § 226.46(b)(5)), if either of the following conditions is met.

A. The creditor makes an extension of credit at consummation that exceeds the threshold amount in effect at the time of consummation. In these circumstances, the loan remains exempt under § 226.3(b) even if the amount owed is subsequently reduced below the threshold amount (such as through repayment of the loan).

B. The creditor makes a commitment at consummation to extend a total amount of credit in excess of the threshold amount in effect at the time of consummation. In these circumstances, the loan remains exempt under § 226.3(b) even if the total amount of credit extended does not exceed the threshold amount.

ii. *Subsequent changes.* If a creditor makes a closed-end extension of credit or commitment to extend closed-end credit that exceeds the threshold amount in effect at the time of consummation, the closed-end loan remains exempt under § 226.3(b) regardless of a subsequent increase in the threshold amount. However, a closed-end loan is not exempt under § 226.3(b) merely because it is used to satisfy and replace an existing exempt loan, unless the new extension of credit is itself exempt under the applicable threshold amount. For example, assume a closed-end loan that qualified for a § 226.3(b) exemption at consummation in year one is refinanced in year ten and that the new loan amount is less than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of this part with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan, which is not exempt under § 226.3(b). See also comment 3(b)–6.

6. *Addition of a security interest in real property or a dwelling after account opening or consummation.*

i. *Open-end credit.* For open-end accounts, if, after account opening, a security interest is taken in real property, or in personal property used or expected to be used as the consumer's principal dwelling, a previously exempt account ceases to be exempt under § 226.3(b) and the creditor must begin to comply with all of the applicable requirements of this part within a reasonable period of time. See comment 3(b)–4.ii. If a security interest is taken in the consumer's principal dwelling, the creditor must also give the consumer the right to rescind the security interest consistent with § 226.15.

ii. *Closed-end credit.* For closed-end loans, if, after consummation, a security interest is taken in any real property, or in personal property used or expected to be used as the consumer's principal dwelling, an exempt loan remains exempt under § 226.3(b). However, the addition of a security interest in the consumer's principal dwelling is a transaction for purposes of § 226.23, and the creditor must give the consumer the right to rescind the security interest consistent with that section. See § 226.23(a)(1) and the accompanying commentary. In contrast, if a closed-end loan that is exempt under § 226.3(b) is satisfied and replaced by a loan that is secured by any real property, or by personal property used or expected to be used as the consumer's principal dwelling, the new loan is not exempt under § 226.3(b) and the creditor must comply with all of the applicable requirements of this part. See comment 3(b)–5.

7. *Application to extensions secured by mobile homes.* Because a mobile home can be a dwelling under § 226.2(a)(19), the exemption in § 226.3(b) does not apply to a credit extension secured by a mobile home that is used or expected to be used as the principal dwelling of the consumer. See comment 3(b)–6.

8. *Transition rule for open-end accounts exempt prior to July 21, 2011.* Section 226.3(b)(2) applies only to open-end accounts opened prior to July 21, 2011. Section 226.3(b)(2) does not apply if a security interest is taken by the creditor in any real property, or in personal property used or expected to be used as the consumer's principal dwelling. If, on July 20, 2011, an open-end account is exempt under § 226.3(b) based on a firm commitment to extend credit in excess of $25,000, the account remains exempt under § 226.3(b)(2) until December 31, 2011 (unless the firm commitment is reduced to $25,000 or less). If the firm commitment is increased on or before December 31, 2011 to an amount in excess of $50,000, the account remains exempt under § 226.3(b)(1) regardless of subsequent increases in the threshold amount as a result of increases in the CPI–W. If the firm commitment is not increased on or before December 31, 2011 to an amount in excess of $50,000, the account ceases to be exempt under § 226.3(b) based on a firm commitment to extend credit. For example:

i. Assume that, on July 20, 2011, the account is exempt under § 226.3(b) based on the creditor's firm commitment to extend $30,000 in credit. On November 1, 2011, the creditor increases the firm commitment on the account to $55,000. In these circumstances, the account remains

exempt under § 226.3(b)(1) regardless of subsequent increases in the threshold amount as a result of increases in the CPI–W.

ii. Same facts as paragraph i. above except, on November 1, 2011, the creditor increases the firm commitment on the account to $40,000. In these circumstances, the account ceases to be exempt under § 226.3(b)(2) after December 31, 2011, and the creditor must begin to comply with the applicable requirements of this part.

* * * * *

**Bureau of Consumer Financial Protection**

**Authority and Issuance**

For the reasons set forth in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

## PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 3. The authority citation for part 1026 continues to read as follows:

**Authority:** 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

■ 4. In supplement I to part 1026, under *Section 1026.3—Exempt Transactions,* the entry for *3(b)—Credit Over Applicable Threshold Amount* is revised to read as follows:

**Supplement I to Part 1026—Official Interpretations**

* * * * *

**Subpart A—General**

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*Section 1026.3—Exempt Transactions*

* * * * *

3(b) Credit Over Applicable Threshold Amount

1. *Threshold amount.* For purposes of § 1026.3(b), the threshold amount in effect during a particular period is the amount stated in comment 3(b)–3 below for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 3(b)–3 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

2. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

3. *Threshold.* For purposes of § 1026.3(b), the threshold amount in effect during a particular period is the amount stated below for that period.

i. Prior to July 21, 2011, the threshold amount is $25,000.

ii. From July 21, 2011 through December 31, 2011, the threshold amount is $50,000.

iii. From January 1, 2012 through December 31, 2012, the threshold amount is $51,800.

iv. From January 1, 2013 through December 31, 2013, the threshold amount is $53,000.

v. From January 1, 2014 through December 31, 2014, the threshold amount is $53,500.

vi. From January 1, 2015 through December 31, 2015, the threshold amount is $54,600.

vii. From January 1, 2016 through December 31, 2016, the threshold amount is $54,600.

viii. From January 1, 2017 through December 31, 2017, the threshold amount is $54,600.

4. *Open-end credit.* i. *Qualifying for exemption.* An open-end account is exempt under § 1026.3(b) (unless secured by real property, or by personal property used or expected to be used as the consumer's principal dwelling) if either of the following conditions is met:

A. The creditor makes an initial extension of credit at or after account opening that exceeds the threshold amount in effect at the time the initial extension is made. If a creditor makes an initial extension of credit after account opening that does not exceed the threshold amount in effect at the time the extension is made, the creditor must have satisfied all of the applicable requirements of this part from the date the account was opened (or earlier, if applicable), including but not limited to the requirements of § 1026.6 (account-opening disclosures), § 1026.7 (periodic statements), § 1026.52 (limitations on fees), and § 1026.55 (limitations on increasing annual percentage rates, fees, and charges). For example:

*1.* Assume that the threshold amount in effect on January 1 is $50,000. On February 1, an account is opened but the creditor does not make an initial extension of credit at that time. On July 1, the creditor makes an initial extension of credit of $60,000. In this circumstance, no requirements of this part apply to the account.

*2.* Assume that the threshold amount in effect on January 1 is $50,000. On February 1, an account is opened but the creditor does not make an initial extension of credit at that time. On July 1, the creditor makes an initial extension of credit of $50,000 or less. In this circumstance, the account is not exempt and the creditor must have satisfied all of the applicable requirements of this part from the date the account was opened (or earlier, if applicable).

B. The creditor makes a firm written commitment at account opening to extend a total amount of credit in excess of the threshold amount in effect at the time the account is opened with no requirement of additional credit information for any advances on the account (except as permitted from time to time with respect to open-end accounts pursuant to § 1026.2(a)(20)).

ii. *Subsequent changes generally.* Subsequent changes to an open-end account or the threshold amount may result in the account no longer qualifying for the exemption in § 1026.3(b). In these circumstances, the creditor must begin to comply with all of the applicable requirements of this part within a reasonable period of time after the account ceases to be exempt. Once an account ceases to be exempt, the requirements of this part apply to any balances on the account. The creditor, however, is not required to comply with the requirements of this part with respect to the period of time

during which the account was exempt. For example, if an open-end credit account ceases to be exempt, the creditor must within a reasonable period of time provide the disclosures required by § 1026.6 reflecting the current terms of the account and begin to provide periodic statements consistent with § 1026.7. However, the creditor is not required to disclose fees or charges imposed while the account was exempt. Furthermore, if the creditor provided disclosures consistent with the requirements of this part while the account was exempt, it is not required to provide disclosures required by § 1026.6 reflecting the current terms of the account. *See also* comment 3(b)–6.

iii. *Subsequent changes when exemption is based on initial extension of credit.* If a creditor makes an initial extension of credit that exceeds the threshold amount in effect at that time, the open-end account remains exempt under § 1026.3(b) regardless of a subsequent increase in the threshold amount, including an increase pursuant to § 1026.3(b)(1)(ii) as a result of an increase in the CPI–W. Furthermore, in these circumstances, the account remains exempt even if there are no further extensions of credit, subsequent extensions of credit do not exceed the threshold amount, the account balance is subsequently reduced below the threshold amount (such as through repayment of the extension), or the credit limit for the account is subsequently reduced below the threshold amount. However, if the initial extension of credit on an account does not exceed the threshold amount in effect at the time of the extension, the account is not exempt under § 1026.3(b) even if a subsequent extension exceeds the threshold amount or if the account balance later exceeds the threshold amount (for example, due to the subsequent accrual of interest).

iv. *Subsequent changes when exemption is based on firm commitment.* A. *General.* If a creditor makes a firm written commitment at account opening to extend a total amount of credit that exceeds the threshold amount in effect at that time, the open-end account remains exempt under § 1026.3(b) regardless of a subsequent increase in the threshold amount pursuant to § 1026.3(b)(1)(ii) as a result of an increase in the CPI–W. However, see comment 3(b)–8 with respect to the increase in the threshold amount from $25,000 to $50,000. If an open-end account is exempt under § 1026.3(b) based on a firm commitment to extend credit, the account remains exempt even if the amount of credit actually extended does not exceed the threshold amount. In contrast, if the firm commitment does not exceed the threshold amount at account opening, the account is not exempt under § 1026.3(b) even if the account balance later exceeds the threshold amount. In addition, if a creditor reduces a firm commitment, the account ceases to be exempt unless the reduced firm commitment exceeds the threshold amount in effect at the time of the reduction. For example:

*1.* Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $55,000 in credit. If during year one the creditor reduces its firm commitment to $53,000, the account remains exempt under § 1026.3(b). However, if during year one the creditor reduces its firm commitment to $40,000, the account is no longer exempt under § 1026.3(b).

*2.* Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $55,000 in credit. If the threshold amount is $56,000 on January 1 of year six as a result of increases in the CPI–W, the account remains exempt. However, if the creditor reduces its firm commitment to $54,000 on July 1 of year six, the account ceases to be exempt under § 1026.3(b).

B. *Initial extension of credit.* If an open-end account qualifies for a § 1026.3(b) exemption at account opening based on a firm commitment, that account may also subsequently qualify for a § 1026.3(b) exemption based on an initial extension of credit. However, that initial extension must be a single advance in excess of the threshold amount in effect at the time the extension is made. In addition, the account must continue to qualify for an exemption based on the firm commitment until the initial extension of credit is made. For example:

*1.* Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $55,000 in credit. The account is not used for an extension of credit during year one. On January 1 of year two, the threshold amount is increased to $51,000 pursuant to § 1026.3(b)(1)(ii) as a result of an increase in the CPI–W. On July 1 of year two, the consumer uses the account for an initial extension of $52,000. As a result of this extension of credit, the account remains exempt under § 1026.3(b) even if, after July 1 of year two, the creditor reduces the firm commitment to $51,000 or less.

*2.* Same facts as in paragraph iv.B.*1* above except that the consumer uses the account for an initial extension of $30,000 on July 1 of year two and for an extension of $22,000 on July 15 of year two. In these circumstances, the account is not exempt under § 1026.3(b) based on the $30,000 initial extension of credit because that extension did not exceed the applicable threshold amount ($51,000), although the account remains exempt based on the firm commitment to extend $55,000 in credit.

*3.* Same facts as in paragraph iv.B.*1* above except that, on April 1 of year two, the creditor reduces the firm commitment to $50,000, which is below the $51,000 threshold then in effect. Because the account ceases to qualify for a § 1026.3(b) exemption on April 1 of year two, the account does not qualify for a § 1026.3(b) exemption based on a $52,000 initial extension of credit on July 1 of year two.

5. *Closed-end credit.* i. *Qualifying for exemption.* A closed-end loan is exempt under § 1026.3(b) (unless the extension of credit is secured by real property, or by personal property used or expected to be used as the consumer's principal dwelling; or is a private education loan as defined in § 1026.46(b)(5)), if either of the following conditions is met:

A. The creditor makes an extension of credit at consummation that exceeds the threshold amount in effect at the time of consummation. In these circumstances, the loan remains exempt under § 1026.3(b) even if the amount owed is subsequently reduced below the threshold amount (such as through repayment of the loan).

B. The creditor makes a commitment at consummation to extend a total amount of credit in excess of the threshold amount in effect at the time of consummation. In these circumstances, the loan remains exempt under § 1026.3(b) even if the total amount of credit extended does not exceed the threshold amount.

ii. *Subsequent changes.* If a creditor makes a closed-end extension of credit or commitment to extend closed-end credit that exceeds the threshold amount in effect at the time of consummation, the closed-end loan remains exempt under § 1026.3(b) regardless of a subsequent increase in the threshold amount. However, a closed-end loan is not exempt under § 1026.3(b) merely because it is used to satisfy and replace an existing exempt loan, unless the new extension of credit is itself exempt under the applicable threshold amount. For example, assume a closed-end loan that qualified for a

§ 1026.3(b) exemption at consummation in year one is refinanced in year ten and that the new loan amount is less than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of this part with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan, which is not exempt under § 1026.3(b). *See also* comment 3(b)–6.

6. *Addition of a security interest in real property or a dwelling after account opening or consummation.* i. *Open-end credit.* For open-end accounts, if after account opening a security interest is taken in real property, or in personal property used or expected to be used as the consumer's principal dwelling, a previously exempt account ceases to be exempt under § 1026.3(b) and the creditor must begin to comply with all of the applicable requirements of this part within a reasonable period of time. *See* comment 3(b)–4.ii. If a security interest is taken in the consumer's principal dwelling, the creditor must also give the consumer the right to rescind the security interest consistent with § 1026.15.

ii. *Closed-end credit.* For closed-end loans, if after consummation a security interest is taken in real property, or in personal property used or expected to be used as the consumer's principal dwelling, an exempt loan remains exempt under § 1026.3(b). However, the addition of a security interest in the consumer's principal dwelling is a transaction for purposes of § 1026.23, and the creditor must give the consumer the right to rescind the security interest consistent with that section. *See* § 1026.23(a)(1) and its commentary. In contrast, if a closed-end loan that is exempt under § 1026.3(b) is satisfied and replaced by a loan that is secured by real property, or by personal property used or expected to be used as the consumer's principal dwelling, the new loan is not exempt under § 1026.3(b), and the creditor must comply with all of the applicable requirements of this part. *See* comment 3(b)–5.

7. *Application to extensions secured by mobile homes.* Because a mobile home can be a dwelling under § 1026.2(a)(19), the exemption in § 1026.3(b) does not apply to a credit extension secured by a mobile home that is used or expected to be used as the principal dwelling of the consumer. *See* comment 3(b)–6.

8. *Transition rule for open-end accounts exempt prior to July 21, 2011.* Section 1026.3(b)(2) applies only to open-end accounts opened prior to July 21, 2011. Section 1026.3(b)(2) does not apply if a security interest is taken by the creditor in real property, or in personal property used or expected to be used as the consumer's principal dwelling. If, on July 20, 2011, an open-end account is exempt under § 1026.3(b) based on a firm commitment to extend credit in excess of $25,000, the account remains exempt under § 1026.3(b)(2) until December 31, 2011 (unless the firm commitment is reduced to $25,000 or less). If the firm commitment is increased on or before December 31, 2011 to an amount in excess of $50,000, the account remains exempt under § 1026.3(b)(1) regardless of subsequent increases in the threshold amount as a result of increases in the CPI–W. If the firm commitment is not increased on or before December 31, 2011 to an amount in excess of $50,000, the account ceases to be exempt under § 1026.3(b) based on a firm commitment to extend credit. For example:

i. Assume that, on July 20, 2011, the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $30,000 in credit. On November 1, 2011, the creditor increases the firm commitment on the account to $55,000. In these circumstances, the account remains exempt under § 1026.3(b)(1) regardless of subsequent increases in the threshold amount as a result of increases in the CPI–W.

ii. Same facts as paragraph i above except, on November 1, 2011, the creditor increases the firm commitment on the account to $40,000. In these circumstances, the account ceases to be exempt under § 1026.3(b)(2) after December 31, 2011, and the creditor must begin to comply with the applicable requirements of this part.

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 17, 2016.

**Robert deV. Frierson,**

*Secretary of the Board.*

Dated: November 7, 2016.

**Richard Cordray,**

*Director, Bureau of Consumer Financial Protection.*

[FR Doc. 2016–28718 Filed 11–29–16; 8:45 am]

**BILLING CODE 6210–01–4810–AM–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 573

**[Docket No. FDA–2015–F–2337]**

## Food Additives Permitted in Feed and Drinking Water of Animals; Guanidinoacetic Acid

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

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA, we, the Agency) is amending the regulations for food additives permitted in feed and drinking water of animals to provide for the safe use of guanidinoacetic acid as a substance that spares arginine and serves as a precursor of creatine in broiler chicken and turkey feeds. This action is in response to a food additive petition filed by Alzchem AG.

**DATES:** This rule is effective November 30, 2016. Submit either written or electronic objections and requests for a hearing by December 30, 2016. See section V of this document for information on the filing of objections.

**ADDRESSES:** You may submit objections and requests for a hearing as follows:

*Electronic Submissions*

Submit electronic objections in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Objections submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your objection will be made public, you are solely responsible for ensuring that your objection 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 objection, that information will be posted on *http://www.regulations.gov.*
- If you want to submit an objection with confidential information that you do not wish to be made available to the public, submit the objection as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper objections submitted to the Division of Dockets Management, FDA will post your objection, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2015–F–2337 for ''Food Additives Permitted in Feed and Drinking Water of Animals; Guanidinoacetic Acid.'' Received objections will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit an objection with confidential information that you do not wish to be made publicly available, submit your objections only as a written/paper submission. You should submit two copies in 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 objections. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your objections and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

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

**FOR FURTHER INFORMATION CONTACT:** Chelsea Trull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–6729, *chelsea.trull@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

In a document published in the **Federal Register** of July 16, 2015 (80 FR 42069), FDA announced that we had filed a food additive petition (animal use) (FAP 2292) submitted by Alzchem AG, Chemiepark Trostberg, Dr.-Albert-Frank-Str. 32, 83308, Trostberg, Germany. The petition proposed that the regulations for food additives permitted in feed and drinking water of animals be amended to provide for the safe use of guanidinoacetic acid as a substance that spares arginine and serves as a precursor of creatine in broiler chicken and turkey feeds. The notice of petition provided for a 30-day comment period on the petitioner's request for categorical exclusion from preparing an environmental assessment or environmental impact statement.

## II. Conclusion

FDA concludes that the data establish the safety and utility of guanidinoacetic acid for use as a substance that spares arginine and serves as a precursor of creatine in broiler chicken and turkey feeds and that the food additive regulations should be amended as set forth in this document.

## III. Public Disclosure

In accordance with § 571.1(h) (21 CFR 571.1(h)), the petition and documents we considered and relied upon in reaching our decision to approve the petition will be made available for public disclosure (see **FOR FURTHER INFORMATION CONTACT**). As provided in § 571.1(h), we will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

## IV. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.32(r) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## V. Objections and Hearing Requests

Any person who will be adversely affected by this regulation may file with the Division of Dockets Management (see **ADDRESSES**) either electronic or written objections. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provision of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection.

Any objections received in response to the regulation may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

## List of Subjects in 21 CFR Part 573

Animal feeds, Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 573 is amended as follows:

## PART 573—FOOD ADDITIVES PERMITTED IN FEED AND DRINKING WATER OF ANIMALS

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

**Authority:** 21 U.S.C. 321, 342, 348.

■ 2. Add § 573.496 to read as follows:

### § 573.496 Guanidinoacetic acid.

The food additive, guanidinoacetic acid, may be safely used in broiler chicken and turkey feeds in accordance with the following prescribed conditions:

(a) The additive is manufactured by reacting glycine with cyanamide in an aqueous solution.

(b) The additive is used or intended for use to spare arginine and as a precursor of creatine in broiler chicken and turkey feeds at levels not to exceed 0.12 percent of the complete feed.

(c) The additive consists of not less than 97 percent guanidinoacetic acid [*N*-(aminoiminomethyl)-glycine] (CAS 352–97–6) by weight.

(d) The additive meets the following specifications:

(1) Dicyandiamide not to exceed 0.5 percent;

(2) Cyanamide not to exceed 0.01 percent;

(3) Melamine not to exceed 15 parts per million (ppm);

(4) Sum of ammeline, ammelide, and cyanuric acid not to exceed 35 ppm; and

(5) Water not to exceed 1 percent.

(e) To assure safe use of the additive in addition to the other information required by the Federal Food, Drug, and Cosmetic Act:

(1) The label and labeling of the additive, any feed premix, and complete feed shall contain the name of the additive.

(2) The label and labeling of the additive and any feed premix shall also contain:

(i) A statement to indicate that the maximum use level of guanidinoacetic acid must not exceed 0.12 percent of the complete feed for broiler chickens and turkeys; and

(ii) Adequate directions for use.

Dated: November 22, 2016.

**Tracey H. Forfa,**

*Deputy Director, Center for Veterinary Medicine.*

[FR Doc. 2016–28754 Filed 11–29–16; 8:45 am]

**BILLING CODE 4164–01–P**

## POSTAL SERVICE

### 39 CFR Part 265

### Production or Disclosure of Material or Information

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service is amending its regulations concerning compliance with the Freedom of Information Act (FOIA) to implement the changes to the procedures for the disclosure of records and for engaging in dispute resolution required by the FOIA Improvement Act of 2016. As part of this process, the Postal Service is also restructuring the regulations setting forth its FOIA procedures, without substantive change, to make them easier for members of the public to understand and use.

**DATES:** These regulations are effective December 27, 2016.

**ADDRESSES:** Questions or comments on this action are welcome. Mail or deliver written comments to: Michael Elston, Associate General Counsel and Chief Ethics & Compliance Officer, 475 L'Enfant Plaza SW., Room 6000, Washington, DC 20260–1135.

**FOR FURTHER INFORMATION CONTACT:** Natalie A. Bonanno, Chief Counsel, Federal Compliance, *natalie.a.bonanno@usps.gov,* (202) 268–2944.

**SUPPLEMENTARY INFORMATION:** The Postal Service is amending 39 CFR part 265 to implement changes to the procedures for the disclosure of records and for engaging in dispute resolution under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as required by the FOIA Improvement Act of 2016 (FOIAIA), Public Law 114–185 (June 30, 2016), 130 Stat. 538. Under section 3 of the FOIA Improvement Act (130 Stat. 544) agencies are required to make such changes not later than 180 days after its date of enactment.

The Postal Service has accordingly prepared a revision of 39 CFR part 265 to implement the amendments to the FOIA contained in section 2 of the FOIAIA. These amendments relate to such matters as the availability of certain records for public inspection in an electronic format; the assessment of fees related to voluminous record requests; modifications to the exemptions from disclosure for certain records described in 5 U.S.C. 552(b); and addressing the role of the Office of Government Information Services (OGIS).

In addition, the Postal Service is restructuring its FOIA response procedures, without substantive change to their underlying policy, with the objective of enhancing their usefulness and comprehensibility. In this regard, 39 CFR part 265 has been retitled and subdivided into three subparts, dealing separately with (1) the generally applicable procedures for the disclosure of records under FOIA; (2) special rules applicable to the disclosure of records in compliance with subpoenas and other court orders, in response to requests for records or testimony in other legal proceedings, or pursuant to requests directed to the Postal Inspection Service; and (3) the rules concerning the availability of specific categories of records that are not subject to mandatory disclosure in whole or in part.

As reorganized and amended, 39 CFR part 265 is structured as follows:

**Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act**

This subpart sets forth the procedural rules applicable to the submission and processing of FOIA requests, including how and to whom a request should be submitted, the responsibility for and the timing of a response, the nature and content of the response, the treatment of confidential commercial information obtained from a submitter outside the Postal Service that may be protected from disclosure, the procedure for making an administrative appeal of the Postal Service's response to a request, and the fees that may apply to processing a request. This subpart is designed to carry forward the substantive content of former §§ 265.1–265.5 and §§ 265.7–265.9 in a more accessible and useful format.

*265.1 General Provisions*

This section has been retitled and revised to present a concise and accessible overview of the policies and functions implemented by this subpart.

*265.2 Proactive Disclosure of Postal Service Records*

This section has been retitled and revised to ensure the continued availability of those records that must be made publicly available, or are appropriate for public disclosure, and to provide for the posting and indexing of records in an electronic format as required under the FOIAIA.

*265.3 Procedure for Submitting a FOIA Request*

This section has been retitled and revised to explain the organization and functions of the Postal Service's FOIA Requester Service Centers (RSCs), as well as the procedures to be followed in submitting a FOIA request.

*265.4 Responsibility for Responding to Requests*

This section has been retitled and revised to clarify the functional responsibilities of the RSCs in responding to FOIA requests.

*265.5 Timing of Responses to Requests*

This section has been retitled and revised to set out the timeframe applicable to the processing of requests, including special provisions for the multitrack processing of simple or complex requests, expedited processing where appropriate, the extension of time in unusual circumstances, and aggregation of requests.

*265.6 Responses to Requests*

This section has been retitled and revised to specify the procedures for grants of requests, adverse determinations of requests, denials of requests, and any redaction of documents released.

*265.7 Confidential Commercial Information Obtained From Submitters*

This section, the successor to former § 265.8, has been retitled and revised to specify the procedures for processing requests for information that may be protected from disclosure under FOIA Exemption 4 (5 U.S.C. 552(b)(4)) because it contains confidential commercial or financial information obtained by the Postal Service from a submitter outside the Postal Service.

*265.8 Administrative Appeals*

This section has been retitled and revised to set forth the requirements for making an appeal of a FOIA decision, and the process for its adjudication.

*265.9 Fees*

This section has been retitled and revised to specify the fee structure for processing FOIA requests, including special provisions concerning requests from educational institutions, noncommercial scientific institutions, and representatives of the news media.

**Subpart B—Production or Disclosure in Federal and State Proceedings**

This subpart retains current §§ 265.11–265.13 with no substantive change. Where necessary, cross-references to other postal regulations have been updated.

*265.11 Compliance With Subpoenas Duces Tecum, Court Orders, and Summonses*

No substantive changes have been made in this section.

*265.12 Demands for Testimony or Records in Certain Legal Proceedings*

No substantive changes have been made in this section.

*265.13 Compliance With Subpoenas, Summonses, and Court Orders by Postal Employees Within the Postal Inspection Service Where the Postal Service, the United States, or Any Other Federal Agency Is Not a Party*

No substantive changes have been made in this section.

**Subpart C—Availability of Records**

The provisions of former § 265.6 have been redesignated as § 265.14, and relocated to a separate subpart. This action is intended to enhance the usefulness of these regulations, and add clarity to the distinction between those records that are available to the public on request, and those records that are not subject to mandatory public disclosure, or available only with certain restrictions.

*265.14 Rules Concerning Specific Categories of Records*

This section retitles, relocates, and revises for clarity the rules concerning records that are not subject to mandatory public disclosure, as well as those that are available with certain restrictions, including records compiled for law enforcement purposes, the names and addresses of postal customers, and records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

**List of Subjects in 39 CFR Part 265**

Administrative practice and procedure, Courts, Freedom of Information, Government employees.

For the reasons stated in the preamble, the Postal Service amends 39 CFR chapter I by revising part 265 to read as follows:

## PART 265—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

**Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act**

Sec.



**Subpart B—Production or Disclosure in Federal and State Proceedings**



**Subpart C—Availability of Records**



**Authority:** 5 U.S.C. 552; 5 U.S.C. App. 3; 39 U.S.C. 401, 403, 410, 1001, 2601; Pub. L. 114–185.

**§ 265.1 General provisions.**

(a) This subpart contains the regulations that implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, insofar as the Act applies to the Postal Service. These rules should be read in conjunction with the text of the FOIA and the *Uniform Freedom of Information Fee Schedule and Guidelines* published by the Office of Management and Budget, (OMB Guidelines), 52 FR 10012 (Mar. 27, 1987). The *Postal Service FOIA Requester's Guide,* an easy-to-read guide for making Postal Service FOIA requests, is available at *http://about.usps.com/who-we-are/foia/welcome.htm.*

(b) Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under Part 266 as well as under this subpart.

(c) It is the policy of the Postal Service to make its official records available to the public to the maximum extent consistent with the public interest. This policy requires a practice of full disclosure of those records that are covered by the requirements of the FOIA, subject only to the specific exemptions required or authorized by law. The exemptions from mandatory disclosure for various types of records provided by 5 U.S.C. 552(b) and 39 U.S.C. 410(c) reflect the fact that under some circumstances, the public interest may be better served by leaving the disclosure of particular records to the discretion of the Postal Service rather than by requiring their disclosure. This Postal Service policy does not create any right enforceable in court.

(d) As referenced in this subpart, *component* means any department or facility within the Postal Service that maintains records; the Office of Inspector General; and the Postal Inspection Service. *Postal Service* refers to all such components collectively.

(e) Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

**§ 265.2 Proactive disclosure of Postal Service records.**

(a) *In general.* The Postal Service is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Postal Service's FOIA Requester Service Centers (RSCs) and FOIA Public Liaisons can assist individuals in locating Postal Service records.

Descriptions of, and contact information for, the various FOIA RSCs can be found at *http://about.usps.com/who-we-are/foia/welcome.htm.*

(b) *Records available in an electronic format.* Records that the FOIA requires the Postal Service to make available for public inspection in an electronic format pursuant to 5 U.S.C. 552(a)(2) and that are exempt from the requirements of 5 U.S.C. 552(a)(3), may be accessed through the Postal Service's Web site at *http://about.usps.com/who-we-are/foia/welcome.htm.* The Postal Service must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. Such records available for public inspection in an electronic format include the following:

(1) *Opinions.* All final opinions and orders made in the adjudication of cases by the Judicial Officer and Administrative Law Judges, all final determinations pursuant to section 404(b) of title 39, United States Code, to close or consolidate a post office, or to disapprove a proposed closing or consolidation, all advisory opinions concerning the private express statutes issued pursuant to 39 CFR 310.6, and all supplier disagreement decisions are on file and available for inspection and copying at the Headquarters Library and, if created on or after November 1, 1996, also at the Postal Service's Web site at *http://about.usps.com/who-we-are/foia/welcome.htm.*

(2) *Administrative manuals and instructions.* The manuals, instructions, and other publications of the Postal Service that affect members of the public are available through the Headquarters Library and at many post offices and other postal facilities. Those which are available to the public but are not listed for sale may be inspected in the Headquarters Library, at any postal facility which maintains a copy, or, if created on or after November 1, 1996, through the Postal Service's Web site at *http://about.usps.com/who-we-are/foia/welcome.htm.* Copies of publications which are not listed as for sale or as available free of charge may be requested on an individual basis in accordance with the procedures provided in § 265.3.

(3) *Previously released records.* Copies of all records, regardless of form or format, that have been released to any person pursuant to the FOIA; and that because of the nature of their subject matter, the Postal Service determines have become or are likely to become the subject of subsequent requests for substantially the same records; or that have been requested 3 or more times, as well as a general index of such records. Records processed and disclosed after March 31, 1997, are available for inspection and copying at the Headquarters Library. Any such records created by the Postal Service on or after November 1, 1996, also will be available at the Postal Service's Web site identified at § 265.2(b). Records described in this paragraph that were not created by, or on behalf of, the Postal Service generally will not be available at the Web site. Records will be available in the form in which they were originally disclosed, except to the extent that they contain information that is not appropriate for public disclosure and may be withheld pursuant to this section. Any deleted material will be marked and the applicable exemptions indicated in accordance with § 265.6(d).

(4) *Public index.* (i) A public index is maintained in the Headquarters Library and at the Web site of all final opinions and orders made by the Postal Service in the adjudication of cases, Postal Service policy statements which may be relied on as precedents in the disposition of cases, administrative staff manuals and instructions that affect the public, and other materials which the Postal Service elects to index and make available to the public on request in the manner set forth in paragraph (b) of this section.

(ii) The index contains references to matters issued after July 4, 1967, and may reference matters issued prior to that date.

(iii) Any person may arrange for the inspection of any matter in the public index in accordance with the procedures of § 265.3.

(iv) Copies of the public index and of matters listed in the public index may be requested through the procedures described in § 265.3, with payment of any applicable fees.

(v) Materials listed in the public index that were created on or after November 1, 1996, will also be available in electronic format at the Postal Service's Web site at *http://about.usps.com/who-we-are/foia/welcome.htm.*

**§ 265.3 Procedure for submitting a FOIA request.**

(a) *To whom submitted.* A request must be submitted to the appropriate FOIA Requester Service Center (RSC). Descriptions of, and contact information for, the various FOIA RSCs can be found at *http://about.usps.com/who-we-are/foia/welcome.htm.* For assistance in determining the appropriate FOIA RSC, requesters may contact the USPS HQ FOIA Requester Service Center, Privacy and Records Office, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260, telephone (202) 268–2608. Requests for listings of postal employee names should also be sent to the USPS HQ FOIA Requester Service Center.

(b) *Form of request.* A request to inspect or to obtain a copy of an identifiable Postal Service record must be in writing and bear the caption ''Freedom of Information Act Request'' or otherwise be clearly and prominently identified as a request for records pursuant to the Freedom of Information Act, both on the letter and on the envelope or other cover. Requests for records that are labeled incorrectly may be delayed in reaching the appropriate FOIA RSC. A requester must provide his or her full name and mailing address. A requester may also provide a daytime telephone number or email address to facilitate communication regarding his or her request.

(c) *Content of request.* Requesters must describe the records sought in sufficient detail to enable Postal Service personnel to locate them with a reasonable amount of effort. Whenever possible, requesters should include specific information about each record sought, such as the type of record (*e.g.,* contract, report, memorandum, etc.); the title or case number of a specific document or report; the topic or subject matter; the name of the office, facility, functional unit or employees most likely to possess the record; the geographical location, such as a city and state, where the records are thought to exist; the date or general timeframe of the record's creation; and any details related to the purpose of the record. Requests for email records should specify the likely senders and recipients, keywords, and a range of dates. If seeking information about a company, requesters should provide the exact name and address of the company (many companies use similar names). Before submitting requests, requesters may contact the relevant Postal Service FOIA Requester Service Center to discuss the records they are seeking and to receive assistance in describing the records. The request may state the maximum amount of fees for which the requester is willing to accept liability without prior notice. If no amount is stated, the requester will be deemed willing to accept liability for fees not to exceed $25.00. See paragraph (e)(2) of § 265.9.The request may also specify the preferred form or format (including electronic formats) of the requested records.

(d) *First-party requests.* A requester who is making a request for records about himself must provide verification of identity sufficient to satisfy the component as to his identity prior to release of the record. For Privacy Act-protected records, the requester must

further comply with the procedures set forth in 39 CFR 266.6.

(e) *Third-party requests.* Where a FOIA request seeks disclosure of records that pertain to a third party, a requester may receive greater access by submitting a written authorization signed by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.,* a copy of a death certificate or an obituary). As an exercise of administrative discretion, each component can require a requester to supply a notarized authorization, a declaration, or other additional information if necessary in order to verify that a particular individual has consented to disclosure.

(f) *Improper requests.* A request that does not reasonably describe the records sought, or does not comply with the published rules regarding the procedures to be followed for submitting a request, will be deemed to be an improper FOIA request. If after receiving a request, the Postal Service determines that it is improper, the Postal Service will inform the requester as to why the request is improper. If the requester fails to respond to the Postal Service's request for clarification or additional information within 30 calendar days, the Postal Service will assume the requester is no longer interested in pursuing the request and close its file. The FOIA Requester Service Centers and the FOIA Public Liaisons are available to assist requesters in correcting a request that does not reasonably describe the records sought.

**§ 265.4 Responsibility for responding to requests.**

(a) *In general.* When a request is received, the FOIA RSC will either respond to the request, or refer the request to the appropriate FOIA RSC or records custodians. The FOIA RSC will advise the requester of any such referral. The Postal Service, the Office of Inspector General of the Postal Service, and the Postal Inspection Service, respectively, are responsible for responding to requests they receive for records they maintain. Records responsive to a request ordinarily will include only records in the Postal Service's possession as of the date of the search. If any other date is used, the Postal Service shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c) or 39 U.S.C. 410(c) is not considered responsive to the request.

(b) *Authority to grant or deny requests.* The records custodian of the requested record, or his designee, is authorized to grant or to deny the request. FOIA RSC staff may also grant or deny requests.

(c) *Receipt and tracking of requests.* FOIA RSCs are responsible for the initial receipt and tracking of FOIA requests.

(d) *Acknowledgments of requests.* FOIA RSCs must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. The acknowledgement of the request must include a brief description of the records sought to allow requesters to more easily keep track of their requests.

**§ 265.5 Timing of responses to requests.**

(a) *In general.* Requests will ordinarily be responded to according to their order of receipt. A request that is not initially submitted to the appropriate FOIA RSC will be deemed to have been received by the Postal Service at the time that it is actually received by the appropriate FOIA RSC or at the time the request is referred to the appropriate records custodian by a FOIA RSC, but in any case a request will be deemed to have been received no later than 10 business days after the request is first received by a FOIA RSC.

(b) *Multitrack processing.* (1) Unless expedited processing has been granted, the Postal Service places each request in simple or complex tracks based on the amount of work and time involved in processing the request. Factors considered in assigning a request into the complex track may include one or more of the following factors:

(i) The request involves voluminous documents;

(ii) The complexity of the material;

(iii) The request involves record searches at multiple facilities or locations;

(iv) The request requires consultation among components or other agencies;

(v) The number of open requests submitted by the same requester.

(2) Within each track, the Postal Service processes requests in the order in which they are received. When appropriate, the FOIA RSC or the component will notify the requester if it has placed the request in the ''Complex'' track, and provide the requester with an opportunity to limit the scope of the request. If the requester limits the scope of the request, it may result in faster processing.

(c) *Expedited processing.* (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, a component may waive the formal certification requirement.

(3) A component shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously

(d) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of ''unusual circumstances'', as defined in the FOIA, and the component extends the time limit on that basis, the component shall, before the expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, the component shall, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing and alert the requester to the availability of the Office of Government Information Services to provide dispute

resolution services. The component shall make available its designated FOIA contact and its FOIA Public Liaison for this purpose.

(e) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, the Postal Service may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a single requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Multiple requests that involve unrelated matters shall not be aggregated.

**§ 265.6 Responses to requests.**

(a) *Grants of requests.* Once a component makes a determination to grant a request in whole or in part, it shall notify the requester in writing and include a statement alerting the requester of his or her right to seek assistance from the FOIA Public Liaison. The component also shall inform the requester of any fees charged under § 265.9 and shall disclose the requested records to the requester promptly upon payment of any applicable fees.

(b) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(c) *Content of denial.* The denial shall include, to the extent applicable:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the component in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under § 265.8, and a description of the requirements set forth therein.

(5) A statement notifying the requester of his or her right to seek dispute resolution services from the FOIA Public Liaison or the Office of Government Information Services.

(d) *Markings on released documents.* Markings on released documents must be clearly visible to the requester. Records disclosed in part shall be marked to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted shall also be indicated on the record, if technically feasible.

(e) *Use of record exclusions.* (1) In the event that a component identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component must confer with Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

**§ 265.7 Confidential commercial information obtained from submitters.**

(a) *Definitions.* (1) *Confidential commercial information* means commercial or financial information obtained by the Postal Service from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides information, either directly or indirectly to the Postal Service.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. The Postal Service will not determine the validity of any request for confidential treatment until a request for disclosure of the information is received. These designations shall expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The Postal Service shall promptly provide written notice to a submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the Postal Service determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The Postal Service has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

(2) The notice shall either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section shall not apply if:

(1) The Postal Service determines that the information is exempt under the FOIA or 39 U.S.C. 410(c);

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a Postal Service regulation; if disclosure is required by a Postal Service regulation and the submitter provided written justification for protection of the information under Exemption 4 at the time of submission or a reasonable time thereafter, advanced written notice of the disclosure must be provided to the submitter; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous or overly broad, except that, in such cases, the component shall give the submitter written notice of any final decision to disclose the information and must provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The Postal Service shall specify a reasonable time period within which the submitter must respond to the notice referenced above. If a submitter has any

objections to disclosure, it should provide the Postal Service a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter that the information in question is in fact confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by the Postal Service after the date of any disclosure decision shall not be considered by the Postal Service. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA. The Postal Service must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(f) *Determination that confidential treatment is warranted.* If the Postal Service determines that confidential treatment is warranted for any part of the requested records and that the records will therefore be redacted or withheld, it must inform the requester in writing, and must advise the requester of the right to appeal. A copy of the letter of denial must also be provided to the submitter of the records in any case in which the submitter had been notified of the request.

(g) *Notice of intent to disclose.* If the Postal Service decides to disclose information over the objection of a submitter, the Postal Service shall provide the submitter written notice, which shall include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description or copy of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the component shall promptly notify the submitter. Whenever a submitter files a lawsuit to prevent disclosure of confidential commercial information, the component shall promptly notify the requester.

(i) *Requester notification.* The Postal Service shall notify a requester whenever it notifies the submitter of its intent to disclose the requested information.

**§ 265.8 Administrative appeals.**

(a) *Requirements for making an appeal.* Requesters may appeal adverse decisions rendered by the Postal Inspection Service or any Postal Service component by mail to the General Counsel, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260; or by email to *foiaappeal@usps.gov.* The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response; or within a reasonable time if the appeal is from a failure of the custodian to act. The General Counsel may, in his or her discretion, consider late appeals. In the event of the denial of a request or of other action or failure to act on the part of a custodian from which no appeal is taken, the General Counsel may, if he or she considers that there is doubt as to the correctness of the custodian's action or failure to act, review the action or failure to act as though an appeal pursuant to this section had been taken. A letter of appeal should include, as applicable:

(1) A copy of the request, of any notification of denial or other action, and of any other related correspondence;

(2) The FOIA tracking number assigned to the request;

(3) A statement of the action, or failure to act, from which the appeal is taken;

(4) A statement identifying the specific redactions to responsive records that the requester is challenging;

(5) A statement of the relief sought; and

(6) A statement of the reasons why the requester believes the action or failure to act is erroneous.

(b) *Adjudication of appeals.* (1) The decision of the General Counsel or his or her designee constitutes the final decision of the Postal Service on the issue being appealed. The General Counsel will give prompt consideration to an appeal for expedited processing of a request. All other decisions normally will be made within 20 working days from the time of the receipt by the General Counsel. The 20-day response period may be extended by the General Counsel, or his or her designee, for a period not to exceed an additional 10 working days when reasonably necessary to permit the proper consideration of an appeal, under one or more of the unusual circumstances set forth in paragraph (a)(5) of this section. The aggregate number of additional working days utilized, however, may not exceed 10 working days.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal, the General Counsel, or his or her designee, must take appropriate action to ensure compliance with applicable classification rules.

(c) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds a component's determination in whole or in part will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If a custodian's decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The component will further process the request in accordance with that appeal determination and respond directly to the requester. If not prohibited by or under law, the General Counsel, or his designee may direct the disclosure of a record even though its disclosure is not required by law or regulation.

(d) *When appeal is required.* Before seeking judicial review of a component's adverse determination, a requester generally must first submit a timely administrative appeal.

(e) *Appeal procedures for the Office of the Inspector General.* The appeal procedures for the Office of the Inspector General are described in 39 CFR 230.5.

**§ 265.9 Fees.**

(a) *In general.* The Postal Service shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, a component may contact a requester for additional information. The Postal Service will conduct searches, review, and duplication in the most efficient and the least expensive manner. The Postal Service ordinarily will collect all applicable fees before sending copies of

records to a requester. Requesters must pay fees by check or money order made payable to ''U.S. Postal Service.''

(b) *Definitions.* For purposes of this section:

(1) *Commercial-use requester* is a requester who asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The Postal Service's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(2) *Direct costs* are those expenses that the Postal Service incurs in searching for and duplicating records in order to respond to a FOIA request. In the case of commercial-use requesters, direct costs include reviewing and taking all other measures needed to prepare the records for disclosure.

(3) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(4) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(5) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 265.6, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(6) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is authorized by, and is made under the auspices of, an educational institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research. To fall within this fee category, the request must serve the scholarly research goals of the institution rather than an individual research goal.

(7) *Noncommercial scientific institution* is an institution that is not operated on a ''commercial'' basis, as defined in paragraph (b)(1) of this section and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(8) *Representative of the news media* is any person or entity organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Postal Service shall also consider a requester's past publication record in making this determination.

(c) *Charging fees.* In responding to FOIA requests, the Postal Service shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, components should not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (d) of this section. The Postal Service may charge for time spent searching even if no responsive records are located or if it determines that the records are entirely exempt from disclosure.

(ii) For each half hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fee shall be $21.00.

(iii) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored at a Federal records center operated by the National Archives and Records Administration (NARA), or other storage facility, additional costs may be charged for their retrieval.

(2) *Duplication.* Duplication fees shall be charged to all requesters, subject to the restrictions of paragraph (d) of this section. A component shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the component in the form or format requested. Where photocopies are supplied, the component shall provide one copy per request at a cost of five cents per page. For copies of records produced on tapes, disks, or other media, components shall charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, components shall charge the direct costs.

(3) *Review.* Commercial-use requesters shall be charged review fees. Review fees shall be assessed in connection with the initial review of the record, *i.e.,* the review conducted by a component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with a component's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees shall be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(2)(i) If a component fails to comply with the time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees.

(ii) If a component has determined that unusual circumstances as defined by the FOIA apply and the component provided timely written notice to the requester in accordance with the FOIA, the component has an additional 10 days to respond to the request.

(iii) If a component has determined that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request, the component may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees if the following steps are taken:

(A) The component provides timely written notice of unusual circumstances to the requester; and

(B) The component discussed or made three good faith attempts to discuss via mail, email, or telephone how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(iv) If a court has determined that exceptional circumstances exist, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, components shall provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is $25.00 or less for any request, no fee will be charged.

(e) *Notice of anticipated fees in excess of $25.00.* (1) When a component determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the component shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and shall advise the requester whether those entitlements have been provided.

(2) In cases in which a requester has been notified that the actual or estimated fees are in excess of $25.00, the request shall not be considered received and further work will not be completed until the requester agrees in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. Components are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the component estimates that the total fee will exceed that amount, the component shall toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The component shall inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) Components shall make available their FOIA Public Liaison or other FOIA contact to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if a component chooses to do so as a matter of administrative discretion, the direct costs of providing the service requested by the requester shall be charged. Examples of such services include providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Aggregating requests.* In instances where the Postal Service reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, or that a requester or group of requesters acting in concert makes multiple requests for the same records maintained at multiple facilities or components, the Postal Service may aggregate those requests and charge accordingly. Multiple FOIA requests by a single requester related to the same issue will be aggregated for the purpose of assessing fees. Multiple requests involving unrelated matters shall not be aggregated.

(h) *Advance payments.* (1) For requests other than those described in paragraphs (h)(2) or (3) of this section, a component shall not require the requester to submit an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.,* payment before copies are sent to a requester) is not an advance payment.

(2) When a component determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. A component may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee within 30 calendar days of the billing date, a component may require that the requester pay the full amount due on that prior request, and the component may require that the requester make an advance payment of the full amount of any anticipated fee before the component begins to process a new request or continues to process a pending request or any pending appeal. Where a component has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which a component requires advance payment, the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the component's fee determination, the request will be administratively closed.

(i) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires the Postal Service

to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the component shall inform the requester of the contact information for that program.

(j) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request shall be furnished without charge or at a reduced rate below the rate established under paragraph (c) of this section, where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Postal Service, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the Postal Service, components shall consider all four of the following factors:

(i) The subject of the request must concern identifiable operations or activities of the Postal Service, with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested records must be meaningfully informative about government operations or activities in order to be ''likely to contribute'' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public shall be considered. A representative of the news media does not automatically satisfy this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent.

(3) To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, components shall consider the following factors:

(i) Components shall identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for a waiver or reduction of fees should be made when the request is first submitted to the component and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

## Subpart B—Production or Disclosure in Federal and State Proceedings

### § 265.11 Compliance with subpoena duces tecum, court orders, and summonses.

(a) *Compliance with subpoena duces tecum.* (1) Except as required by Part 262, produce other records of the Postal Service only in compliance with a subpoena duces tecum or appropriate court order.

(2) Time, leave, and payroll records of postal employees are subject to production when a subpoena duces tecum or appropriate court order has been properly served. The custodian of the records may designate a postal employee to present the records. The presentation by a designee rather than the employee named in the subpoena or court order must meet with the approval of the attorneys for each side. In addition, such records may be released if authorized in writing by the employee.

(3) If the subpoena involves a job-connected injury, the records are under the exclusive jurisdiction of the Office of Workers' Compensation Programs, Department of Labor. Requests for authorization to produce these records shall be addressed to: Office of Workers' Compensation Programs, U.S. Department of Labor, Washington, DC 20210–0001. Also notify the attorney responsible for the issuance of the subpoena or court order.

(4) Employee medical records are primarily under the exclusive jurisdiction of the U.S. Civil Service Commission. The Commission has delegated authority to the Postal Service and to the Commission's Regional Directors to release medical information, in response to proper requests and upon competent medical advice, in accordance with the following criteria:

(i) Except in response to a subpoena or court order, do not release any medical information about an employee to any non-Federal entity or individual without authorization from the employee.

(ii) With authorization from the employee, the Area, Information Systems Service Center, or Chief Field Counsel will respond as follows to a request from a non-Federal source for medical information:

(A) If, in the opinion of a Federal medical officer, the medical information indicates the existence of a malignancy, a mental condition, or other condition about which a prudent physician would hesitate to inform a person suffering from such a condition as to its exact nature and probable outcome, do not release the medical information to the employee or to any individual designated by him, except to a physician, designated by the employee in writing. If a subpoena or court order was issued, the responding official shall caution the moving party as to the possible dangers involved if the medical information is divulged.

(B) If, in the opinion of a Federal medical officer, the medical information does not indicate the presence of any condition which would cause a prudent physician to hesitate to inform a person of the exact nature and probable outcome of his condition, release it in response to a subpoena or court order, or to the employee or to any person, firm, or organization he authorizes in writing.

(C) If a Federal medical officer is not available, refer the request to the Civil Service Commission regional office with the medical certificates or other medical reports concerned.

(5) Do not release any records containing information as to the employee's security or loyalty.

(6) Honor subpoenas or court orders only when disclosure is authorized.

(7) When authorized to comply with a subpoena duces tecum, do not leave the original records with the court.

(b) [Reserved]

**§ 265.12 Demands for testimony or records in certain legal proceedings.**

(a) *Scope and applicability of this section.* (1) This section establishes procedures to be followed if the Postal Service or any Postal Service employee receives a demand for testimony concerning or disclosure of:

(i) Records contained in the files of the Postal Service;

(ii) Information relating to records contained in the files of the Postal Service; or

(iii) Information or records acquired or produced by the employee in the course of his or her official duties or because of the employee's official status.

(2) This section does not create any right or benefit, substantive or procedural, enforceable by any person against the Postal Service.

(3) This section does not apply to any of the following:

(i) Any legal proceeding in which the United States is a party;

(ii) A demand for testimony or records made by either House of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee of Congress;

(iii) An appearance by an employee in his or her private capacity in a legal proceeding in which the employee's testimony does not relate to the employee's official duties or the functions of the Postal Service; or

(iv) A demand for testimony or records submitted to the Postal Inspection Service (a demand for Inspection Service records or testimony will be handled in accordance with rules in § 265.13).

(4) This section does not exempt a request from applicable confidentiality requirements, including the requirements of the Privacy Act, 5 U.S.C. 552a.

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

(1) *Adjudicative authority* includes, but is not limited to, the following:

(i) A court of law or other judicial forums, whether local, state, or federal; and

(ii) Mediation, arbitration, or other forums for dispute resolution.

(2) *Demand* includes a subpoena, subpoena duces tecum, request, order, or other notice for testimony or records arising in a legal proceeding.

(3) *Employee* means a current employee or official of the Postal Service.

(4) *General Counsel* means the General Counsel of the United States Postal Service, the Chief Field Counsels, or an employee of the Postal Service acting for the General Counsel under a delegation of authority.

(5) *Legal proceeding* means:

(i) A proceeding before an adjudicative authority;

(ii) A legislative proceeding, except for a proceeding before either House of Congress or before any committee or subcommittee of Congress; or

(iii) An administrative proceeding.

(6) *Private litigation* means a legal proceeding to which the United States is not a party.

(7) *Records custodian* means the employee who maintains a requested record. For assistance in identifying the custodian of a specific record, contact the Manager, Records Office, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260, telephone (202) 268–2608.

(8) *Testimony* means statements made in connection with a legal proceeding, including but not limited to statements in court or other forums, depositions, declarations, affidavits, or responses to interrogatories.

(9) *United States* means the federal government of the United States and any of its agencies, establishments, or instrumentalities, including the United States Postal Service.

(c) *Requirements for submitting a demand for testimony or records.* (1) Ordinarily, a party seeking to obtain records from the Postal Service should submit a request in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Postal Service's regulations implementing the FOIA at 39 CFR 265.1 through 265.9, 265.14; or the Privacy Act, 5 U.S.C. 552a and the Postal Service's regulations implementing the Privacy Act at 39 CFR 266.1 through 266.10.

(2) A demand for testimony or records issued pursuant to the rules governing the legal proceeding in which the demand arises must:

(i) Be in writing;

(ii) Identify the requested record and/or state the nature of the requested testimony, describe the relevance of the record or testimony to the proceeding, and why the information sought is unavailable by any other means; and

(iii) If testimony is requested, contain a summary of the requested testimony and a showing that no document could be provided and used in lieu of testimony.

(3) Procedures for service of demand are made as follows:

(i) Service of a demand for testimony or records (including, but not limited to, personnel or payroll information) relating to a current or former employee must be made in accordance with the applicable rules of civil procedure on the employee whose testimony is requested or the records custodian. The requester also shall deliver a copy of the demand to the District Manager, Customer Services and Sales, for all current employees whose work location is within the geographic boundaries of the manager's district, and any former employee whose last position was within the geographic boundaries of the manager's district. A demand for testimony or records must be received by the employee whose testimony is requested and the appropriate District Manager, Customer Services and Sales, at least ten (10) working days before the date the testimony or records are needed.

(ii) Service of a demand for testimony or records other than those described in paragraph (c)(3)(i) of this section must be made in accordance with the applicable rules of civil procedure on the employee whose testimony is requested or the records custodian. The requester also shall deliver a copy of the demand to the General Counsel, United States Postal Service, 475 L'Enfant Plaza SW., Washington DC 20260–1100, or the Chief Field Counsel. A demand for testimony or records must be received by the employee and the General Counsel or Chief Field Counsel at least ten (10) working days before the date testimony or records are needed.

(d) *Procedures followed in response to a demand for testimony or records.* (1) After an employee receives a demand for testimony or records, the employee shall immediately notify the General Counsel or Chief Field Counsel and request instructions.

(2) An employee may not give testimony or produce records without the prior authorization of the General Counsel.

(3)(i) The General Counsel may allow an employee to testify or produce records if the General Counsel determines that granting permission:

(A) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, privileges, rules, authority, and regulations; and

(B) Would not be contrary to the interest of the United States. The interest of the United States includes, but is not limited to, furthering a public interest of the Postal Service and protecting the human and financial resources of the United States.

(ii) An employee's testimony shall be limited to the information set forth in the statement described at paragraph (c)(2) of this section or to such portions thereof as the General Counsel determines are not subject to objection. An employee's testimony shall be limited to facts within the personal

knowledge of the employee. A Postal Service employee authorized to give testimony under this rule is prohibited from giving expert or opinion testimony, answering hypothetical or speculative questions, or giving testimony with respect to privileged subject matter. The General Counsel may waive the prohibition of expert testimony under this paragraph only upon application and showing of exceptional circumstances and the request substantially meets the requirements of this section.

(4) The General Counsel may establish conditions under which the employee may testify. If the General Counsel authorizes the testimony of an employee, the party seeking testimony shall make arrangements for the taking of testimony by those methods that, in the General Counsel's view, will least disrupt the employee's official duties. For example, at the General Counsel's discretion, testimony may be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law.

(5) If a response to a demand for testimony or records is required before the General Counsel determines whether to allow an employee to testify, the employee or counsel for the employee shall do the following:

(i) Inform the court or other authority of the regulations in this section; and

(ii) Request that the demand be stayed pending the employee's receipt of the General Counsel's instructions.

(6) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the General Counsel's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951), and the regulations in this section.

(7) The General Counsel may request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Postal Service and the employee.

(8) At his or her discretion, the General Counsel may grant a waiver of any procedure described by this section, where waiver is considered necessary to promote a significant interest of the United States or for other good cause.

(9) If it otherwise is permissible, the records custodian may authenticate, upon the request of the party seeking disclosure, copies of the records. No employee of the Postal Service shall respond in strict compliance with the terms of a subpoena duces tecum unless specifically authorized by the General Counsel.

(e) *Postal Service employees as expert witnesses.* No Postal Service employee may testify as an expert or opinion witness, with regard to any matter arising out of the employee's official duties or the functions of the Postal Service, for any party other than the United States, except that in extraordinary circumstances, the General Counsel may approve such expert testimony in private litigation. A Postal Service employee may not testify as such an expert witness without the express authorization of the General Counsel. A litigant must obtain authorization of the General Counsel before designating a Postal Service employee as an expert witness.

(f) *Substitution of Postal Service employees.* Although a demand for testimony may be directed to a named Postal Service employee, the General Counsel, where appropriate, may designate another Postal Service employee to give testimony. Upon request and for good cause shown (for example, when a particular Postal Service employee has direct knowledge of a material fact not known to the substitute employee designated by the Postal Service), the General Counsel may permit testimony by a named Postal Service employee.

(g) *Fees and costs.* (1) The Postal Service may charge fees, not to exceed actual costs, to private litigants seeking testimony or records by request or demand. The fees, which are to be calculated to reimburse fully the Postal Service for processing the demand and providing the witness or records, may include, among others:

(i) Costs of time spent by employees, including attorneys, of the Postal Service to process and respond to the demand;

(ii) Costs of attendance of the employee and agency attorney at any deposition, hearing, or trial;

(iii) Travel costs of the employee and agency attorney;

(iv) Costs of materials and equipment used to search for, process, and make available information.

(2) All costs for employee time shall be calculated on the hourly pay of the employee (including all pay, allowance, and benefits) and shall include the hourly fee for each hour, or portion of each hour, when the employee is in travel, in attendance at a deposition, hearing, or trial, or is processing or responding to a request or demand.

(3) At the discretion of the Postal Service, where appropriate, costs may be estimated and collected before testimony is given.

(h) *Acceptance of service.* This section does not in any way abrogate or modify the requirements of the Federal Rules of Civil Procedure (28 U.S.C. Appendix) regarding service of process.

**§ 265.13 Compliance with subpoenas, summonses, and court orders by postal employees within the Postal Inspection Service where the Postal Service, the United States, or any other Federal agency is not a party.**

(a) *Applicability of this section.* The rules in this section apply to all federal, state, and local court proceedings, as well as administrative and legislative proceedings, other than:

(1) Proceedings where the United States, the Postal Service, or any other Federal agency is a party;

(2) Congressional requests or subpoenas for testimony or documents;

(3) Consultative services and technical assistance rendered by the Inspection Service in executing its normal functions;

(4) Employees serving as expert witnesses in connection with professional and consultative services under 5 CFR part 7001, provided that employees acting in this capacity must state for the record that their testimony reflects their personal opinions and should not be viewed as the official position of the Postal Service;

(5) Employees making appearances in their private capacities in proceedings that do not relate to the Postal Service (*e.g.,* cases arising from traffic accidents, domestic relations) and do not involve professional or consultative services; and

(6) When in the opinion of the Counsel or the Counsel's designee, Office of the Chief Postal Inspector, it has been determined that it is in the best interest of the Inspection Service or in the public interest.

(b) *Purpose and scope.* The provisions in this section limit the participation of postal employees within or assigned to the Inspection Service, in private litigation, and other proceedings in which the Postal Service, the United States, or any other federal agency is not a party. The rules are intended to promote the careful supervision of Inspection Service resources and to reduce the risk of inappropriate disclosures that might affect postal operations.

(c) *Definitions.* For the purposes of this section:

(1) *Authorizing official* is the person responsible for giving the authorization for release of documents or permission to testify.

(2) *Case* or *matter* means any civil proceeding before a court of law,

administrative board, hearing officer, or other body conducting a judicial or administrative proceeding in which the United States, the Postal Service, or another federal agency is not a named party.

(3) *Demand* includes any request, order, or subpoena for testimony or the production of documents.

(4) *Document* means all records, papers, or official files, including, but not limited to, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, graphs, notes, charts, tabulations, data analyses, statistical or information accumulations, records of meetings and conversations, film impressions, magnetic tapes, computer discs, and sound or mechanical reproductions;

(5) *Employee* or *Inspection Service employee,* for the purpose of this section only, refers to a Postal Service employee currently or formerly assigned to the Postal Inspection Service, student interns, contractors and employees of contractors who have access to Inspection Service information and records.

(6) *Inspection Service* means the organizational unit within the Postal Service that performs the functions specified in part 233 of this chapter.

(7) *Inspection Service Legal Counsel* is an attorney authorized by the Chief Postal Inspector to give legal advice to members of the Inspection Service.

(8) *Inspection Service Manual* is the directive containing the standard operating procedures for Postal Inspectors and certain Inspection Service employees.

(9) *Nonpublic* includes any material or information not subject to mandatory public disclosure under § 265.14(b).

(10) *Official case file* means official documents that relate to a particular case or investigation. These documents may be kept at any location and do not necessarily have to be in the same location in order to constitute the file.

(11) *Postal Inspector reports* include all written reports, letters, recordings, or other memorializations made in conjunction with the duties of a Postal Inspector.

(12) *Testify* or *testimony* includes both in-person oral statements before any body conducting a judicial or administrative proceeding and statements made in depositions, answers to interrogatories, declarations, affidavits, or other similar documents.

(13) *Third-party action* means an action, judicial or administrative, in which the United States, the Postal Service, or any other federal agency is not a named party.

(d) *Policy.* (1) No current or former employee within the Inspection Service may testify or produce documents concerning information acquired in the course of employment or as a result of his or her relationship with the Postal Service in any proceeding to which this section applies (see paragraph (a) of this section), unless authorized to do so. Authorization will be provided by:

(i) The Postal Inspector in Charge of the affected field Division, or designee, for Division personnel and records, after that official has determined through consultation with Inspection Service legal counsel that no legal objection, privilege, or exemption applies to such testimony or production of documents.

(ii) The Chief Postal Inspector or designee for Headquarters employees and records, after that official has determined through consultation with Inspection Service legal counsel, that no legal objection, privilege, or exemption applies to such testimony or production of documents.

(2) Consideration shall be given to:

(i) Statutory restrictions, as well as any legal objection, exemption, or privilege that may apply;

(ii) Relevant legal standards for disclosure of nonpublic information and documents;

(iii) Inspection Service rules and regulations and the public interest;

(iv) Conservation of employee time; and

(v) Prevention of the expenditure of Postal Service resources for private purposes.

(3) If additional information is necessary before a determination can be made, the authorizing official may, in coordination with Inspection Service legal counsel, request assistance from the Department of Justice.

(e) *Compliance with subpoena duces tecum.* (1) Except as required by part 262 of this chapter, produce any other record of the Postal Service only in compliance with a subpoena *duces tecum* or appropriate court order.

(2) Do not release any record containing information relating to an employee's security or loyalty.

(3) Honor subpoenas and court orders only when disclosure is authorized.

(4) When authorized to comply with a subpoena *duces tecum* or court order, do not leave the originals with the court.

(5) Postal Inspector reports are considered to be confidential internal documents and shall not be released unless there is specific authorization by the Chief Postal Inspector or the Inspector in Charge of the affected field Division, after consulting with Inspection Service legal counsel.

(6) The Inspection Service Manual and other operating instructions issued to Inspection Service employees are considered to be confidential and shall not be released unless there is specific authorization, after consultation with Inspection Service legal counsel. If the requested information relates to confidential investigative techniques, or release of the information would adversely affect the law enforcement mission of the Inspection Service, the subpoenaed official, through Inspection Service legal counsel, may request an *in camera, ex parte* conference to determine the necessity for the release of the information. The entire Manual should not be given to any party.

(7) Notes, memoranda, reports, transcriptions, whether written or recorded and made pursuant to an official investigation conducted by a member of the Inspection Service, are the property of the Inspection Service and are part of the official case file, whether stored with the official file.

(f) *Compliance with summonses and subpoenas ad testificandum.* (1) If an Inspection Service employee is served with a third-party summons or a subpoena requiring an appearance in court, contact should be made with Inspection Service legal counsel to determine whether and which exemptions or restrictions apply to proposed testimony. Inspection Service employees are directed to comply with summonses, subpoenas, and court orders, as to appearance, but may not testify without authorization.

(2) Postal Inspector reports or records will not be presented during testimony, in either state or federal courts in which the United States, the Postal Service, or another federal agency is not a party in interest, unless authorized by the Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division, who will make the decision after consulting with Inspection Service legal counsel. If an attempt is made to compel production, through testimony, the employee is directed to decline to produce the information or matter and to state that it may be exempted and may not be disclosed or produced without the specific approval of the Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division. The Postal Service will offer all possible assistance to the courts, but the question of disclosing information for which an exemption may be claimed is a matter of discretion that rests with the appropriate official. Paragraph (e) of this section covers the release of Inspection Service documents in cases where the Postal Service or the United States is not a party.

(g) *General procedures for obtaining Inspection Service documents and testimony from Inspection Service employees.* (1) To facilitate the orderly response to demands for the testimony of Inspection Service employees and production of documents in cases where the United States, the Postal Service, or another federal agency is not a party, all demands for the production of nonpublic documents or testimony of Inspection Service employees concerning matters relating to their official duties and not subject to the exemptions set forth in paragraph (a) of this section shall be in writing and conform to the requirements outlined in paragraphs (g)(2) and (g)(3) of this section.

(2) Before or simultaneously with service of a demand described in paragraph (g)(1) of this section, the requesting party shall serve on the Counsel, Office of the Chief Postal Inspector, 475 L'Enfant Plaza SW., Washington, DC 20260–2101, an affidavit or declaration containing the following information:

(i) The title of the case and the forum where it will be heard;

(ii) The party's interest in the case;

(iii) The reasons for the demand;

(iv) A showing that the requested information is available, by law, to a party outside the Postal Service;

(v) If testimony is sought, a summary of the anticipated testimony;

(vi) If testimony is sought, a showing that Inspection Service records could not be provided and used in place of the requested testimony;

(vii) The intended use of the documents or testimony; and

(viii) An affirmative statement that the documents or testimony is necessary for defending or prosecuting the case at issue.

(3) The Counsel, Office of the Chief Postal Inspector, shall act as agent for the receipt of legal process for demands for production of records or testimony of Inspection Service employees where the United States, the Postal Service, or any other federal agency is not a party. A subpoena for testimony or for the production of documents from an Inspection Service employee concerning official matters shall be served in accordance with the applicable rules of civil procedure. A copy of the subpoena and affidavit or declaration, if not previously furnished, shall also be sent to the Chief Postal Inspector or the appropriate Postal Inspector in Charge.

(4) Any Inspection Service employee who is served with a demand shall promptly inform the Chief Postal Inspector, or the appropriate Postal Inspector in Charge, of the nature of the documents or testimony sought and all relevant facts and circumstances.

(h) *Authorization of testimony or production of documents.* (1) The Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division, after consulting with Inspection Service legal counsel, shall determine whether testimony or the production of documents will be authorized.

(2) Before authorizing the requested testimony or the production of documents, the Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division shall consider the following factors:

(i) Statutory restrictions, as well as any legal objection, exemption, or privilege that may apply;

(ii) Relevant legal standards for disclosure of nonpublic information and documents;

(iii) Inspection Service rules and regulations and the public interest;

(iv) Conservation of employee time; and

(v) Prevention of expenditures of government time and resources solely for private purposes.

(3) If, in the opinion of the authorizing official, the documents should not be released or testimony should not be furnished, that official's decision is final.

(4) Inspection Service legal counsel may consult or negotiate with the party or the party's counsel seeking testimony or documents to refine and limit the demand, so that compliance is less burdensome, or obtain information necessary to make the determination whether the documents or testimony will be authorized. If the party or party's counsel seeking the documents or testimony fails to cooperate in good faith, preventing Inspection Service legal counsel from making an informed recommendation to the authorizing official, that failure may be presented to the court or other body conducting the proceeding as a basis for objection.

(5) Permission to testify or to release documents in all cases will be limited to matters outlined in the affidavit or declaration described in paragraph (g)(2) of this section or to such parts as deemed appropriate by the authorizing official.

(6) If the authorizing official allows the release of documents or testimony to be given by an employee, arrangements shall be made for the taking of testimony or receipt of documents by the least disruptive methods to the employee's official duties. Testimony may, for example, be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law.

(i) While giving a deposition, the employee may, at the option of the authorizing official, be represented by Inspection Service legal counsel.

(ii) While completing affidavits, or other written reports or at any time during the process of preparing for testimony or releasing documents, the employee may seek the assistance of Inspection Service legal counsel.

(7) Absent written authorization from the authorizing official, the employee shall respectfully decline to produce the requested documents, testify, or, otherwise, disclose the requested information.

(8) If the authorization is denied or not received by the return date, the employee, together with counsel, where appropriate, shall appear at the stated time and place, produce a copy of this section, and respectfully decline to testify or produce any document on the basis of the regulations in this section.

(9) The employee shall appear as ordered by the subpoena, summons, or other appropriate court order, unless:

(i) Legal counsel has advised the employee that an appearance is inappropriate, as in cases where the subpoena, summons, or other court order was not properly issued or served, has been withdrawn, discovery has been stayed; or

(ii) Where the Postal Service will present a legal objection to furnishing the requested information or testimony.

(i) *Inspection Service employees as expert or opinion witnesses.* No Inspection Service employee may testify as an expert or opinion witness, with regard to any matter arising out of the employee's duties or functions at the Postal Service, for any party other than the United States, except that in extraordinary circumstances, the Counsel, Office of the Chief Postal Inspector, may approve such testimony in private litigation. An Inspection Service employee may not testify as such an expert or opinion witness without the express authorization of the Counsel, Office of the Chief Postal Inspector. A litigant must first obtain authorization of the Counsel, Office of the Chief Postal Inspector, before designating an Inspection Service employee as an expert or opinion witness.

(j) *Postal liability.* This section is intended to provide instructions to Inspection Service employees and does not create any right or benefit, substantive or procedural, enforceable by any party against the Postal Service.

(k) *Fees.* (1) Unless determined by 28 U.S.C. 1821 or other applicable statute,

the costs of providing testimony, including transcripts, shall be borne by the requesting party.

(2) Unless limited by statute, such costs shall also include reimbursement to the Postal Service for the usual and ordinary expenses attendant upon the employee's absence from his or her official duties in connection with the case or matter, including the employee's salary and applicable overhead charges, and any necessary travel expenses as follows:

(i) The Inspection Service is authorized to charge reasonable fees to parties demanding documents or information. Such fees, calculated to reimburse the Postal Service for the cost of responding to a demand, may include the costs of time expended by Inspection Service employees, including attorneys, to process and respond to the demand; attorney time for reviewing the demand and for legal work in connection with the demand; expenses generated by equipment used to search for, produce, and copy the requested information; travel costs of the employee and the agency attorney, including lodging and per diem where appropriate. Such fees shall be assessed at the rates and in the manner specified in § 265.9.

(ii) At the discretion of the Inspection Service where appropriate, fees and costs may be estimated and collected before testimony is given.

(iii) The provisions in this section do not affect rights and procedures governing public access to official documents pursuant to the Freedom of Information Act, 5 U.S.C 552.

(l) *Acceptance of service.* The rules in this section in no way modify the requirements of the Federal Rules of Civil Procedure (28 U.S.C. Appendix) regarding service of process.

## Subpart C—Availability of Records

### § 265.14 Rules concerning specific categories of records.

(a) *Records available to the public on request.* Except as otherwise proscribed by law or regulations, including but not limited to paragraphs (b) and (c) of this section, § 265.2 and § 265.11–§ 265.13, Postal Service records will be made available to any person in accordance with the procedures provided in § 265.3.

(b) *Records not subject to mandatory public disclosure.* Certain classes of records are exempt from mandatory disclosure under exemptions contained in the Freedom of Information Act and in 39 U.S.C. 410(c). The Postal Service will exercise its discretion, in accordance with the policy stated in § 265.1(c), as implemented by instructions issued by the Records Office with the approval of the General Counsel in determining whether the public interest is served by the inspection or copying of records that are:

(1) Related solely to the internal personnel rules and practices of the Postal Service.

(2) Trade secrets, or privileged or confidential commercial or financial information, obtained from any person.

(3) Information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed. This class includes, but is not limited to:

(i) Information pertaining to methods of handling valuable registered mail.

(ii) Records of money orders, except as provided in R900 of the *Domestic Mail Manual (DMM).*

(iii) Technical information concerning postage meters and prototypes submitted for Postal Service approval prior to leasing to mailers.

(iv) Reports of market surveys conducted by or under contract in behalf of the Postal Service.

(v) Records indicating rural carrier lines of travel.

(vi) Records compiled within the Postal Service which would be of potential benefit to persons or firms in economic competition with the Postal Service.

(vii) Information which, if publicly disclosed, could materially increase procurement costs.

(viii) Information which, if publicly disclosed, could compromise testing or examination materials.

(4) Interagency or internal memoranda or letters that would not be available by law to a private party in litigation with the Postal Service.

(5) Reports and memoranda of consultants or independent contractors, except to the extent they would be required to be disclosed if prepared within the Postal Service.

(6) Files personal in nature, including medical and personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Information prepared for use in connection with proceedings under chapter 36 of title 39, U.S. Code, relating to rate, classification, and service changes.

(8) Information prepared for use in connection with the negotiation of collective bargaining agreements under chapter 12 of title 39, U.S. Code, or minutes of, or notes kept during, negotiating sessions conducted under such chapter.

(9) Other matter specifically exempted from disclosure by statute.

(c) *Records or information compiled for law enforcement purposes.* (1) Investigatory files compiled for law enforcement purposes, whether or not considered closed, are exempt by statute from mandatory disclosure except to the extent otherwise available by law to a party other than the Postal Service, 39 U.S.C. 410(c)(6). As a matter of policy, however, the Postal Service will normally make records or information compiled for law enforcement purposes available upon request unless the production of these records:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority (such as the Postal Inspection Service) in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(2) Whenever a request is made which involves access to records that could reasonably be expected to interfere with law enforcement proceedings, and

(i) The investigation or proceeding involves a possible violation of criminal law; and

(ii) There is reason to believe that,

(A) The subject of the investigation or proceeding is not aware of its pendency, and

(B) Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the Postal Service may, during only such time as that circumstance continues, treat the records as not subject to the requirements of the Freedom of Information Act.

(3) Whenever informant records maintained by a criminal law

enforcement agency (such as the Postal Inspection Service) under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the records may be treated as not subject to the requirements of the Freedom of Information Act unless the informant's status as an informant has been officially confirmed.

(4) Authority to disclose records or information compiled for law enforcement purposes to persons outside the Postal Service must be obtained from the Chief Postal Inspector, U.S. Postal Service, Washington, DC 20260–2100, or designee.

(d) *Disclosure of names and addresses of customers.* Upon request, the names and addresses of specifically identified Postal Service customers will be made available only as follows:

(1) *Change of address.* The new address of any specific customer who has filed a permanent or temporary change of address order (by submitting PS Form 3575, a hand-written order, or an electronically communicated order) will be furnished to any person, except that the new address of a specific customer who has indicated on the order that the address change is for an individual or an entire family will be furnished only in those circumstances stated at paragraph (d)(5) of this section. Disclosure will be limited to the address of the specifically identified individual about whom the information is requested (not other family members or individuals whose names may also appear on the change of address order). The Postal Service reserves the right not to disclose the address of an individual for the protection of the individual's personal safety. Other information on PS Form 3575 or copies of the form will not be furnished except in those circumstances stated at paragraphs (d)(5)(i), (d)(5)(iii), or (d)(5)(iv) of this section.

(2) *Name and address of permit holder.* The name and address of the holder of a particular bulk mail permit, permit imprint or similar permit (but not including postage meter licenses), and the name of any person applying for a permit in behalf of a holder will be furnished to any person upon the filing of a proper FOIA request and payment of any applicable fees. For the name and address of a postage meter license holder, see paragraph (d)(3) of this section. (Lists of permit holders may not be disclosed to members of the public. See paragraph (e)(1) of this section.)

(3) *Name and address of postage evidencing user.* The name and address of an authorized user of a postage meter or PC Postage product (postage evidencing systems) printing a specified indicium will be furnished to any person upon the payment of any fees authorized by § 265.9(b), provided the user is using the postage meter or PC Postage product for business purposes. The request for this information must be sent to the manager of Postage Technology Management, Postal Service Headquarters. The request must include the original or a photocopy of the envelope or wrapper on which the postage meter or PC postage indicium in question is printed, and a copy or description of the contents to support that the sender is a business or firm and not an individual. (Lists of authorized users of postage meters or PC Postage products may not be disclosed to members of the public.)

(4) *Post Office boxholder information.* Information from PS Form 1093, *Application for Post Office Box or Caller Service,* will be provided as follows:

(i) Except as provided in paragraph (d)(4)(iii) of this section, the boxholder applicant name and address from PS Form 1093 will be provided only in those circumstances stated in paragraphs (d)(5)(i) through (iii) of this section.

(ii) Except as provided in paragraph (d)(4)(iii) of this section, the names of persons listed as receiving mail, other than the boxholder applicant, will be furnished from PS Form 1093 only in those circumstances stated in paragraphs (d)(5)(i) and (iii) of this section.

(iii) When a copy of a protective order has been filed with the postmaster, information from PS Form 1093 will not be disclosed except pursuant to the order of a court of competent jurisdiction.

(5) *Exceptions.* Except as otherwise provided in these regulations, names or addresses of Postal Service customers will be furnished only as follows:

(i) To a Federal, State or local government agency upon prior written certification that the information is required for the performance of its duties. The Postal Service requires government agencies to use the format appearing at the end of this section when requesting the verification of a customer's current address or a customer's new mailing address. If the request lacks any of the required information or a proper signature, the postmaster will return the request to the agency, specifying the deficiency in the space marked 'OTHER'. A copy of PS Form 1093 may be provided.

(ii)(A) To a person empowered by law to serve legal process, or the attorney for a party in whose behalf service will be made, or a party who is acting *pro se*,[1] upon receipt of written information that specifically includes all of the following:

(*1*) A certification that the name or address is needed and will be used solely for service of legal process in connection with actual or prospective litigation;

(*2*) A citation to the statute or regulation that empowers the requester to serve process, if the requester is other than the attorney for a party in whose behalf service will be made, or a party who is acting *pro se;*

(*3*) The names of all known parties to the litigation;

(*4*) The court in which the case has been or will be commenced;

(*5*) The docket or other identifying number, if one has been issued; and

(*6*) The capacity in which the boxholder is to be served, *e.g.,* defendant or witness.

(B) By submitting such information, the requester certifies that it is true. The address of an individual who files with the postmaster a copy of a protective court order will not be disclosed except as provided under paragraphs (d)(5)(i), (iii), or (iv) of this section. A copy of Form 1093 will not be provided. The Postal Service suggests use of the standard format appearing at the end of this section when requesting information under this paragraph. When using the standard format on the submitter's own letterhead, the standard format must be used in its entirety. The warning statement and certification specifically must be included immediately before the signature block. If the request lacks any of the required information or a proper signature, the postmaster will return it to the requester specifying the deficiency.

(iii) In compliance with a subpoena or court order, except that change of address or boxholder information which is not otherwise subject to disclosure under these regulations may be disclosed only pursuant to a court order.

(iv) To a law enforcement agency, for oral requests made through the Inspection Service, but only after the Inspection Service has confirmed that the information is needed in the course of a criminal investigation. (All other requests from law enforcement agencies should be submitted in writing to the postmaster as in paragraph (d)(5)(i) of this section.)

(6) *Jury service.* The mailing address of any customer sought in connection with jury service, if known, will be furnished without charge upon prior

[1] The term *pro se* means that a party is not represented by an attorney but by himself or herself.

written request to a court official, such as a judge, court clerk or jury commissioner.

(7) *Address verification.* The address of a postal customer will be verified at the request of a Federal, State, or local government agency upon written certification that the information is required for the performance of the agency's duties. ''Verification'' means advising such an agency whether or not its address for a postal customer is one at which mail for that customer is currently being delivered. ''Verification'' neither means nor implies knowledge on the part of the Postal Service as to the actual residence of the customer or as to the actual receipt by the customer of mail delivered to that address. The Postal Service requires government agencies to use the format appearing at the end of this section when requesting the verification of a customer's current address or a customer's new mailing address. If the request lacks any of the required information or a proper signature, the postmaster will return the request to the agency, specifying the deficiency in the space marked ''OTHER''.

(8) *Business/Residence location.* If the location of a residence or a place of business is known to a Postal Service employee, whether as a result of official duties or otherwise, the employee may, but need not, disclose the location or give directions to it. No fee is charged for such information.

(9) *Private mailbox information.* Information from PS Form 1583, *Application for Delivery of Mail Through Agent,* will be provided as follows:

(i) Except as provided in paragraph (d)(9)(iii) of this section, information from PS Form 1583 will be provided only in the circumstance stated in paragraph (d)(5)(iii) of this section.

(ii) To the public only for the purpose of identifying a particular address as an address of an agent to whom mail is delivered on behalf of other persons. No other information, including, but not limited to, the identities of persons on whose behalf agents receive mail, may be disclosed to the public from PS Form 1583.

(iii) Information concerning an individual who has filed a protective court order with the postmaster will not be disclosed except pursuant to the order of a court of competent jurisdiction.

(e) *Information not available for public disclosure.* (1) Except as provided by paragraph (a)(6) of this section, the Postal Service and its officers and employees shall not make available to the public by any means or for any purpose any mailing list or other list of names or addresses (past or present) of postal patrons or other persons.

(2) Records or other documents which are classified or otherwise specifically authorized by Executive Order 12356 and implementing regulations to be kept secret in the interest of the national defense or foreign policy are not subject to disclosure pursuant to this part.

(3) Records consisting of trade secrets or confidential financial data, the disclosure of which is prohibited by 18 U.S.C. 1905, are not subject to disclosure pursuant to this part.

(4) Other records, the disclosure of which is prohibited by statute, are not subject to disclosure pursuant to this part.

(f) *Protection of the right of privacy.* If any record required or permitted by this part to be disclosed contains the name of, or other identifying details concerning, any person, including an employee of the Postal Service, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, the name or other identifying details shall be deleted before the record is disclosed and the requester so informed.

(g) *Disclosure in part of otherwise exempt record.* Any reasonably segregable portion of a record shall be provided after deleting the information which is neither subject to mandatory disclosure nor available as a matter of discretion.

BILLING CODE 7710–12–P

## Change of Address or Boxholder Request Format — Process Servers

Date:_____

Mail To:

Postmaster

_____

City, State, ZIP Code

**REQUEST FOR CHANGE OF ADDRESS OR BOXHOLDER INFORMATION NEEDED FOR SERVICE OF LEGAL PROCESS**

Please furnish the new address or the name and street address (if a boxholder) for the following:

Name:_____

Last Known Address:_____

**Note:** Only one request may be made per completed form. The name and last known address are required for change of address information. The name, if known, and Post Office box address are required for boxholder information. **You must enclose a copy of the statute or regulation that empowers you to serve process.** (Not required for attorneys or individuals acting pro se.) If you are a corporation proceeding pro se in state court, you must enclose a copy of the state statute or regulation permitting corporations to proceed pro se.

The following information is provided in accordance with 39 CFR 265.14(d)(4)(ii). There is no fee charged for change of address or boxholder information.

1. Capacity of requester (process server, attorney, party representing self): _____
2. The names of all known parties to the litigation: _____
3. The court in which the case has been or will be heard _____
4. The docket or other identifying number if one has been issued: _____
5. The capacity in which this individual is to be served (defendant or witness): _____

**WARNING: THE SUBMISSION OF FALSE INFORMATION TO OBTAIN AND USE CHANGE OF ADDRESS INFORMATION OR BOXHOLDER INFORMATION FOR ANY PURPOSE OTHER THAN THE SERVICE OF LEGAL PROCESS IN CONNECTION WITH ACTUAL OR PROSPECTIVE LITIGATION COULD RESULT IN CRIMINAL PENALTIES INCLUDING A FINE OF UP TO $10,000 OR IMPRISONMENT OF NOT MORE THAN 5 YEARS, OR BOTH (TITLE 18 U.S.C. SECTION 1001).**

I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in conjunction with actual or prospective litigation.

_____ _____

Signature Address

_____ _____

Printed Name City, State, ZIP Code

_____

**FOR POST OFFICE USE ONLY**

____ No change of address on file

____ Moved and left no forwarding address

____ No such address

NEW ADDRESS OR BOXHOLDER NAME POSTMARK AND STREET ADDRESS

_____

_____

_____

## Address Information Request Format — Government Agencies

(MUST BE ON AGENCY LETTERHEAD)

Date _____

Mail To:

Postmaster

_____
City, State, ZIP Code

Requesting Agency Control Number (if applicable): _____

**AGENCY REQUEST FOR ADDRESS INFORMATION**

Please furnish this agency with the new address, if available, for the following individual or verify whether or not the address given below is one at which mail for this individual is currently being delivered. If the following address is a post office box, please furnish the street address as recorded on the boxholder's application form.

Name: _____

Last Known Address: _____

I certify that the address information for this individual is required for the performance of this agency's official duties.

_____
(Signature of Agency Official)

_____
(Title)

_____

**FOR POST OFFICE USE ONLY**

[ ] MAIL IS DELIVERED TO ADDRESS GIVEN

[ ] NOT KNOWN AT ADDRESS GIVEN

[ ] MOVED, LEFT NO FORWARDING ADDRESS

[ ] NO SUCH ADDRESS

[ ] OTHER (SPECIFY):

_____

_____

_____

NEW ADDRESS:

_____

_____

BOXHOLDER STREET ADDRESS:

_____

_____

_____

Agency return address:

_____

_____

(Postmark/Date Stamp)

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2016–28430 Filed 11–29–16; 8:45 am]

**BILLING CODE 7710–12–C**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

**[Docket No. 150916863–6211–02]**

**RIN 0648–XF064**

## Fisheries of the Exclusive Economic Zone Off Alaska; Several Groundfish Species in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; apportionment of reserves; request for comments.

**SUMMARY:** NMFS apportions amounts of the non-specified reserve to the total allowable catch (TAC) of Bering Sea and Aleutian Islands (BSAI) Alaska plaice, Kamchatka flounder, northern rockfish, skates, sculpins, sharks, and octopus in the BSAI management area. This action is necessary to allow the fisheries to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI management area.

**DATES:** Effective November 29, 2016 through 2400 hrs, Alaska local time, December 31, 2016. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, December 15, 2016.

**ADDRESSES:** You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2015–0118 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to, *http://www.regulations.gov/docket?D=NOAA-NMFS-2015-0118,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the (BSAI) exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR parts 600 and 679.

In the BSAI, the 2016 TAC of Alaska plaice was established as 12,325 metric tons (mt), the 2016 TAC of Kamchatka flounder was established as 4,550 mt, the 2016 TAC of northern rockfish was established as 4,375 mt, the 2016 TAC of skates was established as 27,100 mt, the 2016 TAC of sculpins was established as 4,325 mt, the 2016 TAC of sharks was established as 125 mt, and the 2016 TAC of octopus was established as 400 mt by the final 2016 and 2017 harvest specifications for groundfish of the BSAI (81 FR 14773, March 18, 2016) and apportionment of non-specified reserves (81 FR 68369, October 4, 2016). In accordance with § 679.20(a)(3) the Regional Administrator, Alaska Region, NMFS, has reviewed the most current available data and finds that the TACs for BSAI Alaska plaice, Kamchatka flounder, northern rockfish, skates, sculpins, sharks, and octopus need to be supplemented from the non-specified reserve to promote efficiency in the utilization of fishery resources in the BSAI and allow fishing operations to continue.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish 1,000 mt to the Alaska plaice TAC, 300 mt to the Kamchatka flounder TAC, 170 mt to the northern rockfish TAC, 402 mt to the skates TAC, 300 mt to the sculpins TAC, 5 mt to the sharks TAC, and 100 mt to the octopus TAC. These apportionments are consistent with § 679.20(b)(1)(i) and do not result in overfishing of any target species because the revised TACs and total allowable catch (TAC) are equal to or less than the specifications of the acceptable biological catch in the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773; March 18, 2016) and apportionment of non-specified reserves (81 FR 68369; October 4, 2016).

The harvest specification for the 2016 TACs and TACs included in the harvest specifications for groundfish in the BSAI are revised as follows: The 2016 TAC is increased to 13,325 mt for Alaska plaice, 4,850 mt for Kamchatka flounder, 4,545 mt for northern rockfish, 27,502 mt for skates, 4,625 mt for sculpins, 130 mt for sharks, and 500 mt for BSAI octopus.

### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the BSAI Alaska plaice, Kamchatka flounder, northern rockfish, skates, sculpins, sharks, and octopus in the BSAI. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 22, 2016.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until December 15, 2016. This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: November 25, 2016.

**Emily H. Menashes,**

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

[FR Doc. 2016–28814 Filed 11–29–16; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 81, No. 230
Wednesday, November 30, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 302

**RIN 3206–AN30**

## Employment in the Excepted Service

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing to revise its regulations governing employment in the excepted service. The proposed rules will clarify the existing policy on exemptions from excepted service selection procedures, and provide additional procedures for passing over a preference eligible veteran. The intended effect of these proposed changes is to strengthen the application of veterans' entitlements in the excepted service.

**DATES:** Comments must be received on or before January 30, 2017.

**ADDRESSES:** You may submit comments, identified by Regulation Identification Number (RIN) ''3206–AN30'' using any of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identification Number (RIN) for this rulemaking.

*Email: employ@opm.gov.* Include ''RIN 3206–AN30, Excepted Service'' in the subject line of the message.

*Fax:* (202) 606–2329.

*Mail:* Kimberly A. Holden, Deputy Associate Director for Recruitment and Hiring, U.S. Office of Personnel Management, Room 6551, 1900 E Street NW., Washington, DC 20415–9700.

*Hand Delivery/Courier:* U.S. Office of Personnel Management, Room 6500, 1900 E Street NW., Washington, DC 20415–9700.

**FOR FURTHER INFORMATION CONTACT:** Katika Floyd by telephone at (202) 606–0960; by email at *employ@opm.gov;* by fax at (202) 606–2329; or by TTY at (202) 418–3134.

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is proposing to revise the regulations governing employment in the excepted service. OPM is proposing these changes to clarify the existing policy on exemptions from excepted service selection procedures, and provide additional procedures for passing over a preference eligible veteran.

### Background

All Federal civilian employees occupy positions in the competitive service, the excepted service, or the Senior Executive Service. The main differences between the three employment systems are in the manner that candidates apply for jobs and in the opportunity for appointees to move within the Federal service. Each employment system is covered by different laws and regulations.

The term ''excepted service'' covers a variety of situations. Entire agencies may be placed in the excepted service by statute. Positions in large parts of agencies (such as components or offices within agencies) as well as individual positions may be placed in the excepted service. If positions are placed in the excepted service (by law, Executive order, or OPM regulation), it means they have been excepted from certain requirements of the competitive service or the Senior Executive Service. However, the reasons for and scope of the exceptions will vary, depending on the circumstances surrounding their exception and who is authorizing the exception. If positions are not in the competitive service and are subject to the provisions of Title 5, United States Code, or are subject to a statutory requirement to follow veterans preference provisions of Title 5, then the agencies with such positions must follow the employment procedures outlined by OPM in its regulations (which are the ones addressed in this proposed regulation).

### Positions Exempt From Appointment Procedures

OPM can exempt positions from the appointment procedures for the excepted service. The reasons for exemption will vary based on the reasons why the rating and ranking procedures outlined in OPM's regulation would be difficult for an agency to implement. The positions that OPM has exempted from the appointment procedures of 5 CFR part 302 are listed at 5 CFR 302.101(c). Per 5 CFR 302.101(c), agencies must follow the principle of veterans' preference as far as administratively feasible when filling an ''exempted'' position in the excepted service.

We propose clarifying the exemption listed at 5 CFR 302.101(c)(6). This exemption is for, ''positions included in Schedule A (see subpart C of part 213 of this chapter) and similar types of positions when OPM agrees with the agency that the positions should be included hereunder.'' As so written, this exemption may be construed to suggest that all Schedule A appointing authorities are exempt from the excepted service appointment procedures of part 302, however, such a construction is not correct. Therefore, we propose revising this exemption to say, ''Positions included in Schedule A (see subpart C of part 213 of this chapter) for which OPM states in writing that an agency is not required to fill the positions according to the procedures in this subpart.'' We believe this clarification will eliminate any potential ambiguity that all Schedule A positions are subject to the application of veterans' preference only as far as administratively feasible. Additionally, we are proposing to clarify that positions filled under 5 CFR 213.3102(u) by persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities are exempt from the procedures of part 302.

### Passing Over a Preference Eligible

We propose modifying the regulations for the passing over of a preference eligible adding specific procedures. The change will require that an agency must follow the procedures in 5 U.S.C. 3318(c) (which also apply to category rating under 5 U.S.C. 3319(c)(7)) which are described in the *Delegated Examining Operations Handbook.* We are making this change in response to the U.S. Court of Appeals for the Federal Circuit's decision in *Gingery* v. *Department of Defense,* 550 F.3d 1347 (Fed. Cir. 2008). Under *Gingery,* when excepted service positions are not exempted from the hiring requirements in 5 CFR 302.101, and applicants are

hired from certificates—including through category rating—the pass over rules in 5 U.S.C. 3318 generally apply. See *also Dean* v. *Department of Labor,* 808 F.3d 497, 507 (Fed. Cir. 2015); *Jarrard* v. *Department of Justice,* 669 F.3d 1320, 1323 (Fed. Cir. 2012). The court in *Gingery* ruled that the current text in 5 CFR 302.401(b) is invalid, on grounds that it does not provide pass-over protections generally available to preference-eligible applicants under 5 U.S.C. 3318(b)(1) (since renumbered as 5 U.S.C. 3318(c)(1)), or the pass-over protections specifically available to preference eligibles with 30-percent or more compensable service-connected disabilities under 5 U.S.C. 3318(b)(2) and (b)(4) (since renumbered as 5 U.S.C. 3318(c)(2) and (c)(4)). *See* 550 F.3d at 1353–54.

OPM issued guidance on the *Gingery* decision on February 9, 2009, and clarified this guidance on March 12, 2009. However, OPM has not yet amended the text of the regulation. We are proposing to amend section 302.401(b) of our regulations to conform to the pass-over procedures in 5 U.S.C. 3318(c).

OPM notes that Public Law 114–137, the Competitive Service Act of 2015, recently amended 5 U.S.C. 3318 and 3319 to permit the use of shared certificates. This proposed rule does not address the Competitive Service Act. OPM will initiate a separate regulatory action to implement the Competitive Service Act.

**E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

**Regulatory Flexibility Act**

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

**List of Subjects in 5 CFR Part 302**

Government employees.

U.S. Office of Personnel Management.

**Beth F. Cobert,**

*Acting Director.*

Accordingly, OPM is proposing to revise 5 CFR part 302 as follows:

## PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

■ 1. The authority citation for part 302 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3320, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*

■ 2. Amend § 302.101 to revise paragraph (c)(6) and to add paragraph (c)(11) to read as follows:

**§ 302.101 Positions covered by regulations.**

* * * * *

(c) * * *

(6) Positions included in Schedule A (see subpart C of part 213 of this chapter) for which OPM agrees with the agency that the positions should be included hereunder and states in writing that an agency is not required to fill positions according to the procedures in this part.

* * * * *

(11) Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities to positions filled under 5 CFR 213.3102(u).

■ 3. Revise § 302.401(b) to read as follows:

**§ 302.401 Selection and appointment.**

* * * * *

(b) *Passing over a preference applicant.* When an agency, in making an appointment as provided in paragraph (a) of this section, passes over the name of a preference eligible, it shall follow the procedures in 5 U.S.C. 3318(c) and 3319(c)(7) as described in the *Delegated Examining Operations Handbook.* An agency may discontinue consideration of the name of a preference eligible for a position as described in 5 U.S.C. 3318(c).

[FR Doc. 2016–28783 Filed 11–29–16; 8:45 am]

**BILLING CODE 6325–39–P**

## DEPARTMENT OF JUSTICE

### Executive Office for Immigration Review

### 8 CFR Part 1240

**[EOIR No. 180; AG Order No. 3780–2016]**

**RIN 1125–AA25**

## Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice proposes to amend the regulations of the Executive Office for Immigration Review (EOIR) governing the annual statutory limitation on cancellation of removal and suspension of deportation decisions. First, the rule proposes to eliminate certain procedures created in 1998 that were used to convert 8,000 conditional grants of suspension of deportation and cancellation of removal to outright grants before the end of fiscal year 1998. The need for such procedures ceased to exist after the end of fiscal year 1998. Second, the Department proposes to authorize immigration judges and the Board of Immigration Appeals (Board) to issue final decisions denying applications, without restriction, regardless of whether the annual limitation has been reached. This proposed amendment would decrease the high volume of reserved decisions that results when the annual limitation is reached early in the fiscal year; reduce the associated delays caused by postponing the resolution of pending cases before EOIR; and provide an applicant with knowledge of a decision in the applicant's case on or around the date of the hearing held on the applicant's suspension or cancellation application.

**DATES:** Written comments must be submitted on or before January 30, 2017. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

**ADDRESSES:** Please submit written comments to Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125–AA25 or EOIR docket No. 180 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at *www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 605–1744 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. To provide the most assistance

to EOIR, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that support such recommended change.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 180. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov*. Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) voluntarily submitted by the commenter.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov*.

Personally identifiable information and confidential business information provided as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for agency counsel's contact information.

## II. Background

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, div. C, 110 Stat. 3009–546, added section 240A(e) to the Immigration and Nationality Act (''INA'' or the ''Act''), Public Law 82–414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.), by establishing an annual limitation on the number of aliens who may be granted suspension of deportation or cancellation of removal followed by adjustment of status.[1] The annual limitation is as follows:

> [T]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), of a total of more than 4,000 aliens in any fiscal year.

INA sec. 240A(e)(1), 8 U.S.C. 1229b(e)(1).

In February 1997, EOIR reached the fiscal year 1997 annual limitation and the Chief Immigration Judge directed immigration judges to reserve decisions in suspension of deportation cases that they intended to grant. *See* 63 FR 52134, 52134 (Sep. 30, 1998). These instructions were intended to serve as a temporary measure to provide the Department with time to consider how best to address the annual limitation. *See id.*

On October 3, 1997, the Department issued an interim rule, which authorized immigration judges and the Board to grant applications for suspension of deportation and cancellation of removal only on a ''conditional basis.'' 62 FR 51760, 51762 (Oct. 3, 1997). On October 15, 1997, the Chief Immigration Judge instructed immigration judges to convert previously reserved grants of suspension and cancellation to conditional grants.

On November 19, 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (''NACARA''), Public Law 105–100, title II, 111 Stat. 2160, 2193–2201, which amended section 240A(e) of the Act. NACARA reaffirmed the annual limitation of 4,000 grants but exempted from the limitation certain nationals of Guatemala, El Salvador, and the former Soviet bloc countries. *See* NACARA sec. 204, 111 Stat. at 2200–01. Moreover, NACARA provided for an additional 4,000 suspension/cancellation grants to increase the annual limitation to a total of 8,000 for fiscal year 1998 only. *Id.*

On September 30, 1998, the Department issued the current interim rule to: (1) Create a process to convert 8,000 conditional grants to outright grants before the end of fiscal year 1998, *see* 63 FR at 52138–39 (codified at 8 CFR 1240.21(b)); and (2) establish a new procedure for processing applications for suspension and cancellation in order to avoid exceeding the annual limitation, *see id.* at 52139–40 (codified at 8 CFR 1240.21(c)).

First, in order to utilize the 8,000 grants available in fiscal year 1998, the rule provided for converting the first 8,000 conditional grants made since October 1997 to outright grants of suspension/cancellation in order of the date the conditional grant was issued by the immigration judge or the Board. *See id.* at 52138 (codified at 8 CFR 1240.21(b)(1)). Any conditional grants remaining after 1998 were to be converted to outright grants in fiscal year 1999 when a grant became available. *See id.* at 52139 (codified at 8 CFR 1240.21(b)(3)).

Additionally, in an effort to preserve as many grants as possible in fiscal year 1998, the rule required nationals of Nicaragua and Cuba who received a

[1] The Department has considered whether section 240A(e) of the Act can be interpreted as imposing an annual limitation on adjustments of status only, rather than on the immigration judge or Board's decision to grant an application for cancellation of removal or suspension of deportation. The Department has determined that section 240A(e) does not apply only to adjustments of status. The language and history of that section indicates that Congress intended ''cancellation/suspension'' and ''adjustment of status'' to be a single inseparable process, and that the 4,000 annual limitation applies to the entire process. To be sure, in other sections of the Act, Congress has distinguished between the act of granting relief to an alien and the process of adjusting the alien's status to lawful permanent resident. *See* INA sec. 208, 209 (8 U.S.C. 1158, 1159(b)). But section 240A(b)(1) of the Act indicates that Congress did not intend to separate the act of granting cancellation of removal or suspension of deportation from adjustment of status in section 240A.

Further justification for the Department's interpretation is found in section 240A(e)(1) of the Act which provides that: ''[t]he numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien under this section . . . .'' INA sec. 240A(e)(1) (8 U.S.C. 1229b(e)(1)). The use of the phrase ''aggregate number of decisions'' indicates that Congress intended the 4,000 annual limitation to apply to ''decisions'' and not just the ministerial act of adjusting an alien's status to lawful permanent resident.

The legislative history of section 240A(e) also supports the Department's interpretation. When initially passed by the House of Representatives, the annual limitation provision stated that: ''[t]he number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year.'' *See* Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. sec. 304 (as passed by House, March 21, 1996). Although the language of the House Bill was never signed into law, many of its provisions were later added to IIRIRA, including section 240A(e) of the Act which was amended and enacted as follows: ''The Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) . . . of a total of more than 4,000 aliens in any fiscal year.'' Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, div. C, sec. 304(a), 110 Stat. 3009–546, 3009–596. The significance of this amendment is a shift from a limitation only on adjustments to a limitation on cancellation of removal (or suspension of deportation) *and* adjustment of status, which confirms that Congress intended ''cancellation/suspension'' and ''adjustment of status'' to be a single inseparable process for purposes of applying the 4,000 annual limitation.

conditional grant of suspension or cancellation to first pursue adjustment under section 202 of NACARA, because NACARA exempts the adjustment of status of certain nationals from the annual limitation. *See* NACARA sec. 202, 111 Stat. at 2160. The rule directed the former Immigration and Naturalization Service (INS) to notify all Cuban and Nicaraguan applicants to appear at an INS office to apply for NACARA adjustment before December 31, 1998. *See* 63 FR at 52138–39 (codified at 8 CFR 1240.21(b)(2)(i)). The rule provided that ''[a]n alien who fail[ed] to appear to perfect his or her request for NACARA adjustment . . . [had] his or her conditional grant of suspension of deportation or cancellation of removal automatically converted . . . to a grant of suspension of deportation or cancellation effective December 31, 1998.'' *Id.* at 52139 (codified at 8 CFR 1240.21(b)(2)(vi)). Second, the rule established a procedure for future processing of suspension of deportation and cancellation cases under the annual limitation. Specifically, the rule eliminated the conditional grant process, stating that ''[t]he Immigration Court and the Board shall no longer issue conditional grants . . . .'' *Id.* at 52138 (codified at 8 CFR 1240.21(a)(2)). Instead, under the interim rule, immigration judges and the Board may issue grants of suspension or cancellation in chronological order until grants are no longer available in a fiscal year.[2] When grants are no longer available in a fiscal year, ''further decisions to grant or *deny* such relief shall be reserved'' until grants become available in a future fiscal year.[3] *Id.* at 52140 (codified at 8 CFR 1240.21(c)(1)) (emphasis added). With respect to denials, the rule further clarified that immigration judges and the Board ''may deny without reserving decision or may pretermit those suspension of deportation or cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief.'' *Id.* However, the rule prohibits immigration judges and the Board from basing such denials ''on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the [INA], a failure to establish exceptional or extremely unusual hardship to a qualifying relative in cancellation cases, or a failure to establish extreme hardship to the applicant and/or qualifying relative in suspension cases.'' *Id.*

## III. Rationale for the Proposed Amendments

The Department proposes to make three amendments to the current rule before it is finalized. First, the Department proposes to eliminate the current text of paragraph (b), which established a procedure to convert 8,000 conditional grants of suspension of deportation and cancellation of removal to outright grants before the end of fiscal year 1998 and to convert some conditional grants to grants of adjustment of status under NACARA. *See* 8 CFR 1240.21(b). The need for such procedures ceased to exist after fiscal year 1998. Second, the Department proposes to amend the interim rule to allow immigration judges and the Board to issue final decisions denying cancellation and suspension applications, without restriction, regardless of whether the annual limitation has been reached. Under the proposed rule, after the annual limitation has been reached, only grants would be required to be reserved. *Contra* 8 CFR 1240.21(c)(1). Finally, the Department proposes to make a technical amendment to the current text of 8 CFR 1240.21(c).

### *A. Elimination of Current Text of Paragraph (b)*

The Department has determined that the current text of paragraph (b) in the interim rule should be removed. As discussed, that section was added to address a discrete issue that required resolution before the end of fiscal year 1998: the interaction between the September 1997 interim rule authorizing immigration judges and the Board to grant applications for suspension and cancellation on a ''conditional basis'' and the enactment of NACARA in November 1997, which added 4,000 grants to the statutory annual limitation, creating a total of 8,000 available grants for fiscal year 1998. Specifically, the issue before the Department was how best to convert 8,000 conditional grants to outright grants before the end of fiscal year 1998. Pursuant to 8 CFR 1240.21(b)(1), the Department successfully converted all 8,000 conditional grants to outright grants in fiscal year 1998. Additionally, the Department was able to preserve grants for use in fiscal year 1998 by offering Nicaraguan and Cuban nationals who received a conditional grant of suspension or cancellation in 1997 an opportunity to pursue adjustment under NACARA pursuant to the procedures in 8 CFR 1240.21(b)(2). Any applicants who did not apply for adjustment under NACARA (or whose applications were denied) automatically received a grant of cancellation or suspension by the end of fiscal year 1998. Given that the purpose of these provisions has been achieved, the Department now proposes to remove the current text of paragraph (b). This amendment will not affect any applicant who has applied or will apply for cancellation of removal, suspension of deportation, or NACARA relief.[4]

### *B. Authorizing Issuance of Denials*

The Department proposes to amend the interim rule to allow immigration judges and the Board to issue final decisions denying applications after the annual limitation has been reached. This amendment would (1) decrease the high volume of reserved decisions that results from reaching the annual limitation early in the fiscal year; (2) reduce the associated delays caused by postponing the resolution of pending cases before EOIR; and (3) provide an applicant with knowledge of a decision in the applicant's case on or around the date of the hearing held on the applicant's suspension or cancellation application.

As an initial matter, the Department notes that this proposed amendment is permitted by the INA. Section 240A(e)(1) of the INA limits the number of aliens who may be granted suspension of deportation or cancellation of removal to 4,000 aliens in any fiscal year. The statute, however, does not prohibit the issuance of denials

[2] As explained in the rule's preamble, future grants were to be issued on a first-in-time basis, but only when numbers became available. *See* 63 FR at 52136–37. As a general matter, the immigration courts and the Board continue to follow the first-in-time rule. However, a limited number of grants that would count against the annual limitation are held in reserve, if needed, to allow immigration judges and the Board to grant relief in high priority cases. Such priority cases currently include, for example, cases of aliens who are being held in detention. Other categories of cases may be designated as priorities in the future as a result of exigent circumstances.

[3] The rule's preamble explained: ''[p]ersons with reserved decisions will be considered to be 'in proceedings' while their decision is reserved. They normally cannot be removed from the country while they are still in proceedings. Neither can they receive any form of relief until the Immigration Court or the Board takes further action.'' 63 FR at 52137.

[4] Paragraph (b) contains other sections concerning the conversion of conditional grants into outright grants in fiscal year 1998. Paragraph (b)(4) allows INS to file a motion to reopen within 90 days after the alien's conditional grant is converted into a final grant. Paragraph (b)(5) enables an alien with a conditional grant to remain eligible for conversion to an outright grant in fiscal year 1998 notwithstanding the alien's departure from the United States. Paragraph (b)(3) provides a rule for conditional grants on appeal to the Board to be converted when a grant is available. As discussed, the conversion process was completed in fiscal year 1998 and remaining grants were converted in 1999. Therefore, the Department has determined that these provisions can be eliminated because they no longer have any continuing effect.

of suspension of deportation or cancellation of removal applications once the annual limitation is reached. Therefore, the current regulation at 8 CFR 1240.21(c)(1), which prohibits immigration judges and the Board from issuing grants and some denials of suspension of deportation or cancellation of removal applications once the annual limitation is reached, is not mandated by statute.

In recent years, immigration judges and the Board have reached the annual 4,000 limitation early in the fiscal year. By May 23, 2011, approximately 3,800 applications had been granted. Procedures were instituted to halt further decisions so as not to exceed the annual limitation.[5] As a result of reaching the annual limitation early in fiscal year 2011, a backlog of reserved decisions to grant or deny applications was created. EOIR estimates nearly 1,400 decisions were reserved after May 23, 2011. EOIR reached the annual limitation even earlier in fiscal year 2012 because of the fiscal year 2011 backlog. By February 6, 2012, approximately 3,500 applications had been granted. Throughout the remainder of fiscal year 2012, approximately 3,547 decisions were reserved. Given the number of cases being carried over from fiscal year 2012, EOIR reached 3,500 grants in the first two months of fiscal year 2013. Throughout the remainder of fiscal year 2013, approximately 5,250 decisions were reserved. EOIR estimates that approximately 1,967 of these applications would have been denied in fiscal year 2013 if the decision had not been reserved.[6] Because of the large number of decisions that were reserved in fiscal year 2013, the annual limitation was not lifted at the beginning of fiscal year 2014. Instead, immigration judges were required to reserve all decisions in non-detained suspension and cancellation of removal cases unless notified that a grant was available. To comply with the annual limitation, a total of approximately 6,405 decisions had to be reserved throughout fiscal year 2014. Of these cases, 4,890 were identified as potential grants and 1,814 were identified as potential denials. Therefore, the entire 4,000 grants available for fiscal year 2015 must be allocated to cases that were reserved in fiscal year 2014 and identified as potential grants. In sum, as the multi-year backlog grows, more total cases are held, and aliens must wait longer for resolution of their cases.[7]

Allowing immigration judges and the Board to issue denials even after the annual limitation is reached would significantly reduce the number of reserved decisions. This would also reduce administrative burden and scheduling complications, as well as related costs, associated with suspension and cancellation of removal cases subject to the annual limitation.[8] In turn, the amendment would allow the Department to better meet the objectives of expeditious processing of removal proceedings.

Finally, the proposed amendment would provide final case resolution to more individuals applying for suspension of deportation and cancellation of removal.[9] An applicant would have knowledge of a decision to grant, reserve, or deny the application at or near the date of the hearing in which the immigration judge considered the applicant's application for suspension or cancellation. As a result, an applicant whose case is denied would be able to determine whether to file an appeal from the immigration judge's decision with the Board or get the applicant's affairs in order and apply for any other relief for which an applicant remains eligible. Additionally, an applicant who is advised that the applicant's case is reserved, because the applicant's case has not been denied, would now have greater certainty in knowing that the applicant likely will be granted cancellation or suspension once grant numbers become available.[10]

For these reasons, the Department is proposing to amend the regulations at 8 CFR 1240.21(c)(1) to provide that, even after the annual limitation is reached, immigration judges and the Board may issue decisions denying the suspension of deportation or cancellation of removal application without restriction.[11]

### *C. Technical Amendment to 8 CFR 1240.21(c)*

The final sentence of the introductory text of § 1240.21(c) of the current rule states that ''[t]he awarding of such relief shall be determined according to the date the order granting such relief becomes final as defined in §§ 1003.1(d)(3) and 1003.39 of this chapter.'' The citation to § 1003.1(d)(3), which relates to the Board's scope of review, is erroneous. Therefore, the Department proposes to replace the reference to § 1003.1(d)(3) with a reference to § 1003.1(d)(7), which appropriately relates to finality of decisions.

## IV. Response to Comments Received on the 1998 Interim Rule

The Department received the following comments in response to the 1998 interim rule.

One commenter stated that the rule does not implement the intent of Congress because it does not limit the number of aliens granted cancellation or suspension by the immigration courts. The commenter suggests that section 240A(e) of the Act requires denial of relief and deportation of aliens for whom one of the 4,000 slots is not available at the time the case is completed. The Department does not interpret section 240A(e) in this manner. Rather, the Department construes the annual limitation as a restriction on when, not whether, EOIR may grant suspension of deportation or cancellation to an alien who falls outside of the annual allotment of 4,000 slots. Accordingly, the interim rule was necessary for the Department to create a procedure for reserving a decision

[5] The statutory limitation of 4,000 grants was reached in September 2012, once the remaining 200 grants had been allocated.

[6] The precise number of reserved decisions that will ultimately result in denials cannot be determined because of the variety of possible case outcomes (including the withdrawal of the application or the grant of another form of relief).

[7] A reserved decision is not a final decision and cannot be appealed by either party. Unlike a conditional grant, no benefits accrue when a decision is reserved. *See* Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 12–01: Procedures on Handling Applications for Suspension/Cancellation in Non-Detained Cases Once Numbers are no Longer Available in a Fiscal Year 3–5 (February 3, 2012) (indicating that reserved decisions may be rendered as ''draft oral decisions'' or ''draft written decisions'' that may become final decisions when a number in the queue is available); *see also* 63 FR at 52137 (preamble to the rule explained that ''[p]ersons with reserved decisions will be considered to still be 'in proceedings' while their decision is reserved . . . [and cannot] receive any form of relief until the Immigration Court or the Board takes further action''); 8 CFR 1003.1(b) (jurisdiction of Board of Immigration Appeals over decisions of immigration judges).

[8] At present, when a denial is reserved, immigration judges and court staff spend significant resources preparing a draft decision. Moreover, when the annual limitation is lifted each fiscal year, an immigration judge must again review the decision before issuing it. *See* EOIR, OPPM 12–01, *supra* (outlining current procedures immigration judges and court staff must follow to reserve denial decisions).

[9] This result is also consistent with views expressed by one commenter to the 1998 rule. *See* Section III *infra.*

[10] Moreover, an applicant who receives a denial may be able to appeal to the Board sooner, rather than having to wait in the queue for a denial, and then potentially having to go back in the queue if the Board grants the appeal and remands to the immigration judge for a new decision.

[11] This regulatory amendment mirrors the solution adopted in February 1997 when EOIR reached the fiscal year 1997 annual limitation. *See* 63 FR 52134. Specifically, that directive reserved the adjudication of grants of suspension of deportation or cancellation of removal while allowing immigration judges and the Board to continue to issue denials of such relief.

granting a suspension or cancellation of removal application until a number becomes available.

In addition, one commenter expressed concern about the ''adverse effect on applicants of the reservation of decision procedure.'' The commenter states that the ''reservation of decision results in a secret determination causing the applicant to remain in proceedings with no knowledge of a decision for an undeterminable amount of time. Although the applicant will have presented his or her best case and evidence and had his or her day in court, the applicant will be unable to make any decisions about the future or get affairs in order in case of a denial.'' The Department shares these concerns. As noted above, the proposed amendment would provide final case resolution to more individuals applying for suspension of deportation and cancellation of removal, thereby providing greater certainty and eliminating concerns about a ''secret determination'' process. In addition, the alien would be able to appeal the denial, whereas at present a reserved decision is not appealable until the decision is issued.

Moreover, two commenters asked why aliens with reserved decisions could not receive advance parole to travel outside of the United States or work authorization while their cases were pending. EOIR does not have jurisdiction over work authorization and advance parole. These issues may be raised with the Department of Homeland Security (DHS) which does have such jurisdiction.

Finally, two commenters discussed the procedures designed to convert 8,000 conditional grants to outright grants in fiscal year 1998. As discussed above, all conditional grants were converted into outright grants by 1999. Therefore, the proposed rule would eliminate the procedures created to convert 8,000 conditional grants of suspension of deportation and cancellation of removal to outright grants before the end of fiscal year 1998. Accordingly, the Department does not address these comments.

## V. Regulatory Requirements

### *A. Regulatory Flexibility Act*

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate ''small entities,'' as that term is defined in 5 U.S.C. 601(6).

### *B. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *C. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

### *D. Executive Orders 12866 and 13563: Regulatory Planning and Review*

The Department has determined that this rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and, therefore, it has not been reviewed by the Office of Management and Budget. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Additionally, it calls on each agency to periodically review its existing regulations and determine whether any should be modified, streamlined, expanded, or repealed to make the agency's regulatory program more effective or less burdensome in achieving its regulatory objectives.

The Department is issuing this proposed rule consistent with these Executive Orders. This rule would affect the adjudication of suspension of deportation and cancellation of removal cases after the annual limitation under section 240A(e) has been reached. The Department expects this rule would reduce the number of reserved suspension of deportation and cancellation of removal cases once the annual limitation has been reached. Further, this rule will have a positive economic impact on Department functions because it will significantly reduce the administrative work and scheduling complications associated with suspension of deportation and cancellation of removal cases subject to the annual limitation. While this rule would remove all the current restrictions on issuing denials, immigration judges and the Board will still be required to provide a legal analysis for all decisions denying a suspension of deportation or cancellation of removal application. Accordingly, the Department does not foresee any burdens to the public as a result of this proposed rule. To the contrary, it will benefit the public by saving administrative costs and allowing earlier resolution of cases.

### *E. Executive Order 13132: Federalism*

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

### *F. Executive Order 12988: Civil Justice Reform*

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

### *G. Paperwork Reduction Act*

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

## List of Subjects

### *8 CFR Part 1240*

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, part 1240 of chapter V of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 1. The authority citation for part 1240 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

■ 2. Amend § 1240.21 by:

■ a. Removing and reserving paragraph (b); and

■ b. Revising paragraphs (c) introductory text, and (c)(1) to read as follows:

**§ 1240.21 Suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect before April 1, 1997) and cancellation of removal and adjustment of status under section 240A(b) of the Act for certain nonpermanent residents.**

* * * * *

(c) *Grants of suspension of deportation or cancellation of removal in fiscal years subsequent to fiscal year 1998.* On and after October 1, 1998, the Immigration Court and the Board may grant applications for suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect prior to April 1, 1997) or cancellation of removal and adjustment of status under section 240A(b) of the Act that meet the statutory requirements for such relief and warrant a favorable exercise of discretion until the annual numerical limitation has been reached in that fiscal year. The awarding of such relief shall be determined according to the date the order granting such relief becomes final as defined in §§ 1003.1(d)(7) and 1003.39 of this chapter.

(1) *Applicability of the Annual Limitation.* When grants are no longer available in a fiscal year, further decisions to grant such relief must be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year.

* * * * *

Dated: November 21, 2016.

**Loretta E. Lynch,**

*Attorney General.*

[FR Doc. 2016–28590 Filed 11–29–16; 8:45 am]

**BILLING CODE 4410–30–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2016–9452]**

### 14 CFR Part 21

### Airworthiness Criteria: Glider Design Criteria for Stemme AG Model Stemme S12 Powered Glider

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

**ACTION:** Notice of proposed design criteria.

**SUMMARY:** This notice announces the availability of and requests comments on the proposed design criteria for the Stemme AG model Stemme S12 powered glider. The Administrator finds the proposed design criteria, which make up the certification basis for the Stemme S12, acceptable.These final design criteria will be published in the **Federal Register**.

**DATES:** Comments must be received on or before December 30, 2016.

**ADDRESSES:** Send comments identified by docket number FAA–2016–9452 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery of Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m., and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

*Privacy:* The FAA will post all comments it receives, without change, to *http://regulations.gov,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov*.

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

**FOR FURTHER INFORMATION CONTACT:** Mr. Jim Rutherford, Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, 901 Locust, Room 301, Kansas City, MO 64106, telephone (816) 329–4165, facsimile (816) 329–4090.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the design criteria, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will consider all comments received on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these airworthiness design criteria based on received comments.

#### Background

On January 08, 2016, Stemme AG submitted an application for type validation of the Stemme S12 in accordance with the Technical Implementation Procedures for Airworthiness and Environmental Certification Between the FAA and the European Aviation Safety Agency (EASA), Revision 5, dated September 15, 2015. The Stemme S12 is a two-seat, self-launching, powered glider with a liquid cooled, turbocharged engine mounted in the center fuselage, an indirect drive shaft, and a fully-foldable, variable-pitch composite propeller in the nose. It is constructed from glass and carbon fiber reinforced composites, features a conventional T-type tailplane, and has a retractable main landing gear. The glider has a maximum weight of 1,984 pounds (900 kilograms) and may be equipped with an optional dual-axis autopilot system. EASA type certificated the Stemme S12 under Type Certificate Number (No.) EASA.A.054 on March 11, 2016. The associated EASA Type Certificate Data Sheet (TCDS) No. EASA.A.054 defined the certification basis Stemme AG submitted to the FAA for review and acceptance.

The applicable requirements for glider certification in the United States can be

found in FAA Advisory Circular (AC) 21.17–2A, ''Type Certification—Fixed-Wing Gliders (Sailplanes), Including Powered Gliders,'' dated February 10, 1993. AC 21.17–2A has been the basis for certification of gliders and powered gliders in the United States for many years. AC 21.17–2A states that applicants may utilize the Joint Aviation Requirements (JAR)–22, ''Sailplanes and Powered Sailplanes'', or another accepted airworthiness criteria, or a combination of both, as the accepted means for showing compliance for glider type certification.

**Type Certification Basis**

The applicant proposed a Certification Basis based on EASA Certification Specification (CS)–22, ''Sailplanes and Powered Sailplanes'', initial issue, dated November 14, 2003. In addition to CS–22 requirements, the applicant proposed to comply with other requirements from the certification basis referenced in EASA TCDS No. EASA.A.054, including special conditions and equivalent safety findings.

**The Proposed Design Criteria**

Applicable Airworthiness Criteria under § 21.17(b).

Based on the Special Class provisions of § 21.17(b), the following airworthiness requirements form the FAA Certification Basis for this design:

1. 14 CFR part 21, effective February 1, 1965, including amendments 21–1 through 21–93 as applicable.

2. EASA CS–22, initial issue, dated November 14, 2003.

3. EASA Special Condition No. SC–A.22.1.01, ''Increase in maximum mass for sailplanes and powered sailplanes.''

4. ''Preliminary Standard for the Substantiation of Indirect Drive Shafts in Power Plants of Powered Sailplanes Certified to JAR–22'' (with a modification for the Stemme AG model Stemme S 10), Luftfahrt-Bundesamt (LBA) document number (no.) I231–87, issued August 05, 1988.

5. Installation of a Dual-Axis Autopilot System, including—

• EASA CS–VLA (Very Light Aeroplanes) 1309, ''Equipment, systems, and installations''; initial issue, dated November 14, 2003; and

• EASA CS–23.1329, ''Automatic pilot system'', amendment 3, dated July 20, 2012.

6. Drop Testing for Retractable Landing Gear (EASA equivalent safety findings) to include CS–VLA 725, ''Limit drop tests''; CS–VLA 726, ''Ground load dynamic tests''; and CS–VLA 727, ''Reserve energy absorption''; initial issue dated November 14, 2003.

7. ''Standards for Structural Substantiation of Sailplane and Powered Sailplane Parts Consisting of Glass or Carbon Fiber Reinforced Plastics'', LBA document no. I4–FVK/91, issued July 1991.

8. ''Guideline for the analysis of the electrical system for powered sailplanes'', LBA document no. I334–MS 92, issued September 15, 1992.

9. The following kinds of operation are allowed: VFR-Day.

10. Date of application for FAA Type Certificate: January 08, 2016.

Issued in Kansas City, Missouri on November 18, 2016.

**Mel Johnson,**

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

[FR Doc. 2016–28575 Filed 11–29–16; 8:45 am]

**BILLING CODE 4910–13–P**

## OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

### 29 CFR Part 2201

### Regulations Implementing the Freedom of Information Act

**AGENCY:** Occupational Safety and Health Review Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Occupational Safety and Health Review Commission (''OSHRC'') is proposing revisions to its regulations implementing the Freedom of Information Act (''FOIA''). These proposed revisions account for statutory amendments included in the FOIA Improvement Act of 2016 (''FOIA Improvement Act''), as well as the addition of procedures pertaining to confidential commercial information and preservation of records, clarifications of existing procedures, and updates to contact information.

**DATES:** Comments must be received by OSHRC on or before December 20, 2016.

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

• *Email: NChadwick@oshrc.gov.* Include ''PROPOSED RULEMAKING, PART 2201'' in the subject line of the message.

• *Fax:* (202) 606–5417.

• *Mail:* Occupational Safety and Health Review Commission, ATTN: FOIA Public Liaison, One Lafayette Centre, 1120 20th Street NW., Ninth Floor, Washington, DC 20036–3457.

• *Hand Delivery/Courier:* Same as mailing address.

*Instructions:* All submissions must include your name, return address, and email address, if applicable. Please clearly label submissions as ''PROPOSED RULEMAKING, PART 2201.''

**FOR FURTHER INFORMATION CONTACT:** OSHRC's FOIA Public Liaison, by telephone at (202) 606–5410, by email at *NChadwick@oshrc.gov,* or by mail at the address stated above.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

OSHRC proposes several substantive and procedural revisions to its regulations implementing the FOIA that fall within four general categories. First, OSHRC proposes modifying its existing FOIA regulations to reflect the amendments to the FOIA contained in the FOIA Improvement Act of 2016, Public Law 114–185. The FOIA Improvement Act amended various practices under the FOIA, such as requiring notification to requesters of the right to seek dispute resolution at various times throughout the FOIA process from the National Archives and Records Administration's Office of Government Information Services (''OGIS''), a ninety-day minimum time period to file administrative appeals, and limitations on assessing certain fees and exceptions to those limitations.

Second, OSHRC proposes revising its regulations to further clarify and update its procedures relating to the submission and processing of FOIA requests.

Third, OSHRC proposes adding a new section to its regulations establishing procedures to notify submitters of records containing confidential commercial information when those records are requested under the FOIA, in compliance with Executive Order 12,600.

Fourth, OSHRC proposes adding a new section to its regulations explaining the procedure for the preservation of records related to FOIA requests.

Accordingly, OSHRC proposes to revise its regulations implementing the FOIA and put them out for public comment. The specific amendments that OSHRC proposes to each section of 29 CFR part 2201 are discussed hereafter in regulatory sequence.

In 29 CFR 2201.3, OSHRC proposes revising paragraph (a) to direct requestors to OSHRC's FOIA Reference Guide for further information. OSHRC proposes a minor revision to paragraph (c) explaining the role of the FOIA Public Liaison. OSHRC also proposes minor revisions to paragraph (d) to update the contact information for the FOIA Requester Service Center.

In 29 CFR 2201.4, OSHRC proposes a minor revision to a reference to another section of the regulations included in

paragraph (a). OSHRC proposes removing paragraph (b) regarding examination of records in cases appealed to courts as the provision is no longer necessary. OSHRC additionally proposes revising new paragraph (b), previously paragraph (c), to update the list of records available at the OSHRC e-FOIA Reading Room. OSHRC proposes revising new paragraph (c), previously paragraph (d), to clarify the location of records available onsite at the OSHRC National Office. OSHRC proposes changing paragraph (e) to paragraph (d) due to the removal of paragraph (b) in this section.

In 29 CFR 2201.5, OSHRC proposes revising paragraph (a) to clarify the procedure for how to make a FOIA request regarding the ability to submit a request in multiple ways, including by email and OSHRC's online FOIA request form. OSHRC proposes changing paragraph (b) to describe the procedures for a requester making a request for records about himself or herself. OSHRC proposes adding paragraph (c) to describe the procedure enabling a requester to receive greater access when a request for records pertains to another individual. OSHRC also proposes adding paragraph (d) to explain what elements should be included in the description of records in a FOIA request. OSHRC proposes adding paragraph (e), previously included in part in another paragraph in this section, to explain the procedure for requests regarding the preferred form or format of a response. OSHRC proposes adding paragraph (f) to describe the necessary contact information to be provided by a requestor. OSHRC further proposes adding paragraph (g), previously included in another paragraph of this section, to describe how OSHRC determines the date of receipt of a FOIA request and revising the reference in this paragraph to reflect the changes to paragraph designations in a subsequent section.

In 29 CFR 2201.6, OSHRC proposes revising paragraphs (c) and (f) to include notification to the requestor of the availability of assistance from the FOIA Public Liaison and the right to seek dispute resolution services from OGIS. OSHRC also proposes revising the references in paragraph (f) to reflect the changes to paragraph designations in subsequent sections. OSHRC proposes revising paragraph (h) to reflect changes to the procedure notifying a requester of the tracking number assigned to the FOIA request.

OSHRC proposes redesignating 29 CFR 2201.7 to 29 CFR 2201.10 as 29 CFR 2201.8 to 29 CFR 2201.11, respectively, and then adding a new 29 CFR 2201.7. This proposed new section pertains to ''confidential commercial information,'' and describes this type of information and how it is designated as such by a submitter, the circumstances under which OSHRC must notify the submitter of such information when it is contained in records requested under the FOIA, exceptions to this notice requirement, and the process for the submitter to object to the disclosure of such information.

In redesignated 29 CFR 2201.8, OSHRC proposes revising paragraph (a) to explain that OSHRC shall charge fees in accordance with the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget. OSHRC also proposes revising paragraph (b) to explain the limitations on assessing certain fees and exceptions to those limitations, as well as a minor revision to a reference to the Commission. OSHRC proposes revising paragraphs (h) and (i) to reflect the change in name for the Commission's Office of the Executive Director. OSHRC proposes revising the references in this entire section to reflect the changes to paragraph designations in previous and subsequent sections.

In redesignated 29 CFR 2201.9, OSHRC proposes revising the reference in this section to reflect the changes to paragraph designations in a previous section.

In redesignated 29 CFR 2201.10, OSHRC proposes adding paragraph (a) to revise the time period to file an appeal, as well as identify information to be included with the appeal. OSHRC proposes adding paragraph (b) to clarify the procedure for adjudication of appeals. OSHRC also proposes adding paragraph (c) to explain the content of and procedure for decisions on appeals. OSHRC proposes adding paragraph (d) to explain the process of mediation provided by OGIS. OSHRC also proposes adding paragraph (e) to describe the requirements for seeking review by a court of an adverse determination by OSHRC.

In redesignated 29 CFR 2201.11, OSHRC proposes a minor revision to a reference to OSHRC's Web site.

OSHRC proposes adding a new section at 29 CFR 2201.12 on the procedures for preserving records pertaining to FOIA requests.

## II. Statutory and Executive Order Reviews

*Executive Orders 12866 and 13132, and the Unfunded Mandates Reform Act of 1995:* OSHRC is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq*.

*Regulatory Flexibility Act:* The Chairman of OSHRC certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that these rules, if adopted, would not have a significant economic impact on a substantial number of small entities. The only proposed revisions that could economically impact a small entity pertain to how OSHRC charges its FOIA fees. OSHRC, however, receives relatively few FOIA requests from ''small entities'' that result in fees being assessed; when fees are assessed, the amounts are generally minimal; and it is not anticipated that the amendments will have much affect (if any) on the number of entities responsible for paying FOIA fees or the amounts of those fees. For these reasons, a regulatory flexibility analysis is not required.

*Paperwork Reduction Act of 1995:* OSHRC has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* does not apply because these rules do not contain any information collection requirements that require the approval of OMB.

*Congressional Review Act:* These proposed revisions do not constitute a ''rule,'' as defined by the Congressional Review Act, 5 U.S.C. 804(3)(C), because they involve changes to agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

**List of Subjects**

Freedom of information.

Signed at Washington, DC, on the 17th day of November, 2016.

**Cynthia L. Attwood,**

*Chairman.*

For the reasons set forth in the preamble, OSHRC proposes to amend 29 CFR part 2201 as follows:

## PART 2201—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

■ 1. The authority citation for part 2201 continues to read as follows:

**Authority:** 29 U.S.C. 661(g); 5 U.S.C. 552.

**§ 2201.3 [Amended]**

■ 2. Amend § 2201.3 by:

■ a. Removing the words ''FOIA handbook'' and adding, in their place, the words ''FOIA Reference Guide'' in paragraph (a)(5).

■ b. Removing the word ''supervisory'' in paragraph (c).

■ c. Revising paragraph (d) to read as follows:

**§ 2201.3 Delegation of authority and responsibilities.**

* * * * *

(d) OSHRC establishes a FOIA Requester Service Center that shall be staffed by the FOIA Disclosure Officer(s) and FOIA Public Liaison(s). The address of the FOIA Requester Service Center is 1120 20th Street NW., 9th Floor, Washington, DC 20036–3457. The telephone number, fax number and additional contact information for the FOIA Requester Service Center is located on the agency's Web site at: *http://www.oshrc.gov/foia.html.* The FOIA Requester Service Center is available to provide information about the status of a request to the requester using the assigned tracking number (as described in § 2201.6(h)), including:

(1) The date on which the agency originally received the request; and

(2) An estimated date on which the agency will complete action on the request.

* * * * *

**§ 2201.4 [Amended]**

■ 3. Amend § 2201.4 by:

■ a. Removing the citation ''§ 2201.5(a)'' and adding, in its place, the citation ''§ 2201.5'' in paragraph (a).

■ b. Removing paragraph (b) in its entirety.

■ c. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d), respectively.

■ d. Revising the opening of redesignated paragraph (b), and paragraphs (b)(1), (b)(5), (b)(6), and (c) to read as follows:

**§ 2201.4 General policy and definitions.**

* * * * *

(b) *Record availability at the OSHRC e-FOIA Reading Room.* The records of Commission activities are publicly available for inspection and copying, and may be accessed electronically on the Commission's Web site at *http://www.oshrc.gov/foia/foia_reading_room.html.* These records include:

(1) Final decisions, including concurring and dissenting opinions, remand orders, as well as Administrative Law Judge decisions pending OSHRC review, briefing notices, and other significant orders;

* * * * *

(5) Copies of records that have been released to a person under the FOIA that, because of the subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records, as well as records the Commission determines absent a FOIA request could be of significant public interest; and

(6) A general index of records referred to under paragraph (b)(5) of this section.

(c) *Record availability onsite at OSHRC National Office.* Any member of the public may, upon request, access OSHRC's e-FOIA Reading Room via a computer terminal at the OSHRC National Office, located at 1120 20th St. NW., 9th Floor, Washington, DC 20036–3457. Such a request must be made in writing to the FOIA Requester Service Center, and indicate a preferred date and time for the requested access. OSHRC reserves the right to arrange a different date and time with the requester, if necessary.

* * * * *

**§ 2201.5 [Amended]**

■ 4. Revise § 2201.5 to read as follows:

**§ 2201.5 Procedure for requesting records.**

(a) *General information.* All requests for information must be made in writing to the FOIA Disclosure Officer and may be: (1) Mailed or delivered; (2) faxed; or (3) emailed. Requests may also be made using the Commission's online FOIA request form (which is a downloadable PDF file found at *http://www.oshrc.gov/foia/foia_request_form.html*) and the completed form can be submitted by mail, fax, or email. Contact information for the FOIA Disclosure Officer is described in § 2201.3(d). For mailed or delivered requests, the words ''Freedom of Information Act Request'' must be printed on the face of the request's envelope or covering as well as the request itself.

(b) A requester who is making a request for records about himself or herself must comply with verification of identity requirements as required by 29 CFR 2400.6 in OSHRC's Privacy Act regulations.

(c) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.,* a copy of a death certificate or an obituary).

(d) *Description of records sought.* A request must describe the records sought in sufficient detail to enable the Commission to locate them with a reasonable amount of effort. To the extent possible, the request should include specific information to identify the requested records, such as the docket number(s) or case name(s). Before submitting a request, the requester may contact the FOIA Disclosure Officer, as described in § 2201.3(d), to discuss the records being sought and receive assistance in describing them. If a determination is made after receiving a request that it does not reasonably describe the records sought, the FOIA Disclosure Officer will contact the requester to explain what additional information is needed or why the request is otherwise insufficient. A requester attempting to reformulate or modify such a request is encouraged to discuss the request with the FOIA Disclosure Officer. If a request does not reasonably describe the records sought, the agency's response may be delayed.

(e) Requests may specify the preferred form or format (including electronic formats) of the response. The FOIA Disclosure Officer shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format. When a requester does not specify the preferred form or format of the response, the FOIA Disclosure Officer shall respond in the form or format in which the record is most accessible to the Commission.

(f) The requester must provide contact information, such as a phone number, email address, and/or mailing address, to facilitate the agency's communication with the requester.

(g) *Date of receipt.* A request that complies with paragraph (a) of this section is deemed received on the actual date it is received by the Commission. A request that does not comply with paragraph (a) of this section is deemed received when it is actually received by the FOIA Disclosure Officer. For requests that are expected to result in fees exceeding $250, the request shall not be deemed to have been received until the requester is advised of the anticipated costs and the Commission has received full payment or satisfactory assurance of full payment as provided under § 2201.8(f).

**§ 2201.6 [Amended]**

■ 5. Amend § 2201.6 by revising paragraphs (c), (f), and (h) to read as follows:

**§ 2201.6 Responses to requests.**

* * * * *

(c) *Additional extension.* The FOIA Disclosure Officer shall notify the requester in writing when it appears that a request cannot be completed within the allowable time (20 working days plus a 10-working-day extension). In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be

processed in the time limit, or to agree to a reasonable alternative time frame for processing. The FOIA Disclosure Officer or FOIA Public Liaison shall be available to assist the requester for this purpose and shall notify the requester of the right to seek dispute resolution services from the National Archives and Records Administration's Office of Government Information Services (OGIS).

* * * * *

(f) *Content of denial.* When the FOIA Disclosure Officer denies a request for records, either in whole or in part, a request for expedited processing, and/or a request for fee waivers (see § 2201.9), the written notice of the denial shall state the reason for denial, give a reasonable estimate of the volume of matter denied (unless doing so would harm an interest protected by the exemption(s) under which the request was denied), set forth the name and title or position of the person responsible for the denial of the request, notify the requester of the right to appeal the determination as specified in § 2201.10, and notify the requester of the assistance available from the FOIA Public Liaison and the dispute resolution services offered by OGIS. A refusal by the FOIA Disclosure Officer to process the request because the requester has not made advance payment or given a satisfactory assurance of full payment required under § 2201.8(f) may be treated as a denial of the request and appealed under § 2201.10.

* * * * *

(h) *Tracking numbers.* The FOIA Disclosure Officer shall assign an individualized tracking number to each request received for processing and provide the requester with the tracking number.

* * * * *

**§§ 2201.7 through 2201.10 [Redesignated as §§ 2201.8 through 2201.11 and Amended]**

■ 6. Redesignate §§ 2201.7 through 2201.10 as §§ 2201.8 through 2201.11, respectively.

■ 7. Add new § 2201.7 to read as follows:

**§ 2201.7 Confidential commercial information.**

(a) *Definitions.*

(1) Confidential commercial information means commercial or financial information obtained by OSHRC from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to OSHRC.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* OSHRC shall promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if OSHRC determines that it may be required to disclose the records, provided the submitter has complied with paragraph (b) of this section or OSHRC has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure. The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) OSHRC determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, OSHRC shall give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* OSHRC shall specify a reasonable time period within which the submitter must provide a response to the notice referenced above. If a submitter has any objections to disclosure, it should provide a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential. A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. OSHRC is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* OSHRC shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of decision.* OSHRC shall provide the submitter with written notice once a decision is made as to whether or not to disclose information over the submitter's objection. When a decision is made to disclose information over the submitter's objection, this notice shall include a statement of the reasons why each of the submitter's disclosure objections was not sustained, a description of the information to be disclosed or copies of the records as the agency intends to release them, and a specified disclosure date (which must be a reasonable time after the notice).

(h) *Notice of FOIA lawsuit.* OSHRC shall promptly notify the submitter when a requester files a lawsuit seeking to compel the disclosure of confidential commercial information.

(i) *Requester notification.* OSHRC shall notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

■ 8. Amend redesignated § 2201.8 by:

■ a. Redesignating paragraph (b)(3) as paragraph (b)(5).

■ b. Revising paragraphs (a), the opening of paragraph (b), and paragraphs (b)(1) and (b)(2)(v); adding new paragraphs (b)(3) and (b)(4); and revising redesignated paragraph (b)(5), and paragraphs (h) and (i), to read as follows:

**§ 2201.8 Fees for copying, searching, and review.**

(a) *Fees required unless waived.* The FOIA Disclosure Officer shall charge fees in accordance with the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office

of Management and Budget and in accordance with paragraph (b) of this section. See Appendix A. If the fees for a request are less than the threshold amount as provided in OSHRC's fee schedule, no fees shall be charged. The FOIA Disclosure Officer shall, however, waive the fees in the circumstances stated in § 2201.9.

(b) *Calculation of fees.* Fees for copying, searching and reviewing will be based on the direct costs of these services, including the average hourly salary (base plus DC locality payment), plus 16 percent for benefits, of the following three categories of employees involved in responding to FOIA requests: Clerical—based on an average of all employees at GS–9 and below; professional—based on an average of all employees at GS–10 through GS–14; and managerial—based on an average of all employees at GS–15 and above. OSHRC will calculate a schedule of fees based on these direct costs. The schedule of fees under this section appears in Appendix A to this part. A copy of the schedule of fees may also be obtained at no charge from the FOIA Disclosure Officer. See § 2201.3(d).

(1) *Copying fee.* The fee per copy of each page shall be calculated in accordance with the per-page amount established in OSHRC's fee schedule. See Appendix A to this part. For other forms of duplication, direct costs of producing the copy, including operator time, shall be calculated and assessed. Copying fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use. No copying fee shall be charged for educational, scientific, or news media requests if the agency fails to comply with any time limit in § 2201.6, provided that no unusual or exceptional circumstances (as those terms are defined in § 2201.6(b) and § 2201.4(d), respectively) apply to the processing of the request.

(2) * * *

(v) *Failure to comply with time limits.* No search fee shall be charged if the Commission fails to comply with any time limit in § 2201.6, provided that no unusual or exceptional circumstances (as those terms are defined in § 2201.6(b) and § 2201.4(d), respectively) apply to the processing of the request.

(3) *Unusual circumstances.* (i) If the Commission has determined that unusual circumstances, as defined in § 2201.6(b), apply and has provided timely written notice to the requester, a failure to comply with the time limit shall be excused for an additional 10 days and the Commission shall assess fees as usual.

(ii) If the Commission has determined that unusual circumstances, as defined in § 2201.6(b), apply and more than 5,000 pages are necessary to respond to the request, the Commission may charge search fees, or, in the case of requesters described in § 2201.8(b)(2)(ii), may charge duplication fees, if the Commission provided timely written notice of unusual circumstances to the requester in accordance with § 2201.6(b) and the Commission discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with the FOIA. If this exception is satisfied, the Commission may charge all applicable fees incurred in the processing of the request even if such processing extends beyond an additional 10 days.

(4) If a court has determined that exceptional circumstances exist, as defined in § 2201.4(d), a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(5) *Review fee.* A review fee shall be charged only for commercial requests. Review fees shall be calculated in accordance with the amounts established in OSHRC's schedule of fees. See Appendix A. A review fee shall be charged for the initial examination of documents located in response to a request to determine if it may be withheld from disclosure, and for the excision of withholdable portions. However, a review fee shall not be charged for review by the Chairman under § 2201.10 (Appeal of denials).

* * * * *

(h) *Interest on unpaid bills.* The Commission's Office of the Executive Director shall begin assessing interest charges on unpaid bills starting on the thirty-first day after the date the bill was sent. Interest will accrue from the date of billing until the Commission receives full payment. Interest will be at the rate described in 31 U.S.C. 3717.

(i) *Debt collection procedures.* If bills are unpaid 60 days after the mailing of a written notice to the requester, the Commission's Office of the Executive Director may resort to the debt collection procedures set out in the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

■ 9. Amend redesignated § 2201.9 by removing the citation ''§ 2201.7(b)'' in paragraph (a) and adding, in its place, the citation ''§ 2201.8(b)''.

■ 10. Revise redesignated § 2201.10 to read as follows:

**§ 2201.10 Appeal of denials.**

(a) *Requirements for making an appeal.* A denial of a request for records, either in whole or in part, a request for expedited processing, or a request for fee waivers, may be appealed in writing to the Chairman of the Commission. To be considered timely, the appeal must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days of the date of the agency's written notice of denial. The appeal should clearly identify the agency determination that is being appealed and the assigned FOIA tracking number. To facilitate handling, the requester should mark both the appeal and its envelope, or state in the subject line of an electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.* The Chairman shall act on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation. On receipt of any appeal involving classified information, the Chairman shall take appropriate action to ensure compliance with applicable classification rules.

(c) *Decisions on appeals.* The Chairman shall provide the decision on an appeal in writing. If the Chairman wholly or partially upholds the denial of the request, the decision shall contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must include notification that the requester may obtain judicial review of the decision under 5 U.S.C. 552(a)(4)(B)–(G). The decision shall also inform the requester of the mediation services offered by OGIS as a non-exclusive alternative to litigation. If the Chairman's decision is remanded or modified on appeal to the court, the requester will be notified by the agency of that determination in writing. The Commission shall then further process the request in accordance with the appeal determination and shall respond directly to the requester.

(d) *Engaging in dispute services provided by OGIS.* Mediation is a voluntary process. If the Commission agrees to participate in the mediation services provided by OGIS, it will actively engage as a partner in the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking review by a court of the Commission's adverse determination, a

requester generally must first submit a timely administrative appeal.

■ 11. Amend redesignated § 2201.11 by removing the words ''through OSHRC's Web site'' and adding, in their place, the words ''on OSHRC's Web site'' in paragraph (b).

**§ 2201.12 [Added]**

■ 12. Add § 2201.12 to read as follows:

**§ 2201.12 Preservation of Records.**

OSHRC shall preserve all correspondence pertaining to FOIA requests, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. OSHRC shall not dispose of or destroy records while they are the subject of a pending request, appeal or lawsuit under the FOIA.

[FR Doc. 2016–28305 Filed 11–29–16; 8:45 am]

**BILLING CODE 7600–01–P**

## DEPARTMENT OF THE TREASURY

### Fiscal Service

### 31 CFR Part 210

**RIN 1510–AB32**

## Federal Government Participation in the Automated Clearing House

**AGENCY:** Bureau of the Fiscal Service, Treasury.

**ACTION:** Notice of proposed rulemaking with request for comment.

**SUMMARY:** The Department of the Treasury, Bureau of the Fiscal Service (Fiscal Service) is proposing to amend its regulation governing the use of the Automated Clearing House (ACH) Network by Federal agencies. Our regulation adopts, with some exceptions, the NACHA Operating Rules developed by NACHA—The Electronic Payments Association (NACHA) as the rules governing the use of the ACH Network by Federal agencies. We are issuing this proposed rule to address changes that NACHA has made to the NACHA Operating Rules since the publication of the 2013 NACHA Operating Rules & Guidelines book. These changes include amendments set forth in the 2014, 2015, and 2016 NACHA Operating Rules & Guidelines books.

**DATES:** Comments on the proposed rule must be received by January 30, 2017.

**ADDRESSES:** Comments on this rule, identified by docket FISCAL–2016–0001, should only be submitted using the following methods:

- *Federal eRulemaking Portal: www.regulations.gov*. Follow the instructions on the Web site for submitting comments.
- *Mail:* Ian Macoy, Bureau of the Fiscal Service, 401 14th Street SW., Room 400B, Washington, DC 20227.

The fax and email methods of submitting comments on rules to Fiscal Service have been decommissioned.

*Instructions:* All submissions received must include the agency name (Bureau of the Fiscal Service) and docket number FISCAL–2016–0001 for this rulemaking. In general, comments received will be published on *Regulations.gov* without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not disclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You can download this proposed rule at the following Web site: *https://www.fiscal.treasury.gov/fsservices/instit/pmt/ach/ach_home.htm*. You may also inspect and copy this proposed rule at: Treasury Department Library, Freedom of Information Act (FOIA) Collection, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue NW., Washington, DC 20220. Before visiting, you must call (202) 622–0990 for an appointment.

In accordance with the U.S. government's eRulemaking Initiative, Fiscal Service publishes rulemaking information on *www.regulations.gov*. *Regulations.gov* offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

**FOR FURTHER INFORMATION CONTACT:** Ian Macoy, Director of Settlement Services, at (202) 874–6835 or *ian.macoy@fiscal.treasury.gov;* or Natalie H. Diana, Senior Counsel, at (202) 874–6680 or *natalie.diana@fiscal.treasury.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Title 31 CFR part 210 (Part 210) governs the use of the ACH Network by Federal agencies. The ACH Network is a nationwide electronic fund transfer (EFT) system that provides for the inter-bank clearing of electronic credit and debit transactions and for the exchange of payment-related information among participating financial institutions. Part 210 incorporates the NACHA Operating Rules, with certain exceptions. From time to time the Fiscal Service amends Part 210 in order to address changes that NACHA periodically makes to the NACHA Operating Rules or to revise the regulation as otherwise appropriate.

Currently, Part 210 incorporates the NACHA Operating Rules as set forth in the 2013 NACHA Operating Rules & Guidelines book. NACHA has adopted a number of changes to the NACHA Operating Rules since the publication of the 2013 NACHA Operating Rules & Guidelines book. We are proposing to incorporate in Part 210 most, but not all, of these changes. We are also proposing two changes to Part 210, related to reversals and prepaid cards, that do not stem from a change to the NACHA Operating Rules.

We are requesting public comment on all the proposed amendments to Part 210.

## II. Summary of Proposed Rule Changes

### *A. 2014 NACHA Operating Rules & Guidelines Book Changes*

The 2014 edition of the NACHA Operating Rules & Guidelines contains changes related to the following amendments:

- Person-to-Person Payments via ACH;
- IAT Modifications; Proof of Authorization for Non-Consumer Entries;
- Dishonored Returns and Contested Dishonored Returns Related to an Unintended Credit to a Receiver;
- Reclamation Entries—Corrections to Rules Governing Authorizations;
- Incomplete Transaction Clarification;
- Use of Tilde as Data Segment Terminator;
- Editorial Clarification—Non-Consumer Receiver's Obligation to Credit Originator's Account;
- Prenotification Entries—Reduction in Waiting Period for Live Entries;
- Notification of Change (NOC)—Removal of Change Code C04 (Incorrect Individual Name/Receiving Company Name); and
- ACH Operator Edit for Returns.

We are proposing to incorporate in Part 210 all of the foregoing amendments, which are summarized below, except the amendment relating to reclamation entries.

1. Person-to-Person Payments via ACH

This amendment standardized the use of the ACH Network for Person-to-Person (P2P) Entries by expanding the Internet-Initiated/Mobile (WEB) SEC Code to accommodate credit Entries transmitted between consumers (P2P

transactions). A P2P Entry is defined as ''a credit Entry initiated by or on behalf of a holder of a Consumer Account that is intended for a Consumer Account of a Receiver.'' The amendment also modified the definition of a Customer Initiated Entry (CIE) to ''a credit Entry initiated by or on behalf of the holder of a Consumer Account to the Non-Consumer Account of a Receiver.'' These definitional changes ensure there is a clear differentiation between WEB credit and CIE—*i.e.,* CIE for a bill payment from a consumer to a business, and WEB credit for a P2P transaction from one consumer to another or between consumer accounts belonging to the same person. In addition, this amendment clarified the treatment of NOCs related to credit WEB Entries and CIE Entries.

We are proposing to accept this amendment.

2. IAT Modifications

This amendment revised the NACHA Operating Rules to update the rules and formatting of the International ACH Transaction (IAT) in order to facilitate more accurate screening and compliance with OFAC sanctions policies. This modification requires a Gateway to identify within an Inbound IAT Entry (1) the ultimate foreign beneficiary of the funds transfer when the proceeds from a debit Inbound IAT Entry are for further credit to an ultimate foreign beneficiary that is a party other than the Originator of the debit IAT Entry, or (2) the foreign party ultimately funding a credit Inbound IAT Entry when that party is not the Originator of the credit IAT Entry. This amendment revised the description of the Payment Related Information Field as it relates to the IAT Remittance Addenda Record to establish specific formatting requirements for inclusion of the ultimate foreign beneficiary's/payer's name, street address, city, state/province, postal code, and ISO Country Code. The amendment also requires an Originator, Third-Party Sender, Originating Depository Financial Institution (ODFI), or Gateway transmitting an IAT Entry to identify any country named within the IAT Entry by that country's 2-digit alphabetic ISO Country Code, as defined by the International Organization for Standardization's (ISO) 3166–1-alpha-2 code list.

We are proposing to accept this amendment.

3. Proof of Authorization for Non-Consumer Entries

This amendment established a minimum standard for proof of authorization for Non-Consumer Entries to aid in the resolution of unauthorized or fraudulent debits to businesses, particularly those where no trading partner relationship/agreement exists between the Originator and Receiver. This change permits a Receiving Depository Financial Institution (RDFI) to request proof of a Non-Consumer Receiver's authorization for a CCD, CTX, or an Inbound IAT Entry to a Non-Consumer Account. The ODFI must provide the required information to the RDFI at no charge within ten banking days of receiving a written request for such information from the RDFI. The amendment also requires the Originator to provide such proof of authorization to the ODFI for its use or for use by the RDFI.

The amendment provides two methods by which an ODFI can comply with the RDFI's request for proof of authorization. The first is to provide an accurate record of the authorization. The second is to provide the Originator's contact information that can be used for inquiries about authorization of Entries. At a minimum, this contact information must include (1) the Originator's name, and (2) the Originator's phone number or email address for inquiries regarding authorization of Entries.

We are proposing to accept this amendment.

4. Dishonored Returns and Contested Dishonored Returns Related to an Unintended Credit to a Receiver

This amendment established the right of an ODFI to dishonor the Return of a debit Erroneous Entry if the Return Entry results in an unintended credit to the Receiver because (1) the Return Entry relates to a debit Erroneous Entry, (2) the ODFI has already originated a credit Reversing Entry to correct the Erroneous Entry, and (3) the ODFI has not received a Return of that credit Reversing Entry.

Similarly, under this amendment an ODFI may dishonor the Return of a debit Reversing Entry if the Return Entry results in an unintended credit to the Receiver because (1) the Return Entry relates to a debit Reversing Entry that was intended to correct a credit Erroneous Entry, and (2) the ODFI has not received a Return of that credit Erroneous Entry. The amendment requires an ODFI dishonoring a debit Return Entry under either of these conditions to warrant that it originated a Reversal in an effort to correct the original erroneous transaction and therefore is dishonoring the Return of the debit Erroneous Entry or the debit Reversing Entry, either of which causes an unintended credit to the Receiver. The amendment also establishes the right of an RDFI to contest this type of dishonored Return if either of the following conditions exists: (1) The RDFI returned both the Erroneous Entry and the related Reversal; or (2) the RDFI is unable to recover the funds from the Receiver.

We are proposing to accept this amendment.

5. Reclamation Entries—Corrections to Rules Governing Authorization

This amendment made several corrections to the rules governing the authorization of Reclamation Entries. These changes address technical and drafting discrepancies between Reversing Entries and Reclamation Entries in the NACHA Operating Rules and make the rules related to Reclamation Entries consistent with those for Reversing Entries to the extent possible.

We are proposing not to incorporate this amendment in Part 210. Part 210 generally excludes all NACHA Operating Rules relating to the reclamation of benefit payments because Part 210 contains specific provisions on the reclamation of Federal benefit payments. No revision to the text of Part 210 is required to exclude this amendment from Part 210 because the amendment modifies Section 2.10 of the NACHA Operating Rules, which is already inapplicable to the government under § 210.2(d)(2).

6. Incomplete Transaction Clarifications

The Incomplete Transaction Clarifications amendment recognizes certain ARC, BOC, and POP Entries to Non-Consumer Accounts as eligible for return under the Incomplete Transaction Rule. This change streamlines RDFIs' processing of ARC, BOC, and POP returns and improves their ability to comply with the NACHA Operating Rules by eliminating different processing requirements for unauthorized/improper consumer and non-consumer ARC, BOC, and POP Entries, which share the same Standard Entry Class Code. The change restores the RDFI's ability to rely solely on the Standard Entry Class Code when determining handling requirements for specific types of Entries. This amendment also added specific references to ''consumer'' Receivers, where appropriate, to add clarity regarding the scope of the Incomplete Transaction Rules.

This amendment modifies Article Three, Subsection 3.12.3 (Incomplete Transaction) to add the word ''consumer'' to clarify that the Receiver

of an Incomplete Transaction is generally the owner of a consumer account, with one specific exception. The amendment also adds language to this subsection to state that an ARC, BOC, or POP Entry may also be considered an Incomplete Transaction regardless of whether the account that is debited is a Consumer Account or a Non-Consumer Account. The amendment made corresponding changes to the definition of an Incomplete Transaction in Article Eight, Section 8.50 and clarified that a Written Statement of Unauthorized Debit must be accepted for any Incomplete Transaction involving any ARC, BOC, or POP Entry.

We are proposing to accept this amendment.

7. Use of Tilde as Data Segment Terminator

This amendment corrected two IAT field descriptions, ''Originator City and State/Province'' and ''Receiver City and State/Province,'' to clarify that the tilde (''~'') is a valid data segment terminator.

We are proposing to accept this amendment.

8. Editorial Clarification—Non-Consumer Receiver's Obligation to Credit Originator's Account

This amendment revised the text and title of Article Three, Subsection 3.3.1.3 (Non-Consumer Receiver Must Credit Originator's Account) to make the section's intent clearer and easier to understand for ACH Network participants. This change was editorial in nature only.

We are proposing to accept this amendment.

9. Prenotification Entries—Reduction in Waiting Period for Live Entries

This amendment reduced the six banking-day waiting period between initiation of a Prenotification and ''live'' Entries for Originators choosing to originate Prenotes. This amendment also modified the NACHA Operating Rules related to Notifications of Change to clarify the Originator's obligations with respect to an NOC received in response to a Prenote. This change permits an Originator that has originated a Prenotification Entry to a Receiver's account to initiate subsequent Entries to the Receiver's account as soon as the third Banking Day following the Settlement Date of the Prenotification Entry, provided that the ODFI has not received a return or NOC related to the Prenotification.

We are proposing to accept this amendment.

10. Notification of Change—Removal of Change Code C04 (Incorrect Individual Name/Receiving Company Name)

This amendment removed the Notification of Change Code—C04 (Incorrect Individual Name/Receiving Company Name) from the NACHA Operating Rules. Change Code C04 (Incorrect Individual Name/Receiving Company Name) had been used by RDFIs to request a correction to the name of the Receiver indicated in an ACH Entry. As with any Notification of Change, the RDFI that transmitted an NOC with this change code warranted the accuracy of the corrected data (in this case, the Receiver's name). The Originator was then obligated to make the requested change within six banking days or prior to initiating a subsequent Entry, whichever is later.

In certain scenarios, the use of C04 created compliance and liability challenges for the Originator, ODFI, and RDFI. Generally speaking, an ACH transaction involves a mutual customer of both the Originator and the RDFI. In the event that the Receiver's name on a debit Entry was different from the name on the account, most RDFIs would either post the Entry based solely on the account number or return the transaction using Return Reason Code R03 (No Account/Unable to Locate Account). In some cases, RDFIs transmitted NOCs using Change Code C04 to instruct the Originator to change the Receiver's name on future Entries. The use of C04 presented additional risk to the RDFI and the ODFI and/or the Originator because the RDFI was warranting that the name change is accurate, but it did not always reflect the party with whom the Originator has the relationship. As a result, Originators were typically unable or unwilling to make the changes in accordance with their obligations under the NACHA Operating Rules. An Originator continuing to debit its customer without making the change warranted by the RDFI did so in violation of the current Rules, creating challenges and conflict for all parties. Eliminating Change Code C04 (Incorrect Individual Name/Receiving Company Name) removed the challenges and potential rules violations that Originators faced when they receive a request for a name change that they were unable to make. Under the amendment, an Originator can rely on its own contracts and records to properly identify the name of the Receiver being credited or debited without being in violation of the NACHA Operating Rules because of the failure to respond to an NOC.

Eliminating Change Code C04 (Incorrect Individual Name/Receiving Company Name) lessens the risk to the RDFI as it warrants that information contained in an NOC is correct. A change as significant as a name change should be accomplished through communication of the Receiver with the Originator so that the authorization held by the Originator is accurate. The RDFI that identifies a name mismatch can post the Entry based solely on the account number, return the Entry as R03, or choose to assist its Receiver by communicating directly with the ODFI/Originator. Any of these options should cause the Originator and the Receiver to communicate relating to needed changes while relieving the RDFI of the warranty that the information is correct.

We are proposing to accept this amendment.

11. ACH Operator Edit for Returns

This amendment incorporated an additional ACH Operator edit within the listing of ACH Operator file/batch reject edit criteria specified within Appendix Two of the NACHA Operating Rules. Specifically, this edit requires ACH Operators to reject any batch of Return Entries in which RDFI returns and ACH Operator returns are commingled. By definition, different parties are responsible for generating each type of return, and each must be separately identified within the Company/Batch Header Record as the sender of the batch. This ACH Operator edit codifies this fact within the NACHA Operating Rules and ensures consistent processing of return batches by all ACH Operators.

We are proposing to accept this amendment.

*B. 2015 NACHA Operating Rules & Guidelines Book Changes*

The 2015 edition of the NACHA Operating Rules contains changes related to the following amendments: [1]

- ACH Network Risk and Enforcement;
- Improving ACH Network Quality—Unauthorized Entry Fee;
- Clarification on Company Identification for P2P WEB Credit Entries;
- Point-of-Sale Entries—Clarification of General Rule;
- Return Fee Entry Formatting Requirements;

[1] The 2015 Rules & Guidelines book also included two amendments addressed in the 2014 Rules & Guidelines book that had effective dates in 2015: (1) Dishonored Returns and Contested Dishonored Returns Related to an Unintended Credit to a Receiver and (2) Notification of Change—Removal of Change Code C04. Because those amendments are addressed in Section A above, we are not including them in Section B.

• Entry Detail Record for Returns—Clarification Regarding POP Entries;
• Clarification of RDFI's Obligation to Recredit Receiver;
• Clarification on Prenotification Entries and Addenda Records; and
• ACH Operator Edit for Returns.

We are proposing to incorporate in Part 210 all of the foregoing amendments, which are summarized below, other than some provisions of the amendment relating to ACH Network Risk and Enforcement and the amendment on Improving ACH Network Quality—Unauthorized Entry Fee.

1. ACH Network Risk and Enforcement

This amendment expanded existing rules regarding ODFIs' and Third-Party Senders' requirements for risk management and origination practices, such as return rate levels. It also expanded NACHA's authority to initiate enforcement proceedings for a potential violation of the NACHA Operating Rules related to unauthorized Entries.

Return Rate Levels

The amendment reduced the threshold for unauthorized debit Entries (Return Reason Codes R05, R07, R10, R29, and R51) from 1.0 percent to 0.5 percent and also established two new return rate levels for other types of returns. First, a return rate level of 3.0 percent will apply to debit entries returned due to administrative or account data errors (Return Reason Codes R02—Account Closed; R03—No Account/Unable to Locate Account; and R04—Invalid Account Number Structure). Second, a return rate level of 15.0 percent will apply to all debit entries (excluding RCK entries) that are returned for any reason.

The amendment also established an inquiry process, which is separate and distinct from an enforcement proceeding, as a starting point to evaluate the origination activity of Originators and Third-Party Senders that reach the new administrative return and overall debit return rate levels. The identification of an Originator or Third-Party Sender with a return rate that is higher than the respective return rate level may trigger a review of the Originator's or Third-Party Sender's ACH origination procedures. At the conclusion of the inquiry, NACHA may determine that no further action is required, or it may take the next step and recommend to the ACH Rules Enforcement Panel that the ODFI be required to reduce the Originator's or Third-Party Sender's overall or administrative return rate below the established level.

In this new role, the ACH Rules Enforcement Panel will be the final authority in deciding, after the completion of the inquiry, whether the ODFI should be required to reduce the Originator's or Third-Party Sender's overall or administrative return rate. After reviewing NACHA's recommendation, the Panel can decide either to take no action, at which point the case would be closed, or to have NACHA send a written directive to the ODFI, which would require the reduction of the Originator's or Third-Party Sender's administrative or overall return rate.

We are proposing not to incorporate in Part 210 the provisions of the amendment relating to return rate levels. No change to the text of Part 210 is required to exclude these provisions because Part 210 already excludes Section 2.17 and Appendix 10, which is where the return rate level changes have been addressed in the NACHA Operating Rules.

Reinitiation of Entries

This amendment explicitly prohibited the reinitiation of Entries outside of the express limited circumstances under which they are permitted under the NACHA Operating Rules. The amendment also added a specific prohibition against reinitiating a transaction that was returned as unauthorized. The amendment further included an anti-evasion provision, specifying that any other Entry that NACHA reasonably believes represents an attempted evasion of the defined limitations will be treated as an improper reinitiation. The ACH Rules Enforcement Panel will have final authority in deciding whether a specific case involves an attempted evasion of the limitations on reinitiation.

To avoid unintended consequences from these clarifications, the amendment included two categories of Entries that will not be considered reinitiations. First, the amendment clarified that a debit Entry in a series of preauthorized recurring debit Entries will not be treated as a reinitiated Entry, even if the subsequent debit Entry follows a returned debit Entry, as long as the subsequent Entry is not contingent upon whether an earlier debit Entry in the series has been returned. Second, the amendment expressly stated that a debit Entry will not be considered a ''reinitiation'' if the Originator obtains a new authorization for the debit Entry after the receipt of the Return.

The amendment requires a reinitiated Entry to contain identical content in the following fields: Company Name, Company ID, and Amount. Further, the amendment permits modification to other fields only to the extent necessary to correct an error or facilitate processing of an Entry. This change allows reinitiations to correct administrative errors, but prohibits reinitiation of Entries that may be attempts to evade the limitation on the reinitiation of returned Entries by varying the content of the Entry. Finally, the amendment addressed certain technical issues associated with the reinitiation requirements.

We are proposing to accept the reinitiation provisions of the amendment.

Third-Party Sender Issues

The amendment added a direct obligation on Third-Party Senders to monitor, assess and enforce limitations on their customer's origination and return activities in the same manner the NACHA Operating require of ODFIs. Prior to this amendment, the NACHA Operating Rules required ODFIs to establish, implement, periodically review and enforce exposure limits for their Originators and Third-Party Senders. The ODFI was required to monitor each Originator's and Third-Party Sender's origination and return activity across multiple Settlement Dates, enforce restrictions on the types of Entries that may be originated and enforce the exposure limit. If an ODFI enters into a relationship with a Third-Party Sender that processes Entries such that the ODFI itself cannot or does not perform these monitoring and enforcement tasks with respect to the Originators serviced by the Third-Party Sender, the Third-Party Sender must do so. The amendment added a specific statement of this obligation.

We are proposing to accept the Third-Party Sender provisions of the amendment.

NACHA's Enforcement Authority

The amendment provided NACHA with the express authority to bring an enforcement action based on the origination of unauthorized entries. To ensure the judicious use of the expanded authority, the amendment requires the ACH Rules Enforcement Panel to validate the materiality of this type of enforcement case before NACHA can initiate any such proceeding. In addition, the amendment encourages RDFIs to voluntarily provide to NACHA information, such as return data, that may be indicative of a potential *Rules* violation for improper authorization practices by other ACH Network participants, even if the RDFI is not interested in itself initiating a *Rules*

enforcement proceeding. Such early sharing of information regarding unusual return rates or unauthorized transactions can help eliminate improper activities more quickly.

We are proposing not to incorporate in Part 210 the provisions of the amendment that relate to NACHA's enforcement authority. Part 210 excludes the government from the risk investigation and enforcement provisions of the NACHA Operating Rules. Fiscal Service tracks unauthorized return rates for Federal agencies and will use the new unauthorized return limits and reinitiation limitations in overseeing agency ACH origination activity. No change to the text of Part 210 is required to exclude these provisions because Part 210 already excludes Appendix Ten of the NACHA Operating Rules, which governs rules enforcement.

2. Improving ACH Network Quality—Unauthorized Entry Fee

This amendment requires an ODFI to pay a fee to the RDFI for each ACH debit that is returned as unauthorized (return reason codes R05, R07, R10, R29 and R51). RDFIs will be compensated for a portion of the costs they bear for handling unauthorized transactions, and will experience reduced costs due to a reduction in unauthorized transactions over time. The amendment provides that ODFIs and RDFIs authorize debits and credits to their accounts for the collection and distribution of the fees. IAT transactions are not covered by the fee, but could be included in the future. The amendment defines a methodology by which NACHA staff will set and review every three years the amount of the Unauthorized Entry Fee. In setting the amount of the fee, NACHA staff will apply several stated principles, including the review of RDFI cost surveys. Based on the results of the current data collection on RDFIs' costs for handling unauthorized transactions, NACHA has estimated that the fee amount will be in the range of $3.50–$5.50 per return.

We are proposing not to incorporate this amendment in Part 210. Part 210 does not incorporate those provisions of the NACHA Operating Rules dealing with enforcement for noncompliance and the government therefore is not subject to fines for violation of the provisions of the ACH Rules. See 31 CFR part 210.2(d)(2), (3). Fiscal Service works with agencies to achieve Government-wide compliance with all ACH Rule requirements and tracks compliance, including returns of unauthorized debit entries. The number of such returns is low in relation to originated entries: in calendar year 2015, approximately 73,000 ACH debits originated by agencies were returned as unauthorized. Based on an estimated fee of $3.50–$5.50, the resulting cost to the government would be approximately $255,500–$401,500 per year. We do not believe it is in the public interest to subject the Treasury General Account to fines of this nature. Rather, we propose to work with agencies to monitor and reduce the number of unauthorized debit entries.

3. Clarification of Company Identification for Person-to-Person WEB Credit Entries

This amendment added language to the Company Identification field description to clarify content requirements for Person-to-Person (P2P) WEB credit Entries. For P2P WEB credit Entries, the Company/Batch Header Record identifies the P2P service provider (*i.e.,* the consumer Originator's own financial institution or a third-party service provider) rather than the consumer Originator. Prior to the amendment, the NACHA Operating Rules specifically defined service provider content requirements for the Company Name field, but omitted the same clarification for the Company Identification, which is a related field. The purpose of the amendment was to eliminate any potential confusion over proper formatting of this field.

We are proposing to accept this amendment.

4. Point-of-Sale (POS) Entries—Clarification of General Rule

This amendment re-aligned the general rule for POS Entries with the definition of POS Entries in Article Eight. A POS Entry is generally considered to be a debit Entry initiated at an electronic terminal by a consumer to pay an obligation incurred in a point-of-sale transaction. However, a POS Entry can also be an adjusting or other credit Entry related to the debit Entry, transfer of funds, or obligation (for example, a credit to refund a previous point-of-sale transaction). Prior to the amendment, the definition of POS within the NACHA Operating Rules recognized these Entries as both debits and credits, but the general rule for POS identified POS Entries only as debits. This amendment corrected the discrepancy.

We are proposing to accept this amendment.

5. Return Fee Entry Formatting Requirements

This amendment modified the description of the Individual Name Field in a PPD Return Fee Entry related to a returned ARC, BOC, or POP Entry to require that it contain the same information identified within the original ARC, BOC, or POP Entry. The Individual Name Field is optional for ARC, BOC, and POP; therefore, this field (1) may include the Receiver's name, (2) may include a reference number, identification number, or code that the merchant needs to identify the particular transaction or customer, or (3) may be blank.

The name of the Receiver must be included in all PPD Entries. With ARC, BOC, or POP Entries, where a reading device must be used to capture the Receiver's routing number, account number, and check serial number, it is difficult for the Originator to capture the Receiver's name in an automated fashion. For this reason, the NACHA Operating Rules do not require Originators to include the Receiver's name in the ARC, BOC, or POP Entry Detail Record. Originators are permitted the choice of including either the Receiver's name, or a reference number, identification number, or code necessary to identify the transaction, or the field may be left blank. Because information contained within the returned ARC, BOC, or POP Entry is typically used to create a related Return Fee Entry, the Receiver's name is likely not readily available to the Originator for use in the Return Fee Entry, especially when the Receiver's authorization for the Return Fee Entry was obtained by notice. This amendment established consistent formatting requirements with respect to the Receiver's name for check conversion entries and related return fees.

We are proposing to accept this amendment.

6. Entry Detail Record for Returns—Clarification Regarding POP Entries

This amendment added a footnote to the Entry Detail Record for Return Entries to clarify the specific use of positions 40–54 with respect to the return of a POP Entry. On a forward POP Entry, positions 40–54 represent three separate fields to convey (1) the check serial number (positions 40–48); (2) the truncated name or abbreviation of the city or town in which the electronic terminal is located (positions 49–52); and (3) the state in which the electronic terminal is located (positions 53–54). However, these three fields are not explicitly identified in the Entry Detail Record for Return Entries, which caused some confusion among users as to how to map such information from

the original forward Entry into the Return Entry format.

We are proposing to accept this amendment.

7. Clarification of RDFI's Obligation to Recredit Receiver

This amendment clarified that an RDFI's obligation to recredit a Receiver for an unauthorized or improper debit Entry is generally limited to Consumer Accounts, with certain exceptions for check conversion and international transactions. Prior to the NACHA Operating Rules simplification initiative in 2010, the rules governing a Receiver's right to recredit for unauthorized debit entries clearly limited this provision to debit Entries affecting Consumer Accounts, except as expressly provided for ARC, BOC, IAT, and POP Entries (which can affect both consumer and business accounts). However, when rules language was combined and revised during the simplification process into a general discussion on recredit, some of this clarity was lost, resulting in language that was somewhat ambiguous and the cause of confusion for some ACH participants. This change more clearly defines the intent of the rule requirement for an RDFI to recredit a Receiver.

We are proposing to accept this amendment.

8. Clarification of Prenotification Entries and Addenda Records

This amendment revised the NACHA Operating Rules to clarify that, with the exception of IAT Entries, a prenotification Entry is not required to include addenda records that are associated with a subsequent live Entry. Generally speaking, the format of a Prenotification Entry must be the same as the format of a live dollar Entry. There are, however, some differences between Prenotes and live Entries to which the Prenotes relate:

- The dollar amount of a Prenotification Entry must be zero;
- a Prenotification Entry is identified by a unique transaction code; and
- addenda records associated with a live Entry are not required with Prenotes (unless the Prenote relates to an IAT Entry).

While the first two formatting criteria above for Prenotification Entries are clearly defined within the technical standards and are commonly understood by industry participants, the issue of whether Prenotification Entries require addenda records was somewhat ambiguous. The amendment eliminated that ambiguity.

We are proposing to accept this amendment.

9. ACH Operator Edit for Returns

This amendment incorporated an additional ACH Operator edit within the listing of ACH Operator file/batch reject edit criteria specified within Appendix Two of the NACHA Operating Rules. Specifically, this edit requires ACH Operators to reject any batch of Return Entries in which RDFI returns and ACH Operator returns are commingled. By definition, different parties are responsible for generating each type of return, and each must be separately identified within the Company/Batch Header Record as the sender of the batch. This ACH Operator edit codifies this fact and ensures consistent processing of return batches by all ACH Operators.

We are proposing to accept this amendment.

C. 2016 NACHA Operating Rules & Guidelines Book Changes

The 2016 edition of the *NACHA Operating Rules & Guidelines* contains changes related to the following amendments: [2]

- Same-Day ACH: Moving Payments Faster;
- Disclosure Requirements for POS Entries;
- Recrediting Receiver—Removal of Fifteen Calendar Day Notification Time Frame;
- Clarification of RDFI Warranties for Notifications of Change; and
- Minor Rules Topics.

We are proposing to incorporate in Part 210 all of the foregoing amendments except that we are proposing to delay our implementation of Same-Day ACH as discussed below.

1. Same-Day ACH: Moving Payments Faster

This amendment will allow for same-day processing of ACH payments. Currently, the standard settlement period for ACH transactions is one or two business days after processing. The Same-Day ACH amendment will enable the option for same-day processing and settlement of ACH payments through new ACH Network functionality without affecting existing ACH schedules and capabilities. Originators that desire same-day processing will have the option to send Same Day ACH Entries to accounts at any RDFI. All RDFIs will be required to receive Same-Day ACH Entries, which gives ODFIs and Originators the certainty of being able to send same day ACH Entries to accounts at all RDFIs in the ACH Network. The amendment includes a ''Same-Day Entry fee'' on each Same-Day ACH transaction to help mitigate RDFI costs for supporting Same-Day ACH.

The amendment has a phased implementation period, spreading from 2016 to 2018, with the following effective dates:

- Phase 1—September 23, 2016: ACH credits will be eligible to be processed during two new Same-Day ACH windows with submission deadlines at 10:30 a.m. ET and 2:45 p.m. ET, with settlement occurring at 1:00 p.m. ET and 5:00 p.m. ET, respectively. RDFIs will be required to provide funds availability by the end of the RDFI's processing day. Applicable to ACH credits only and non-monetary Entries, with funds availability due at the end of the RDFI's processing day.
- Phase 2—September 15, 2017: ACH debits will become eligible for same-day processing during the two new Same-Day windows.
- Phase 3—March 16, 2018: RDFIs will be required to provide funds availability for same day credits no later than 5:00 p.m. at the RDFI's local time.

The existing next-day ACH settlement window of 8:30 a.m. ET will not change. With the addition of the new Same-Day ACH processing windows, the ACH Network will provide three opportunities for ACH settlement each day.

Payment Eligibility

Virtually all types of ACH payments will be eligible for same-day processing by the end of the implementation period. The only ACH transactions ineligible for same-day processing will be IAT transactions and individual transactions over $25,000.

In addition to credits and debits, the ACH Network supports a number of transaction types that do not transfer a dollar value. Non-monetary transactions include Prenotifications; Notifications of Change (NOCs); Zero Dollar Entries that convey remittance information using CCDs and CTXs; and Death Notification Entries. With the exception of Prenotifications for future debit Entries, these non-monetary transactions will be eligible for same-day processing from the outset. Automated Enrollment Entries (ENRs) do not use Effective Entry Dates. Since there will not be a way to distinguish same day ENR Entries from next-day Entries, ENRs will not be processed as same day transactions.

[2] The 2016 Rule Book also codified changes related to the rule NACHA adopted in 2015 on Improving ACH Network Quality (Unauthorized Entry Fee), which is addressed above in Section B—2015 NACHA Operating Rule Book Changes.

Identification of Same-Day Transactions via the Effective Entry Date

Same-Day ACH transactions will be identified by the ODFI and its Originator by using the current day's date in the Effective Entry Date field of the Company/Batch Header Record. (Note: The NACHA Operating Rules define the Effective Entry Date as ''the date specified by the Originator on which it intends a batch of Entries to be settled.'') In addition, transactions intended for same-day processing that carry a current day Effective Entry Date will need to meet an ACH Operator's submission deadline for same-day processing. For example, transactions originated on Monday, October 10, 2016 that are intended for same-day processing must have an Effective Entry Date of ''161010'' in the Company/Batch Header Record and be submitted to an ACH Operator no later than the 2:45 p.m. ET deadline to ensure same-day settlement. Any Entry carrying the current day's date in the Effective Entry Date field that is submitted prior to an ACH Operator's same-day processing submission deadline will be handled as a Same-Day ACH transaction and assessed the Same-Day Entry fee.

Stale or Invalid Effective Entry Dates

In the current processing environment, any batch of Entries submitted to an ACH Operator that contains an Effective Entry Date that is invalid or stale (in the past) is processed at the next settlement opportunity, which is currently the next banking day. With the arrival of same-day processing, the same protocol will apply. ACH transactions submitted to an ACH Operator with stale or invalid Effective Entry Dates will be settled at the earliest opportunity, which could be the same-day. If the transactions are submitted prior to the close of the second same-day processing window at 2:45 p.m. ET, the Entries will be settled the same-day and the Same-Day Entry fee will apply. If the transactions are submitted to the ACH Operator after 2:45 p.m. ET, the Entries will be settled the next day and the Same-Day Entry fee will not apply.

Return Entry Processing

The amendment allows same-day processing of return Entries at the discretion of the RDFI, whether or not the forward Entry was a Same-Day ACH transaction. Any return Entry will be eligible for settlement on a same-day basis; the $25,000 per transaction limit and IAT restriction will not apply. Because returns are initiated and flow from RDFI to ODFI, return Entries processed on a same-day basis will not be subject to the Same-Day Entry fee. RDFIs will not be required to process returns on the same-day that the forward Entry is received. The existing return time frame (the return Entry must be processed in such time that it is made available to the ODFI no later than the opening of business on the second banking day following the Settlement Date of the original Entry) will still be applicable. RDFIs will have the option of using any of the available settlement windows for returns, as long as the existing return time frame is met.

Same-Day Entry Fee

In order to ensure universal reach to any account at any RDFI, all RDFIs must implement Same-Day ACH. To assist RDFIs in recovering costs associated with enabling same-day transactions, the amendment includes a fee paid from the ODFI to the RDFI for each Same-Day ACH Entry. The fee provides a mechanism to help RDFIs mitigate investment and operating expenses and provide a fair return on their required investments. The initial Same-Day Entry fee is set at 5.2 cents per Same Day Entry. The fee will be assessed and collected by the ACH Operators through their established monthly billing. The Rule includes a methodology to measure the effectiveness of the Same-Day Entry fee at five, eight and ten full years after implementation. After each review, the Same-Day Entry fee could be maintained or lowered, but not increased.

We are proposing to accept the Same-Day amendment but with delayed implementation of NACHA's Phase 1 implementation date where the government is receiving Same-Day credit Entries. Fiscal Service plans to enable agencies to originate Same-Day Entries in appropriate situations and will work with agencies to develop and publish guidance outlining the criteria and procedures to be used for originating Same-Day Entries. Fiscal Service believes that Same-Day credit Entries may be useful to agencies that need to make certain emergency or time-sensitive payments, including payments not exceeding $25,000 that are currently made by Fedwire. We believe that the majority of ACH credit Entries originated by the government are not suitable for same-day processing in light of the fee payable for Same-Day Entries, and therefore we anticipate that the government's origination of Same-Day Entries will be limited. We plan to publish guidance for agencies that will set forth both the criteria and the procedure for certifying a Same-Day ACH transaction. That guidance will indicate whether agencies should indicate their intent for same-day processing and settlement solely by utilizing the Effective Entry Date, or may also utilize the optional standardized content in the Company Descriptive Date field as a same-day transaction indicator.

With regard to Same-Day ACH credit Entries received by the Federal Government, we are proposing to begin processing those Same-Day Entries on a same-day basis beginning no earlier than August 30, 2017 rather than on NACHA's Phase 1 implementation date of September 23, 2016. This delayed implementation date reflects coding and reporting changes and testing that must be undertaken to enable the processing of incoming Same-Day credit Entries by Fiscal Service's ACH credit processing systems. Any ACH credit Entry received by the U.S. government prior to August 30, 2017, will not be eligible for same-day settlement and will continue to settle on a future date (typically the next banking day) regardless of submission date and time. We are not proposing any delay to the NACHA Same-Day ACH amendment's Phase 2 or Phase 3 implementation dates for the Government's same-day processing.

The 2016 NACHA Operating Rules incorporate in the rule text only those provisions of the Same-Day ACH amendment that have effective dates in 2016. However, in order to provide advance notice of the impact of the Phase 2 and 3 implementations, the 2016 Rules Book sets forth the sections of the NACHA Operating Rules affected by the Same-Day ACH amendment as they will read upon implementation in 2017 and 2018.

We are proposing to incorporate in Part 210 the future changes relating to the Same-Day ACH amendment's Phase 2 and 3 implementation provisions scheduled for 2017 and 2018 as they appear in the 2016 NACHA Operating Rules & Guidelines book.

2. Disclosure Requirements for POS Entries

This amendment established an Originator/Third-Party Service Provider obligation to provide consumer Receivers with certain disclosures when providing those consumers with cards used to initiate ACH Point of Sale (POS) Entries. The amendment requires Originators or Third-Party Service Providers that issue ACH cards (or their virtual, non-card equivalent, collectively referred to as ''ACH Cards'') to make the following disclosures in written or electronic, retainable form to a consumer prior to activation:

• The ACH Card is not issued by the consumer's Depository Financial Institution.

• POS Entries made with the ACH Card that exceed the balance in the consumer's financial institution account may result in overdrafts and associated fees, regardless of whether the consumer has opted to allow overdrafts with respect to debit cards issued by the Depository Financial Institution that holds the consumer's account.

• Benefits and protections for transactions made using the ACH Card may vary from those available through debit cards issued by the consumer's Depository Financial Institution.

The amendment included sample language for Originators or Third-Party Service Providers to consider in designing an ACH Card disclosure for purposes of compliance with the NACHA Operating Rules. This amendment will not affect Agencies because they do not issue ACH Cards.

We are proposing to accept this amendment.

3. Recrediting Receiver—Removal of Fifteen Calendar Day Notification Time Frame

This amendment removed the fifteen calendar day notification period associated with an RDFI's obligation to promptly recredit a consumer account for an unauthorized debit Entry, and aligned the RDFI's recredit obligation with its ability to transmit an Extended Return Entry. Because of the extended return window for unauthorized consumer debits under the NACHA Operating Rules, prior to the amendment many RDFIs found the reference to the fifteen calendar day timing to be a source of confusion and misunderstanding. The amendment revised the NACHA Operating Rules to align the provision for prompt recredit with the RDFI's receipt of a Written Statement of Unauthorized Debit from the consumer and the RDFI's ability to transmit an Extended Return Entry (*i.e.,* transmitted to the ACH Operator so that the Extended Return Entry is made available to the ODFI no later than opening of business on the banking day following the sixtieth calendar day following the settlement date of the original Entry). This change applies to unauthorized/improper entries bearing Standard Entry Class Codes (SECs) that are classified as consumer entries, as well as those that can be both consumer and non-consumer entries (ARC, BOC, POP, and IAT debit entries).

We are proposing to accept this amendment.

4. Clarification of RDFI Warranties for Notifications of Change

This amendment modified the NACHA Operating Rules with respect to Notifications of Change (NOCs) to clarify aspects of: (1) The RDFI's warranties made with respect to its transmission of a Notification of Change or Corrected Notification of Change; and (2) the ODFI's warranties made with respect to usage of the corrected data within subsequent transactions. Specifically, the amendment clarified that the RDFI's warranty for information contained in a Notification of Change or Corrected Notification of Change is applicable only to the corrected information supplied by the RDFI.

This modification removed from the RDFI's warranty on NOCs the specific statement that the Receiver has authorized the change identified in the NOC, if the Receiver's authorization is required. This subsection has been misinterpreted to mean that it supersedes the ODFI's warranty that a subsequent Entry is properly authorized by the Receiver. The RDFI does not warrant that the Entry itself has been properly authorized by the Receiver, but only that the data supplied in the Corrected Data field is accurate. The warranty that any Entry (including a subsequent Entry that uses corrected data from an NOC) is properly authorized still lies with the ODFI per Article Two, Subsection 2.4.1.1 (The Entry is Authorized by the Originator and Receiver).

We are proposing to accept this amendment.

5. Minor Rules Topics

These amendments changed four areas of the NACHA Operating Rules to address minor topics. Minor changes to the NACHA Operating Rules have little-to-no impact on ACH participants and no significant economic impact.

i. Clarification of ODFI Periodic Statement Requirements for CIE and WEB Credits

This amendment made minor, editorial clarifications to the language within Article Two, Subsections 2.5.4.2 (ODFI to Satisfy Periodic Statement Requirement) and 2.5.17.6 (ODFI to Satisfy Periodic Statement Requirement for Credit WEB Entries) to clarify the intent of language governing an ODFI's periodic statement obligations with respect to the origination of CIE and credit WEB Entries by consumers.

Periodic statement requirements typically are an obligation of the RDFI for the receipt of Entries to a consumer account. For CIE and WEB credits, however, the Originator of the ACH credit also is a consumer, thus putting periodic statement requirements on the ODFI as well for these entries. These clarifications do not affect the substance of the ODFI's obligation to identify on the consumer Originator's periodic statement the date, amount, and description of a transaction involving the consumer's account; rather, they simply recognize that the debiting of the consumer's account to provide funds for the CIE or WEB credit could be accomplished by something other than an ACH debit.

We are proposing to accept this amendment.

ii. Clarifying the Commercially Reasonable Encryption Standard

The NACHA Operating Rules require ACH participants to utilize a commercially reasonable standard of encryption technology when transmitting any banking information related to an Entry via an Unsecured Electronic Network. This amendment removed the reference to 128-bit encryption technology as the minimum acceptable commercially reasonable standard, but retained the general reference to using a commercially reasonable level of encryption. The amendment also clarified that a commercially reasonable level of security must comply with current, applicable regulatory guidelines, which already impose more rigorous encryption obligations.

Prior to the amendment the NACHA Operating Rules established a minimum for this commercially reasonable encryption standard at the 128-bit RC4 encryption technology level. A task force of NACHA's former Internet Council, comprised of technology expert members, recommended that the specific reference to 128-bit RC4 encryption be removed, on the grounds that it is now out of date as a commercially reasonable standard.

We are proposing to accept this amendment.

iii. Definition of Zero-Dollar Entry

This amendment reintroduced the definition of a Zero-Dollar Entry within Article Eight (Definitions of Terms Used in These Rules) to correspond to unique technical references in the Appendices of the NACHA Operating Rules. Zero Dollar Entries are unique in that, although their dollar amount is zero, they bear remittance data that must be provided to the Receiver in an identical manner as ''live'' entries that transfer funds. The definition was removed in 2010 when the definition of a ''Non-

Monetary Entry'' was introduced into the NACHA Operating Rules.

We are proposing to accept this amendment.

iv. Expansion of Permissible Criteria for ODFI Requests for Return

In addition to being able to request the return of an Erroneous Entry, as permitted by the NACHA Operating Rules, this amendment revised the NACHA Operating Rules to permit an ODFI to request that an RDFI return any Entry that the ODFI claims was originated without the authorization of the Originator. This amendment also expanded the description of Return Reason Code R06 (Returned per ODFI's Request) to include Entries returned by the RDFI for this reason. This newly permissible circumstance reflects actual current industry practice with regard to the recovery of funds related to unauthorized credit origination.

Use of the ODFI Request for Return process is always optional on the part of both ODFIs and RDFIs. An RDFI will continue to be able to make its own business decision about whether to agree to return an Entry that the ODFI claims was originated without the authorization of the Originator. An RDFI responding to a request for the return of such an Entry will be indemnified under the NACHA Operating Rules against loss or liability by the ODFI.

We are proposing to accept this amendment.

*D. Notification of Reversals*

NACHA Operating Rule 2.9.1 requires that the Originator of a Reversing Entry make a reasonable attempt to notify the Receiver of the Reversing Entry and the reason for the Reversing Entry no later than the settlement date of the Entry. In attempting to contact Receivers regarding the reversal of a duplicate or erroneous Entry on behalf of federal agencies, Fiscal Service has found that efforts to reach Receivers, typically through the RDFI, are often unsuccessful. Adhering to the notification requirement also impedes the timeliness and efficiency of originating reversals, which is disadvantageous both for Fiscal Service and for Receivers. Accordingly, we are proposing to exclude this requirement from incorporation in Part 210.

We request comment on whether this exclusion raises any concerns for Receivers or RDFIs.

*E. Prepaid Cards*

In 2010, Fiscal Service amended Part 210 to establish requirements that prepaid cards receiving Federal payments must meet. 75 FR 80335. To be eligible to receive Federal payments, a prepaid card must meet four conditions: (1) The card account must be held at an insured financial institution; (2) the account be set up to meet the requirements for pass through deposit or share insurance under 12 CFR part 330 or 12 CFR part 745; (3) the account may not be attached to a line of credit or loan agreement under which repayment from the card account is triggered by delivery of the Federal payment; and (4) the issuer of the card must comply with all of the requirements, and provide the Federal payment recipient with the same consumer protections, that apply to a payroll card under regulations implementing the Electronic Fund Transfer Act, 15 U.S.C. 1693a(1). See 31 CFR 210.5(b)(5)(i).

We required that prepaid cards provide Regulation E payroll card protections because when our prepaid rule was issued in 2010, Regulation E did not cover any prepaid cards other than payroll cards. However, on October 5, 2016, the Consumer Financial Protection Bureau (CFPB) released its final rule to amend Regulation E to cover prepaid accounts. We are therefore proposing to amend our prepaid rule to replace the reference in 210.5(b)(5)(i)(D) to ''payroll card'' with a reference to ''prepaid account,'' so that the requirement would read: ''The issuer of the card complies with all of the requirements, and provides the holder of the card with all of the consumer protections, that apply to a prepaid account under the rules implementing the Electronic Fund Transfer Act, as amended.'' We would also delete the definition of ''payroll card account'' from the rule because it would be unnecessary. These changes would be effective on the effective date of the CFPB's final rule. We request comment on this proposed amendment.

**III. Section-by-Section Analysis**

In order to incorporate in Part 210 the NACHA Operating Rule changes that we are accepting, we are replacing references to the 2013 NACHA Rules & Guidelines book with references to the 2016 NACHA Operating Rules & Guidelines book. Several of the NACHA Operating Rule amendments that we are not proposing to incorporate are modifications to provisions of the NACHA Operating Rules that are already excluded under Part 210. Other than replacing the references to the 2013 NACHA Operating Rules & Guidelines book, no change to Part 210 is necessary to exclude those amendments.

§ 210.2

We are proposing to amend the definition of ''applicable ACH Rules'' at § 210.2(d) to reference the rules published in NACHA's 2016 Rules & Guidelines book rather than the rules published in NACHA's 2013 Rules & Guidelines book. The definition has been updated to reflect the reorganization and renumbering of the NACHA Operating Rules. A reference to Section 1.11 of the NACHA Operating Rules is added to § 210.2(d)(1) in order to exclude from Part 210 the imposition of fees for ACH debits that are returned as unauthorized. The reference in § 210.2(d)(6) to the NACHA Operating Rule governing International ACH Transactions section has been updated by replacing an obsolete reference to ACH Rule 2.11 with the correct reference to Section 2.5.8. A new paragraph (7) is added to § 210.2(d) to exclude from Part 210 the requirement to make a reasonable attempt to notify the Receiver of a Reversing Entry under Subsection 2.9.1 of the NACHA Operating Rules. A new paragraph (8) is added to exclude from Part 210, until July 1, 2017, the provisions of Subsection 3.3.1.1, Section 8.99 and Appendix Three (definition of Effective Entry Date) that require an RDFI to make the amount of a credit Same-Day Entry available no later than the completion for that Settlement Date.

§ 210.3(b)

We are proposing to amend § 210.3(b) by replacing the references to the ACH Rules as published in the 2013 Rules & Guidelines book with references to the ACH Rules as published in the 2016 NACHA Operating Rules & Guidelines book.

§ 210.6

In § 210.6 we are proposing to replace the reference to ACH Rule 2.4.4 with a reference to ACH Rule 2.4.5 to reflect the re-numbering of ACH Rule 2.4.4. This change is not substantive.

§ 210.8

In § 210.8(b) we are proposing to replace the reference to ACH Rule 2.4.4 with a reference to ACH Rule 2.4.5 to reflect the re-numbering of ACH Rule 2.4.4. This change is not substantive.

**IV. Incorporation by Reference**

In this rule, Fiscal Service is proposing to incorporate by reference the 2016 NACHA Operating Rules & Guidelines book. The Office of Federal Register (OFR) regulations require that agencies discuss in the preamble of a proposed rule ways that the materials the agency proposes to incorporate by

reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties. In addition, the preamble of the proposed rule must summarize the material. 1 CFR 51.5(a). In accordance with OFR's requirements, the discussion in the Supplementary Information section summarizes the 2016 NACHA Operating Rules. Financial institutions utilizing the ACH Network are bound by the NACHA Operating Rules and have access to the NACHA Operating Rules in the course of their everyday business. The NACHA Operating Rules are available as a bound book or in online form from NACHA—The Electronic Payments Association, 2550 Wasser Terrace, Suite 400, Herndon, Virginia 20171, tel. 703–561–1100, *info@nacha.org.*

**V. Procedural Analysis**

*Request for Comment on Plain Language*

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how to make the proposed rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suit your needs; (2) whether the requirements of the rule are clear; or (3) whether there is something else we could do to make the rule easier to understand.

*Regulatory Planning and Review*

The proposed rule does not meet the criteria for a ''significant regulatory action'' as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

*Regulatory Flexibility Act Analysis*

It is hereby certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes on the Federal government a number of changes that NACHA—The Electronic Payments Association, has already adopted and imposed on private sector entities that utilize the ACH Network. The proposed rule does not impose any additional burdens, costs or impacts on any private sector entities, including any small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required.

*Unfunded Mandates Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the proposed rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

**List of Subjects in 31 CFR Part 210**

Automated Clearing House, Electronic funds transfer, Financial institutions, Fraud, and Incorporation by reference.

**Words of Issuance**

For the reasons set out in the preamble, we propose to amend 31 CFR part 210 as follows:

## PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

■ 1. The authority citation for part 210 continues to read as follows:

**Authority:** 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321, 3301, 3302, 3321, 3332, 3335, and 3720.

■ 2. In § 210.2, revise paragraph (d) to read as follows:

**§ 210.2 Definitions.**

* * * * *

(d) *Applicable ACH Rules* means the ACH Rules with an effective date on or before March 16, 2018, as published in ''2016 NACHA Operating Rules & Guidelines: A Complete Guide to Rules Governing the ACH Network'' and supplements thereto, except:

(1) Section 1.11; Subsections 1.2.2, 1.2.3, 1.2.4, 1.2.5 and 1.2.6; Appendix Seven; Appendix Eight; Appendix Nine and Appendix Ten (governing the enforcement of the ACH Rules, including self-audit requirements, and claims for compensation);

(2) Section 2.10 and Section 3.6 (governing the reclamation of benefit payments);

(3) The requirement in Appendix Three that the Effective Entry Date of a credit entry be no more than two Banking Days following the date of processing by the Originating ACH Operator (see definition of ''Effective Entry Date'' in Appendix Three);

(4) Section 2.2 (setting forth ODFI obligations to enter into agreements with, and perform risk management relating to, Originators and Third-Party Senders) and Section 1.6 (Security Requirements);

(5) Section 2.17 (requiring reporting and reduction of high rates of entries returned as unauthorized);

(6) The requirements of Section 2.5.8 (International ACH Transactions) shall not apply to entries representing the payment of a Federal tax obligation by a taxpayer;

(7) The requirement to make a reasonable attempt to notify the Receiver of a Reversing Entry under Subsection 2.9.1; and

(8) Until August 30, 2017, the provisions of Subsection 3.3.1.1, Section 8.99 and Appendix Three (definition of Effective Entry Date) that require an RDFI to make the amount of a credit Same-Day Entry available no later than the completion for that Settlement Date.

* * * * *

■ 3. In § 210.3, revise paragraph (b) to read as follows:

**§ 210.3 Governing law.**

* * * * *

(b) *Incorporation by reference—applicable ACH Rules.*

(1) This part incorporates by reference the applicable ACH Rules, including rule changes with an effective date on or before March 16, 2018, as published in the ''2016 NACHA Operating Rules & Guidelines: A Complete Guide to Rules Governing the ACH Network,'' and supplements thereto. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the ''2016 NACHA Operating Rules & Guidelines'' are available from NACHA—The Electronic Payments Association, 2550 Wasser Terrace, Suite 400, Herndon, Virginia 20171, tel. 703–561–1100, *info@nacha.org.* Copies also are available for public inspection at the Office of the Federal Register, 800 North Capitol Street NW., Suite 700, Washington, DC 20002; and the Bureau of the Fiscal Service, 401 14th Street SW., Room 400A, Washington, DC 20227.

(2) Any amendment to the applicable ACH Rules approved by NACHA—The Electronic Payments Association after publication of the 2016 NACHA Operating Rules & Guidelines shall not apply to Government entries unless the Service expressly accepts such amendment by publishing notice of acceptance of the amendment to this

part in the **Federal Register**. An amendment to the ACH Rules that is accepted by the Service shall apply to Government entries on the effective date of the rulemaking specified by the Service in the **Federal Register** notice expressly accepting such amendment.

* * * * *

■ 4. Revise § 210.6 to read as follows:

**§ 210.6 Agencies.**

Notwithstanding any provision of the ACH Rules, including Subsections 2.4.5, 2.8.4, 4.3.5, 2.9.2, 3.2.2, and 3.13.3, agencies shall be subject to the obligations and liabilities set forth in this section in connection with Government entries.

(a) *Receiving entries.* An agency may receive ACH debit or credit entries only with the prior written authorization of the Service.

(b) *Liability to a recipient.* An agency will be liable to the recipient for any loss sustained by the recipient as a result of the agency's failure to originate a credit or debit entry in accordance with this part. The agency's liability shall be limited to the amount of the entry(ies).

(c) *Liability to an originator.* An agency will be liable to an Originator or an ODFI for any loss sustained by the originator or ODFI as a result of the agency's failure to credit an ACH entry to the agency's account in accordance with this part. The agency's liability shall be limited to the amount of the entry(ies).

(d) *Liability to an RDFI or ACH association.* Except as otherwise provided in this part, an agency will be liable to an RDFI for losses sustained in processing duplicate or erroneous credit and debit entries originated by the agency. An agency's liability shall be limited to the amount of the entry(ies), and shall be reduced by the amount of the loss resulting from the failure of the RDFI to exercise due diligence and follow standard commercial practices in processing the entry(ies). This section does not apply to credits received by an RDFI after the death or legal incapacity of a recipient of benefit payments or the death of a beneficiary as governed by subpart B of this part. An agency shall not be liable to any ACH association.

(e) *Acquittance of the agency.* The final crediting of the amount of an entry to a recipient's account shall constitute full acquittance of the Federal Government.

(f) *Reversals.* An agency may reverse any duplicate or erroneous entry, and the Federal Government may reverse any duplicate or erroneous file. In initiating a reversal, an agency shall certify to the Service that the reversal complies with applicable law related to the recovery of the underlying payment. An agency that reverses an entry shall indemnify the RDFI as provided in the applicable ACH Rules, but the agency's liability shall be limited to the amount of the entry. If the Federal Government reverses a file, the Federal Government shall indemnify the RDFI as provided in the applicable ACH Rules, but the extent of such liability shall be limited to the amount of the entries comprising the duplicate or erroneous file. Reversals under this section shall comply with the time limitations set forth in the applicable ACH Rules.

(g) *Point-of-purchase debit entries.* An agency may originate a Point-of-Purchase (POP) entry using a check drawn on a consumer or business account and presented at a point-of-purchase. The requirements of ACH Rules Subsections 2.3.2.2 and 2.5.10.1 shall be met for such an entry if the Receiver presents the check at a location where the agency has posted the notice required by the ACH Rules and has provided the Receiver with a copy of the notice.

(h) *Return Fee Entry.* An agency that has authority to collect returned item service fees may do so by originating a Return Fee Entry if the agency provides notice to the Receiver in accordance with the ACH Rules.''

■ 5. In § 210.8, revise paragraphs (a) and (b) to read as follows:

**§ 210.8 Financial institutions.**

(a) *Status as a Treasury depositary.* The origination or receipt of an entry subject to this part does not render a financial institution a Treasury depositary. A financial institution shall not advertise itself as a Treasury depositary on such basis.

(b) *Liability.* Notwithstanding ACH Rules Subsections 2.4.5, 2.8.4, 4.3.5, 2.9.2, 3.2.2, and 3.13.3, if the Federal Government sustains a loss as a result of a financial institution's failure to handle an entry in accordance with this part, the financial institution shall be liable to the Federal Government for the loss, up to the amount of the entry, except as otherwise provided in this section. A financial institution shall not be liable to any third party for any loss or damage resulting directly or indirectly from an agency's error or omission in originating an entry. Nothing in this section shall affect any obligation or liability of a financial institution under Regulation E, 12 CFR part 1005, or the Electronic Funds Transfer Act, 12 U.S.C. 1693 *et seq.*

* * * * *

Dated: November 23, 2016.

**David A. Lebryk,**

*Fiscal Assistant Secretary.*

[FR Doc. 2016–28671 Filed 11–29–16; 8:45 am]

**BILLING CODE 4810–AS–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR 180

**[EPA–HQ–OPP–2015–0032; FRL–9954–06]**

## Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

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

**ACTION:** Notice of filing of petitions and request for comment.

**SUMMARY:** This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

**DATES:** Comments must be received on or before December 30, 2016.

**ADDRESSES:** Submit your comments, identified by the docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, 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 L. Goodis, Acting Director, Registration Division (RD) (7505P), main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov;* or Robert McNally, Director, Biopesticides and Pollution Prevention Division (7511P); main number (703) 305–7090; email address:

*BPPDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each pesticide petition summary.

**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).

If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT** for the division listed at the end of the pesticide petition summary of interest.

*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.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

## II. What action is the Agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petitions so that the public has an opportunity to comment on these requests for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petitions may be obtained through the petition summaries referenced in this unit.

New Tolerances

1. PP 6E8462. (EPA–HQ–OPP–2016–0365). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419, requests to establish an import tolerance in 40 CFR part 180 for residues of the herbicide trinexapac-ethyl: 4-(cyclopropyl-α-hydroxy-methylene)-3,5-dioxo-cyclohexanecarboxylic acid ethyl ester expressed as its primary metabolite CGA–179500: 4-(cyclopropyl-α-hydroxy-methylene)-3,5-dioxo-cyclohexanecarboxylic acid in or on poppy, seed at 8 parts per million (ppm). The Syngenta Crop Protection Analytical Method GRM020.01A is used to measure and evaluate the chemical trinexapac-ethyl expressed as its major metabolite CGA–179500. Contact: RD.

2. PP 6E8488. (EPA–HQ–OPP–2016–0384). Interregional Research Project No. 4 (IR–4) Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide quinclorac, 3,7-dichloro-8-quinolinecarboxylic acid in or on asparagus at 0.06 ppm; the bushberry subgroup 13–07B, except lowbush blueberry at 0.6 ppm; and the caneberry subgroup 13–07A at 0.06 ppm. Adequate analytical methods gas chromatography/electron capture detector (GC/ECD) are available for enforcing quinclorac tolerances on plant (BASF Method A8902) and livestock (BASF Method 268/1) commodities. Contact: RD.

3. PP 6E8492. (EPA–HQ–OPP–2016–0495). Interregional Research Project No. 4 (IR–4) Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to establish a tolerance in 40 CFR part 180 for residues of prometryn in or on the raw agricultural commodity lettuce at 0.5 ppm; cottonseed subgroup 20C at 0.25 ppm; fennel, Florence at 0.5 ppm; leaf petiole vegetable subgroup 22B at 0.5 ppm; sesame, oil at 0.12 ppm; sesame, seed at 0.05 ppm; and Swiss chard at 0.5 ppm. A gas chromatography analytical method is available for enforcement purposes. The method determines residues of prometryn in/on plants using a microcoulometric sulfur detection system. Contact: RD.

4. PP 6E8498. (EPA–HQ–OPP–2016–0563). Bayer CropScience, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide, imidacloprid, in or on olive at 2 ppm, tea, green at 50 ppm, and tea, black (dried) at 50 ppm. The common moiety method using a permanganate oxidation, silyl derivatization, and capillary gas chromatography mass spectrometry (GC MS) selective ion

monitoring is used to measure and evaluate the chemical imidacloprid and its metabolites containing the 6-chloropyridinyl moiety. Contact: RD.

5. PP 6F8479. (EPA–HQ–OPP–2016–0508). Bayer CropScience LP, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide fluoxastrobin in or on Rapeseed Subgroup 20A at 0.01 ppm. The analytical method liquid chromatography-mass spectrometry (LC/MS/MS) detection method is used to measure and evaluate the chemical fluoxastrobin. Contact: RD.

6. PP 6F8458. (EPA–HQ–OPP–2016–0537). Syngenta Crop Protection, LLC, PO Box 18300, Greensboro, NC 27419, requests to establish tolerances in 40 CFR 180.665 for residues of the fungicide, sedaxane, by establishing tolerances in or on grain, cereal, forage, fodder and straw, group 16 at 0.06 ppm; grain, cereal, group 15 at 0.01 ppm; peanut at 0.01 ppm; and peanut, hay at 0.08 ppm. The GRM023.01A/GRM023.01B and HPLC/LC–MS/MS is used to measure and evaluate the chemical sedaxane. Contact: RD.

7. PP 6F8475. (EPA–HQ–OPP–2016–0538). FMC Corporation, 1735 Market Street, Philadelphia, PA 19103, requests to establish a tolerance in 40 CFR 180 for residues of the fungicide, bixafen, in or on cattle, fat at 0.5 ppm; cattle, kidney at 0.3 ppm; cattle, liver at 1.5 ppm; cattle, muscle at 0.15 ppm; grain, cereal, forage, fodder and straw, group 16 (except rice), forage at 4.0 ppm; grain, cereal, forage, fodder and straw, group 16 (except rice), hay at 5.0 ppm; grain, cereal, forage, fodder and straw, group 16 (except rice), stover at 6.0 ppm; grain, cereal, forage, fodder and straw, group 16 (except rice), straw at 7.0 ppm; grain, cereal, group 15 (except rice and sorghum) at 0.15 ppm; grain, aspirated fractions at 80 ppm; milk at 0.1 ppm; oilseed, rapeseed subgroup 20A at 0.15 ppm; peanut, hay at 10.0 ppm; peanut, nutmeat at 0.02 ppm; peanut, refined oil at 0.04 ppm; poultry, eggs at 0.02 ppm; poultry, fat at 0.02 ppm; poultry, liver at 0.02 ppm; poultry, muscle at 0.02 ppm; sorghum, grain at 3.0 ppm; soybean, hulls at 0.15 ppm; soybean, seed at 0.06 ppm; sugar beet, dried pulp at 1.0 ppm; vegetable, root subgroup 1A at 0.2 ppm and vegetable, tuberous and corm subgroup 1C at 0.02 ppm. The HPLC–MS/MS is used to measure and evaluate the chemical bixafen. Contact: RD.

8. PP 6F8493. (EPA–HQ–OPP–2016–0536). United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406, requests to establish a tolerance in 40 CFR 180 for residues of the fungicide, ziram, in or on filbert (hazelnut) at 0.1 ppm. The residues of ziram are determined by acid hydrolysis to release carbon disulfide (CS2). The CS2 is measured by head-space gas chromatography or colorimetrically. Adequate enforcement methodology is used to measure and evaluate the chemical ziram. Contact: RD.

Amended Tolerances

1. PP 6E8492. (EPA–HQ–OPP–2016–0495). Interregional Research Project No. 4 (IR–4) Project Headquarters, Rutgers, The State University of NJ, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to remove the tolerances in 40 CFR 180.222 for residues of prometryn in or on cotton, undelinted seed at 0.25 ppm and the leaf petioles subgroup 4B at 0.5 ppm. A gas chromatography analytical method is available for enforcement purposes. The method determines residues of prometryn in/on plants using a microcoulometric sulfur detection system. Contact: RD.

2. PP 6E8500. (EPA–HQ–OPP–2016–0518). BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709, requests to amend the tolerance in 40 CFR 180.663 for residues of the fungicide ametoctradin in or on hops, dried cone from 10 ppm to 100 ppm. The high performance liquid chromotography—mass spectrometry (HPLC–MS/MS) analytical method is used to measure and evaluate the chemical residues of ametoctradin. Contact: RD.

3. PP 6F8458. (EPA–HQ–OPP–2016–0537). Syngenta Crop Protection, LLC, PO Box 18300, Greensboro, NC 27419, requests to amend the tolerances in 40 CFR 180.665 for residues of the fungicide, sedaxane, by removing the tolerances on barley, grain at 0.01 ppm; barley, hay at 0.04 ppm; barley, straw at 0.01 ppm; corn, field, forage at 0.01 ppm; corn, field, grain at 0.01 ppm; corn, field, stover at 0.01 ppm; corn, pop, grain at 0.01 ppm; corn, pop, stover at 0.01 ppm; corn, sweet, forage at 0.01 ppm; corn, sweet, kernel plus cob with husks removed at 0.01 ppm; corn, sweet, stover at 0.01 ppm; oat, forage at 0.015 ppm; oat, grain at 0.01 ppm; oat, hay at 0.06 ppm; oat, straw at 0.01 ppm; rye, forage at 0.015 ppm; rye, grain at 0.01 ppm; rye, straw at 0.01 ppm; sorghum, grain, forage at 0.01 ppm; sorghum, grain, grain at 0.01 ppm; sorghum, grain, stover at 0.01 ppm; wheat, forage at 0.015 ppm; wheat, grain at 0.01 ppm; wheat, hay at 0.06 ppm; and wheat, straw at 0.01 ppm. The GRM023.01A/GRM023.01B and HPLC/LC–MS/MS is used to measure and evaluate the chemical sedaxane. Contact: RD.

New Tolerance Exemptions

1. PP IN–10849. (EPA–HQ–OPP–2015–0728). Jeneil Biosurfactant Company, 1150 18th Street NW., Suite 1000, Washington, DC 20036, requests to establish an exemption from the requirement of a tolerance for residues of isoamyl alcohol (CAS Reg. No. 123–51–3) when used as an inert ingredient (solvent) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest under 40 CFR 180.910. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. Contact: RD.

2. PP IN–10949. (EPA–HQ–OPP–2016–0337). Clariant Corporation, 4000 Monroe Road, Charlotte, NC 28205 requests to establish an exemption from the requirement of a tolerance for residues of fatty acids, montan-wax, ethoxylated (CAS Reg No. 68476–04–0) having a minimum number-average molecular weight (in amu) of 1800, when used as an inert ingredient in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for a tolerance exemption. Contact: RD.

Amended Tolerance Exemptions

1. PP 6E8471. (EPA–HQ–OPP–2016–0566). Interregional Research Project Number 4 (IR–4), Rutgers University, 500 College Rd. East, Suite 201W, Princeton, NJ 08540, requests to amend an exemption from the requirement of a tolerance in 40 CFR 180.1206 for residues of the fungicide *Aspergillus flavus* AF36 by adding in or on almond and fig. The petitioner believes no analytical method is needed because an exemption from the requirement of a tolerance is proposed for Almond and Fig. Contact: BPPD.

**Authority:** 21 U.S.C. 346a.

Dated: November 16, 2016.

**Michael L. Goodis,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2016–28738 Filed 11–29–16; 8:45 am]

**BILLING CODE 6560–50–P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[4500030115]**

## Endangered and Threatened Wildlife and Plants; 90-Day Findings on Three Petitions

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings and initiation of status reviews.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce 90-day findings on three petitions to list or reclassify wildlife or plants under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that one petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted, and we are not initiating a status review in response to this petition. We refer to this as the ''not-substantial'' petition finding. We also find that two petitions present substantial scientific or commercial information indicating that the petitioned actions may be warranted. Therefore, with the publication of this document, we announce that we plan to initiate a review of the status of these species to determine if the petitioned actions are warranted. To ensure that these status reviews are comprehensive, we are requesting scientific and commercial data and other information regarding these species. Based on the status reviews, we will issue 12-month findings on the petitions, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

**DATES:** When we conduct status reviews, we will consider all information that we have received. To ensure that we will have adequate time to consider submitted information during the status reviews, we request that we receive information no later than January 30, 2017. For information submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below), this means submitting the information electronically by 11:59 p.m. Eastern Time on that date.

**ADDRESSES:** *Not-substantial petition finding:* A summary of the basis for the not-substantial petition finding contained in this document is available on *http://www.regulations.gov* under the appropriate docket number (see Table 1 under **SUPPLEMENTARY INFORMATION**), or on the Service's Web site at *http://ecos.fws.gov.* Supporting information in preparing this finding is available for public inspection, by appointment, during normal business hours by contacting the appropriate person, as specified in Table 3 under **SUPPLEMENTARY INFORMATION**. If you have new information concerning the status of, or threats to, this species or its habitat, please submit that information to the person listed in Table 3 under **SUPPLEMENTARY INFORMATION**.

*Status reviews:* You may submit information on species for which a status review is being initiated by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter the appropriate docket number (see Table 2 under **SUPPLEMENTARY INFORMATION**). Then, click on the Search button. After finding the correct document, you may submit information by clicking on ''Comment Now!'' If your information will fit in the provided comment box, please use this feature of *http://www.regulations.gov,* as it is most compatible with our information review procedures. If you attach your information as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred format is a spreadsheet in Microsoft Excel.

(2) *By hard* copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: [Insert appropriate docket number; see Table 2 under **SUPPLEMENTARY INFORMATION**]; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We request that you send information only by the methods described above. We will post all information we receive on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Request for Information for Status Reviews, below, for more information).

**FOR FURTHER INFORMATION CONTACT:** See Table 3 under **SUPPLEMENTARY INFORMATION** for specific people to contact for each species.

**SUPPLEMENTARY INFORMATION:**

### Not-Substantial Finding

The not-substantial petition finding contained in this document is listed in Table 1 below, and a summary of the basis for the finding, along with supporting information, are available on *http://www.regulations.gov* under the appropriate docket number, or on the Service's Web site at *http://ecos.fws.gov.*

TABLE 1—NOT-SUBSTANTIAL FINDING

| Common name | Docket No. | URL to Docket on *http://www.regulations.gov* |
|---|---|---|
| *Tetraneuris verdiensis* (Verde four-nerve daisy). | FWS–R2–ES–2016–0132 | *http://www.regulations.gov/#!docketDetail;D=FWS-R2-ES-2016-0132.* |

### Substantial Findings

*List of Substantial Findings*

The list of substantial findings contained in this document is given below in Table 2, and the basis for the findings, along with supporting information, are available on *http://www.regulations.gov* under the appropriate docket number, or on the Service's Web site at *http://ecos.fws.gov.*

TABLE 2—LIST OF SUBSTANTIAL FINDINGS FOR WHICH A STATUS REVIEW IS BEING INITIATED

| Common name | Docket No. | URL to Docket on *http://www.regulations.gov* |
|---|---|---|
| Leopard | FWS–HQ–ES–2016–0131 | *http://www.regulations.gov/#!docketDetail;D=FWS-HQ-ES-2016-0131.* |
| Lesser prairie-chicken | FWS–R2–ES–2016–0133 | *http://www.regulations.gov/#!docketDetail;D=FWS-R2-ES-2016-0133.* |

**Request for Information for Status Reviews**

When we make a finding that a petition presents substantial information indicating that listing, reclassification, or delisting a species may be warranted, we are required to review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on these species from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns; and

(d) Historical and current population levels, and current and projected trends.

(2) The five factors that are the basis for making a listing, reclassification, or delisting determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), including past and ongoing conservation measures that could decrease the extent to which one or more of the factors affect the species, its habitat, or both. The five factors are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range (Factor A);

(b) Overutilization for commercial, recreational, scientific, or educational purposes (Factor B);

(c) Disease or predation (Factor C);

(d) The inadequacy of existing regulatory mechanisms (Factor D); or

(e) Other natural or manmade factors affecting its continued existence (Factor E).

(3) The potential effects of climate change on the species and its habitat, and the extent to which it affects the habitat or range of the species.

If, after the status review, we determine that listing is warranted, we will propose critical habitat (see definition at section 3(5)(A) of the Act) for domestic (U.S.) species under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, we also request data and information (submitted as provided for in **ADDRESSES**, above) for the species listed in Table 2 on:

(1) What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range occupied by the species;

(2) Where these features are currently found;

(3) Whether or not any of these features may require special management considerations or protection;

(4) Specific areas outside the geographical area occupied by the species that are ''essential for the conservation of the species''; and

(5) What, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat falls within the definition of ''critical habitat'' at section 3(5) of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

You may submit your information concerning these status reviews by one of the methods listed in **ADDRESSES.** If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

**Contacts**

Contact information is provided below in Table 3 for both substantial and not-substantial findings.

TABLE 3—CONTACTS

| Common name | Contact person |
|---|---|
| Leopard | Janine VanNorman, 703–358–2370; *Janine_VanNorman@fws.gov.* |
| Lesser prairie-chicken | Clay Nichols, 817–471–6357; *clay_nichols@fws.gov.* |
| Verde four-nerve daisy. | Shaula Hedwall, 928–556–2118; *shaula_hedwall@fws.gov.* |

If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

**Background**

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our regulations in the Code of Federal Regulations (CFR) establish that the standard for substantial scientific or commercial information with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that a petition presents substantial scientific or commercial information, we are required to promptly commence a review of the status of the species, and we will subsequently summarize the status review in our 12-month finding.

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR part 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species because of one or more of the five factors described in section 4(a)(1) of the Act (see Request for Information for Status Reviews, above).

In considering whether conditions described within one or more of the factors might constitute threats, we must look beyond the exposure of the species to those conditions to evaluate whether the species may respond to the conditions in a way that causes actual impacts to the species. If there is exposure to a condition and the species responds negatively, the condition qualifies as a stressor and, during the subsequent status review, we attempt to determine how significant the stressor is. If the stressor is sufficiently significant that it drives, or contributes to, the risk of extinction of the species such that the species may warrant listing as endangered or threatened as those terms are defined in the Act, the stressor constitutes a threat to the species. Thus, the identification of conditions that could affect a species negatively may not be sufficient to compel a finding that the information in

the petition and our files is substantial. The information must include evidence sufficient to suggest that these conditions may be operative threats that individually or cumulatively act on the species to a sufficient degree that the species may meet the definition of an endangered or threatened species under the Act.

**Evaluation of a Petition To List Tetraneuris verdiensis (Verde Four-nerve Daisy) as an Endangered or Threatened Species Under the Act**

Additional information regarding our review of this petition can be found as an appendix at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0132 under the Supporting Documents section.

*Species and Range*

*Tetraneuris verdiensis* (Verde four-nerve daisy): Arizona.

*Petition History*

On April 21, 2016, we received a petition dated March 11, 2016, from the Center for Biological Diversity requesting that *Tetraneuris verdiensis* be listed as endangered or threatened and that critical habitat be designated for this species under the Act. The petition clearly identified itself as a petition under section 4 of the Act and included the identification information for the petitioner as required at 50 CFR 424.14(a). We responded to the petitioner on June 29, 2016, with an email message acknowledging the receipt of the petition. This finding addresses the petition.

*Finding*

Based on our review of the petition and sources cited in the petition, we find that the petition does not present substantial scientific or commercial information indicating that listing the *Tetraneuris verdiensis* may be warranted. Because the petition does not present substantial information indicating that listing *Tetraneuris verdiensis* may be warranted, we are not initiating a status review of this species in response to this petition. The basis and scientific support for this finding can be found as an appendix at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0132 under the Supporting Documents section. However, we ask that the public submit to us any new information that becomes available concerning the status of, or threats to, this species or its habitat at any time (see Table 3, above).

**Evaluation of a Petition To Reclassify Leopards Currently Listed as Threatened Species to Endangered Species Under the Act**

Additional information regarding our review of this petition can be found as an appendix at *http://www.regulations.gov* under Docket No. FWS–HQ–ES–2016–0131 under the Supporting Documents section.

*Species and Range*

Leopard (*Panthera pardus*): Democratic Republic of the Congo, Gabon, Kenya, and Uganda.

*Petition History*

On July 26, 2016, we received a petition dated July 25, 2016, from The Humane Society of the United States and the Fund for Animals, requesting that the leopard be reclassified as endangered throughout its range under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, required at 50 CFR 424.14(a). This finding addresses the petition.

*Finding*

Based on our review of the petition and sources cited in the petition, we find that the petition presents substantial scientific or commercial information indicating that reclassifying the leopard (*Panthera pardus*) as endangered throughout its range may be warranted, based on Factors A, B, D, and E (for a listing of the factors, see (2) under Request for Information for Status Reviews, above). However, during our status review, we will thoroughly evaluate all potential threats to the species, including the extent to which any protections or other conservation efforts have reduced those threats. Thus, for this species, the Service requests any information relevant to whether the species falls within the definition of an endangered species under section 3(6) of the Act, including information on the five listing factors under section 4(a)(1) and any other factors identified in this finding.

**Evaluation of a Petition To List the Lesser Prairie-Chicken as an Endangered Species Under the Act**

Additional information regarding our review of this petition can be found as an appendix at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0133 under the Supporting Documents section.

*Species and Range*

Lesser prairie-chicken (*Tympanuchus pallidus*): Colorado, Kansas, Oklahoma, New Mexico, Texas.

*Petition History*

On September 8, 2016, we received a petition dated September 8, 2016, from WildEarth Guardians, Center for Biological Diversity, and Defenders of Wildlife requesting that we list the lesser prairie-chicken (*Tympanuchus pallidus*) and three distinct population segments as endangered under the Act. The petition additionally requests that the sandsage and the shinnery oak prairie population segments be emergency listed as endangered under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, required at 50 CFR 424.14(a). We reviewed the information presented in the petition and did not find that an emergency listing under section 4(b)(7) of the Act was necessary. This finding addresses the petition.

*Finding*

Based on our review of the petition and sources cited in the petition, we find that the petition presents substantial scientific or commercial information indicating that listing the lesser prairie-chicken may be warranted, based on Factors A, D, and E (for a listing of the factors, see (2) under Request for Information for Status Reviews, above). However, during our status review, we will thoroughly evaluate all potential threats to the species, including the extent to which any protections or other conservation efforts have reduced those threats. Thus, for this species, the Service requests any information relevant to whether the species falls within the definition of either an endangered species under section 3(6) of the Act or a threatened species under section 3(20) of the Act, including information on the five listing factors under section 4(a)(1) and any other factors identified in this finding.

**Conclusion**

On the basis of our evaluation of the information presented in the petitions under section 4(b)(3)(A) of the Act, we have determined that the petition summarized above for *Tetraneuris verdiensis* (Verde four-nerve daisy) does not present substantial scientific or commercial information indicating that the requested action may be warranted. Therefore, we are not initiating a status review for this species.

The petitions summarized above for the leopard and lesser prairie-chicken present substantial scientific or commercial information indicating that the requested actions may be warranted.

Because we have found that these petitions present substantial

information indicating that the petitioned actions may be warranted, we are initiating status reviews to determine whether these actions under the Act are warranted. At the conclusion of each status review, we will issue a finding, in accordance with section 4(b)(3)(B) of the Act, as to whether or not the petitioned action is warranted.

It is important to note that the standard for a 90-day finding differs from the Act's standard that applies to a status review to determine whether a petitioned action is warranted. In making a 90-day finding, we consider only the information in the petition and in our files, and we evaluate merely whether that information constitutes ''substantial information'' indicating that the petitioned action ''may be warranted.'' In a 12-month finding, we must complete a thorough status review of the species and evaluate the ''best scientific and commercial data available'' to determine whether a petitioned action ''is warranted.'' Because the Act's standards for 90-day and 12-month findings are different, a substantial 90-day finding does not mean that the 12-month finding will result in a ''warranted'' finding.

## References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the appropriate lead field offices (contact the appropriate person listed in Table 3, above).

## Authors

The primary authors of this notice are staff members of the Ecological Services Program, U.S. Fish and Wildlife Service.

## Authority

The authority for these actions is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 16, 2016.

**Daniel M. Ashe,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2016–28513 Filed 11–29–16; 8:45 am]

**BILLING CODE 4333–15–P**

# Notices

Federal Register
Vol. 81, No. 230
Wednesday, November 30, 2016

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Document No. AMS–SC–16–0091]**

### National Research, Promotion, and Consumer Information Programs; Request for Extension and Revision of a Currently Approved Information Collection

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this document announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget (OMB). AMS requests an extension of and revision to the currently approved information collection 0581–0093 the National Research, Promotion, and Consumer Information Programs.

**DATES:** Comments must be received by January 30, 2017.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this notice. Comments should be submitted on the Internet at *http://www.regulations.gov* or to Promotion and Economics Division, Specialty Crops Program, AMS, U.S. Department of Agriculture (USDA), 1400 Independence Avenue SW., Stop 0244, Room 1406–S, Washington, DC 20250–0244. All comments should reference the document number, the date and the page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours or at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Marlene M. Betts, Marketing Specialist, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., Stop 0244, Room 1406–S, Washington, DC 20250–0244; telephone at (202) 720–9915, or by email at *marlene.betts@ams.usda.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* National Research, Promotion, and Consumer Information Programs.

*OMB Number:* 0581–0093.

*Expiration Date of Approval:* June 30, 2017.

*Type of Request:* Extension and Revision of a currently approved information collection.

*Abstract:* National research and promotion programs are designed to strengthen the position of a commodity in the marketplace, maintain and expand existing domestic and foreign markets, and develop new uses and markets for specified agricultural commodities. AMS has the responsibility for implementing and overseeing programs for a variety of commodities including beef, blueberries, cotton, dairy, eggs, fluid milk, Hass avocados, honey, lamb, mangos, mushrooms, paper and paper-based packaging, peanuts, popcorn, pork, potatoes, processed raspberries, softwood lumber, sorghum, soybeans, and watermelons. The enabling legislation includes the Beef Promotion and Research Act of 1985 [7 U.S.C. 2901–2911]; the Cotton Research and Promotion Act of 1966 [7 U.S.C. 2101–2118]; the Dairy Production Stabilization Act of 1983 [7 U.S.C. 4501–4514]; the Fluid Milk Promotion Act of 1990 [7 U.S.C. 6401–6417]; the Egg Research and Consumer Information Act [7 U.S.C. 2701–2718]; the Hass Avocado Promotion, Research, and Information Act [7 U.S.C. 7801–7813]; the Mushroom Promotion, Research, and Consumer Information Act of 1990 [7 U.S.C. 6101–6112]; the Popcorn Promotion, Research, and Consumer Information Act [7 U.S.C. 7481–7491]; the Pork Promotion, Research, and Consumer Information Act of 1985 [7 U.S.C. 4801–4819]; the Potato Research and Promotion Act [7 U.S.C. 2611–2627]; the Soybean Promotion, Research, and consumer Information Act [7 U.S.C. 6301–6311]; the Watermelon Research and Promotion Act [7 U.S.C. 4901–4916]; and the Commodity Promotion, Research, and Information Act of 1996 [7 U.S.C. 7411–7425](which governs the blueberry, honey, lamb, mango, paper and paper-based packaging, peanut, processed raspberry, softwood lumber, and sorghum programs). These programs appear in the Code of Federal Regulations 7 CFR, parts 1150 and 1160, and parts 1205 through 1260.

These programs carry out projects relating to research, consumer information, advertising, sales, promotion, producer information, market development, and product research to assist, improve, or promote the marketing, distribution, and utilization of their respective commodities. Approval of the programs is required through referendum of affected parties. The programs are administered by the industry boards composed of producer, handler, processor, manufacturers, and in some cases, importer and public members appointed by the Secretary of Agriculture. Program funding is generated through assessments on designated industry segments.

The Secretary also approves the board's budgets, plans, and projects. These responsibilities have been delegated to AMS. The applicable commodity program areas within AMS have direct oversight of the respective programs.

The information collection requirements in this request are essential to carry out the intents of the various Acts authorizing such programs, thereby providing a means of administering the programs. The objective in carrying out this responsibility includes assuring the following: (1) Funds are collected and properly accounted for; (2) expenditures of all funds are for the purposes authorized by the enabling legislation; and, (3) the board's administration of programs conforms to USDA policy. The forms covered under this collection require the minimum information necessary to effectively carry out the requirements of the respective orders, and their use is necessary to fulfill the intents of the Acts as expressed in orders. The information collected is used only by authorized employees of the various boards and authorized employees of USDA.

The various boards utilize a variety of forms including: Reports concerning status information such as handler and importer reports; transaction reports; exemption from assessment forms and reimbursement forms; forms and

information concerning board nominations and selection and acceptance statements; certification of industry organizations; and recordkeeping requirements. The forms and information covered under this information collection require minimum information necessary to effectively carry out the requirements of the programs and their use is necessary to fulfill the intent of the applicable authority.

AMS is committed to comply with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

**For National Research, Promotion, and Consumer Information Program—0581–0093**

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.347 hours per response.

*Respondents:* Producers, processors, handlers, manufacturers, importers, and others in the marketing chain of a variety of agricultural commodities, and recordkeepers.

*Estimated Number of Respondents:* 117,942.

*Estimated Total Annual Responses:* 450,673.

*Estimated Number of Responses per Respondent:* 3.82.

*Estimated Total Annual Burden on Respondents:* 156,460.

**For Paper and Paper-Based Packaging Promotion, Research, and Information (Referendum Ballot)**

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 0.25 hours per response.

*Respondents:* Manufacturers and importers.

*Estimated Number of Respondents:* 70.

*Estimated Number of Responses per Respondent:* 1 every 7 years (0.14).

*Estimated Total Annual Burden on Respondents:* 2.45.

This referendum ballot is being merged into the information collection 0581–0093 the National Research, Promotion, and Consumer Information Programs.

*Comments are invited on:* (1) Whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this document will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

**Authority:** 44 U.S.C. Chapter 35.

Dated: November 23, 2016.

**Elanor Starmer,**

*Administrator.*

[FR Doc. 2016–28816 Filed 11–29–16; 8:45 am]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Craig and Thorne Bay Ranger Districts, Tongass National Forest; Alaska; Prince of Wales Landscape Level Analysis Project Environmental Impact Statement

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The U.S. Department of Agriculture, Forest Service will prepare an Environmental Impact Statement (EIS) to propose a variety of projects for multiple resource benefits at a landscape level to implement over the course of 10 to 15 years. Both the Craig and Thorne Bay Ranger Districts encompass Prince of Wales Island (POW) and surrounding islands, which serves as the project area for the Prince of Wales Landscape Level Analysis (POW LLA) Project. Our intention is that this project will be a highly collaborative process involving the public at all stages throughout the development of this analysis.

**DATES:** Comments concerning the scope of the analysis must be received by December 30, 2016. The publication date of this NOI in the **Federal Register** is the exclusive means for calculating the comment period for this scoping opportunity. If the comment period ends on a Saturday, Sunday, or Federal holiday, comments will be accepted until the end of the next Federal working day (11:59 p.m.). The POW LLA Project is an activity implementing the forest plan and is subject to 36 CFR 218, subparts A and B. Only individuals or entities who submit timely and specific written comments about this proposed project or activity during this or another public comment period established by the Responsible Official will be eligible to file an objection. The draft environmental impact statement is expected January of 2018 and the final environmental impact statement is expected July of 2018.

**ADDRESSES:** Send written comments to Thorne Bay Ranger District, at P.O. Box 19001, Thorne Bay, AK 99919. Comments may also be submitted electronically at *https://cara.ecosystem-management.org/Public/CommentInput?project=50337,* or via facsimile to (907) 828–3309.

**FOR FURTHER INFORMATION CONTACT:** Matthew Anderson, District Ranger, Craig and Thorne Bay Ranger Districts, at 504 9th Street, Craig, AK 99921, by telephone at (907) 826–3271; or Delilah Brigham, Project Leader, at 1312 Federal Way, Thorne Bay, AK 99919, by telephone at (907) 828–3232.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Action**

The purpose of the POW LLA Project is to improve forest ecosystem health on Craig and Thorne Bay Ranger Districts, help support community resiliency, and provide economic development through an integrated approach to meet multiple resource objectives.

There is a need to provide a sustainable level of forest products to contribute to the economic viability of the region. There is also a need to provide old-growth timber to help maintain the expertise and infrastructure of the existing timber industry so the forest products industry can prepare for an increasing amount of merchantable young-growth offerings. These businesses are fundamental to both the young-growth and restoration components of the evolving timber program, and to the economic vitality of the region.

Timber stand establishment (TSE) and timber stand improvement (TSI) activities that restore and enhance early seral forests are necessary. This translates to the need for commercial and precommercial treatments of young-growth forests to produce future desired resource values, products, services, and forest health conditions that sustain the diversity and productivity of forested ecosystems.

Past management activities have affected watershed function and fish and wildlife habitat in the project area. There is a need for restoration activities in these watersheds to reestablish self-sustaining habitats that promote viable fish and wildlife populations. These will contribute to subsistence values and the continued traditional and cultural uses by residents of Prince of Wales and surrounding islands.

Providing sustainable recreation opportunities on POW and surrounding islands is critical to maintaining the existing opportunities for residents as well as to expand opportunities for growth in the recreation and tourism business sector. A sustainable program in terms of operations and maintenance is needed in order to maintain infrastructure to an acceptable level.

**Proposed Action**

The proposed action will be developed through extensive public involvement to meet the Purpose and Needs for the project, with activities that will occur over the course of 10 to 15 years. Input from the tribes and the public will help determine the location and types of activities, and how extensively they will occur across the landscape. Management activities that traditionally meet the needs associated with this project include: (1) Commercial and precommercial young-growth treatments including timber stand improvement activities, timber harvests, planting/interplanting, pruning and slash removal/manipulation; (2) old-growth timber harvests; (3) transportation management activities such as road construction, reconstruction, maintenance, and decommissioning in support of accomplishing other proposed management actions; (4) in-stream restoration work, riparian thinning, improvement of fish passages at road crossings, and improving water quality and both fish and wildlife habitat; and (5) developing and improving recreation infrastructure such as cabins and shelters, trails, winter recreation areas, campgrounds, interpretive sites, and boat launches. The proposed action is not limited to only the above activity types, but will be consistent with the Tongass Land and Resource Management Plan.

**Possible Alternatives**

Scoping comments will be used to develop a full range of alternatives to the proposed action, in response to significant issues that are identified. A no-action alternative will be analyzed as well, which represents no change and serves as the baseline for the comparison among the action alternatives.

**Responsible Official**

The Responsible Official for the decision on this project is M. Earl Stewart, Forest Supervisor, Tongass National Forest, Federal Building, 648 Mission Street, Ketchikan, Alaska, 99901.

**Nature of Decision To Be Made**

Given the purpose and need of the project, the Forest Supervisor will review the no action, the proposed action, other alternatives, and the environmental consequences in order to make decisions including the following: (1) Whether to select the proposed action or another alternative; (2) the locations, design, and scheduling of commercial and precommercial timber treatments, restoration activities, habitat improvements, road construction and reconstruction, and improvements to recreation opportunities; (3) mitigation measures and monitoring requirements; and (4) whether there may be a significant restriction of subsistence uses. No Forest Plan Amendments are anticipated with this decision.

**Permits or Licenses Required**

All necessary permits will be obtained prior to project implementation, and may include the following:

(1) State of Alaska, Department of Environmental Conservation (DEC), Alaska Pollutant Discharge Elimination System (APDES):

- General permit for Log Transfer Facilities in Alaska;
- Review Spill Prevention Control and Countermeasure Plan;
- Certification of Compliance with Alaska Water Quality Standards (401 Certification) Chapter 20;
- Storm Water Discharge Permit/National Pollutant Discharge Elimination System review (Section 402 of the Clean Water Act);
- Solid Waste Disposal Permit;

(2) U.S. Army Corp of Engineers:

- Approval of discharge of dredged or fill material into the waters of the United States under Section 404 of the Clean Water Act;
- Approval of the construction of structures or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899;

(3) State of Alaska, Division of Natural Resources (DNR):

- Authorization for occupancy and use of tidelands and submerged lands.

(4) State of Alaska, Department of Fish and Game (ADF&G)

- Fish Habitat Permit and Concurrence (Title 16)

**Scoping Process**

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. The Forest Service will be seeking information, comments, and assistance from Tribal Governments; Federal, State, and local agencies; individuals and organizations interested in or affected by the proposed activities. In addition to this Notice of Intent, legal notices will be placed in the *Ketchikan Daily News,* the official newspaper of record for this project. There will also be ample public involvement on Prince of Wales Island, including: Public meetings held in various communities, subsistence hearings, information posted in public places and in local publications such as the *Island Post,* and from the Prince of Wales Landscape Assessment Team, a collaborative group independently formed to provide widely based proposals to be considered by the U.S. Forest Service in the POW LLA Project development and analysis process. Project information and updates, meeting notices, and documents will be provided throughout the process on the project Web page at *http://www.fs.usda.gov/project/?project=50337.* Individuals may also provide comments and sign up for an electronic mailing list at that site.

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the Agency with the ability to provide the respondent with subsequent environmental documents.

Dated: November 23, 2016.

**Tawnya Brummett,**

*Acting Forest Supervisor.*

[FR Doc. 2016–28760 Filed 11–29–16; 8:45 am]

**BILLING CODE 3411–15–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**[Docket No. 161024999–6999–01]**

### Impact of the Implementation of the Chemical Weapons Convention (CWC) on Legitimate Commercial Chemical, Biotechnology, and Pharmaceutical Activities Involving ''Schedule 1'' Chemicals (Including Schedule 1 Chemicals Produced as Intermediates) Through Calendar Year 2016

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Bureau of Industry and Security (BIS) is seeking public comments on the impact that implementation of the Chemical Weapons Convention (CWC), through the Chemical Weapons Convention Implementation Act (CWCIA) and the Chemical Weapons Convention Regulations (CWCR), has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2016. The purpose of this notice of inquiry is to collect information to assist BIS in its preparation of the annual certification to Congress on whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms are being harmed by such implementation. This certification is required under Condition 9 of Senate Resolution 75, April 24, 1997, in which the Senate gave its advice and consent to the ratification of the CWC.

**DATES:** Comments must be received by December 30, 2016.

**ADDRESSES:** You may submit comments by any of the following methods (please refer to RIN 0694–XC034 in all comments and in the subject line of email comments):

- *Federal rulemaking portal (http://www.regulations.gov*)—you can find this notice by searching on its regulations.gov docket number, which is BIS–2016–0038;
- *Email: willard.fisher@bis.doc.gov*—include the phrase ''Schedule 1 Notice of Inquiry'' in the subject line;
- *Fax:* (202) 482–3355 (Attn: Willard Fisher);
- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** For questions on the Chemical Weapons Convention requirements for ''Schedule 1'' chemicals, contact Douglas Brown, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482–1001. For questions on the submission of comments, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482–2440.

**SUPPLEMENTARY INFORMATION:**

#### Background

In providing its advice and consent to the ratification of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC or ''the Convention''), the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its ratification. Condition 9, titled ''Protection of Advanced Biotechnology,'' calls for the President to certify to Congress on an annual basis that ''the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1.'' On July 8, 2004, President Bush, by Executive Order 13346, delegated his authority to make the annual certification to the Secretary of Commerce.

The CWC is an international arms control treaty that contains certain verification provisions. In order to implement these verification provisions, the CWC established the Organization for the Prohibition of Chemical Weapons (OPCW). The CWC imposes certain obligations on countries that have ratified the Convention (*i.e.,* States Parties), among which are the enactment of legislation to prohibit the production, storage, and use of chemical weapons, and the establishment of a National Authority to serve as the national focal point for effective liaison with the OPCW and other States Parties in order to achieve the object and purpose of the Convention and the implementation of its provisions. The CWC also requires each State Party to implement a comprehensive data declaration and inspection regime to provide transparency and to verify that both the public and private sectors of the State Party are not engaged in activities prohibited under the CWC.

''Schedule 1'' chemicals consist of those toxic chemicals and precursors set forth in the CWC ''Annex on Chemicals'' and in Supplement No. 1 to part 712 of the Chemical Weapons Convention Regulations (CWCR) (15 CFR parts 710–722). The CWC identified these toxic chemicals and precursors as posing a high risk to the object and purpose of the Convention.

The CWC (Part VI of the ''Verification Annex'') restricts the production of ''Schedule 1'' chemicals for protective purposes to two facilities per State Party: a single small-scale facility (SSSF) and a facility for production in quantities not exceeding 10 kg per year. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103–21 defined the term ''protective purposes'' to mean ''used for determining the adequacy of defense equipment and measures.'' Consistent with this definition and as authorized by Presidential Decision Directive (PDD) 70 (December 17, 1999), which specifies agency and departmental responsibilities as part of the U.S. implementation of the CWC, the Department of Defense (DOD) was assigned the responsibility to operate these two facilities. Although this assignment of responsibility to DOD under PDD–70 effectively precluded commercial production of ''Schedule 1'' chemicals for protective purposes in the United States, it did not establish any limitations on ''Schedule 1'' chemical activities that are not prohibited by the CWC. However, DOD does maintain strict controls on ''Schedule 1'' chemicals produced at its facilities in order to ensure accountability for such chemicals, as well as their proper use, consistent with the object and purpose of the Convention.

The provisions of the CWC that affect commercial activities involving ''Schedule 1'' chemicals are implemented in the CWCR (see 15 CFR 712) and in the Export Administration Regulations (EAR) (see 15 CFR 742.18 and 15 CFR 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCR restrict commercial production of ''Schedule 1'' chemicals to research, medical, or pharmaceutical purposes (the CWCR prohibit commercial production of ''Schedule 1'' chemicals for ''protective purposes'' because such production is effectively precluded per PDD–70, as described above—see 15 CFR 712.2(a)). The CWCR also contain other requirements and prohibitions that apply to ''Schedule 1'' chemicals and/or ''Schedule 1'' facilities. Specifically, the CWCR:

(1) Prohibit the import of ''Schedule 1'' chemicals from States not Party to the Convention (15 CFR 712.2(b));

(2) Require annual declarations by certain facilities engaged in the production of ''Schedule 1'' chemicals in excess of 100 grams aggregate per calendar year (*i.e.,* declared ''Schedule 1'' facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));

(3) Provide for government approval of ''declared Schedule 1'' facilities (15 CFR 712.5(f));

(4) Provide that ''declared Schedule 1'' facilities are subject to initial and routine inspection by the Organization for the Prohibition of Chemical Weapons (15 CFR 712.5(e) and 716.1(b)(1));

(5) Require 200 days advance notification of establishment of new ''Schedule 1'' production facilities producing greater than 100 grams aggregate of ''Schedule 1'' chemicals per calendar year (15 CFR 712.4);

(6) Require advance notification and annual reporting of all imports and exports of ''Schedule 1'' chemicals to, or from, other States Parties to the Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and

(7) Prohibit the export of ''Schedule 1'' chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

For purposes of the CWCR (see 15 CFR 710.1), ''production of a Schedule 1 chemical'' means the formation of ''Schedule 1'' chemicals through chemical synthesis, as well as processing to extract and isolate ''Schedule 1'' chemicals produced biologically. Such production is understood, for CWCR declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

**Request for Comments**

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, ''Schedule 1'' chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act and the Chemical Weapons Convention Regulations, has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2016. To allow BIS to properly evaluate the significance of any harm to commercial activities involving ''Schedule 1'' chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

**Submission of Comments**

All comments must be submitted to one of the addresses indicated in this notice. The Department requires that all comments be submitted in written form.

The Department encourages interested persons who wish to comment to do so at the earliest possible time. The period for submission of comments will close on December 30, 2016. The Department will consider all comments received before the close of the comment period. Comments received after the end of the comment period may not be considered. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them. All comments submitted in response to this notice will be a matter of public record and will be available for public inspection and copying.

The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays public comments on the BIS Freedom of Information Act (FOIA) Web site at *http://www.bis.doc.gov/foia.* This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration, at (202) 482–1093, for assistance.

Dated: November 23, 2016.

**Kevin J. Wolf,**

*Assistant Secretary for Export Administration.*

[FR Doc. 2016–28799 Filed 11–29–16; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

**[Docket No. PTO–P–2016–0051]**

### Notice of Roundtables and Extension of the Period for Comments on Examination Time Goals

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of public roundtables and extension of the comment period.

**SUMMARY:** The United States Patent and Trademark Office (Office or USPTO) previously announced information for roundtables in Alexandria, Virginia, and Dallas, Texas, to solicit public feedback as part of an effort to reevaluate its examination time goals. Examination time goals vary by technology and represent the average amount of time that a patent examiner is expected to spend examining a patent application in a particular technology. The Office now is providing information on the additional three roundtables that the Office will be conducting in Detroit, Michigan; Denver, Colorado; and San Jose, California. In addition, the Office is extending the written comment period to ensure that all stakeholders have sufficient opportunity to submit comments on the reevaluation of the Office's examination time goals.

**DATES:** *Written Comments Deadline:* To be ensured of consideration, written comments must be received on or before January 30, 2017.

**ADDRESSES:** Written comments should be sent by electronic mail addressed to *ExternalExaminationTimeStudy@USPTO.gov.* Comments also may be submitted by postal mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Raul Tamayo, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy.

Although comments may be submitted by postal mail, the Office prefers to receive comments by electronic mail in order to facilitate posting on the USPTO's Internet Web site (*http://www.uspto.gov*). Electronic comments may be submitted in plain text, ADOBE® portable document format, or MICROSOFT WORD® format. Comments not submitted electronically should be submitted on paper in a format that facilitates digital scanning into ADOBE® portable document format.

The comments will be available for viewing via the USPTO's Internet Web site (*http://www.uspto.gov*). The comments also will be available for public inspection at the Office of the Commissioner for Patents, currently located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia 22314. Because the comments will be made publicly available, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** *Roundtable information, including roundtable registration information:* Elizabeth Magargel, Strategic Planning Project Manager, Office of the Assistant Deputy Commissioner for Patent Operations, by telephone at (571) 270–7248.

*Written comments:* Raul Tamayo, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272–7728.

*Examination time goals:* Daniel Sullivan, Director Technology Center 1600, by telephone at (571) 272–0900.

**SUPPLEMENTARY INFORMATION:** In a **Federal Register** Notice, *Request for Comments on Examination Time Goals,* 81 FR 73383 (Oct. 25, 2016), the Office solicited written comments on the reevaluation of the Office's examination time goals. In addition to accepting public feedback through the submission of written comments, the Office provided increased interactive participation through IdeaScale®, a Web-based collaboration tool that allows users to post comments and interact with the posted comments of others; and through roundtables in Alexandria, Detroit, Denver, Dallas, and San Jose. The October 25, 2016 **Federal Register** Notice provided dates and other information for the Alexandria and Dallas roundtables. The October 25, 2016 **Federal Register** Notice indicated that dates and other information for the roundtables to be conducted in Detroit, Denver, and San Jose would be forthcoming.

The Office now provides dates and other information for the roundtables to be conducted in Detroit, Denver, and San Jose.

The San Jose roundtable has been scheduled for January 11, 2017, which is after the written comment deadline set forth in the October 25, 2016 **Federal Register** Notice. To ensure that all roundtable attendees also have the opportunity to provide written comments, the Office hereby is extending the period for submission of written comments until January 30, 2017.

Please visit *http://www.uspto.gov/patent/initiatives/eta-external-outreach* for more information on the reevaluation of the Office's examination time goals. The Web page includes: Dates and registration information for the roundtables; information on how to use IdeaScale® to comment on examination time goals; and information to help inform public comments responsive to the October 25, 2016 **Federal Register** Notice requesting comments, such as background material illustrating the use of examination time goals in the context of individual examiner evaluation, and as an input into the model used to forecast pendency and hiring needs. The Office plans to use the public feedback it receives as an input to help ensure that the Office's examination time goals accurately reflect the amount of time needed by examiners to conduct quality examination in a manner that responds to stakeholders' interests.

*Detroit, Denver, and San Jose Roundtable Registration Information:* Roundtables will be conducted in Detroit, Denver, and San Jose, as detailed below. Registration is required, and early registration is recommended because seating is limited. There is no fee to register for any of the roundtables, and registration will be on a first-come, first-served basis. Registration on the day of the roundtables will be permitted on a space-available basis beginning 30 minutes before each roundtable.

To register, please send an email message to *ExternalExaminationTimeStudy@USPTO.gov* and provide the following information: (1) Your name, title, and if applicable, company or organization, address, phone number, and email address; and (2) which roundtable you wish to attend. Each attendee, even if from the same organization, must register separately. If you need special accommodations, *e.g.,* due to a disability, please inform a contact person identified below.

For more information on any of the roundtables, including the agenda for each roundtable and webcast access instructions for the Alexandria roundtable, please visit *http://www.uspto.gov/patent/initiatives/eta-external-outreach.*

**Detroit Roundtable**

*Detroit Dates: Roundtable Date:* The Detroit roundtable will be held on Thursday, December 15, 2016, beginning at 9:00 a.m. Eastern Standard Time (EST) and ending at 11:00 a.m. EST.

*Registration Deadline:* Registration to attend the Detroit roundtable in person or via webcast is requested by December 8, 2016. See the ''Roundtable Registration Information'' section of this notice, or visit *http://www.uspto.gov/patent/initiatives/eta-external-outreach,* for additional details on how to register.

*Address of Detroit Roundtable:* The Detroit roundtable will be held at the USPTO's Midwest Regional Office in the Stroh Building, 300 River Place Drive, Suite 2900, Detroit, MI, 48207.

**Denver Roundtable**

*Denver Dates: Roundtable Date:* The Denver roundtable will be held on Thursday, December 15, 2016, beginning at 10:00 a.m. Mountain Standard Time (MST) and ending at 12:00 p.m. MST.

*Registration Deadline:* Registration to attend the Denver roundtable is requested by December 8, 2016. See the ''Roundtable Registration Information'' section of this notice, or visit *http://www.uspto.gov/patent/initiatives/eta-external-outreach,* for additional details on how to register.

*Address of Denver Roundtable:* The Denver roundtable will be held at the USPTO's Rocky Mountain Regional Office in the Byron G. Rogers Federal Building, 1961 Stout Street, Longs Peak Conference Room, 2nd Floor, Denver, CO 80296.

**San Jose Roundtable**

*San Jose Dates: Roundtable Date:* The San Jose roundtable will be held on Wednesday, January 11, 2017, beginning at 1:00 p.m. Pacific Standard Time (PST) and ending at 3:00 p.m. PST.

*Registration Deadline:* Registration to attend the San Jose roundtable is requested by January 4, 2017. See the ''Roundtable Registration Information'' section of this notice, or visit *http://www.uspto.gov/patent/initiatives/eta-external-outreach,* for additional details on how to register.

*Address of San Jose Roundtable:* The San Jose roundtable will be held at the San Jose City Hall, 200 E. Santa Clara Street, San Jose, CA 95113.

Dated: November 22, 2016.

**Michelle K. Lee,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2016–28689 Filed 11–29–16; 8:45 am]

**BILLING CODE 3510–16–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:* ER12–1265–007.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* Compliance filing: 2016–11–22_Order 719 Compliance Filing to be effective 6/12/2012.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5101.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER13–1943–006.
*Applicants:* Midcontinent Independent System Operator, Inc.
*Description:* Compliance filing: 2016–11–22_MISO–PJM JOA Order 1000 Interregional Compliance to be effective 1/1/2014.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5188.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–272–001.
*Applicants:* Startrans IO, LLC.
*Description:* Tariff Amendment: Errata to TRBAA 2017 Update to be effective 1/1/2017.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5178.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–404–000.
*Applicants:* Midcontinent Independent System Operator, Inc., MidAmerican Energy Company, ITC Midwest LLC.
*Description:* § 205(d) Rate Filing: 2016–11–22_SA 2972 MidAmerican-ITC Midwest FCA (Coulter-Tap) to be effective 11/23/2016.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5096.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–405–000.
*Applicants:* American Electric Power Service Corporation, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: AEP East Submits OATT H–14 Revisions to be effective 1/1/2017.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5099.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–406–000.
*Applicants:* American Electric Power Service Corporation, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: AEP submits OATT H–20 Revisions to be effective 1/1/2017.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5132.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–407–000.
*Applicants:* ISO New England Inc., Central Maine Power Company.
*Description:* § 205(d) Rate Filing: CMP and ISO–NE Filing of LSA under Schedule 21–CMP of ISO OATT to be effective 8/8/2016.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5148.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–408–000.
*Applicants:* California Independent System Operator Corporation.
*Description:* § 205(d) Rate Filing: 2016–11–22 Transferred Frequency Response Agreement with BPA to be effective 12/1/2016.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5156.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–409–000.
*Applicants:* Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: MAIT submits Agency Agreement No. 4580 among MetEd, Penelec and MAIT to be effective 1/1/2017.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5159.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–410–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Queue #X4–048/Y2–089, First Revised Service Agreement No. 3838 to be effective 10/25/2016.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5160.
*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–411–000.
*Applicants:* California Independent System Operator Corporation.
*Description:* § 205(d) Rate Filing: 2016–11–22 Transferred Frequency Response Agreement with City of Seattle to be effective 12/1/2016.
*Filed Date:* 11/22/16.
*Accession Number:* 20161122–5166.
*Comments Due:* 5 p.m. ET 12/13/16.

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: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28763 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL17–21–000]**

### Kansas Electric Power Cooperative, Inc. v. Southwest Power Pool, Inc.; Notice of Complaint

Take notice that on November 21, 2016, pursuant to sections 206 and 306 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 (2016) and section 306 of the Federal Power Act (FPA), 16 U.S.C. 824(e) and 825(e), Kansas Electric Power Cooperative, Inc. (Complainant) filed a formal complaint against Southwest Power Pool, Inc. (Respondent) alleging that, Respondent's direct cost assignment of approximately $6.2 million to Complainant in connection with the Attachment Z2 revenue crediting process is unlawful under Respondent's Open Access Transmission Tariff, all as more fully explained in the complaint.

Complainant certifies that copies of the complaint were served on the contacts for Respondent as listed on the Commission's list of Corporate Officials as well as the Kansas Corporation Commission.

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. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

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 electronic review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5:00 p.m. Eastern Time on December 12, 2016.

Dated: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28765 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER17–382–000]**

### CED Ducor Solar 1, 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 CED Ducor Solar 1, 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 December 12, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28766 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP17–16–000]**

### Gulf South Pipeline Company, LP; Notice of Request Under Blanket Authorization

Take notice that on November 17, 2016 Gulf South Pipeline Company, LP (Gulf South), 9 Greenway Plaza, Suite 2800, Houston, Texas, 77046, filed in the above referenced docket a prior notice application pursuant to sections 157.205 and 157.216(b) of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act (NGA), and Gulf South's blanket certificate issued in Docket No. CP82–430–000. Gulf South seeks authorization to abandon in place two 2,000 horsepower (HP) reciprocating units, compressor fuel lines and a fuel meter located at its Bayou Sale Compressor Station (CS) in St. Mary Parish, Louisiana, all as more fully set forth in the application, which is open to the public for inspection.

The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application may be directed to Kathy D. Fort, Manager, Certificates and Tariffs, Gulf South Pipeline Company, LP, 610 West 2nd Street Owensboro, Kentucky, 42301, by phone at (270) 688–6825 or by email at *katy.fort@bwpmlp.com* or to Juan Eligio Jr., Sr. Regulatory Analyst, Gulf South Pipeline Company, LP, 9 Greenway Plaza, Suite 2800, Houston, Texas, 77046, by phone at (713) 479–3480 or by email at *juan.eligio@bwpmlp.com.*

Specifically, Gulf South states that facilities proposed for abandonment were initially installed to receive gas from south Louisiana and Eugene Island, offshore Louisiana; however, there have not been sufficient offshore gas supplies to operate the facilities in over 20 years. Gulf South states that by abandoning compression at Bayou Sale CS, the maximum capacity on this section of Gulf South's system will decrease to 196.7 million cubic feet per day (MMcf/d), while the maximum throughput on this system for the past five years has been 125.7 MMcf/d. Therefore, Gulf South states that the proposed abandonment will have no adverse impact on its system and Gulf South's ability to comply with its contractual obligations.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9,

within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and five (5) copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28764 Filed 11–29–16; 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 Number:* PR17–4–000.
*Applicants:* Columbia Gas of Ohio, Inc.
*Description:* Tariff filing per 284.123(b) + (e) COH SOC to be effective 10/27/2016; Filing Type: 980.
*Filed Date:* 11/15/16.
*Accession Number:* 201611155070.
*Comments/Protests Due:* 5 p.m. ET 12/6/16.

*Docket Number:* PR17–5–000.
*Applicants:* NET Mexico Pipeline Partners, LLC.
*Description:* Tariff filing per 284.123(b) + (e) + (g): Revised Statement of Operating Conditions to be effective 11/16/2016; Filing Type: 1300.
*Filed Date:* 11/16/2016.
*Accession Number:* 201611165072.
*Comments Due:* 5 p.m. ET 12/7/16.
*284.123(g) Protests Due:* 5 p.m. ET 1/17/17.

*Docket Number:* PR17–6–000.
*Applicants:* Enable Illinois Intrastate Transmission, LLC.
*Description:* Tariff filing per 284.123(e) + (g): Cancellation of SOC to be effective 11/16/2016; Filing Type: 1290.
*Filed Date:* 11/16/2016.
*Accession Number:* 201611165131.
*Comments Due:* 5 p.m. ET 12/7/16.
*284.123(g) Protests Due:* 5 p.m. ET 1/17/17.

*Docket Numbers:* RP17–184–000.
*Applicants:* Southern Natural Gas Company, L.L.C.
*Description:* Compliance filing Annual Report on Operational Transactions.
*Filed Date:* 11/17/16.
*Accession Number:* 20161117–5050.
*Comments Due:* 5 p.m. ET 11/29/16.

*Docket Numbers:* RP17–185–000.
*Applicants:* Tennessee Gas Pipeline Company, L.L.C.
*Description:* § 4(d) Rate Filing: Volume No. 2—Neg. Rate Agmt—Crestwood Gas Marketing LLC SP39122 to be effective 11/1/2016.
*Filed Date:* 11/17/16.
*Accession Number:* 20161117–5077.
*Comments Due:* 5 p.m. ET 11/29/16.

*Docket Numbers:* RP17–186–000.
*Applicants:* Ruby Pipeline, L.L.C.
*Description:* § 4(d) Rate Filing: Ruby FLU Filing to be effective 1/1/2017.
*Filed Date:* 11/18/16.
*Accession Number:* 20161118–5060.
*Comments Due:* 5 p.m. ET 11/30/16.

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 date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

**Filings in Existing Proceedings**

*Docket Numbers:* RP16–1299–001.
*Applicants:* Kinetica Energy Express, LLC.
*Description:* Compliance filing: Compliance Filing to be effective 11/1/2016.
*Filed Date:* 11/18/16.
*Accession Number:* 20161118–5051.
*Comments Due:* 5 p.m. ET 11/30/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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 November 21, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–28808 Filed 11–29–16; 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:* RP17–187–000.
*Applicants:* DBM Pipeline, LLC.
*Description:* § 4(d) Rate Filing: Negotiated Rate Filing to be effective 12/1/2016.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5064.
*Comments Due:* 5 p.m. ET 12/5/16.

*Docket Numbers:* RP17–188–000.
*Applicants:* Gas Transmission Northwest LLC.
*Description:* § 4(d) Rate Filing: Annual Fuel Filing 2016 to be effective 1/1/2017.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5067.
*Comments Due:* 5 p.m. ET 12/5/16.
*Docket Numbers:* RP17–189–000.
*Applicants:* Transcontinental Gas Pipe Line Company,
*Description:* § 4(d) Rate Filing: LSS and SS–2 Tracker Effective Nov. 1 2016 (National Fuel) to be effective 11/1/2016.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5087.
*Comments Due:* 5 p.m. ET 12/5/16.
*Docket Numbers:* RP17–190–000.
*Applicants:* Young Gas Storage Company, Ltd.
*Description:* § 4(d) Rate Filing: Annual FL&U Filing to be effective 1/1/2017.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5088.
*Comments Due:* 5 p.m. ET 12/5/16.
*Docket Numbers:* RP17–191–000.
*Applicants:* KPC Pipeline, LLC.
*Description:* Request for Waiver of Tariff Provision Requiring the Filing of an Annual Interruptible Transportation Revenue Crediting Report of KPC Pipeline, LLC.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5089.
*Comments Due:* 5 p.m. ET 12/5/16.
*Docket Numbers:* RP17–192–000.
*Applicants:* Colorado Interstate Gas Company, L.L.C.
*Description:* § 4(d) Rate Filing: Quarterly LUF True-up Filing to be effective 1/1/2017.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5098.
*Comments Due:* 5 p.m. ET 12/5/16.
*Docket Numbers:* RP17–193–000.
*Applicants:* Mojave Pipeline Company, L.L.C.
*Description:* § 4(d) Rate Filing: Annual FL&U Filing and Operational Purchase and Sales Report to be effective 1/1/2017.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5113.
*Comments Due:* 5 p.m. ET 12/5/16.

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 November 22, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–28809 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER17–384–000]**

### CED Ducor Solar 3, 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 CED Ducor Solar 3, 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 December 12, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28768 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC17–38–000.
*Applicants:* Helix Generation, LLC, TC Ravenswood, LLC, TC Ironwood LLC, TransCanada Maine Wind Development Inc., Ocean State Power LLC, TransCanada Power Marketing Ltd.
*Description:* Joint Application of Helix Generation, LLC, et al. for Approval Under Section 203 of the FPA.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5263.
*Comments Due:* 5 p.m. ET 12/12/16.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–2487–003; ER15–2380–001.
*Applicants:* Pacific Summit Energy LLC, Willey Battery Utility, LLC.
*Description:* Notice of Change in Status of Pacific Summit Energy LLC, et al.
*Filed Date:* 11/21/16.
*Accession Number:* 20161121–5203.
*Comments Due:* 5 p.m. ET 12/12/16.
*Docket Numbers:* ER16–1804–001.
*Applicants:* Deepwater Block Island Wind, LLC.

*Description:* Notice of Non-Material Change in Status of Deepwater Block Island Wind, LLC.

*Filed Date:* 11/21/16.

*Accession Number:* 20161121–5199.

*Comments Due:* 5 p.m. ET 12/12/16.

*Docket Numbers:* ER17–212–001.

*Applicants:* Upper Michigan Energy Resources Corporation.

*Description:* Tariff Amendment: Executed UMERC to Crystal Falls FERC Rate Schedule No 4 to be effective 1/1/2017.

*Filed Date:* 11/21/16.

*Accession Number:* 20161121–5195.

*Comments Due:* 5 p.m. ET 12/12/16.

*Docket Numbers:* ER17–388–000.

*Applicants:* SunZia Transmission, LLC.

*Description:* Report on the Open Solicitation and Selection Process for Anchor Customers of SunZia Transmission, LLC.

*Filed Date:* 11/18/16.

*Accession Number:* 20161118–5133.

*Comments Due:* 5 p.m. ET 12/9/16.

*Docket Numbers:* ER17–401–000.

*Applicants:* Pacific Summit Energy LLC.

*Description:* Compliance filing: Notice of Change in Status and Revised MBR Tariff to be effective 1/20/2017.

*Filed Date:* 11/21/16.

*Accession Number:* 20161121–5193.

*Comments Due:* 5 p.m. ET 12/12/16.

*Docket Numbers:* ER17–402–000.

*Applicants:* Willey Battery Utility, LLC.

*Description:* Compliance filing: Notice of Change in Status and Revised MBR Tariff to be effective 1/20/2017.

*Filed Date:* 11/21/16.

*Accession Number:* 20161121–5194.

*Comments Due:* 5 p.m. ET 12/12/16.

*Docket Numbers:* ER17–403–000.

*Applicants:* Niagara Mohawk Power Corporation.

*Description:* Notice of Cancellation of Interconnection Agreement, Rate Schedule No. 200 of Niagara Mohawk Power Corporation.

*Filed Date:* 11/21/16.

*Accession Number:* 20161121–5202.

*Comments Due:* 5 p.m. ET 12/12/16.

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: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28762 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER17–383–000]**

### CED Ducor Solar 2, 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 CED Ducor Solar 2, 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 December 12, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 22, 2016.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2016–28767 Filed 11–29–16; 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 Number:* PR17–7–000.

*Applicants:* NorthWestern Corporation.

*Description:* Tariff filing per 284.123(b),(e): Revised Rate Schedules for Transportation and Storage Service to be effective 11/1/2016; Filing Type: 1000.

*Filed Date:* 11/21/2016.

*Accession Number:* 20161121–5071.

*Comments/Protests Due:* 5 p.m. ET 12/12/16.

*Docket Number:* PR17–8–000.

*Applicants:* Columbia Gas of Maryland, Inc.

*Description:* Tariff filing per 284.123(b),(e): CMD SOC to be effective 10/27/2016; Filing Type: 980.

*Filed Date:* 11/21/2016.

*Accession Number:* 20161121–5185.

*Comments/Protests Due:* 5 p.m. ET 12/12/16.

*Docket Numbers:* RP17–194–000.

*Applicants:* Sierrita Gas Pipeline LLC.

*Description:* Annual Operational Purchases and Sales Report of Sierrita Gas Pipeline LLC under RP17–194.

*Filed Date:* 11/22/16.

*Accession Number:* 20161122–5140.

*Comments Due:* 5 p.m. ET 12/5/16.

*Docket Numbers:* RP17–195–000.

*Applicants:* National Fuel Gas Supply Corporation.

*Description:* Compliance filing TSCA Informational Filing (11–22–16).

*Filed Date:* 11/22/16.

*Accession Number:* 20161122–5173.

*Comments Due:* 5 p.m. ET 12/5/16.

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 November 23, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–28810 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–1874–004; ER10–2881–030; ER10–2882–031; ER10–2883–030; ER10–2884–030.

*Applicants:* Mankato Energy Center, LLC, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company.

*Description:* Notification of Non-Material of Change in Status of Mankato Energy Center, LLC, et al.

*Filed Date:* 11/22/16.

*Accession Number:* 20161122–5246.

*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER12–1266–007.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* Compliance filing: 2016–11–23_Order 745 Compliance Filing to be effective 6/12/2012.

*Filed Date:* 11/23/16.

*Accession Number:* 20161123–5082.

*Comments Due:* 5 p.m. ET 12/14/16.

*Docket Numbers:* ER13–1944–005.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* Compliance filing: Compliance filing per 10/28/2016 order in Docket No. ER13–1944 to be effective 1/1/2014.

*Filed Date:* 11/22/16.

*Accession Number:* 20161122–5198.

*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–392–000.

*Applicants:* City of Pasadena, California.

*Description:* City of Pasadena, California tariff filing (Work Paper Filings—Parts 1 and 2).

*Filed Date:* 11/22/16.

*Accession Number:* 20161122–5245, 20161122–5244.

*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–412–000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2016–11–22_SA 2898 Termination of Ameren-Ford County Wind Farm GIA (J375) to be effective 1/23/2017.

*Filed Date:* 11/22/16.

*Accession Number:* 20161122–5195.

*Comments Due:* 5 p.m. ET 12/13/16.

*Docket Numbers:* ER17–413–000.

*Applicants:* Southern California Edison Company.

*Description:* § 205(d) Rate Filing: SCE Amendments to WDAT GIP—Smart Inverter & Interconnection Process to be effective 1/23/2017.

*Filed Date:* 11/23/16.

*Accession Number:* 20161123–5081.

*Comments Due:* 5 p.m. ET 12/14/16.

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: November 23, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–28815 Filed 11–29–16; 8:45 am]

**BILLING CODE 6717–01–P**

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

### Sunshine Act Notice

November 28, 2016.

**TIME AND DATE:** 10:00 a.m., Thursday, December 8, 2016.

**PLACE:** The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Portable, Inc.,* Docket No. EAJA 2015–1–M. (Issues include whether the Judge erred by ruling that the Secretary's position was not substantially justified.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

**CONTACT PERSON FOR MORE INFO:** Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

**PHONE NUMBER FOR LISTENING TO MEETING:** 1–(866) 867–4769, Passcode: 129–339.

**Sarah L. Stewart,**

*Deputy General Counsel.*

[FR Doc. 2016–28864 Filed 11–28–16; 4:15 pm]

**BILLING CODE 6735–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[30Day–17–16AQM]**

### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted 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 notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) 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; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) 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; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

**Proposed Project**

Presidential Youth Fitness Program Evaluation—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

In 2013, the Presidential Youth Fitness Program began its first round of funding to elementary, middle and high school PE teachers who applied to the program. A second round of funding began in 2014 and a third in 2015. Each participating school receives support to implement the PYFP for three years. The resources provided to PE teachers include: professional development training, awards for student recognition of fitness achievements, access to a professional learning community and access to FitnessGram® fitness assessment software. For the schools selected to receive PYFP support, the requirements include: (1) Information Technology (IT) manager and PE teacher participation in the FitnessGram® software training, (2) PE teacher participation in PYFP professional development training, (3) conducting FitnessGram® assessments according to the training, (4) recognizing student achievement in fitness and physical activity, (5) confirming continued participation in the program at the end of Years 1 and 2, and (6) participating in evaluation activities, including the submission of required data on an annual basis. The PYFP is designed to supplement the traditional PE course and support physical education (PE) teachers in laying the foundation for students to lead an active life.

CDC plans to conduct the first rigorous evaluation of the PYFP. The evaluation will assess the impact of the program on student, PE teacher and school level outcomes (outcome evaluation) as well as barriers and facilitators to program implementation (process evaluation). Evaluation activities will take place in 11 schools implementing the PYFP and 11 match comparison schools, contributing a total of 82 sixth grade PE classes. Information collection will be conducted in 6 PYFP and 6 match comparison schools in Spring 2017 and 5 PYFP and 5 match comparison schools in Fall 2017. The PYFP schools recruited to participate in the PYFP Evaluation will be identified from a list of schools receiving Round 2 or Round 3 PYFP funding and meeting the following inclusion criteria: (1) Middle school with a sixth grade, (2) sixth grade enrollment of 150 or higher, (3) 50% or more of students receiving free or reduced lunch, and (4) documented completion of PYFP professional development training. Comparison schools will be matched based on criteria 1–3 above as well as location to ensure similar PE policies and standards. The process and outcome evaluation will involve data collection activities with four respondent groups: (1) Students, (2) PE teachers, (3) parents, and (4) school administrators.

The specific aims of the outcome evaluation are to examine how the PYFP impacts student fitness and physical activity, particularly how the program impacts student: (1) Fitness knowledge and health knowledge, (2) attitudes toward physical activity, (3) motivation to be physically active, (4) physical activity levels and (5) fitness. Surveys to be conducted at all schools include the: (1) Paper-based PYFP Student Survey, (2) online PYFP PE Teacher Survey, and (3) online PYFP School Administrator Survey. There are minor differences in the survey instruments depending on whether the school is a PYFP participant or a non-PYFP school. The outcome evaluation will also determine the changes made as a result of the PYFP such as changes at the school level (*e.g.,* improved PE and physical activity policies and practices, increased parent awareness of school PE and physical activity) and changes in PE teaching practices (*e.g.,* integration of fitness education, increased use of fitness assessment tools and improved practices for fitness testing).

The outcome evaluation will include fitness assessments with approximately 2,460 students as part of the standard PE program (1,230 PYFP sixth grade students and 1,230 non-PYFP sixth grade students). Fitness assessments will be conducted at both the beginning and end of the semester using FitnessGram®'s pacer and body composition assessments. Finally, a subset of 6 PYFP and 6 match comparison schools will assess students' physical activity levels by collecting student accelerometry data. Accelerometry will be conducted in a subset of 25 PYFP and 25 non-PYFP classes to capture data from approximately 500 students (250 students from PYFP schools and 250 students from match comparison schools). Accelerometry data collection will involve wearing the device for a week at the beginning and a week at the end of semester and noting hours of wear time and class schedule.

Information collection for the process evaluation will be conducted only in the 11 PYFP schools. The aims of the process evaluation are to describe how PYFP resources were used by teachers and schools, the strategies used by teachers and schools to integrate fitness education and student recognition of fitness achievement into the schools, and barriers and facilitators relevant to PYFP implementation. All PYFP schools will complete cost and time use worksheets. In addition, focus groups with PE teachers, students, and parents will be conducted in a subset of 6 PYFP schools. Focus groups will take place on school grounds during or outside of the school day, depending on availability of a given respondent group.

The information collected for the PYFP evaluation will allow the CDC and partners to assess the impact of the PYFP compared with a traditional PE curriculum and gather information critical for program improvement.

OMB approval is requested for two years. Participation in the PYFP Evaluation is voluntary and there are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hrs) |
|---|---|---|---|---|
| 6th grade students in PYFP Schools | FitnessGram® Data Collection Form | 615 | 2 | 15/60 |
| | Accelerometry Log | 125 | 2 | 30/60 |
| | Student Survey (PYFP Schools) | 615 | 1 | 15/60 |
| | Student Focus Group Moderator Guide | 30 | 1 | 1 |
| PE teachers in PYFP Schools | PE Teacher Survey (PYFP Schools) | 22 | 1 | 25/60 |
| | PE Teacher Focus Group Moderator Guide | 12 | 1 | 1 |
| | PYFP Time Use Worksheet | 6 | 1 | 30/60 |
| School administrators in PYFP Schools | School Administrator Survey (PYFP Schools) | 6 | 1 | 20/60 |
| | PYFP Cost Worksheet | 6 | 1 | 1 |
| Parents of 6th graders enrolled in PE at PYFP Schools. | Parent Focus Group Moderator Guide | 30 | 1 | 1 |
| 6th grade students in non-PYFP Schools | FitnessGram® Data Collection Form | 615 | 2 | 15/60 |
| | Accelerometry Log | 125 | 2 | 30/60 |
| | Student Survey (non-PYFP Schools) | 615 | 1 | 15/60 |
| PE teachers in non-PYFP Schools | PE Teacher Survey (non-PYFP Schools) | 22 | 1 | 25/60 |
| School Administrators in non-PYFP Schools | School Administrator Survey (non-PYFP Schools). | 6 | 1 | 20/60 |

**Leroy A. Richardson,**

*Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2016–28797 Filed 11–29–16; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–17–16BCY; Docket No. CDC–2016–0112]**

### Proposed Data Collection Submitted for Public Comment and Recommendations

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice with comment period.

**SUMMARY:** The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project entitled ''Knowledge, Attitudes, and Practices related to a Domestic Readiness Initiative on Zika Virus Disease.'' This project consists of telephone interviews with participants in Puerto Rico and the domestic U.S.

**DATES:** Written comments must be received on or before January 30, 2017.

**ADDRESSES:** You may submit comments, identified by Docket No. CDC–2016–0112 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

*Instructions:* All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

*Please note:* All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train

personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

**Proposed Project**

Knowledge, Attitudes, and Practices related to a Domestic Readiness Initiative on Zika Virus Disease—New—Office of the Associate Director of Communications (OADC), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Since late 2015, Zika has rapidly spread through Puerto Rico. As of July 2016, there have been 7,286 confirmed cases of Zika in Puerto Rico, with 788 cases among pregnant women and 23 cases of Guillain-Barré caused by Zika. In the continental United States, there have been 1,658 travel-associated cases of Zika. And as of August 2, 2016, there have been 14 locally-acquired Zika cases in Miami, Florida. Due to the urgent nature of this public health emergency, CDC is implementing a Zika prevention communication and education initiative in the continental United States and Puerto Rico.

The CDC requests approval from the Office of Management and Budget (OMB) to conduct an assessment of a domestic U.S. and Puerto Rico-based communication and education initiative aimed at encouraging at-risk populations to prepare and protect themselves and their families from Zika virus infection. As part of the mission of CDC's Domestic Readiness Initiative on the Zika Virus Disease, CDC will assess the following communication and education objectives: (1) Determine the reach and saturation of the initiative's messages in Puerto Rico and 20 U.S. states and Washington, DC; (2) measure the extent to which messages were communicated clearly across multiple channels to advance knowledge and counter misinformation; and (3) monitor individual and community-level awareness, attitudes and intention to follow recommended behaviors.

CDC seeks to collect data over the next six months related to Zika prevention efforts that have been and will be implemented in Puerto Rico and the domestic U.S. Specifically, CDC needs this assessment to ensure that Zika prevention campaigns effectively reach target audiences to educate individuals regarding Zika prevention behaviors. On-going evaluation is an important part of this program because it can inform awareness of campaign activities, how people perceive Zika as a health risk, and assess their uptake of recommended health behaviors after the campaign has been implemented.

These interviews can help articulate motivations for and against engaging in Zika prevention behaviors that are critical for preventing Zika-associated birth defects and morbidities. Implementing changes based on results from this assessment is expected to facilitate program improvement and ensure the most efficient allocation of resources for this public health emergency.

The goal of this project is to determine knowledge, attitudes, and practices related to a new Domestic Readiness Initiative on Zika Virus Disease being launched in the United States (U.S.) mainland and Puerto Rico.

Findings will be used to improve planning, implementation, refinements, and demonstrate outcomes of a Zika Domestic Readiness Initiative communication and education effort. The plan is to conduct up to 3,600 interviews in the domestic U.S. (1,200 immediately following OMB approval, and again at three months and 12 months post-launch) and 3,600 in Puerto Rico at similar timepoints.

As each phase of data is collected, researchers will analyze the data, and generate a report for leaders of the response to offer insights on the delivery of the communication campaign. The information will be used to make recommendations for improving communication and education regarding the prevention and spread of the Zika virus. Information may also be used to develop presentations, reports, and manuscripts to document the communication effort and lessons learned in order to inform future similar communication efforts.

This information collection will allow CDC to assess core components of its Zika response in communicating prevention behaviors and risk messages to the public about vector control services.

The following factors will be assessed:

- Knowledge about Zika virus and related prevention behaviors;
- Self-efficacy in engaging in Zika prevention behaviors;
- Engagement in Zika prevention behaviors (*e.g.,* protective clothing use, condom use, and standing water removal);
- Risk perceptions of Zika.

CDC will conduct telephone interviews with a mix of closed-ended and open-ended questions with individuals domestically in the U.S. and in Puerto Rico. We estimate 7,200 individuals will participate in the project over a six month period.

Results of this project will have limited generalizability. However, results of this evaluation should provide information that can be used to enhance and revise the existing program as well as offer lessons learned to inform infectious disease control programs that use education materials. Authorizing legislation comes from Section 301 of the Public Health Service Act (42 U.S.C. 241). There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| U.S. Domestic Adults | Zika Readiness Initiative Survey | 3,600 | 1 | 12/60 | 720 |
| Puerto Rico Adults | Zika Readiness Initiative Survey | 3,600 | 1 | 12/60 | 720 |
| Total | | 7,200 | | | 1,440 |

**Leroy A. Richardson,**

*Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.*

[FR Doc. 2016–28798 Filed 11–29–16; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

**[CFDA Number: 93.645]**

### Notice of Allotment Percentages to States for Child Welfare Services State Grants

**AGENCY:** Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services.

**ACTION:** Biennial publication of allotment percentages for states under the title IV–B subpart 1, Child Welfare Services State Grants Program.

**SUMMARY:** As required by section 423(c) of the Social Security Act (42 U.S.C. 623(c)), the Department of Health and Human Services is publishing the allotment percentage for each state under the title IV–B subpart 1, Child Welfare Services State Grants Program. Under section 423(a), the allotment percentages are one of the factors used in the computation of the federal grants awarded under the program.

**DATES:** The allotment percentages will be effective for federal fiscal years 2018 and 2019.

**FOR FURTHER INFORMATION CONTACT:** Deborah Bell, Grants Fiscal Management Specialist, Office of Grants Management, Office of Administration, Administration for Children and Families, telephone (202) 401–4611.

**SUPPLEMENTARY INFORMATION:** The allotment percentage for each state is determined on the basis of paragraphs (b) and (c) of section 423 of the Act. These figures are available on the ACF Internet homepage at: *http://www.acf.dhhs.gov/programs/cb/.* The allotment percentage for each State is as follows:

| State | Allotment percentage ** |
|---|---|
| Alabama | 59.23 |
| Alaska * | 41.66 |
| Arizona | 58.86 |
| Arkansas | 58.95 |
| California | 45.44 |
| Colorado | 47.15 |
| Connecticut | [1] 30.00 |
| Delaware | 49.75 |
| District of Columbia | [1] 30.00 |
| Florida | 53.62 |
| Georgia | 57.61 |
| Hawaii * | 50.02 |
| Idaho | 60.23 |
| Illinois | 48.03 |
| Indiana | 56.98 |
| Iowa | 51.63 |
| Kansas | 51.11 |
| Kentucky | 59.34 |
| Louisiana | 54.36 |
| Maine | 55.71 |
| Maryland | 41.06 |
| Massachusetts | 36.19 |
| Michigan | 55.72 |
| Minnesota | 46.82 |
| Mississippi | 62.54 |
| Missouri | 54.87 |
| Montana | 56.55 |
| Nebraska | 48.68 |
| Nevada | 55.79 |
| New Hampshire | 42.77 |
| New Jersey | 37.54 |
| New Mexico | 59.90 |
| New York | 39.59 |
| North Carolina | 57.44 |
| North Dakota | 40.45 |
| Ohio | 54.23 |
| Oklahoma | 53.00 |
| Oregon | 55.26 |
| Pennsylvania | 48.29 |
| Rhode Island | 47.67 |
| South Carolina | 60.12 |
| South Dakota | 51.12 |
| Tennessee | 55.91 |
| Texas | 50.70 |
| Utah | 59.01 |
| Vermont | 49.65 |
| Virginia | 45.19 |
| Washington | 46.36 |
| West Virginia | 60.79 |
| Wisconsin | 52.03 |
| Wyoming | 41.49 |
| American Samoa | 70.00 |
| Guam | 70.00 |
| Puerto Rico | 70.00 |
| N. Mariana Islands | 70.00 |
| Virgin Islands | 70.00 |

* State Percentage = 50 percent of year average divided by the National United States 3-year average.

** State Percentage minus 100 percent yields the IV–B1 allotment percentage.

[1] Allotment Percentage has been adjusted in accordance with Section 423(b)(1).

**Statutory Authority:** Section 423(c) of the Social Security Act (42 U.S.C. 623(c)).

**Mary M. Wayland,**

*Senior Grants Policy Specialist, Division of Grants Policy, Office of Administration.*

[FR Doc. 2016–28770 Filed 11–29–16; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Notice of Issuance of Final Determination Concerning Country of Origin of Computer Notebook Hard Disk Drives

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of final determination.

**SUMMARY:** This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of computer notebook hard disk drives.

**DATES:** The final determination was issued on November 22, 2016. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within December 30, 2016.

**FOR FURTHER INFORMATION CONTACT:** Robert Dinerstein, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade (202–325–0132).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on November 22, 2016, pursuant to subpart B of Part 177, Customs and Border Protection (CBP) Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of computer notebook hard disk drives which may be offered to the United States Government under an undesignated government procurement contract. This final determination, HQ H261623, was issued at the request of Seagate Technology under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP was presented with two scenarios on how the hard disk drives are produced. In the first scenario, the firmware for the hard disk drives is primarily written and installed onto the hard disk drives in the same country. CBP concluded for purposes of U.S. Government procurement, that the country of origin of the notebook hard disk drives will either be Singapore or South Korea. In the second scenario, the firmware is written in a different country from where it is downloaded. In the second scenario, for purposes of U.S. Government procurement, the country of origin of the notebook hard disk drives will be the country where

the components for the devices are finally assembled, either [redacted].

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: November 22, 2016.

**Myles B. Harmon,**

*Acting Executive Director, Regulations and Rulings, Office of Trade.*

**HQ H261623**

November 22, 2016

OT:RR:CTF:VS H261623 RSD

CATEGORY: Origin

Stuart P. Seidel, Esq.
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

RE: U.S. Government Procurement; Country of Origin of Computer Notebook Hard Disk Drives; Substantial Transformation

Dear Mr. Seidel:

This is in response to your letter dated February 6, 2015, on behalf of Seagate Technology (Seagate), of Cupertino, California, requesting a final determination pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection (''CBP'') Regulations (19 CFR Part 177, subpart B). Under these regulations, which implement Title III of the Trade Agreements Act of 1979 (''TAA''), as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or for products offered for sale to the U.S. Government. This final determination concerns the country of origin of the ''Notebook'' family of hard disk storage devices under two scenarios. As a U.S. importer, Seagate is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination. In addition, we have reviewed and granted the importer's request for confidentiality pursuant to section 177.2(b)(7) of the CBP Regulations (19 CFR 177.2(b)(7)), with respect to certain information submitted.

**FACTS:**

The products at issue in this final determination are a family of hard disk drives (HDD) known as ''Notebook'' (''NS''). The NS line currently consists of the following brand names: Ultra Mobile HDD, Laptop Ultrathin HDD, Laptop HDD, and Samsung Spinpoint. You describe two scenarios in which the HDDs will be produced. The HDDs use mechanical and electromagnetic components that are designed or specified by Seagate in one or more of Seagate's five design centers located in the United States. Each family of HDDs consists of approximately ten products offered each year. The annual person hours required to fully design an average recording head and recording media (media), fit for integration into the HDD, was provided along with the various countries that contribute to the design. The design of the head incorporates semiconductor design, magnetic design, mechanical design, and a manufacturing process design into an integrated recording reader and writer. The design of the media integrates thin film magnetics mechanical surface design, and a manufacturing process design. On average, three heads and two media are assembled into a HDD.

The design of each family of HDDs integrates electromagnetic recording position engineering firmware design, ASIC design, and overall system design. Manufacturing and test engineering is also sourced from the design centers. The design for the NS laptop product is mostly conducted by the Singapore Science Park with support from the United States. The design of the Spinpoint product is mostly conducted by the South Korea Design Center with support from the United States.

The HDD components are manufactured internally by Seagate factories located throughout Asia, or externally at Seagate's supply partners throughout Asia. These components are shipped to a HDD assembly site in [ ]. The head disk assembly is assembled from the raw components of magnetic media, read write heads, a head actuator assembly, and an airtight metal enclosure. This assembly takes only a matter of minutes to perform. The head disk assembly is mated to a printed circuit board assembly containing the disc drive electronics. This assembly takes a few seconds. Next, the drive is loaded into the factory testing system and tested. Firmware is downloaded into the drive to facilitate media certification. At this point, the drive is only functional for testing and it can perform no useful disc drive functions at the computer interface. The drive stays in a sequence of a media certification operation for one day depending upon the capacity of the media.

Following successful media qualifications, the drive testing firmware is replaced with a generic basic disc drive firmware solely to allow the drive computer interface functions to be tested. With this firmware, the operation of the disc drive interface is tested. The basic disc drive firmware in the previous step is removed, rendering the device useless for any functional disc drive purpose. After completion of the interface testing, the drive is ''forced blocked'' from label and shipment (so that it is no longer treated as the standard HDD). The drive as shipped from [ ] does not function as a HDD because it lacks firmware and does not have the ability to serve as a storage device without loading the final firmware.

Final assembly and configuration are done in Singapore or South Korea for Scenario I, or in the United States for the second scenario. Once the disk drives have been imported into Singapore, Korea, or the United States, Seagate employees perform: security preparation, visual mechanical inspection, and installation of the firmware for each HDD. The firmware will have all features and functions of the firmware for a standard HDD. The firmware will also include additional code required to configure the firmware to the customer's specifications and requirements. In addition, certain models will have additional security programming such as encryption. The architecture for encryption features was designed in the United States. The encryption installation is performed in Singapore or the United States during the firmware installation. During this time period, the drive is processed for security preparation and the encryption is enabled, the security interface is enabled, debug ports are locked, credentials are loaded, and the certificates are loaded. The firmware, primarily developed and programmed in the United States and South Korea, is installed and tested. After completion of the firmware loading and testing, a final quality assurance inspection is performed; the drive receives a new part number and a label; and it is shipped to Seagate. You explain that a drive cannot function until the firmware is loaded onto it. According to your submission, the purchased value of a fully assembled HDD is approximately 16 to 66 times the value of an assembled recording head, depending on the family, capacity, and the security features.

**ISSUE:**

What is the country of origin of the Notebook HDDs for purposes of U.S. government procurement in the two described scenarios?

**LAW AND ANALYSIS:**

Pursuant to subpart B of Part 177, 19 CFR 177.21 *et seq.,* which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

*See also* 19 CFR 177.22(a).

''The term 'character' is defined as 'one of the essentials of structure, form, materials, or function that together make up and usually distinguish the individual.' '' *Uniden America Corporation* v. *United States,* 120 F. Supp. 2d. 1091, 1096 (citations omitted) (Ct. Int'l Trade 2000), *citing National Hand Tool*

*Corp.* v. *United States,* 16 Ct. Int'l Trade 308, 311 (1992). In *Uniden,* concerning whether the assembly of cordless telephones and the installation of their detachable A/C (alternating current) adapters constituted instances of substantial transformation, the Court of International Trade applied the ''essence test'' and found that ''[t]he essence of the telephone is housed in the base and the handset.''

In *Data General* v. *United States,* 4 Ct. Int'l Trade 182 (1982), the court determined that for purposes of determining eligibility under item 807.00, Tariff Schedules of the United States (predecessor to subheading 9802.00.80, Harmonized Tariff Schedule of the United States), the programming of a foreign PROM (Programmable Read-Only Memory chip) in the United States substantially transformed the PROM into a U.S. article. In programming the imported PROMs, the U.S. engineers systematically caused various distinct electronic interconnections to be formed within each integrated circuit. The programming bestowed upon each circuit its electronic function, that is, its ''memory'' which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. This physical alteration, not visible to the naked eye, could be discerned by electronic testing of the PROM. The court noted that the programs were designed by a U.S. project engineer with many years of experience in ''designing and building hardware.'' In addition, the court noted that while replicating the program pattern from a ''master'' PROM may be a quick one-step process, the development of the pattern and the production of the ''master'' PROM required much time and expertise. The court noted that it was undisputed that programming altered the character of a PROM. The essence of the article, its interconnections or stored memory, was established by programming. The court concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device, possessing a desired distinctive circuit pattern, was no less a ''substantial transformation'' than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern.

In C.S.D. 84–85, 18 Cust. B. & Dec. 1044, CBP stated:

> We are of the opinion that the rationale of the court in the Data General case may be applied in the present case to support the principle that the essence of an integrated circuit memory storage device is established by programming; . . . [W]e are of the opinion that the programming (or reprogramming) of an EPROM results in a new and different article of commerce which would be considered to be a product of the country where the programming or reprogramming takes place.

In *Texas Instruments* v. *United States,* 681 F.2d 778, 782 (CCPA 1982), the court observed that the substantial transformation issue is a ''mixed question of technology and customs law.'' Accordingly, the programming of a device that confers its identity as well as defines its use generally constitutes substantial transformation. *See also* Headquarters Ruling Letter (''HQ'') 558868, dated February 23, 1995 (programming of SecureID Card substantially transforms the card because it gives the card its character and use as part of a security system, and the programming is a permanent change that cannot be undone); HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions that allow it to perform certain functions that prevent piracy of software constitutes substantial transformation); and, HQ 733085, dated July 13, 1990; *but see* HQ 732870, dated March 19, 1990 (formatting a blank diskette does not constitute substantial transformation because it does not add value, does not involve complex or highly technical operations, and does not create a new or different product); and, HQ 734518, dated June 28, 1993 (motherboards are not substantially transformed by the implanting of the central processing unit on the board because, whereas in *Data General* use was being assigned to the PROM, the use of the motherboard has already been determined when the importer imported it).

Essentially, programming an information processing device will not in every case result in a substantial transformation of the device. It will depend on the nature of the programming, as compared to the nature and complexity of the information processing device on which the programming is completed. In other words, installing a relatively simple program on a complex information technology device will generally, by itself, not result in a substantial transformation of the device.

In this case, firmware is installed on the HDDs to enable to them operate. The website ''*techterms.com*'' explains firmware as follows:

> Firmware is a software program or set of instructions programmed on a hardware device. It provides the necessary instructions for how the device communicates with the other computer hardware. But how can software be programmed onto hardware? Good question. Firmware is typically stored in the flash ROM of a hardware device. While ROM is read-only memory, flash ROM can be erased and rewritten because it is actually a type of flash memory.

Additionally, the website *http://pcsupport.about.com/od/termsf/g/Firmware.htm,* notes that firmware is software that is embedded in a piece of hardware. Firmware is simply ''software for hardware.''

In HQ H241362, dated August 14, 2013 published in the **Federal Register** on August 21, 2013, (78 Fed. Reg. 51737), CBP considered whether the programming of HDDs resulted in a substantial transformation of the HDDs. In that particular instance, CBP issued a final determination concerning the country of origin of HDDs and self-encrypting drives produced by Seagate. In that case, Seagate imported fully assembled HDDs from two different countries. The HDDs were designed in the United States, but assembled in one of two other countries from components manufactured by Seagate outside of the United States or obtained by Seagate from a supplier in Asia. The fully assembled HDDs were shipped to the United States, and in their imported condition they could not function as storage media devices. The disk heads could not move, they could not store or retrieve data, and they could not be recognized or listed on a computer system or a network in the United States. In the United States, the imported HDD was unblocked and programmed with two types of firmware. The first type of firmware was Servo firmware, which controlled all motor, preamp and servo function without which the motors media and heads would not operate and the HDD would not work. The second type of firmware was non-security controller firmware which managed all communication between the host and target drives, as well as all data within the drive. This type of firmware permitted data files to be stored on the HDDs media so that the data files could be found and listed within a particular application and allowed the stored data to be saved, retrieved, and overwritten. Consequently, we determined that the firmware caused the imported HDDs to function as digital storage devices. Approximately 80 percent of the work hours spent on combined firmware design was allocated to work in the United States at Seagate's design center, and approximately 20 percent in another country. Combined, the compiled firmware code was approximately 2 MB in size and contained approximately one million lines of code. The firmware loaded onto the HDDs in the United States made them fully functioning generic storage devices. In addition, some of the HDDs were programmed with security controller firmware to allow them to be secured through encryption. The security controller firmware was mostly written in the United States. Because of the nature and the complexity of the firmware, CBP found in HQ H241362 that the installation of the firmware significantly altered the character of the Seagate HDDs. Therefore, the HDDs were considered products of the United States for purposes of U.S. Government procurement.

CBP has also considered a scenario (in HQ H241177 dated December 3, 2013) in which a device was manufactured in one country, the software used to permit that device to operate was written in another country, and the installation of that software occurred in a third country. In that case, switches were assembled to completion in Malaysia and then shipped to Singapore, where EOS software developed in the United States was downloaded. It was claimed that the EOS software enabled the imported switches to interact with other network switches through network switching and routing, and allowed for the management of functions such as network performance monitoring and security, and access control; without this software, the imported devices could not function as Ethernet switches. But, CBP found that the software downloading performed in Singapore did not amount to programming. We explained that programming involves writing, testing and implementing code necessary to make a computer function in a certain way. *See Data General, supra; see also* ''computer

program'', *Encyclopedia Britannica* (2013), (9/19/2013) *http://www.britannica.com/EBchecked/topic/130654/computer-program,* which explains, in part, that ''a program is prepared by first formulating a task and then expressing it in an appropriate computer language, presumably one suited to the application.'' While the programming occurred in the United States, the downloading occurred in Singapore. Given these facts, we found that the country where the last substantial transformation occurred was Malaysia, namely, where the major assembly processes were performed. Therefore, we found that the country of origin for purposes of U.S. Government procurement was Malaysia.

In HQ H240199 dated March 10, 2015, four different scenarios for the production of a computer were presented. In the third scenario, all of the hardware components were assembled in Country A and imported into Country F. The operations that occurred in Country F were that the BIOS and the OS were downloaded. The issue was whether the downloading of the BIOS and OS substantially transformed the notebook computer. We reiterated that programming a device that defines its use generally constitutes a substantial transformation. Software downloading, however, does not amount to programming. Consistent with previous CBP rulings cited above, we found that the BIOS and OS downloading did not result in a substantial transformation in Country F. Given these facts, we found that the country where the last substantial transformation occurred was Country A, where the major assembly processes were performed.

The facts involved in this case are very similar to the facts described in HQ H241362, except that in the second scenario presented, the firmware that is installed on the HDDs is largely written in a country other than the country where it will be installed. Although some of the work in writing the firmware is done in the United States, the overwhelming majority of the time and money expended in developing the firmware was expended in Singapore and not in the United States. In fact, according to the submission, in developing the firmware, more than five times the amount of time and money is expended in Singapore than in the United States. In the second scenario the only major operation that occurs in the United States to produce the finished HDDs, is the installation of the largely foreign written firmware.

For the first scenario, we find that the country of origin of the HDDs will be the country where the firmware is largely written and installed onto the HDDs, Singapore for the NS drives, and South Korea for the Samsung Spinpoint. As in H241362, the firmware, mostly created in either Singapore or South Korea and downloaded in those countries, imparts the essential character of the HDDs. The use of the HDDs is solely dictated by the firmware and it otherwise has no use. However, in the second scenario, the HDDs are assembled in one country, the firmware is largely written in another country, and downloaded in a third country, the United States. While counsel contends that the country of origin of the HDDs should similarly be the country where the firmware is downloaded because the HDD cannot function without the firmware being installed, that is not the correct test used to determine the country of origin of a product. The country of origin of a product is determined based on where the last substantial transformation occurs. As the holdings of HQ H241177 and HQ H240199 make clear, it is CBP's position that mere downloading of software that is written in another country onto an information processing device is not sufficient to be considered a substantial transformation of that device. While the downloading does make the HDD functional, the country where that occurs is not where a substantial transformation occurs. As the entire assembly process occurs in either [ ], we find that the country of origin of the HDDs will either be [ ]. This finding regarding the country of origin of the HDDs will apply both for purposes of government procurement, as well as for country of origin marking.

**HOLDING:**

Based on the facts of this case, in first scenario, we find for purposes of U.S. Government procurement, the country of origin of the Notebook HDDs will either be Singapore or South Korea, where the firmware is both written and installed onto the HDDs. In the second scenario, where the firmware is written in a different country from where it is downloaded onto the HDDs, for purposes of U.S. Government procurement and country of origin marking, the country of origin of the Notebook HDDs will be the country where the last substantial transformation takes place, namely the country where the device components are finally assembled, which in this case will either be [ ].

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Myles B. Harmon,

*Acting Executive Director Regulations and Rulings Office of Trade.*

[FR Doc. 2016–28790 Filed 11–29–16; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF THE INTERIOR

**[FWS–R4–FHC–2016–N208; FVHC98210408710–XXX–FF04G01000]**

## Deepwater Horizon Oil Spill; Draft Louisiana Trustee Implementation Group Restoration Plan #1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds

**AGENCY:** Department of the Interior.

**ACTION:** Notice of availability; reopening of public comment period.

**SUMMARY:** We are reopening the public comment period on the Louisiana Trustee Implementation Group Draft Restoration Plan #1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds (Draft Restoration Plan #1). We opened the public comment period via a November 1, 2016, notice of availability. The public comment period closed on November 28, 2016.

**DATES:** *Comments Due Date:* We will consider public comments received November 1, 2016 through December 9, 2016.

**ADDRESSES:**

*Obtaining Documents:* You may download the Louisiana Trustee Implementation Group Draft Restoration Plan 1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds at any of the following sites:

- *http://www.gulfspillrestoration.noaa.gov*
- *http://www.doi.gov/deepwaterhorizon*
- *http://la-dwh.com*

Alternatively, you may request a CD of the Draft Restoration Plan 1 (see **FOR FURTHER INFORMATION CONTACT**). You may also view the document at any of the public facilities listed at *http://www.gulfspillrestoration.noaa.gov*.

*Submitting Comments:* You may submit comments on the draft document by one of following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov/restoration-areas/louisiana.*
- *Via U.S. Mail:* U.S. Fish and Wildlife Service, P.O. Box 49567, Atlanta, GA 30345.
- Louisiana Coastal Protection & Restoration Authority, ATTN: Liz Williams, P.O. Box 44027, Baton Rouge, LA 70804.

**FOR FURTHER INFORMATION CONTACT:** Liz Williams at *LATIG.la.gov*.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act (NEPA), the Consent Decree, and the Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement, the Federal and State natural resource trustee agencies for the Louisiana Trustee Implementation Group (Trustees) have prepared a Draft Restoration Plan 1: Restoration of Wetlands, Coastal, and Nearshore Habitats; Habitat Projects on Federally Managed Lands; and Birds (Draft Restoration Plan 1). Draft Restoration Plan 1 describes and proposes engineering and design activities for restoration projects intended to continue the process of restoring natural resources and services injured or lost as a result of the *Deepwater Horizon* oil spill, which occurred on or about April 20, 2010, in the Gulf of Mexico.

**Background**

For additional background information, see our original **Federal Register** notice, which opened the comment period (November 1, 2016; 81 FR 75840).

**Invitation To Comment**

The Trustees seek public review and comment on the proposed projects and supporting analysis included in the Draft Restoration Plan 1. 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.

**Authority**

The authority of this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*) and the implementing Natural Resource Damage Assessment regulations found at 15 CFR 990.

**Kevin D. Reynolds,**

*Department of the Interior Deepwater Horizon Case Manager.*

[FR Doc. 2016–28675 Filed 11–29–16; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCON04000 L16100000.DP0000–16X]**

### Notice of Availability of the Record of Decision Adopting U.S. Forest Service's Final Environmental Impact Statement for Oil and Gas Leasing on Lands Administered by the White River National Forest, CO

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the National Environmental Policy Act of 1969 (NEPA), the Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) adopting the Final United States Forest Service's (USFS) ''White River National Forest Oil and Gas Leasing Final Environmental Impact Statement (EIS),'' which identifies the lands available for oil and gas leasing in the White River National Forest, including stipulations to protect surface resources.

**ADDRESSES:** Copies of the ROD are available for public inspection at the BLM Colorado River Valley Field Office, 2300 River Frontage Road, Silt, CO 81652. Interested persons may also review the ROD on the project Web site at *https://eplanning.blm.gov/epl-front-office/eplanning/nepa/nepa_register.do.*

**FOR FURTHER INFORMATION CONTACT:** Greg Larson, Project Manager, at the address above, by telephone at 970–876–9000, or by email at *glarson@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM's ROD formally adopts the USFS, December 2014, White River National Forest Oil and Gas Leasing Final EIS. The Department of the Interior (DOI) and the BLM concur with the selection of a combination of Alternatives B and C as described in the USFS ROD (December 3, 2015). As identified in 40 CFR 1506.3(a), ''[a]n agency may adopt a Federal draft or final . . . [EIS] or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these [the Council on Environmental Quality (CEQ)] regulations.'' The BLM affirms that this Final EIS meets all requirements of the CEQ, DOI and BLM for preparation of an EIS.

Oil and gas leasing on National Forest System Lands is a collaborative process between the USFS and the BLM. The USFS is responsible for making land availability decisions, while the BLM is responsible for issuing and managing oil and gas leases, as described in the Federal Onshore Oil and Gas Leasing Reform Act.

The BLM was a Cooperating Agency in the preparation of the USFS's Final EIS. Per 40 CFR 1506.3(c), the BLM adopts the Final EIS without re-circulating, as the BLM has concluded that its comments and suggestions were incorporated during the NEPA process.

This decision is approved by the Deputy Secretary of DOI; therefore, it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

**Authority:** 40 CFR 1506.6, 40 CFR 1506.10.

**Ruth Welch,**

*BLM Colorado State Director.*

[FR Doc. 2016–28806 Filed 11–29–16; 8:45 am]

**BILLING CODE 4310–JB–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCON04000 L16100000.DP0000–16X]**

### Notice of Availability of the Record of Decision for the Previously Issued Oil and Gas Leases in the White River National Forest, CO

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The Bureau of Land Management (BLM) has prepared a Record of Decision (ROD) based on the analysis in the ''Previously Issued Oil and Gas Leases in the White River National Forest Final Environmental Impact Statement (EIS).'' That EIS addressed the treatment of 65 previously issued oil and gas leases on lands within the White River National Forest (WRNF). By this notice the BLM is announcing the availability of the ROD. On November 17, 2016, the BLM Colorado State Director signed and the Deputy Secretary of the Department of the Interior approved the ROD.

**ADDRESSES:** Copies of the ROD are available for public inspection at the BLM Colorado River Valley Field Office, 2300 River Frontage Road, Silt, CO 81652. Interested persons may also review the ROD on the project Web site

at *https://eplanning.blm.gov/epl-front-office/eplanning/nepa/nepa_register.do.*

**FOR FURTHER INFORMATION CONTACT:** Greg Larson, Project Manager, at the address above, by telephone at (970) 876–9000, or by email at *glarson@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The BLM has developed the Previously Issued Oil and Gas Leases in the White River National Forest EIS (Previously Issued Leases in the WRNF EIS) to address a National Environmental Policy Act (NEPA) deficiency identified by the Interior Board of Land Appeals (IBLA) related to the issuance of oil and gas leases on WRNF lands between the years of 1995 to 2004. In 2007, the IBLA ruled that before including WRNF parcels in an oil and gas lease sale, the BLM must either formally adopt the NEPA analysis completed by the U.S. Forest Service (USFS) or conduct its own NEPA analysis (*Board of Commissioners of Pitkin County,* 173 IBLA 173 (2007)). The BLM canceled the three leases at issue in that case and identified 65 additional leases with effective dates ranging from 1995 to 2012 that the BLM had leased without either adopting applicable USFS NEPA, or preparing its own NEPA analysis. For these 65 existing leases, the most recent USFS decision to make these lands available for oil and gas leasing was analyzed and put forth in the USFS's 1993 Oil and Gas Leasing EIS and ROD. The USFS then adopted its 1993 Oil and Gas Leasing EIS in its 2002 White River National Forest Land and Resource Management Plan.

While the BLM obtained USFS consent before offering and subsequently issuing the 65 leases at issue, it did not adopt the USFS' NEPA analysis or prepare its own analysis. As a result, the BLM determined that the issuance of the leases in question was not in compliance with applicable NEPA requirements, rendering the leases voidable. The BLM therefore determined that additional actions were necessary to reaffirm, modify, or cancel those leases. As part of that determination, the BLM determined that the available USFS NEPA analysis relevant to the 65 leases was no longer adequate due to changes in laws, regulations, policies and conditions since that analysis was finalized in 1993. As a result, the BLM prepared the Previously Issued Leases in the WRNF EIS to determine whether these 65 leases should be cancelled, reaffirmed, or modified with additional or different terms. The ROD announced by this Notice is based on that EIS analysis.

Distinct from this effort, the USFS recently updated its 1993 Oil and Gas Leasing EIS to address future oil and gas leasing availability on WRNF lands and issued a new EIS, the White River National Forest Oil and Gas Leasing Final Environmental Impact Statement (USFS WRNF Oil and Gas Leasing EIS), in December 2014. The USFS signed their Final ROD for this new EIS in December 2015. The recently issued USFS EIS and ROD are forward-looking and do not affect the 65 previously issued leases that the BLM is reexamining; however, the information generated as part of that process was relevant to the BLM's analysis. Therefore, as part of its process, the BLM has incorporated the new USFS analysis into its analysis of the previously issued leases, to the extent practicable.

The BLM considered six alternatives in the Previously Issued Leases in the WRNF EIS, including a *No Action Alternative.* The *No Action Alternative* would reaffirm the lease stipulations on the 65 leases as they were issued. Under this alternative, the BLM would take no action by continuing to administer the leases with their current stipulations. *Alternative 2* would address inconsistencies in some of the existing leases by adding stipulations identified in the USFS 1993 Oil and Gas Leasing EIS that were not attached to eight leases when they were issued. *Alternative 3* would modify the 65 leases to match the stipulations identified for future leasing in the 2014 USFS WRNF Oil and Gas Leasing Final EIS Proposed Action. *Alternative 4* (BLM's Proposed Action) would modify or cancel the 65 leases to match the stipulations and availability decision in the USFS ROD. In areas the USFS identified as open to future leasing, stipulations would be modified to track those found in the most recent USFS decision and all or part of 25 existing leases in areas identified as closed would be cancelled. *Alternative 5* would cancel all 65 leases. For purposes of the BLM's Previously Issued Oil and Gas Leases in the WRNF Final EIS, the BLM identified a combination of *Alternatives 2* and *4* as its *Preferred Alternative.* Under this Preferred Alternative, the BLM would cancel in their entirety 25 leases that are not producing or committed to a unit or communitization agreement, and which overlap with the area identified as closed to future leasing by the USFS Final ROD. The BLM would apply *Alternative 4* stipulations (*i.e.,* those that were identified in the 2015 USFS ROD) to 12 undeveloped (as of Final EIS publication) leases that are within parts of the WRNF identified as open to future leasing, including one expired lease under appeal. It would apply *Alternative 2* stipulations to 27 leases that were producing or committed to a unit agreement or communitization agreement as of Final EIS publication, including four expired leases currently under appeal that had previously been part of the Willow Creek Unit. In addition, one expired lease not subject to appeal would receive no decision. As with *Alternative 4,* the lessee would have to either accept the new stipulations or have the lease cancelled. Cancellation would be accomplished through an administrative process and would require reimbursement of bonus bids and rental payments.

The BLM released the Draft Previously Issued Leases in the WRNF EIS on November 20, 2015 (80 FR 72733), for a 49-day public comment period. During that period, the BLM held three public meetings in communities near the project area: Glenwood Springs, DeBeque and Carbondale, Colorado. The BLM received 60,515 comments during the formal comment period. The BLM worked with cooperating agencies (including the Environmental Protection Agency; USFS; the Colorado Department of Natural Resources, including Colorado Parks and Wildlife; Garfield, Mesa, Pitkin and Rio Blanco counties; the Cities of Glenwood Springs and Rifle; and the Towns of Carbondale, New Castle, Parachute and Silt) to prepare the Previously Issued Leases in the WRNF EIS. The BLM also consulted with the U.S. Fish and Wildlife Service (Service) informally and through a Biological Assessment. In response, the Service issued a consultation memorandum on May 19, 2016, concurring with the BLM effects determinations of ''may affect, but is not likely to adversely affect'' for the following species: Ute ladies'-tresses orchid, Colorado hookless cactus and its critical habitat, Western yellow-billed cuckoo, Green-lineage cutthroat trout, Colorado pikeminnow and its critical habitat, Razorback sucker and its critical habitat, Humpback chub and its critical habitat, Bonytail and its critical habitat, and Canada lynx. In addition, the BLM notified the Colorado State Historic Preservation Office (SHPO) via an informational letter that, pursuant to the

2014 Protocol agreement between the BLM Colorado and the SHPO, this undertaking does not exceed any of the review thresholds requiring SHPO concurrence, and that there will be no adverse effect to historic properties. Finally, the BLM began tribal consultation for the project in April 2014 when the field manager sent a scoping letter via certified mail to the Ute Indian Tribe (Uintah and Ouray Reservation), Ute Mountain Ute Tribe, and Southern Ute Indian Tribe. Consultation and outreach continued through April 22, 2016, when the BLM sent the tribes a letter that identified the Preferred Alternative and summarized cultural resource records within the area of potential effect (including potential Traditional Cultural Properties). The letter also offered the opportunity for comments or clarifications. The BLM will continue to offer opportunities for tribes that may be affected by potential future development of these leases as stipulated under E.O. 13175, November 6, 2000.

The BLM published the Notice of Availability of the Final Previously Issued Leases in the WRNF EIS in the **Federal Register** on August 5, 2016 (81 FR 51936). Publication of the Notice of Availability initiated a 30-day availability period. Even though there was no comment period on the Final EIS, the BLM received a number of comments, all of which were addressed in the ROD as appropriate.

The BLM's ROD for the Previously Issued Leases in the WRNF EIS implements a slightly modified version of the Preferred Alternative, which combines portions of *Alternatives 2* and *4.* The decision applies stipulations described under *Alternative 2* (including minor updates to reflect the 1993 USFS ROD stipulations) to all leases within the analysis area that are producing or committed to a unit or agreement. For those leases within the analysis area that are not producing or committed to a unit, *Alternative 4* applies (canceling or modifying leases to match the 2015 USFS Final ROD) with one exception: The decision cancels in their entirety all undeveloped leases that overlap the area identified as closed to future leasing by the USFS's 2015 Final ROD. The difference between lease cancellations under *Alternative 4* in the BLM's Previously Issued Leases in the WRNF EIS and this ROD is that seven leases having acres retained under *Alternative 4* are cancelled in full under the ROD. There are no partial lease cancellations. On August 15, 2016, the Middleton Creek Unit was automatically contracted, retroactively effective August 20, 2015, according to Section 2(e) of the unit agreement and as per BLM regulation at 43 CFR 3186.1. As a result of the contraction, three leases (COC67147, COC70013, and COC70361) considered producing in the Final EIS are now considered undeveloped, and thus will be offered modified lease terms consistent with *Alternative 4* of the Final EIS.

Under the BLM's Previously Issued Oil and Gas Lease ROD, 25 undeveloped leases are administratively cancelled in full, 12 undeveloped leases remain open with new stipulations applied under *Alternative 4* (with lessee consent), 20 producing or committed leases are reaffirmed or modified as described under *Alternative 2,* four expired leases currently under appeal that had previously been part of the Willow Creek Unit (held by production) would have *Alternative 2* applied if the appeal is successful, and one expired lease subject to appeal would have *Alternative 4* stipulations applied if it were reauthorized. No decision is made for three leases that have expired or terminated and are not subject to appeal.

The BLM's Previously Issued Oil and Gas Lease ROD takes agency and public comments into account and best meets the BLM's mandate to protect important resources while allowing oil and gas development. For reaffirmed or modified leases, upon receiving an application to approve an action on the ground, the BLM will conduct site-specific analysis of impacts through the subsequent NEPA reviews and analyses that will be necessary before the BLM issues any permit or approval for oil and gas development.

This decision is approved by the Deputy Secretary for the U.S. Department of the Interior; therefore it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

**Authority:** 40 CFR 1506.6, 40 CFR 1506.10.

**Gregory P. Shoop,**

*BLM Colorado Associate State Director.*

[FR Doc. 2016–28807 Filed 11–29–16; 8:45 am]

**BILLING CODE 4310–JB–P**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Meeting of the Judicial Conference Committee on Rules of Practice and Procedure

**AGENCY:** Judicial Conference of the United States, Committee on Rules of Practice and Procedure.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Committee on Rules of Practice and Procedure will hold a meeting on January 3, 2017. The meeting will be open to public observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

**DATES:** January 3, 2017.

**TIME:** 9:00 a.m.–5:00 p.m.

**ADDRESSES:** Special Proceedings Courtroom, U.S. District Court, 401 Washington Street, Phoenix, Arizona 85003.

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Womeldorf, Rules Committee Secretary, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: November 23, 2016.

**Rebecca A. Womeldorf,**

*Rules Committee Secretary.*

[FR Doc. 2016–28761 Filed 11–29–16; 8:45 am]

**BILLING CODE 2210–55–P**

## DEPARTMENT OF JUSTICE

### Foreign Claims Settlement Commission

**[F.C.S.C. Meeting and Hearing Notice No. 10–16]**

### Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR part 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings as follows:

*Wednesday, December 14, 2016:* 10:00 a.m.—Consolidated oral hearing on Objection to Commission's Proposed Decisions in Claim Nos. LIB–III–036, LIB–III–037, LIB–III–038, LIB–III–039, LIB–III–040, LIB–III–041, LIB–III–042, LIB–III–043, LIB–III–044, LIB–III–045, LIB–III–046, LIB–III–047, LIB–III–048, LIB–III–049, LIB–III–050, LIB–III–051, LIB–III–052, LIB–III–053, LIB–III–054, LIB–III–055, LIB–III–056, LIB–III–057, LIB–III–058, LIB–III–059, LIB–III–060, LIB–III–061, LIB–III–062, LIB–III–063, LIB–III–064, LIB–III–065, LIB–III–066, LIB–III–068, LIB–III–069, LIB–III–070, LIB–III–071, LIB–III–072, LIB–III–073, LIB–III–074, LIB–III–075, LIB–III–076, LIB–III–077, LIB–III–078, LIB–III–079, LIB–III–080, LIB–III–081, LIB–III–082, LIB–III–083, LIB–III–084, LIB–III–086 and LIB–III–087.

*Status:* Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Patricia M. Hall, Foreign Claims Settlement Commission, 600 E Street NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

**Brian M. Simkin,**

*Chief Counsel.*

[FR Doc. 2016–28898 Filed 11–28–16; 4:15 pm]

**BILLING CODE 4410–BA–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Leave Supplement to the American Time Use Survey

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Bureau of Labor Statistics (BLS) sponsored information collection request (ICR) proposal titled, ''Leave Supplement to the American Time Use Survey,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 30, 2016.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201607-1220-004* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–BLS, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks PRA authority for the Leave Supplement to the American Time Use Survey (ATUS) information collection. The leave supplement includes questions about workers' access to and use of paid and unpaid leave, job flexibility, and their work schedules. Information collected in the supplement will be published as a public use data set to facilitate research on numerous topics, such as: The characteristics of people with paid and unpaid leave; occupations with the greatest and least access to paid leave; reasons workers are able to take leave from their jobs; how many workers have access to job flexibilities such as the ability to work from home or adjust their start and stop times; and the relationship between workers' time use and their access to job flexibilities. The supplement would survey eligible wage and salary workers aged 15-years and up from a nationally representative sample of approximately 2,060 sample households each month. The BLS Authorizing Statue authorizes this information collection. *See* 29 U.S.C. 1.

This proposed information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. For additional information, see the related notice published in the **Federal Register** on July 26, 2016 (81 FR 48850).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB ICR Reference Number 201607–1220–004. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* DOL–BLS.

*Title of Collection:* Leave Supplement to the American Time Use Survey.

*OMB ICR Reference Number:* 201607–1220–004.

*Affected Public:* Individuals or Households.

*Total Estimated Number of Respondents:* 5,950.

*Total Estimated Number of Responses:* 5,950.

*Total Estimated Annual Time Burden:* 496 hours.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: November 25, 2016.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2016–28820 Filed 11–29–16; 8:45 am]

**BILLING CODE 4510–24–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Work Opportunity Tax Credit

**ACTION:** Notice.

**SUMMARY:** On November 30, 2016, the Department of Labor (DOL) will submit the Employment and Training Administration (ETA) sponsored information collection request (ICR) revision titled, ''Work Opportunity Tax

Credit,'' to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before December 30, 2016.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201611-1205-003* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

**FOR FURTHER INFORMATION CONTACT:** Contact Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks approval under the PRA for revisions to the Work Opportunity Tax Credit (WOTC) information collection. The WOTC is a Federal tax credit available to employers for hiring individuals from certain target groups who have consistently faced significant barriers to employment. The data collected under this submission are necessary for effective Federal administration of the WOTC program, including allowing the ETA and Internal Revenue Service (IRS) to oversee state administration of the tax credit. This ICR covers six WOTC processing and administrative program forms: (1) Form ETA–9058, Report 1—Certification Workload and Characteristics of Certified Individuals; (2) Form ETA 9061, Individual Characteristics; (3) Form ETA–9062, Conditional Certification; (4) Form ETA–9063, Employer Certification; (5) Form ETA–9065, Agency Declaration of Verification Results Worksheet; and (6) Form ETA–9175, Long-term Unemployment Recipient Self-Attestation. This information collection has been classified as a revision, because the ETA has modified two of the forms. Form ETA–9160 changes would combine certain questions, clarify instructions by referencing a recent IRS Notice, and update Empowerment Zone information. Form ETA–9175 updates would remove questions related to date of birth and Federal Employer Identification Number. Internal Revenue Code sections 51 and 3111(e) authorize the WOTC program. *See* 26 U.S.C. 51 and 3111(e).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0371. The current approval is scheduled to expire on November 30, 2016; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 4, 2016 (81 FR 51497).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0371. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Agency:* DOL–ETA.

*Title of Collection:* Work Opportunity Tax Credit.

*OMB Control Number:* 1205–0371.

*Affected Public:* State, Local, and Tribal Governments; Individuals or Households; and Private Sector—businesses or other for-profits, farms, and not-for-profit institutions.

*Total Estimated Number of Respondents:* 2,010,874.

*Total Estimated Number of Responses:* 5,840,620.

*Total Estimated Annual Time Burden:* 1,960,777 hours.

*Total Estimated Annual Other Costs Burden:* $0.

Dated: November 23, 2016.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2016–28803 Filed 11–29–16; 8:45 am]

**BILLING CODE 4510–FN–P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit applications received under the Antarctic Conservation Act of 1978, Public Law 95–541.

**SUMMARY:** The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

**DATES:** Interested parties are invited to submit written data, comments, or

views with respect to this permit application by December 30, 2016. This application may be inspected by interested parties at the Permit Office, address below.

**ADDRESSES:** Comments should be addressed to Permit Office, Room 755, Division of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

**FOR FURTHER INFORMATION CONTACT:** Nature McGinn, ACA Permit Officer, at the above address or *ACApermits@nsf.gov*.

**SUPPLEMENTARY INFORMATION:** The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

**APPLICATION DETAILS:**

*Permit Application: 2017–032.*

*Applicant:* James Droney, Vice President, Itinerary and Destination Planning, The World of Residense II, Ltd., 1551 Sawgrass Corporate Parkway, Suite 200, Fort Lauderdale, FL 33323.

*Activity for Which Permit is Requested:* Enter Antarctic Specially Protected Area. The applicant proposes to enter Antarctic Specially Protected Area (ASPA) No. 155, Cape Evans, Ross Island; ASPA No. 157 Backdoor Bay, Cape Royds, Ross Island; ASPA No. 158, Hut Point, Ross Island; and ASPA No. 159, Cape Adare, Borchgrevink Coast in order to visit the Historic Sites and Monuments from the Heroic Age of Antarctic exploration located within the ASPAs. The applicant is planning a voyage to the Ross Sea region aboard M/V THE WORLD and will offer visits to the ASPAs listed above as shore excursions. Experienced expedition staff will supervise groups of no more than 40 people at any time in the ASPAs. The visits will be conducted according to the ASPA management plans and codes of conduct. No more than eight people at a time will enter the huts at Cape Evans, Cape Royds, and Hut Point; no more than four people at a time will enter Borchgrevink's hut at Cape Adare. No food products will be taken into the ASPAs. Care will be taken to avoid damage to historic artifacts and to avoid disturbance of any wildlife in the ASPAs. Entry into ASPAs will be on foot. When visiting ASPA 157, entry into the terrestrial and marine areas of ASPA 121 will be avoided.

*Location:* ASPA No. 155, Cape Evans, Ross Island; ASPA No. 157 Backdoor Bay, Cape Royds, Ross Island; ASPA No. 158, Hut Point, Ross Island; and ASPA No. 159, Cape Adare, Borchgrevink Coast.

*Dates:* January 20–31, 2017.

**Nadene G. Kennedy,**

*Polar Coordination Specialist, Division of Polar Programs.*

[FR Doc. 2016–28753 Filed 11–29–16; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2016–0016]**

### Information Collection: NRC Forms 366, 366A, and 366B, ''Licensee Event Report''

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of submission to the Office of Management and Budget; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, NRC Forms 366, 366A, and 366B, ''Licensee Event Report.''

**DATES:** Submit comments by December 30, 2016.

**ADDRESSES:** Submit comments directly to the OMB reviewer at: Vlad Dorjets, Desk Officer, Office of Information and Regulatory Affairs (3150–0104), NEOB–10202, Office of Management and Budget, Washington, DC 20503; telephone: 202–395–7315, email: *oira_submission@omb.eop.gov*.

**FOR FURTHER INFORMATION CONTACT:** David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2016–0016 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0016.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML16235A382. The supporting statement and NRC Forms 366, 366A, and 366B, ''Licensee Event Report,'' are available in ADAMS under Accession No. ML16273A113.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov*.

*B. Submitting Comments*

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *http://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

#### II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44

U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, NRC Forms 366, 366A, and 366B, ''Licensee Event Report.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on July 27, 2016 (81 FR 49280).

1. *The title of the information collection:* NRC Forms 366, 366A, and 366B, ''Licensee Event Report''.

2. *OMB approval number:* 3150–0104.

3. *Type of submission:* Extension.

4. *The form number if applicable:* NRC Forms 366, 366A, and 366B.

5. *How often the collection is required or requested:* As needed per § 50.73 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Licensee event report system.'' The total number of reports is estimated to be 350 per year.

6. *Who will be required or asked to respond:* The holder of an operating license under 10 CFR part 50 or a combined license under 10 CFR part 52 (after the Commission has made the finding under § 52.103(g)).

7. *The estimated number of annual responses:* The total number of reports is estimated to be 350 per year.

8. *The estimated number of annual respondents:* 100.

9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* The total estimated burden for completing Licensee Event Reports is 28,000 hours (based on 80 hours for each of 350 reports).

10. *Abstract:* Part of the NRC's function is to license and regulate the operation of commercial nuclear power plants to ensure protection of public health and safety and the environment in accordance with the Atomic Energy Act of 1954 (the Act) as amended. In order for the NRC to carry out these responsibilities, licensees must report significant events in accordance with § 50.73, so that the NRC can evaluate the events to determine what actions, if any, are warranted to ensure protection of public health and safety or the environment. Section 50.73 requires reporting on NRC Forms 366, 366A, and 366B.

Dated at Rockville, Maryland, this 22nd day of November, 2016.

For the Nuclear Regulatory Commission.

**David Cullison,**

*NRC Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 2016–28812 Filed 11–29–16; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2016–0001]**

### Sunshine Act Meeting Notice

**DATE:** Week of November 28, 2016.

**PLACE:** OWFN 18 B11, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Closed.

**Week of November 28, 2016**

*Monday, November 28, 2016*

10:00 a.m. Discussion of Management and Personnel Issues (Closed Ex. 2 & 9)

* * * * *

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov*.

* * * * *

*Additional Information*

By a vote of 3–0 on November 23, 2016, the Commission determined pursuant to U.S.C. 552b(e) and '9.107(a) of the Commission's rules that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting was held on November 28, 2016.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or email *Brenda.Akstulewicz@nrc.gov* or *Patricia.Jimenez@nrc.gov*.

Dated: November 28, 2016.

**Denise L. McGovern,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2016–28840 Filed 11–28–16; 11:15 am]

**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

### Hispanic Council on Federal Employment

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Notice of meeting.

**SUMMARY:** The Hispanic Council on Federal Employment (Council) meeting will be held on Tuesday, December 20, 2016 at the following time and location shown below:

*Time:* 11:00 a.m. to 12:30 p.m.

*Location:* Via Teleconference, Dial-in Number: (866) 858–3615, Participant Passcode: 41624240.

The Council is an advisory committee composed of representatives from Hispanic organizations and senior government officials. Along with its other responsibilities, the Council shall advise the Director of the Office of Personnel Management on matters involving the recruitment, hiring, and advancement of Hispanics in the Federal workforce. The Council is co-chaired by the Director of the Office of Personnel Management and the Chair of the National Hispanic Leadership Agenda (NHLA).

The meeting is open to the public. Please contact the Office of Personnel Management at the address shown below if you wish to present material to the Council at any of the meetings. The manner and time prescribed for presentations may be limited, depending upon the number of parties that express interest in presenting information.

**FOR FURTHER INFORMATION CONTACT:** Zina Sutch, Director, for the Office of Diversity and Inclusion, Office of Personnel Management, 1900 E St. NW., Suite 5H35, Washington, DC 20415. Phone (202) 606–2433 FAX (202) 606–6012 or email at *Zina.Sutch@opm.gov*.

U.S. Office of Personnel Management.

**Beth F. Cobert,**

*Acting Director.*

[FR Doc. 2016–28786 Filed 11–29–16; 8:45 am]

**BILLING CODE 6820–B2–P**

## OFFICE OF PERSONNEL MANAGEMENT

### OMB Emergency Review and 60-Day Notice for Comment for Existing Information Collection Request: OPM Form 1203–FX, Occupational Questionnaire OMB No. 3206–0040

**AGENCY:** Office of Personnel Management (OPM).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces the Office of Personnel Management (OPM) has submitted to the Office of Management and Budget (OMB) a request for emergency clearance and review for existing information collection request for the OPM Form 1203–FX, Occupational Questionnaire. Approval of the Occupational Questionnaire, OPM Form 1203–FX is necessary to collect information from applicants to determine their level of qualification when applying for Federal employment. This also serves as the 60-Day Notice for review for full clearance.

**DATES:** Comments on this proposal for emergency review must be received on or before January 30, 2017. We respectfully request OMB take action within five (5) calendar days from the close of this **Federal Register** Notice on the request for emergency review. Comments are encouraged and will be accepted until December 31, 2016.

**ADDRESSES:** Send or deliver comments to: Program Management Office (ICR), Automated System Management Group, U.S. Office of Personnel Management, 1900 E Street NW., Room 2445A, Washington, DC 20415.

*For Information Regarding Administrative Coordination Contact:* Charles Cutshall, Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building NW., Room 10235, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** For copies of this proposal, contact the Automated Systems Management Group, Office of Personnel Management, 1900 E. Street NW., Washington, DC 20415, Attention: Program Management Office (ICR) or via email to *Help@USAStaffing.gov.* Please include your complete mailing address or email address with your request.

**SUPPLEMENTARY INFORMATION:** Emergency clearance is requested given the current form expires December 2016 and continuation of operations is necessary.

Approximately 11,400,000 respondents will complete the Occupational Questionnaire. We estimate it takes 40 minutes to complete the OPM 1203–FX. Electronic submissions are processed through secure Government Web sites maintained by OPM, and in cases where respondents are unable to submit via Web site, via a fax server for electronic processing. The total annual estimated burden is 7,600,000 hours.

Comments are particularly invited on:

- Whether this information is necessary for the proper performance of functions on the Office of Personnel Management, and whether it will have practical utility;
- whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and
- ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**Beth Cobert,**

*Acting Director, U.S. Office of Personnel Management.*

[FR Doc. 2016–28785 Filed 11–29–16; 8:45 am]

**BILLING CODE 6325–38–P**

## POSTAL SERVICE

### Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Effective date:* November 30, 2016.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Reed, 202–268–3179.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 36 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–24, CP2017–44.

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2016–28793 Filed 11–29–16; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Effective date:* November 30, 2016.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Reed, 202–268–3179.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 35 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–23, CP2017–43.

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2016–28792 Filed 11–29–16; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail Express, Priority Mail, & First-Class Package Service Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Effective date:* November 30, 2016.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Reed, 202–268–3179.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express, Priority Mail, & First-Class Package Service Contract 13 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–22, CP2017–42.

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2016–28791 Filed 11–29–16; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Effective date:* December 30, 2016.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Reed, 202–268–3179.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail & First-Class Package Service Contract 37 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–25, CP2017–45.

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2016–28794 Filed 11–29–16; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79386; File No. SR–BatsBYX–2016–35]**

### Self-Regulatory Organizations; Bats BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Ministerial and Corrective Changes to Rules 11.9, 11.13, 11.16, 11.22, and 11.27

November 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 16, 2016, Bats BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange filed a proposal to make ministerial and corrective changes to Exchange Rules 11.9(a)(2), 11.13(b), 11.16(g)(4), 11.22(f), and 11.27(a)(7)(A)(i)2.

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to make ministerial and corrective changes to Exchange Rules 11.9(a)(2), 11.13(b), 11.16(g)(4), 11.22(f), and 11.27(a)(7)(A)(i)2. First, the exchange proposes to harmonize the description of BYX Market Orders under Exchange Rule 11.9(a)(2) with the description of an identical order type on the Exchange's affiliate, Bats BZX Exchange, Inc. (''BZX''). Exchange Rule 11.9(a)(2) currently states that a BYX Market Order that is designated as BYX Only[5] with a time-in-force of Day[6] will be cancelled if, when reaching the Exchange, it cannot be executed on the System[7] in accordance with Exchange Rule 11.13(a)(4) unless the reason that such BYX Market Order cannot be executed is because it is entered into the System and the NBO (NBB) is greater (less) than the Upper (Lower) Price Band, in which case such order will be posted by the System to the BYX Book, *and priced* at the Upper (Lower) Price Band, and re-priced as set forth in Rule 11.18(e)(5)(B). This mirrors the description of BZX Market Orders under BZX Rule 11.9(a)(2), but for the BZX rule stating that the BZX Market Order in the circumstance described in the text would be posted by the System to the BZX Book, and *displayed* at the Upper (Lower) Price Band. Therefore, in order to make the description of market orders identical under both rules, the Exchange proposes to replace the phrase ''and priced'' with the term ''displayed.[8]

Second, the Exchange proposed to amend Rule 11.13(b) to correct an incorrect cross reference. Exchange Rule 11.13(b) states that depending on the instructions set by the User[9] when the incoming order was originally entered, if a market or marketable limit order has not been executed in its entirety pursuant to Exchange Rule 11.13(a) above, the order shall be eligible for additional processing under one or more of the routing options listed under paragraph (a)(3) of Rule 11.13. The reference to paragraph (a)(3) of Rule 11.13 is incorrect as the routing options

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] *See* Exchange Rule 11.9(c)(4).

[6] *See* Exchange Rule 11.9(b)(2).

[7] *See* Exchange Rule 1.5(aa).

[8] *See* Securities Exchange Act Release No. 73875 (December 18, 2014), 79 FR 77552 (December 24, 2014) (SR–BATS–2014–068).

[9] *See* Exchange Rule 1.5(cc).

are listing under paragraph (b)(3) of Rule 11.13. Therefore, the Exchange proposes to replace reference to paragraph (a)(3) with paragraph (b)(3).

Third, the Exchange proposes to amend Rule 11.16(g)(4) to delete an unnecessary cross reference. Exchange Rule 11.16(a)(4) states that ''[t]he pass-through of any compensation to a Member in accordance with this subparagraph (g) is unrelated to any other claims for compensation that are made in accordance with, and subject to the limits of, subparagraph (d) of this Rule 11.16.'' The Exchange now proposes to delete reference to ''11.16'' as a specific reference to the rule is not integral nor necessary to the meaning or application of Rule 11.16 generally.[10]

Fourth, the Exchange proposes to amend Rule 11.22(f) to delete a description of the Latency Monitoring data product, which the Exchange ceased to offer in May 2015. The Exchange determined that the customer demand at that time did not warrant the infrastructure and ongoing maintenance expense required to support the product.

Lastly, the Exchange proposes to amend Rule 11.27(a)(7)(A)(i)2. to correct a typographical error by replacing the phrase ''one of more'' with ''one or more''.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [11] in general, and furthers the objectives of Section 6(b)(5) of the Act [12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes the proposed changes promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system because they seek to correct an incorrect cross-reference and typographical error, harmonize identical rules with the Exchange's affiliates, as well as eliminate a reference to a market data product that is no longer provided. The Exchange notes the changes to Exchange Rules 11.9(a)(2), 11.13(b), 11.16(a)(4), and 11.27(a)(7)(A)(i)2. are ministerial and do not alter the applications of each rule. In addition, the deletion of references to the Latency Monitoring Data product removes references to a product the Exchange no longer provides and that the Exchange is not required by any rule or regulation to offer. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. On the contrary, the proposed rule change will have no impact on competition as it is simply makes ministerial and corrective changes while not altering the meaning or application of each rule.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (A) Significantly affect the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) by its terms, become operative for 30 days from the date on which it was filed or such shorter time as the Commission may designate it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and paragraph (f)(6) of Rule 19b–4 thereunder,[14] the Exchange has designated this rule filing as non-controversial. The Exchange has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

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: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsBYX–2016–35 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 No. SR–BatsBYX–2016–35. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only

[10] Removal of the rule reference would also harmonize the rule language with similar rule of the Exchange's affiliates, Bats EDGA Exchange, Inc. and Bats EDGX Exchange, Inc. SR–Bats–EDGX–2016–65 and SR-BatsEDGA–2016–28.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4.

information that you wish to make available publicly. All submissions should refer to File No. SR–BatsBYX–2016–35 and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28776 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79391; File No. SR–NSCC–2016–803]**

## Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Advance Notice To Accelerate Its Trade Guaranty, Add New Clearing Fund Components, Enhance Its Intraday Risk Management, Provide for Loss Allocation of ''Off-the-Market Transactions,'' and Make Other Changes

November 23, 2016.

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'') [1] and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act''),[2] notice is hereby given that on October 25, 2016, National Securities Clearing Corporation (''NSCC'' or the ''Corporation'') filed with the Securities and Exchange Commission (''Commission'') the advance notice SR–NSCC–2016–803 (''Advance Notice'') as described in Items I, II and III below, which Items have been prepared primarily by the clearing agency.[3] The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons.

### I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This Advance Notice consists of amendments to NSCC's Rules & Procedures (''Rules'') [4] in order to (i) accelerate NSCC's trade guaranty from midnight of one day after trade date (''T+1'') to the point of trade comparison and validation for bilateral submissions or to the point of trade validation for locked-in submissions, (ii) add three new components to the Clearing Fund formula and eliminate the current Specified Activity charge from the Clearing Fund formula, (iii) amend Procedure II to remove language that permits NSCC to delay processing and reporting for certain index receipt transactions, (iv) enhance NSCC's current intraday mark-to-market margin process and clarify the circumstances and criteria for its intraday risk management monitoring and intraday collections of mark-to-market margin, (v) introduce a new loss allocation provision for any trades that fall within the proposed definition of ''Off-the-Market Transactions'' and (vi) make a technical change to Procedure XV to remove the reference to ID Net Subscribers, 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*

NSCC has not received any written comments relating to this proposed rule change. NSCC will notify the Commission of any written comments it receives.

*(B) Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act*

Description of Change

(i) Accelerate the NSCC Trade Guaranty

Pursuant to Addendum K of the Rules, NSCC currently guarantees the completion of trades that are cleared and settled through NSCC's Continuous Net Settlement (''CNS'') [5] system (''CNS trades'') and through its Balance Order Accounting Operation [6] (''Balance Order trades'') that have reached the later of midnight of T+1 or midnight of the day they are reported to Members.[7] NSCC proposes to amend its Rules in order to guarantee the completion of CNS trades and Balance Order trades upon comparison and validation for bilateral submissions to NSCC or upon validation for locked-in submissions to NSCC. Validation refers to the process whereby NSCC validates a locked-in trade, or compares and validates a bilateral trade, to confirm such trade has sufficient and correct information for clearance and settlement processing. For purposes of this description in the proposed rule change, the process of comparing and validating bilateral submissions and the process for validating locked-in submissions are collectively referred to as ''trade validation.''

NSCC has previously shortened the time at which its trade guaranty applied to trades in response to processing developments and risk management considerations and to follow industry settlement cycles.[8] Since implementation of the current trade guaranty policy, the marketplace has experienced significant change. The proposed accelerated trade guaranty and related proposed changes described herein would benefit the industry by mitigating counterparty risk and enhancing counterparties' ability to assess that risk by having NSCC become the central counterparty to CNS trades and by applying the trade guaranty to Balance Order trades at an earlier point in the settlement cycle.

The transfer of counterparty credit risk from Members to NSCC at an earlier point in the settlement cycle facilitates a shortened holding period of bilateral credit risk for counterparties by transferring the obligation onto NSCC, which is better equipped to manage that counterparty credit risk, including potential systemic impact, compared to the counterparties themselves.

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[15] 17 CFR 200.30–3(a)(12).

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] On October 25, 2016, NSCC filed this Advance Notice as a proposed rule change (SR–NSCC–2016–005) with the Commission pursuant to Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1) and Rule 19b–4, 17 CFR 240.19b–4. A copy of the proposed rule change is *available at http://www.dtcc.com/legal/sec-rule-filings.aspx.*

[4] Capitalized terms not defined herein are defined in the Rules, *available at http://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[5] CNS and its operation are described in Rule 11 and Procedure VII.

[6] The Balance Order Accounting Operation is described in Rule 5 and Procedure V. NSCC does not become a counterparty to Balance Order trades, but it does provide a trade guaranty to the receive and deliver parties that remains effective through close of business on the originally scheduled settlement date.

[7] Today, shortened process trades, such as same-day and next-day settling trades, are already guaranteed upon comparison or trade recording processing.

[8] *See* Securities Exchange Act Release Nos. 44648 (August 2, 2001), 66 FR 42245 (August 10, 2001) (SR–NSCC–2001–11); 35442 (March 3, 1995), 60 FR 13197 (March 10, 1995) (SR–NSCC–95–02); 35807 (June 5, 1995), 60 FR 31177 (June 13, 1995) (SR–NSCC–95–03); and 27192 (August 29, 1989), 54 FR 37010 (approving SR–NSCC–87–04, SR–MCC–87–03, and SR–SCCP–87–03 until December 31, 1990).

In order to implement this proposed change, NSCC would amend Addendum K of its Rules [9] to provide that CNS trades and Balance Order trades would be guaranteed by NSCC at the point of trade validation.[10]

NSCC also proposes to clarify in Addendum K [11] that the guaranty of obligations arising out of the exercise or assignment of options that are settled at NSCC is not governed by Addendum K [12] but by a separate arrangement between NSCC and The Options Clearing Corporation, as referred to in Procedure III of the Rules.[13]

(ii) Proposed Enhancements to NSCC's Clearing Fund Formula

In conjunction with accelerating the trade guaranty, NSCC would enhance its Clearing Fund formula to address the risks posed by the expanded trade guaranty. Specifically, NSCC proposes to amend Procedure XV [14] (Clearing Fund Formula and Other Matters) to include three new components: The Margin Requirement Differential (''MRD''), the Coverage Component and the Intraday Backtesting Charge.

NSCC also proposes to add to Procedure XV [15] a description of the enhanced intraday mark-to-market component of the Clearing Fund formula that clarifies the circumstances and criteria for the assessment of an intraday mark-to-market call. In addition, NSCC proposes to delete the Specified Activity charge, a component of the Clearing Fund formula that mitigates shortened cycle risk (that is, the risk of the trade guaranty attaching prior to collection of daily Clearing Fund). This charge would no longer be necessary because the MRD would mitigate those same risks.

A more detailed description of the foregoing changes follows:

A. The Required Deposit and the Accelerated Trade Guaranty

NSCC collects Required Deposits from all Members as margin to protect NSCC against losses in the event of a Member's default. The objective of the Required Deposit is to mitigate potential losses to NSCC associated with liquidation of the Member's portfolio if NSCC ceases to act for a Member (hereinafter referred to as a ''default''). NSCC determines Required Deposit amounts using a risk-based margin methodology that is intended to capture market price risk. The methodology uses historical market moves to project or forecast the potential gains or losses on the liquidation of a defaulting Member's portfolio, assuming that a portfolio would take three days to liquidate or hedge in normal market conditions. The projected liquidation gains or losses are used to determine the Member's Required Deposit, which is calculated to cover projected liquidation losses to be at or above a 99 percent confidence level (the ''Coverage Target''). The aggregate of all Members' Required Deposits constitutes NSCC's Clearing Fund, which NSCC would be able to access if a defaulting Member's own Required Deposit is insufficient to satisfy losses to NSCC caused by the liquidation of the Member's portfolio.

NSCC calculates and collects Required Deposits from Members daily. Each Member's daily Required Deposit is calculated based on the end-of-day positions from the prior day and is generally collected by 10:00 a.m. ET. NSCC's current trade guaranty does not generally attach to trades until midnight of T+1, after Required Deposits reflecting these trades have been collected. Therefore, Members' Required Deposits are generally sufficient to cover projected liquidation losses for guaranteed trades. However, under the accelerated trade guaranty proposal, NSCC's trade guaranty would attach to current-day trades immediately upon trade validation, before Required Deposits reflecting these trades have been collected (which NSCC refers to herein as the ''coverage gap'').[16] Therefore, Members' Required Deposits may not be sufficient to cover the projected liquidation losses of trades guaranteed by NSCC upon trade validation, and NSCC, absent the proposed Clearing Fund formula enhancements, could incur a loss associated with those trades if it ceases to act for a Member.

B. Addition of the MRD to the Clearing Fund Formula

The MRD is designed to help mitigate the risks posed to the Corporation by day-over-day fluctuations in a Member's portfolio by forecasting future changes in a Member's portfolio based on a historical look-back at each Member's portfolio over a given time period. A Member's portfolio may fluctuate significantly from one trading day to the next as the Member executes trades throughout the day. Currently, daily fluctuations in a Member's portfolio resulting from such trades do not pose any additional or different risk to NSCC because those trades are not guaranteed by NSCC until a Required Deposit reflecting such trades is collected by NSCC. However, under the accelerated trade guaranty proposal, trades would be guaranteed by NSCC upon trade validation and therefore may result in large un-margined intraday portfolio fluctuations during the coverage gap. The MRD would increase Members' Required Deposits by an amount calculated to cover forecasted fluctuations in Members' portfolios, based upon historical activity.

The MRD would be calculated and charged on a daily basis as a part of each Member's Required Deposit and consists of two components: The ''MRD VaR'' and the ''MRD MTM.'' The MRD VaR looks at historical day-over-day positive changes in the start of day (''SOD'') volatility component of a Member's Required Deposit [17] (''Volatility Charge'') over a 100-day look-back period and would be calculated to equal the exponentially weighted moving average (''EWMA'') of such changes to the Member's Volatility Charge during the look-back period. The MRD MTM looks at historical day-over-day increases to the SOD mark-to-market component of a Member's Required Deposit [18] over a 100-day look-back period and would be calculated to equal the EWMA of such changes to the Member's SOD mark-to-market component during the look-back period. The MRD is calculated to equal the sum of MRD VaR and MRD MTM times a multiplier calibrated based on backtesting results. NSCC has determined that a 100-day look-back period would provide it with a sufficient time series to reflect current market conditions.

By addressing the day-over-day changes to each Member's SOD Volatility Charge and SOD mark-to-market component, the MRD would help mitigate the risks posed to the Corporation by un-margined day-over-day fluctuations to a Member's portfolio resulting from intraday trading activity

[9] *Supra* note 4.

[10] The proposed accelerated trade guaranty would not apply to items not currently guaranteed today.

[11] *Supra* note 4.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] The coverage gap is the period between the time that NSCC would guarantee a trade and the time that NSCC would collect additional margin to cover such trade.

[17] The volatility component of the Clearing Fund formula for CNS trades and Balance Order trades is described in Procedure XV, Sections I.(A)(1)(a) and I.(A)(2)(a), respectively.

[18] The SOD mark-to-market component of the Clearing Fund formula for CNS trades consists of Regular Mark-to-Market and ID Net Mark-to-Market, which are described in Procedure XV, Sections I.(A)(1)(b) and I.(A)(1)(c), respectively. The SOD mark-to-market component of the Clearing Fund formula for Balance Order trades is described in Procedure XV, Section I.(A)(2)(b).

that would be guaranteed during the coverage gap.

C. Addition of the Coverage Component to the Clearing Fund Formula

The ''Coverage Component'' is designed to mitigate the risks associated with a Member's Required Deposit being insufficient to cover projected liquidation losses to the Coverage Target by adjusting a Member's Required Deposit towards the Coverage Target. The Corporation would face increased exposure to a Member's un-margined portfolio as a result of the proposed accelerated trade guaranty and would have an increased need to have each Member's Required Deposit meet the Coverage Target. The Coverage Component would supplement the MRD by preemptively increasing a Member's Required Deposit in an amount calculated to forecast potential deficiencies in the margin coverage of a Member's guaranteed portfolio. The preemptive nature of the Coverage Component differentiates it from the Regular Backtesting Charge and the Intraday Backtesting Charge, both of which are reactive measures to increase the Member's Required Deposit to above the Coverage Target.

The Coverage Component would be calculated and charged on a daily basis as a part of each Member's Required Deposit. To calculate the Coverage Component, NSCC would compare the simulated liquidation profit and loss of a Member's portfolio, using the actual positions in the Member's portfolio and the actual historical returns on the security positions in the portfolio, against the sum of each of the following components of the Clearing Fund formula: The Volatility Charge, the MRD, the Illiquid Charge and the Market Maker domination charge (collectively, the ''Market Risk Components''), to determine if there were any deficiencies between the amounts collected by these components and the simulated profit and loss of the Member's portfolio that would have been realized had it been liquidated during a 100-day look-back period. NSCC would then determine a daily ''peak deficiency'' amount for each Member equal to the maximum deficiency over a rolling 10 business day period for the preceding 100 days. The Coverage Component would be calculated to equal the EWMA of the peak deficiencies over the 100-day look-back period.

In working to bring each Member's Required Deposit towards the Coverage Target by preemptively collecting an amount designed to cover projected liquidation profit and loss of a Member's portfolio, including the trades guaranteed during the coverage gap, NSCC would further mitigate the risks posed to it by the proposed accelerated trade guaranty.

D. Addition of the Intraday Backtesting Charge to the Clearing Fund Formula

NSCC employs daily backtesting to determine the adequacy of each Member's Required Deposit. NSCC compares the Required Deposit [19] for each Member with the simulated liquidation profit and loss using the actual positions in the Member's portfolio and the actual historical returns on the security positions in the portfolio. NSCC investigates the cause(s) of any backtesting deficiencies. As a part of this investigation, NSCC pays particular attention to Members with backtesting deficiencies that bring the results for that Member below the Coverage Target to determine if there is an identifiable cause of repeat backtesting deficiencies. NSCC also evaluates whether multiple Members experience backtesting deficiencies for the same underlying reason. Upon implementation of the accelerated trade guaranty, NSCC would employ a similar backtesting process on an intraday basis to determine the adequacy of each Member's Required Deposit. However, instead of backtesting a Member's Required Deposit against the Member's SOD portfolio, NSCC would use portfolios from two intraday time slices.[20]

1. Calculation of the Intraday Backtesting Charge

The objective of the Intraday Backtesting Charge is to increase Required Deposits for Members that are likely to experience intraday backtesting deficiencies on the basis described above by an amount sufficient to maintain such Member's intraday backtesting coverage above the Coverage Target. Members that maintain consistent end of day positions but have a high level of intraday trading activity pose risk to NSCC if they were to default intraday.

Because the intraday trading activity and size of the intraday backtesting deficiencies vary among impacted Members, NSCC must assess an Intraday Backtesting Charge that is specific to each impacted Member. To do so, NSCC examines each impacted Member's historical intraday backtesting deficiencies observed over the prior 12-month period to identify the five largest intraday backtesting deficiencies that have occurred during that time. The presumptive Intraday Backtesting Charge amount would equal that Member's fifth largest historical intraday backtesting deficiency, subject to adjustment as further described below. NSCC believes that applying an additional margin charge equal to the fifth largest historical intraday backtesting deficiency to a Member's Required Deposit would have brought the Member's historically observed intraday backtesting coverage above the Coverage Target.[21]

The Intraday Backtesting Charge would only be applicable to those Members whose overall 12-month trailing intraday backtesting coverage falls below the Coverage Target.

Although the fifth largest historical backtesting deficiency for a Member would be used as the Intraday Backtesting Charge in most cases, NSCC would retain discretion to adjust the charge amount based on other circumstances that might be relevant for assessing whether an impacted Member is likely to experience future backtesting deficiencies and the estimated size of such deficiencies. Examples of relevant circumstances that could be considered by NSCC in calculating the final, applicable Intraday Backtesting Charge amount include material differences among the Member's five largest intraday backtesting deficiencies observed over the prior 12-month period, variability in the net settlement activity after the collection of the Member's Required Deposit and observed market price volatility in excess of the Member's historical Volatility Charge. Based on NSCC's assessment of the impact of these circumstances on the likelihood, and estimated size, of future intraday backtesting deficiencies for a Member, NSCC may, in its discretion, adjust the Intraday Backtesting Charge for such Member in an amount that NSCC determines to be more appropriate for maintaining such Member's intraday backtesting results above the Coverage Target.

The resulting Intraday Backtesting Charge would be added to the Required

[19] For backtesting comparisons, NSCC uses the Required Deposit amount without regard to the actual collateral posted by the Member.

[20] Intraday time slices are subject to change based upon market conditions and would include the positions from SOD plus any additional positions up to that time.

[21] Intraday backtesting would include 500 observations per year (twice per day over 250 observation days). Each occurrence of a backtesting deficiency would reduce a Member's overall backtesting coverage by 0.2 percent (1 exception/500 observations). Accordingly, an Intraday Backtesting Charge equal to the fifth largest backtesting deficiency would have brought backtesting coverage up to 99.2 percent.

Deposit for such Member and would be imposed on a daily basis for a one-month period.

In order to differentiate the Backtesting Charge assessed on the start of the day portfolio from the Backtesting Charge assessed on an intraday basis, NSCC would amend the Rules by adding a defined term ''Regular Backtesting Charge'' to Procedure XV, Section I.(B)(3).[22]

2. Communication With Members and Imposition of the Intraday Backtesting Charge

If NSCC determines that an Intraday Backtesting Charge should apply to a Member who was not assessed an Intraday Backtesting Charge during the immediately preceding month or that the Intraday Backtesting Charge applied to a Member during the previous month should be increased, NSCC would notify the Member on or around the 25th calendar day of the month prior to the assessment of the Intraday Backtesting Charge or prior to the increase to the Intraday Backtesting Charge, as applicable, if not earlier.

NSCC would impose the Intraday Backtesting Charge as an additional charge applied to each impacted Member's Required Deposit on a daily basis for a one-month period and would review each applied Intraday Backtesting Charge each month. If an impacted Member's trailing 12-month intraday backtesting coverage exceeds the Coverage Target (without taking into account historically imposed Intraday Backtesting Charges), the Intraday Backtesting Charge would be removed.

E. Removal of the Specified Activity Charge From the Clearing Fund Formula

Currently, NSCC collects a Specified Activity charge, which is designed to cover the risk posed to NSCC by transactions that settle on a shortened cycle.[23] Such transactions pose an increased risk to NSCC because these trades settle on a shortened settlement cycle and may be guaranteed by NSCC prior to the collection of margin on them. The Specified Activity charge currently mitigates this risk by increasing the Required Deposit for a Member in relation to the number of Specified Activity trades submitted by the Member to NSCC over a 100-day look-back period. However, the risk posed to NSCC by Specified Activity would no longer be unique to such trade activity—the proposed accelerated trade guaranty would result in a similar risk to NSCC. The addition of the MRD and Coverage Components to the Clearing Fund formula would mitigate the risks posed by trades guaranteed by NSCC prior to the collection of margin on those trades. As a result, NSCC proposes to eliminate the Specified Activity charge because imposing a separate Specified Activity charge would no longer be necessary once the MRD and Coverage Components are added to the Clearing Fund formula.

F. Enhanced Intraday Mark-to-Market Margining

NSCC proposes to enhance its current intraday margining to further mitigate the intraday coverage gap risk that may be introduced to the Corporation as a result of the proposed accelerated trade guaranty. By way of background, NSCC currently collects a SOD mark-to-market margin, which is designed to mitigate the risk arising out of the value change between the contract/settlement value of a Member's open positions and the current market value, as part of its Clearing Fund formula. A Member's SOD mark-to-market margin is calculated and collected as part of a Member's daily Required Deposit based on the Member's prior end-of-day positions. The SOD mark-to-market component of the daily Required Deposit is calculated to cover a Member's exposure due to market moves and/or trading and settlement activity by bringing the portfolio of open positions up to the current market value. However, because the SOD mark-to-market component is calculated only once daily using the prior end-of-day positions and prices, it will not cover a Member's exposure arising out of any intraday changes to position and market value in a Member's portfolio. Accordingly, NSCC currently collects intraday mark-to-market margin from Members to cover additional risk exposure arising out of intraday position and market value changes to the Member's portfolio if the additional risks are sufficiently large to warrant the collection of an intraday margin.

NSCC has determined that it is not necessary to collect intraday margin from every Member that experiences an intraday mark-to-market change because the Volatility Charge already collected as part of Members' daily Required Deposits is calculated to cover projected changes in the contract/settlement value of a Member's portfolio and likely cover intraday changes to a Member's portfolio. However, in certain instances, Members may have intraday mark-to-market changes that are significant enough that NSCC is exposed to an increased risk of loss as a result of such Member's intraday activities. In particular, NSCC measures each Member's intraday mark-to-market exposure against the Volatility Charge. NSCC collects an intraday mark-to-market amount from any Member that has an intraday mark-to-market exposure that meets or exceeds a threshold percentage as compared to the Member's Volatility Charge. NSCC believes that such Members pose an increased risk of loss to the Corporation because the coverage provided by the Volatility Charge, which is designed to cover estimated losses to a portfolio over a specified time period, would be exhausted by an intraday mark-to-market exposure so large that the Member's Required Deposit would potentially be unable to absorb further intraday losses to the Member's portfolio.

In order to further mitigate the risk posed to NSCC by the proposed accelerated trade guaranty, NSCC is proposing to enhance its collection of intraday mark-to-market margin. NSCC would impose the intraday mark-to-market margin amount at a lower threshold. Currently, NSCC makes an intraday mark-to-market margin call if a Member's intraday mark-to-market exposure meets or exceeds 100 percent of such Member's Volatility Charge; however, such threshold may be reduced by NSCC during volatile market conditions. With this proposal, NSCC would make an intraday margin call if a Member's intraday mark-to-market exposure meets or exceeds 80 percent of such Member's Volatility Charge, where such threshold may still be reduced by NSCC during volatile market conditions. This proposed change would serve to collect intraday margin earlier and more proactively preserve the coverage provided by a Member's Volatility Charge and Required Deposit.

In addition, NSCC would monitor intraday changes to Member's mark-to-market exposure at regular intervals to further mitigate the risk posed to NSCC by the accelerated trade guaranty. By doing so, NSCC would be able to make intraday margin calls more frequently to those Members whose intraday mark-to-market exposures exceed the Volatility Charge threshold. Enhancing the collection of the intraday mark-to-market amount so that it occurs earlier and more frequently would allow NSCC to reduce the amount of uncovered risk during the coverage gap and would therefore further mitigate the risk posed to the Corporation by the accelerated trade guaranty.

NSCC proposes to amend Procedure XV to include a description of the

[22] *Supra* note 4.

[23] Examples of these trades can include next day settling trades, same day settling trades, cash trades or sellers' options.

enhanced intraday mark-to-market margin charge that clarifies the circumstances and criteria for the assessment of an intraday mark-to-market call. This would ensure that Members are aware that the Corporation regularly monitors and considers intraday mark-to-market as part of its regular Clearing Fund formula.

G. Adjustments to the Calculation of the Excess Capital Premium Component

The Excess Capital Premium [24] is designed to address spikes in a Member's Required Deposit based upon any one day of activity. It is not designed to provide additional Required Deposits over an extended period of time. Currently, the Excess Capital Premium for a Member is calculated based upon the Member's Clearing Fund Required Deposit and the Member's excess net capital. With the addition of the MRD and the Coverage Component, NSCC proposes to exclude these charges from the calculation of the Excess Capital Premium. The MRD and the Coverage Component all utilize a historical look-back period, which accounts for the risk of such activity well after the relevant trades have settled. Risks related to such trades would be reflected in increased amounts assessed for these components over the subsequent time periods. If these components are included in the calculation of the Excess Capital Premium, especially during periods following an increase in activity, then the increased MRD and Coverage Component could lead to more frequent Excess Capital Premium charges over an extended period of time. This is not the intended purpose of the Excess Capital Premium and could place an unnecessary burden on Members.

(iii) Proposed Changes to Procedure II (Trade Comparison and Recording Service)

Next day settling index receipts may be guaranteed prior to the collection of margin reflecting such trades and thus carry a very similar risk as Specified Activity trades described above. More specifically, because these trades are settled on the day after they are received and validated by NSCC, NSCC currently attaches its guaranty to them at the time of validation, prior to the collection of a Required Deposit that reflects such trades. Unlike the risk from Specified Activity trades, which is mitigated by the Specified Activity charge, the risk for next day settling index receipts is currently mitigated by permitting NSCC to delay the processing and reporting of these trades if a Member's Required Deposit is not paid on time. However, like the risk associated with Specified Activity, under the proposed rule change, this risk would generally be mitigated by the addition of the MRD and the Coverage Component. Therefore, NSCC proposes to amend Procedure II [25] (Trade Comparison and Recording Service) to remove the language that permits NSCC to delay the processing and reporting of next day settling index receipts until the applicable margin on these transactions is paid.

(iv) Loss Allocation Provision for Off-the-Market Transactions

NSCC proposes to introduce a new loss allocation provision for any trades that fall within the proposed definition of ''Off-the-Market Transactions'' in order to limit NSCC's exposure to certain trades that have a price that differs significantly from the prevailing market price for the underlying security at the time the trade is executed. This provision would apply in the event that NSCC ceases to act for a Member that engaged in Off-the-Market Transactions and only to the extent that NSCC incurs a net loss in the liquidation of such Transactions.[26]

NSCC would define ''Off-the-Market Transactions'' as either a single transaction or a series of transactions settled within the same cycle with greater than $1 million in gross proceeds and either higher or lower than the most recently observed market price by a percentage amount based on market conditions and factors that impact trading behavior of the underlying security, including volatility, liquidity and other characteristics of such security.

The proposed rule change would establish the loss allocation for Off-the-Market Transactions. NSCC would allocate any losses to NSCC resulting from the liquidation of any guaranteed, open Off-the-Market Transaction of a defaulted Member directly and entirely to the surviving counterparty to that transaction. Losses would be allocated to counterparties in proportion to their specific Off-the-Market Transaction gain and would be allocated only to the extent of NSCC's loss; however, no allocation shall be made if the defaulted Member has satisfied all requisite intraday mark-to-market margin assessed by NSCC with respect to the Off-the-Market Transaction.[27]

This proposed change would allow NSCC to mitigate the risk of loss associated with guaranteeing these Off-the-Market Transactions. The proposal recognizes that applying the accelerated trade guaranty to transactions whose price significantly differs from the most recently observed market price could inappropriately increase the loss that NSCC may incur if a Member that has engaged in Off-the-Market Transactions defaults and its open, guaranteed positions are liquidated. Members not involved in Off-the-Market Transactions, or not involved in Off-the-Market Transactions that result in losses to NSCC, would not be included in this process. This exclusion would apply only to losses that are attributable to Off-the-Market Transactions and would not exclude Members from other obligations that may result from any loss or liabilities incurred by NSCC from a Member default.

In order to implement this proposed change, NSCC would amend Rule 4 [28] (Clearing Fund) to provide that, if a loss or liability of NSCC is determined by NSCC to arise in connection with the liquidation of any Off-the-Market Transactions, such loss or liability would be allocated directly to the surviving counterparty to the Off-the-Market Transaction that submitted the transaction to NSCC for clearing. NSCC would also amend Rule 1 [29] (Definitions and Descriptions) to include a definition of Off-the-Market Transactions.

(v) Technical Proposed Rule Change

NSCC is proposing a change to Procedure XV [30] to clarify the calculation of the Regular Mark-to-Market component for CNS transactions. NSCC's historical and current policy for the calculation of any mark-to-market component of the Clearing Fund calculation for CNS trades and Balance Order trades is that where a credit is derived from a Member's mark-to-

[24] The Excess Capital Premium is a charge imposed on a Member when the Member's Required Deposit exceeds its excess net capital, as described in Procedure XV.

[25] *Supra* note 4.

[26] A net loss on liquidation of the Off-the-Market Transaction means that the loss on liquidation of the Member's portfolio exceeds the collected Required Deposit of the Member and such loss is attributed to the Off-the-Market Transaction. Such loss would be allocated directly and entirely to the Member that submitted the Off-the-Market Transaction, or on whose behalf the Off-the-Market Transaction was submitted, to NSCC; however, no allocation would be made if such Member has satisfied all applicable intraday mark-to-market margin charges assessed by NSCC with respect to the Off-the-Market Transaction.

[27] A Member's Off-the-Market Transaction that has been marked to market is, by definition, no longer an Off-the-Market Transaction when the mark-to-market component of the Member's Required Deposit is satisfied.

[28] *Supra* note 4.

[29] *Id.*

[30] *Id.*

market calculation, the value of the calculation is adjusted to zero. When NSCC implemented the ID Net service,[31] a provision was added to Procedure XV[32] that explicitly stated this policy as it relates to CNS transactions of subscribers to the ID Net service. This change inadvertently created an implication that the calculation of Regular Mark-to-Market credit for Members who were not ID Net Subscribers would not be set to zero. NSCC is proposing to revise the applicable provision to remove the reference to ID Net Subscribers.

Expected Effect on Risks to the Clearing Agency, Its Participants and the Market

The proposed rule changes would mitigate Member's counterparty risks and would enhance Members' ability to assess that risk by having NSCC become the central counterparty to CNS trades and by applying the trade guaranty to Balance Order trades at an earlier point in the settlement cycle.

Although the transfer of counterparty credit risk from Members to NSCC at an earlier point in the settlement cycle facilitates a shortened holding period of bilateral credit risk for the Members, it does increase risk to NSCC. However, as discussed below, NSCC believes that it is better equipped to manage that counterparty credit risk, including potential systemic impact, compared to the counterparties themselves.

Management of Identified Risks

The proposal is designed to mitigate counterparty risk while still protecting NSCC and its membership.

The proposed rule changes to (i) add the new components to the Clearing Fund formula and (ii) enhance the intraday mark-to-market margin process would allow NSCC to appropriately collect additional margin to mitigate the exposure presented to NSCC by the accelerated trade guaranty. The proposal to introduce a new loss allocation provision for Off-the-Market Transactions would help NSCC to limit its exposure to Off-the-Market Transactions.

Specifically, the proposal to add the MRD, the Coverage Component and the Intraday Backtesting Charge to the Clearing Fund formula and to collect intraday mark-to-market margin at a lower threshold would mitigate the exposure presented to NSCC by the accelerated trade guaranty and permit NSCC to enhance its margin requirements to better limit its credit exposures to participants under normal market conditions.

In addition, NSCC's proposal to expand its current intraday margin collection to include (a) the collection of intraday mark-to-market margin at a lower threshold and (b) the collection of the Intraday Backtesting Charge would further enhance its intraday monitoring and its ability to measure credit exposures at least once a day.

Similarly, the proposed rule changes to introduce a new loss allocation provision for any trades that fall within the proposed definition of Off-the-Market Transactions would help NSCC to limit its exposure to certain trades that have a price that differs significantly from the most recently observed market price for the underlying security. Therefore, the reduction of NSCC's exposure to Off-the-Market Transactions would assist NSCC in responding to a Member default and would minimize potential losses to NSCC and its non-defaulting Members.

NSCC has also taken actions outside of the proposals described in this filing to strengthen its liquidity resources and to enable it to cover its total liquidity needs, including any liquidity needs that would arise from the accelerated trade guaranty. NSCC calculates its liquidity need by assuming the failure of the Member (including the simultaneous default of the Member's affiliated family) that has the largest net settlement debit in extreme but plausible market conditions.[33] Although the proposal would increase the number of days for which NSCC would be required, under its Rules, to guarantee settlement to include T and T+1 trades, the Rules currently provide that it may, although it is not legally obligated to, optionally guarantee these trades. Given NSCC's role in promoting safety, soundness and stability in the U.S. equities markets, NSCC currently includes these trades in its daily liquidity need analyses to account for the circumstances where this optional guaranty would be called upon. NSCC has never actually experienced a liquidity shortfall in the close out of a defaulted Member.

NSCC measures the potential liquidity impact of the accelerated trade guaranty on a daily basis. NSCC has enhanced its liquidity resources through the implementation of NSCC's supplemental liquidity deposit (''SLD'') requirements.[34] NSCC's SLD requirements were designed to require Members with historically elevated options activity to provide supplemental liquidity deposits in advance of and in anticipation of options expiry periods, as well as to accept voluntary pre-funded supplemental liquidity deposits from other Members who anticipate elevated liquidity needs during these periods. As such, the SLD requirements provide NSCC with the needed liquidity resources to address any liquidity shortfalls that may be experienced under the accelerated trade guaranty settlement cycle. Furthermore, NSCC has established a liquidity program to raise prefunded liquidity through the issuance and private placement of short-term, unsecured notes (''Prefunded Liquidity Program''), which may consist of a combination of commercial paper notes and extendible notes.[35] Proceeds from the Prefunded Liquidity Program further supplement NSCC's existing default liquidity risk management resources.

Consistency With the Clearing Supervision Act

The objectives and principles 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.[36]

The proposal to accelerate the time that NSCC's trade guaranty attaches to trades submitted to it for clearing has been designed to promote robust risk management, promote safety and soundness, reduce systemic risks and support the stability of the broader financial system in furtherance of the Clearing Supervision Act.

Specifically, NSCC would provide a trade guaranty to CNS trades and Balance Order trades at an earlier point in the settlement cycle. The proposed rule changes would mitigate counterparty risk and would enhance NSCC Members' ability to assess that risk by having NSCC become the central counterparty to CNS trades and by applying the trade guaranty to Balance Order trades at an earlier point in the settlement cycle. The transfer of

[31] NSCC's ID Net service is defined further in Rule 65. Rules, *supra* note 4. *See* Securities Exchange Act Release No. 57901 (June 2, 2008), 73 FR 32373 (June 6, 2008) (SR–NSCC–2007–14).

[32] *Supra* note 4.

[33] Every day NSCC measures the liquidity obligations of each of NSCC's Members by taking the sum of their purchase obligations on that day from CNS and for the following three settlement days, and then, taking into account certain adjustments, assumptions and offsets, NSCC identifies the largest Member liquidity need on each day and, determines if the available liquidity resources are adequate to cover that largest liquidity need or if there is a projected liquidity shortfall.

[34] Securities Exchange Act Release No. 70999 (December 5, 2013), 78 FR 75413 (December 11, 2013) (SR–NSCC–2013–02).

[35] Securities Exchange Act Release No. 75730 (August 19, 2015), 80 FR 51638 (August 25, 2015) (SR–NSCC–2015–802).

[36] 12 U.S.C. 5464(b).

counterparty credit risk from Members to NSCC at an earlier point in the settlement cycle facilitates a shortened holding period of bilateral credit risk for the counterparties by transferring the obligation onto NSCC, which is better equipped to manage that counterparty credit risk, including potential systemic impact, compared to the counterparties themselves. Therefore, NSCC believes the proposal to accelerate the trade guaranty would promote robust risk management, promote safety and soundness, reduce systemic risks and support the stability of the broader financial system, consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act cited above.

The proposed rule changes to enhance the Clearing Fund formula and to introduce a new loss allocation provision for Off-the-Market Transactions have been designed to promote robust risk management and promote safety and soundness in furtherance of the Clearing Supervision Act. In conjunction with the enhanced trade processing in the form of the accelerated trade guaranty, the proposed additional Clearing Fund components and enhancements to NSCC's current intraday mark-to-market margin process would allow NSCC to appropriately manage its risk by collecting additional margin to mitigate the exposure presented to NSCC by the accelerated trade guaranty. Additionally, the proposal to introduce a new loss allocation provision for any trades that fall within a proposed definition of ''Off-the-Market Transactions'' would help NSCC to limit its exposure to certain trades that have a price that differs significantly from the most recently observed market price for the underlying security. Together, the collection of additional margin and the reduction of NSCC's exposures to ''Off-the-Market Transactions'' would assist NSCC in responding to a Member default and would minimize potential losses to NSCC and its non-defaulting Members. Therefore, NSCC believes the proposed enhancements to the Clearing Fund formula and the introduction of an Off-the-Market Transaction allocation process would also promote robust risk management and promote safety and soundness, consistent with objectives and principles of Section 805(b) of the Clearing Supervision Act, cited above.

NSCC believes that the proposal is also consistent with Rules 17Ad–22(b)(1) and (b)(2), promulgated under the Act. Rule 17Ad–22(b)(1) requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to measure its credit exposures to its participants at least once a day and limit its exposures to potential losses from defaults by its participants under normal market conditions so that the operations of NSCC would not be disrupted and non-defaulting participants would not be exposed to losses that they cannot anticipate or control.[37] NSCC's proposal to expand its current intraday margin collection to include (a) the collection of intraday mark-to-market margin at a lower threshold and (b) the collection of the Intraday Backtesting Charge would further enhance its intraday monitoring and its ability to measure credit exposures at least once a day. The proposal to enhance the amount of margin collected from each Member would help NSCC to limit its exposure to potential losses from defaults by its participants under normal market conditions and reduce risk of loss mutualization to the NSCC membership. Similarly, the proposal to introduce a new loss allocation provision for Off-the-Market Transactions would also help NSCC to limit its exposure to potential losses from defaults by its participants under normal market conditions. Therefore, NSCC believes the proposals are consistent with the requirements of Rule 17Ad–22(b)(1), promulgated under the Act, cited above.

Rule 17Ad–22(b)(2) requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to ''use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements.'' [38] The proposal to add the MRD, the Coverage Component and the Intraday Backtesting Charge to the Clearing Fund formula and to collect intraday mark-to-market margin at a lower threshold in order to mitigate the exposure presented to NSCC by the accelerated trade guaranty would enable NSCC to enhance its margin requirements to better limit its credit exposures to participants under normal market conditions. Therefore, NSCC believes the proposed changes are consistent with the requirements of Rule 17Ad–22(b)(2), promulgated under the Act, cited above.

The proposed changes to NSCC's Clearing Fund formula and the intraday margin process are also designed to be consistent with Rules 17Ad–22(e)(4) and (e)(6) of the Act, which were recently adopted by the Commission.[39] Rule 17Ad–22(e)(4) will require NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those exposures arising from its payment, clearing, and settlement processes.[40] NSCC's proposal to expand its current intraday margin collection to include (a) the collection of intraday mark-to-market margin at a lower threshold and (b) the collection of the Intraday Backtesting Charge would enhance its ability to identify, measure, monitor and manage its credit exposures to participants. The proposal to enhance the amount of margin NSCC collected from each Member and to introduce a new loss allocation provision for Off-the-Market Transactions would further help NSCC to manage its credit exposures to participants and those exposures arising from its payment, clearing, and settlement processes. Therefore, NSCC believes these proposals are consistent with the requirements of Rule 17Ad–22(e)(4), promulgated under the Act, cited above.

Rule 17Ad–22(e)(6) will require NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that is monitored by management on an ongoing basis and regularly reviewed, tested, and verified.[41] The proposal to add the MRD, the Coverage Component and the Intraday Backtesting Charge to the Clearing Fund formula and to collect intraday mark-to-market margin at a lower threshold would help NSCC to cover its credit exposures to its participants by establishing a risk-based margin system that is monitored by management on an ongoing basis and regularly reviewed, tested, and verified. Therefore, NSCC believes this proposal is consistent with the requirements of Rule 17Ad–22(e)(6), promulgated under the Act, cited above.

[37] 17 CFR 240.17Ad–22(b)(1).

[38] 17 CFR 240.17Ad–22(b)(2).

[39] The Commission adopted amendments to Rule 17Ad–22, including the addition of new section 17Ad–22(e), on September 28, 2016. *See* Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14). The amendments to Rule 17Ad–22 become effective on December 12, 2016. *Id.* NSCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with new section (e) of Rule 17Ad–22 by April 11, 2017. *Id.*

[40] *See* Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14).

[41] *Id.*

Implementation Timeframe

Pending Commission approval, Members would be advised of the implementation date of this proposal through issuance of an NSCC Important Notice. NSCC expects to run the proposed changes in a test environment for a parallel period of at least three months prior to implementation. Details and dates regarding such test period would be communicated to Members through an NSCC Important Notice.

**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.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NSCC–2016–803 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2016–803. 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 Web site (*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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2016–803 and should be submitted on or before December 15, 2016.

By the Commission.

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016–28771 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79387; File No. SR–NYSEArca–2016–150]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 7.16

November 23, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 15, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend NYSE Arca Equities Rule 7.16 (Short Sales) to eliminate the option for a short sale order to include an instruction that it be rejected or cancelled if it is required to be re-priced. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.16 (Short Sales) (''Rule 7.16'') to eliminate the option for a short sale order to include an instruction that it be rejected or cancelled if it is required to be re-priced.

Rule 7.16(f)(5)(B) currently provides that an ETP Holder may mark individual short sale orders to be rejected on arrival, or cancelled if resting, if required to be adjusted to a Permitted Price while a symbol is subject to the Short Sale Price Test.[4] The Exchange adopted the current functionality in its rules in 2015 and implemented it when the Exchange migrated to the Pillar technology trading platform in 2016.[5] Prior to operating on the Pillar platform, this option was available only to arriving orders.[6]

The Exchange proposes to simplify how short sale orders are processed by eliminating the current optional functionality described in Rule 7.16(f)(5)(B). The Exchange does not believe that removing this optional functionality will significantly affect investors or the public because it is a little-used feature.[7] In addition, to reflect the deletion of the text currently set forth in Rule 7.16(f)(5)(B), the Exchange proposes a non-substantive change to renumber current Rules 7.16(f)(5)(C)–(J) as proposed Rules 7.16(f)(5)(B)–(I).

Because of the technology changes associated with this proposed rule change, the Exchange will announce by Trader Update the implementation date.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[8] in general, and furthers the objectives of Section 6(b)(5),[9] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system by simplifying the operation of short sale orders on the Exchange. The Exchange proposes to eliminate an optional feature that provides that if so instructed, during a Short Sale Price Test, an individual short sale order would reject (on arrival) or cancel (if resting) if such order were required to be adjusted to a Permitted Price. Because this is infrequently-used optional functionality, the Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system by simplifying the Exchange's operations and reducing complexity. The Exchange further believes that renumbering the remaining paragraphs of Rule 7.16(f)(5) would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote transparency in Exchange rules by conforming the rule numbering of the remaining rule text of Rule 7.16(f)(5).

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change would not impose any burden on competition because it is not designed to address any competitive issues. Rather, the proposed rule change is designed to simplify the Exchange's offerings and reduce complexity by eliminating an infrequently-used optional feature.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[12] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[13] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. According to the Exchange, the proposal would eliminate an infrequently-used optional functionality and would have little impact on ETP Holders. In addition, the Exchange anticipates that the technology supporting the change will be available in less than 30 days after filing. The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule

[4] The term ''Permitted Price'' is defined in Rule 7.16(f)(5)(A) and the term ''Short Sale Price Test'' is defined in Rule 7.16(f)(2).

[5] *See* Securities Exchange Act Release Nos. 76198 (October 20, 2015), 80 FR 65274 (October 26, 2015) (Approval Order) and 75467 (July 16, 2015), 80 FR 43515 (July 22, 2015) (Notice) (SR–NYSEArca–2016–58).

[6] *See* Notice *supra* note 5 at 43521.

[7] For the three-month period of August 1, 2016 through October 31, 2016, only 0.16% of all sell short orders included the optional instruction.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

change 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–NYSEArca–2016–150 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–150. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–150 and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28777 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79392; File No. SR–NYSEArca–2016–151]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 7.31

November 23, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 15, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Rule 7.31 (Orders and Modifiers). The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Rule 7.31 (Orders and Modifiers). Specifically, Rule 7.31(d)(1)(C) provides that a Reserve Order must be designated Day and may be combined with an Arca Only Order, a Primary Pegged Order or a Q Order as each such order is a displayed order. However, given the lack of participation of Reserve Orders that are combined with Q Orders, the Exchange proposes to delete from its rules that a Reserve Order may be combined with a Q Order.[4] The Exchange believes the proposed change will streamline the operation of Reserve Orders on the Exchange by limiting the functionality to features that are actually utilized by market participants.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that removing the ability for market participants to combine Reserve Orders with Q Orders would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed change would eliminate functionality not used by market participants and thereby, streamline the operation of Reserve Orders on the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange has not received any Reserve Orders combined with a Q Order since the Exchange introduced the Pillar trading platform on February 22, 2016.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

to make amendments to Exchange rules to streamline the operation of Reserve Orders on the Exchange by removing little-used functionality that allowed Reserve Orders to be combined with Q Orders.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[9] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. According to the Exchange, this proposal would eliminate functionality not used by market participants, and the Exchange anticipates that the technology supporting the change will be available in less than 30 days after filing. The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[11]

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change 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–NYSEArca–2016–151 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–151. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–151 and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28781 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79385; File No. SR–BatsBZX–2016–77]**

## Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Ministerial and Corrective Changes to Exchange Rules 11.13, 11.16, 11.22, and 11.27

November 23, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 16, 2016, Bats BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange filed a proposal to make ministerial and corrective changes to Exchange Rules 11.13(b), 11.16(g)(4), 11.22(f), and 11.27(a)(7)(A)(i)2.

The text of the proposed rule change is available at the Exchange's Web site

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to make ministerial and corrective changes to Exchange Rules 11.13(b), 11.16(g)(4), 11.22(f), and 11.27(a)(7)(A)(i)2. First, the Exchange proposed to amend Rule 11.13(b) to correct an incorrect cross reference. Exchange Rule 11.13(b) states that depending on the instructions set by the User [5] when the incoming order was originally entered, if a market or marketable limit order has not been executed in its entirety pursuant to Exchange Rule 11.13(a) above, the order shall be eligible for additional processing under one or more of the routing options listed under paragraph (a)(3) of Rule 11.13. The reference to paragraph (a)(3) of Rule 11.13 is incorrect as the routing options are listing under paragraph (b)(3) of Rule 11.13. Therefore, the Exchange proposes to replace reference to paragraph (a)(3) with paragraph (b)(3).

Second, the Exchange proposes to amend Rule 11.16(g)(4) to delete an unnecessary cross reference. Exchange Rule 11.16(a)(4) states that ''[t]he pass-through of any compensation to a Member in accordance with this subparagraph (g) is unrelated to any other claims for compensation that are made in accordance with, and subject to the limits of, subparagraph (d) of this Rule 11.16.'' The Exchange now proposes to delete reference to ''11.16'' as a specific reference to the rule is not integral nor necessary to the meaning or application of Rule 11.16 generally.[6]

Third, the Exchange proposes to amend Rule 11.22(f) to delete a description of the Latency Monitoring data product, which the Exchange ceased to offer in May 2015. The Exchange determined that the customer demand at that time did not warrant the infrastructure and ongoing maintenance expense required to support the product.

Lastly, the Exchange proposes to amend Rule 11.27(a)(7)(A)(i)2 to correct a typographical error by replacing the phrase ''one of more'' with ''one or more''.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [7] in general, and furthers the objectives of Section 6(b)(5) of the Act [8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes the proposed changes promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system because they seek to correct an incorrect cross-reference and typographical error, harmonize identical rules with the Exchange's affiliates, as well as eliminate a reference [sic] a market data product that is no longer provided. The Exchange notes the changes to Exchange Rules 11.13(b), 11.16(a)(4), and 11.27(a)(7)(A)(i)2 are ministerial and do not alter the applications of each rule. In addition, the deletion of references to the Latency Monitoring Data product removes references to a product the Exchange no longer provides and that the Exchange is not required by any rule or regulation to offer. As such, the proposed amendments would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. On the contrary, the proposed rule change will have no impact on competition as it is simply makes ministerial and corrective changes while not altering the meaning or application of each rule.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (A) Significantly affect the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) by its terms, become operative for 30 days from the date on which it was filed or such shorter time as the Commission may designate it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and paragraph (f)(6) of Rule 19b–4 thereunder,[10] the Exchange has designated this rule filing as non-controversial. The Exchange has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

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: (1) Necessary or appropriate in the public interest; (2) for the protection of investors; or (3) 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 proposal is consistent with the Act. Comments may be submitted by any of the following methods:

[5] *See* Exchange Rule 1.5(cc).

[6] Removal of the rule reference would also harmonize the rule language with similar rule of the Exchange's affiliates, Bats EDGA Exchange, Inc. and Bats EDGX Exchange, Inc. SR–Bats–EDGX–2016–65 and SR–BatsEDGA–2016–28.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4.

*Electronic Comments*

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File No. SR–BatsBZX–2016–77 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 No. SR–BatsBZX–2016–77. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BatsBZX–2016–77 and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28775 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

[11] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79384; File No. SR–NYSEArca–2016–70]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Regarding Use of Rule 144A Securities by the Fidelity Corporate Bond ETF, Fidelity Investment Grade Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF

November 23, 2016.

### I. Introduction

On May 11, 2016, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to permit the Fidelity Corporate Bond ETF, Fidelity Investment Grade Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF (individually, ''Fund,'' and collectively, ''Funds'') to consider securities issued pursuant to Rule 144A under the Securities Act of 1933 (''Securities Act'') as debt securities eligible for principal investment. The proposed rule change was published for comment in the **Federal Register** on May 31, 2016.[3] On June 30, 2016, pursuant to Section 19(b)(2) of the 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 July 26, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.[6] On August 29, 2016, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act [7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.[8] In the Order Instituting Proceedings, the Commission solicited comments to specified matters related to the proposal.[9] On November 22, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.[10] The Commission has received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto.

### II. Exchange's Description of the Proposal

The Commission approved the listing and trading of shares (''Shares'') of the Funds under NYSE Arca Equities Rule 8.600,[11] which governs the listing and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77891 (May 24, 2016), 81 FR 34388 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 78207, 81 FR 44338 (Jul. 7, 2016). The Commission designated August 29, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] In Amendment No. 1, which amended and replaced the proposed rule change in its entirety, the Exchange: (a) corrected certain aspects of the the investment descriptions for each Fund in accordance with the Prior Corporate Bond Releases and Prior Total Bond Releases (as defined herein); (b) confirmed that all of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported to TRACE (as defined herein); and (c) confirmed that FINRA (as defined herein), on behalf of the Exchange, is able to access, as needed, trade information for the Rule 144A securities as well as certain other fixed income securities held by the Funds reported to TRACE. Amendment No. 1 is available at: *https://www.sec.gov/comments/sr-nysearca-2016-70/nysearca201670-1.pdf.* Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 78712, 81 FR 60759 (Sept. 2, 2016) (''Order Instituting Proceedings''). Specifically, the Commission instituted proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' *See id.,* 81 FR at 60764.

[9] *See id.*

[10] In Amendment No. 2, which amended and replaced the proposed rule change in its entirety, the Exchange clarified that no more than 35% of a Fund's assets may be invested in Rule 144A securities. Amendment No. 2 is available at: *https://www.sec.gov/comments/sr-nysearca-2016-70/nysearca201670-2.pdf.* Because Amendment No. 2 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

[11] *See* Securities Exchange Act Release Nos. 72068 (May 1, 2014), 79 FR 25923 (May 6, 2014) (SR–NYSEArca–2014–47) (notice of filing of proposed rule change relating to listing and trading of Shares of Fidelity Corporate Bond ETF Managed Shares under NYSE Arca Equities Rule 8.600) (''Prior Corporate Bond Notice''); 72439 (Jun. 20, 2014), 79 FR 36361 (Jun. 26, 2014) (SR–NYSEArca–2014–47) (order approving proposed rule change relating to listing and trading of Shares of Fidelity Corporate Bond ETF Managed Shares under NYSE Arca Equities Rule 8.600) (''Prior Corporate Bond Order'' and, together with the Prior Corporate Bond Notice, ''Prior Corporate Bond Releases''); 72064 (May 1, 2014), 79 FR 25908 (May 6, 2014) (SR–NYSEArca–2014–46) (notice of filing of proposed rule change relating to listing and trading of Shares of Fidelity Investment Grade Bond ETF; Fidelity Limited Term Bond ETF; and Fidelity Total Bond ETF under NYSE Arca Equities Rule 8.600) (''Prior Total Bond Notice''); 72748 (Aug. 4, 2014), 79 FR 46484 (Aug. 8, 2014) (SR–NYSEArca–2014–46)

trading of Managed Fund Shares. The Exchange proposes to amend the representation in the Prior Corporate Bond Notice and Prior Total Bond Notice to provide that each Fund may include Rule 144A securities within a Fund's principal investments in debt securities (*i.e.,* debt securities in which at least 80% of a Fund's assets are invested), provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities.

*A. Exchange's Description of the Funds*

Fidelity Investments Money Management, Inc. (''FIMM''), an affiliate of Fidelity Management & Research Company (''FMR''), is the manager (''Manager'') of each Fund. FMR Co., Inc. (''FMRC'') serves as a sub-adviser for the Fidelity Total Bond ETF. FMRC has day-to-day responsibility for choosing certain types of investments of foreign and domestic issuers for Fidelity Total Bond ETF. Other investment advisers, which also are affiliates of FMR, serve as sub-advisers to the Funds and assist FIMM with foreign investments, including Fidelity Management & Research (U.K.) Inc., Fidelity Management & Research (Hong Kong) Limited, and Fidelity Management & Research (Japan) Inc. (individually, ''Sub-Adviser,'' and together with FMRC, collectively ''Sub-Advisers''). Fidelity Distributors Corporation is the distributor for the Funds' Shares.

The Funds are funds of Fidelity Merrimack Street Trust (''Trust''), a Massachusetts business trust.[12] The Exchange represents that the Shares of the Fidelity Corporate Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF are currently trading on the Exchange.

1. Fidelity Corporate Bond ETF

As described in the Prior Corporate Bond Notice, the Fidelity Corporate Bond ETF seeks a high level of current income. The Manager normally invests at least 80% of Fidelity Corporate Bond ETF assets in investment-grade corporate bonds and other corporate debt securities.[13] Corporate debt securities are bonds and other debt securities issued by corporations and other business structures, as described in the Prior Corporate Bond Notice.

The Fidelity Corporate Bond ETF may hold uninvested cash or may invest it in cash equivalents such as money market securities, or shares of short-term bond exchanged-traded funds registered under the 1940 Act (''ETFs''), or mutual funds or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients). The Manager uses the Barclays U.S. Credit Bond Index as a guide in structuring the Fund and selecting its investments. FIMM manages the Fund to have similar overall interest rate risk to the Barclays U.S. Credit Bond Index.

As stated in the Prior Corporate Bond Releases, in buying and selling securities for the Fund, the Manager analyzes the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fund's exposure to various risks, including interest rate risk, the Manager considers, among other things, the market's overall risk characteristics, the market's current pricing of those risks, information on the Fund's competitive universe and internal views of potential future market conditions.

While the Manager normally invests at least 80% of assets of the Fund in investment grade corporate bonds and other corporate debt securities, as described above, the Manager may invest up to 20% of the Fund's assets in other securities and financial instruments, as summarized below.

In addition to corporate debt securities, the debt securities in which the Fund may invest are U.S. Government securities; repurchase agreements and reverse repurchase agreements; mortgage- and other asset-backed securities; loans; loan participations, loan assignments, and other evidences of indebtedness, including letters of credit, revolving credit facilities, and other standby financing commitments; structured securities; stripped securities; municipal securities; sovereign debt obligations; obligations of international agencies or supranational entities; and other securities believed to have debt-like characteristics, including hybrid securities, which may offer characteristics similar to those of a bond security such as stated maturity and preference over equity in bankruptcy.

The Fund may invest in restricted securities, which are subject to legal restrictions on their sale. Restricted securities generally can be sold in privately negotiated transactions, pursuant to an exemption from registration under the Securities Act, or in a registered public offering.

2. Fidelity Investment Grade Bond ETF

As described in the Prior Total Bond Notice, the Fidelity Investment Grade Bond ETF (which has not yet commenced operation) will seek a high level of current income. The Manager normally will invest at least 80% of the Fund's assets in investment-grade debt securities (those of medium and high quality). The debt securities in which the Fund may invest are corporate debt securities; U.S. Government securities; repurchase agreements and reverse repurchase agreements; money market securities; mortgage- and other asset-backed securities; senior loans; loan participations and loan assignments and other evidences of indebtedness, including letters of credit, revolving credit facilities and other standby financing commitments; stripped securities; municipal securities; sovereign debt obligations; and obligations of international agencies or supranational entities (collectively, ''Debt Securities'').

As described in the Prior Total Bond Notice, the Fidelity Investment Grade Bond ETF may hold uninvested cash or may invest it in cash equivalents such as repurchase agreements, shares of short term bond ETFs, mutual funds, or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients). The Manager will use the Barclays U.S. Aggregate Bond Index (''Aggregate Index'') as a guide in structuring the Fund and selecting its investments, and will manage the Fund to have similar overall interest rate risk to the Aggregate Index.

As described in the Prior Total Bond Notice, the Manager will consider other factors when selecting the Fidelity

(order approving proposed rule change relating to listing and trading of Shares of the Fidelity Investment Grade Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF under NYSE Arca Equities Rule 8.600) (''Prior Total Bond ETF Order'' and, together with the Prior Total Bond Notice, ''Prior Total Bond Releases'').

[12] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). According to the Exchange, on December 29, 2015, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act and the 1940 Act relating to the Funds (File Nos. 333–186372 and 811–22796) (''Registration Statement''). In addition, the Exchange states that the Trust has obtained certain exemptive relief under the 1940 Act. *See* Investment Company Act Release No. 30513 (May 10, 2013) (File No. 812–14104).

[13] According to the Exchange, investment-grade debt securities include all types of debt instruments, including corporate debt securities that are of medium and high-quality. An investment-grade rating means the security or issuer is rated investment-grade by a credit rating agency registered as a nationally recognized statistical rating organization with the Commission (for example, Moody's Investors Service, Inc.), or is unrated but considered to be of equivalent quality by the Fidelity Corporate Bond ETF's Manager or Sub-Advisers.

Investment Grade Bond ETF's investments, including the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fidelity Investment Grade Bond ETF's exposure to various risks, including interest rate risk, the Manager will consider, among other things, the market's overall risk characteristics, the market's current pricing of those risks, information on the Fidelity Investment Grade Bond ETF's competitive universe, and internal views of potential future market conditions.

3. Fidelity Limited Term Bond ETF

As described in the Prior Total Bond Notice, the Fidelity Limited Term Bond ETF seeks to provide a high rate of income. The Manager normally invests at least 80% of the Fidelity Limited Term Bond ETF's assets in investment-grade Debt Securities (those of medium and high quality).

The Fidelity Limited Term Bond ETF may hold uninvested cash or may invest it in cash equivalents such as repurchase agreements, shares of short term bond ETFs, mutual funds, or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients). The Manager uses the Fidelity Limited Term Composite Index (''Composite Index'') as a guide in structuring the Fund and selecting its investments. The Manager manages the Fidelity Limited Term Bond ETF to have similar overall interest rate risk to the Composite Index.

The Manager considers other factors when selecting the Fidelity Limited Term Bond ETF's investments, including the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fidelity Limited Term Bond ETF's exposure to various risks, including interest rate risk, the Manager considers, among other things, the market's overall risk characteristics, the market's current pricing of those risks, information on the Fund's competitive universe, and internal views of potential future market conditions.

4. Fidelity Total Bond ETF

As described in the Prior Total Bond Notice, the Fidelity Total Bond ETF seeks a high level of current income. The Manager normally invests at least 80% of the Fidelity Total Bond ETF's assets in Debt Securities. The Manager allocates the Fidelity Total Bond ETF's assets across investment-grade, high yield, and emerging market Debt Securities. The Manager may invest up to 20% of the Fund's assets in lower-quality Debt Securities.

The Fidelity Total Bond ETF may hold uninvested cash or may invest it in cash equivalents such as repurchase agreements, shares of short term bond ETFs, mutual funds, or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients).

The Manager uses the Barclays U.S. Universal Bond Index (''Universal Index'') as a guide in structuring and selecting the investments of the Fidelity Total Bond ETF and selecting its investments, and in allocating the Fidelity Total Bond ETF's assets across the investment-grade, high yield, and emerging market asset classes. The Manager manages the Fidelity Total Bond ETF to have similar overall interest rate risk to the Universal Index. The Manager considers other factors when selecting the Fund's investments, including the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fund's exposure to various risks, including interest rate risk, the Manager considers, among other things, the market's overall risk characteristics, the market's current pricing of those risks, information on the Fund's competitive universe, and internal views of potential future market conditions.

As described in the Prior Total Bond Notice, the Manager may invest the Fidelity Total Bond ETF's assets in Debt Securities of foreign issuers in addition to securities of domestic issuers.

5. Other Investments of the Funds

While, as described above, the Manager normally invests at least 80% of assets of Fidelity Limited Term Bond ETF in investment-grade Debt Securities (and will normally invest at least 80% of assets of the Fidelity Investment Grade Bond ETF in investment-grade Debt Securities), and the Manager normally invests at least 80% of assets of the Fidelity Total Bond ETF in Debt Securities, the Manager may invest up to 20% of a Fund's assets in other securities and financial instruments (''Other Investments,'' as described in the Prior Total Bond Notice). As described in the Prior Corporate Bond Notice and Prior Total Bond Notice, as part of a Fund's Other Investments, (*i.e.,* up to 20% of a Fund's assets), each Fund may invest in restricted securities, which are subject to legal restrictions on their sale.[14]

*B. Exchange's Description of the Proposed Change to the Principal Investments of the Funds*

The Exchange proposes that each Fund may include Rule 144A securities within a Fund's principal investments in debt securities (*i.e.,* debt securities in which at least 80% of a Fund's assets are invested), provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities. As discussed below, the Exchange believes it is appropriate for Rule 144A securities to be included as principal investments of a Fund, subject to the 35% limitation referenced above, in view of (1) the high level of liquidity in the market for such securities compared to other debt securities asset classes, and (2) the high level of transparency in the market for Rule 144A securities, particularly in light of reporting of transaction data in such securities through the Trade Reporting and Compliance Engine (''TRACE'') operated by the Financial Industry Regulatory Authority (''FINRA''). All of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE.

FMR has represented to the Exchange that Rule 144A securities account for approximately 20% of daily trading volume in U.S. corporate bonds. Dealers trade and report transactions in Rule 144A securities in the same manner as registered corporate bonds. While the average number of daily trades and U.S. dollar volume in registered corporate bonds is much higher than in Rule 144A securities, the average lot size is higher for Rule 144A securities.[15] Specifically, the average lot size for 144A securities for the period January 1, 2015 through

[14] Restricted securities are subject to legal restrictions on their sale. Restricted securities generally can be sold in privately negotiated transactions, pursuant to an exemption from registration under the Securities Act, or in a registered public offering. Rule 144A securities are securities which, while privately placed, are eligible for purchase and resale pursuant to Rule 144A. Rule 144A permits certain qualified institutional buyers, such as a Fund, to trade in privately placed securities even though such securities are not registered under the Securities Act.

[15] Source: MarketAxess Trace Data. For example, for the period January 1, 2015 through August 31, 2015, for registered bonds and Rule 144A securities with $1 billion to $1.999 billion the average daily dollar volume outstanding was approximately $6.8 billion and $1.7 billion, respectively, and the average lot size was $666,647 and $2,398,292, respectively.

August 31, 2015 was approximately $2.2 million, compared to an average lot size for the same period of approximately $500,000 for registered corporate bonds.

The Exchange notes that, in 2013, the Commission approved FINRA rules relating to dissemination of information regarding transactions in Rule 144A securities in TRACE.[16] Transactions executed by FINRA members became subject to dissemination through FINRA's TRACE on June 30, 2014, thus providing a level of transparency to the Rule 144A market comparable to that of registered bonds.[17]

The Exchange further notes that, while the proposed rule change would categorize Rule 144A securities within a Fund's principal investments in debt securities (subject to a limitation of investments in Rule 144A securities to 35% of a Fund's assets), any investments in Rule 144A securities, of course, would be required to comply with restrictions under the 1940 Act and rules thereunder relating to investment in illiquid assets. As stated in the Prior Corporate Bond Notice and Prior Total Bond Notice, each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Manager or Sub-Advisers. Each Fund monitors its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of a Fund's net assets are held in illiquid assets. Illiquid assets include assets subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[18]

Moreover, as stated in the Prior Corporate Bond Notice and Prior Total Bond Notice, each Fund does not currently intend to purchase any asset if, as a result, more than 10% of its net assets would be invested in assets that are deemed to be illiquid because they are subject to legal or contractual restrictions on resale or because they cannot be sold or disposed of in the ordinary course of business at approximately the prices at which they are valued. For purposes of a Fund's illiquid assets limitation discussed above, if through a change in values, net assets, or other circumstances, a Fund were in a position where more than 10% of its net assets were invested in illiquid assets, it would consider appropriate steps to protect liquidity.

The Prior Corporate Bond Notice and Prior Total Bond Notice stated that various factors may be considered in determining the liquidity of a Fund's investments, including: (1) The frequency of trades and quotes for the asset; (2) the number of dealers wishing to purchase or sell the asset and the number of other potential purchasers; (3) dealer undertakings to make a market in the asset; and (4) the nature of the asset and the nature of the marketplace in which it trades (including any demand, put or tender features, the mechanics and other requirements for transfer, any letters of credit or other credit enhancement features, any ratings, the number of holders, the method of soliciting offers, the time required to dispose of the security, and the ability to assign or offset the rights and obligations of the asset).

The Exchange believes that the size of the Rule 144A market (approximately 20% of daily trading volume in U.S. corporate bonds), the active participation of multiple dealers utilizing trading protocols that are similar to those in the corporate bond market, and the transparency of the 144A market resulting from reporting of Rule 144A transactions in TRACE will deter manipulation in trading the Shares. The Exchange notes that all of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE.

The Exchange represents that, except for the change described above, all other representations made in the Prior Corporate Bond Releases and the Prior Total Bond Releases remain unchanged. The Funds will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

The Exchange further represents that the trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA, on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[19] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and

[16] *See* Securities Exchange Act Release Nos. 70009 (Jul. 19, 2013), 78 FR 44997 (Jul. 25, 2103) (SR–FINRA–2013–029) (notice of filing of a proposed rule change relating to the dissemination of transactions in TRACE-Eligible securities effected pursuant to Rule 144A); 70345 (Sept. 6, 2013), 78 FR 56251 (Sept. 12, 2013) (SR–FINRA–2013–029) (order approving proposed rule change relating to the dissemination of transactions in TRACE-Eligible securities effected pursuant to Rule 144A). In the proposed rule change, FINRA proposed to amend FINRA Rule 6750 to provide for the dissemination of Rule 144A transactions, provided the asset type (*e.g.,* corporate bonds) currently is subject to dissemination under FINRA Rule 6750; to amend the dissemination protocols to extend the dissemination caps currently applicable to the non-Rule 144A transactions in such asset type (*e.g.,* non-Rule 144A corporate bond transactions) to Rule 144A transactions in such securities; to amend FINRA Rule 7730 to establish a data set for real-time Rule 144A transaction data and a second data set for historic Rule 144A transaction data; to amend the definition of ''Historic TRACE Data'' to reference the three data sets currently included therein and the proposed fourth data set; and to make other clarifying and technical amendments. FINRA Rule 6730(a) requires any transaction in a TRACE-Eligible security to be reported to TRACE as soon as practicable, but no later than within 15 minutes of the transaction, subject to specified exceptions. FINRA Rule 6730(c) requires the trade report to contain information on size, price, time of execution, amount of commission, the date of settlement, and other information.

[17] The Exchange notes that in a June 30, 2014 press release ''FINRA Brings 144A Corporate Debt Transactions Into the Light,'' FINRA stated: ''144A transactions—resales of restricted corporate debt securities to large institutions called qualified institutional buyers (QIBs)—account for a significant portion of the volume in corporate debt securities. In the first quarter of 2014, 144A transactions comprised nearly 13 percent of the average daily volume in investment-grade corporate debt, and nearly 30 percent of the average daily volume in high-yield corporate debt. 144A transactions comprised nearly 20 percent of the average daily volume in the corporate debt market as a whole. Through the Trade Reporting and Compliance Engine (TRACE), FINRA will disseminate 144A transactions subject to the same dissemination caps that are currently in effect for non-144A transactions. The same dissemination cap for investment-grade corporate bonds ($5 million) applies to both 144A and non-144A corporate bond transactions, and the $1 million dissemination cap for high-yield corporate bonds similarly applies to both 144A and non-144A transactions. 144A transactions are also subject to the same 15-minute reporting requirement as non-144A corporate debt transactions.'' *See also* FINRA Regulatory Notice 13–35 October 2013.

[18] The Exchange notes that in a recent rulemaking proposal relating to open-end fund liquidity risk management programs, the Commission stated that ''[s]ecurities offered pursuant to rule 144A under the Securities Act may be considered liquid depending on certain factors.'' The Commission, citing to the ''Statement Regarding 'Restricted Securities' '' noted: ''The Commission stated [in the ''Statement Regarding 'Restricted Securities' ''] that 'determination of the liquidity of Rule 144A securities in the portfolio of an investment company issuing redeemable securities is a question of fact for the board of directors to determine, based upon the trading markets for the specific security' and noted that the board should consider the unregistered nature of a rule 144A security as one of the factors it evaluates in determining its liquidity.'' *See* Release Nos. 33–9922; IC–31835; File Nos. S7–16–15; S7–08–15 (Sept. 22, 2015).

[19] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

federal securities laws applicable to trading on the Exchange. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from such markets and other entities. The Exchange may obtain information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[20] FINRA, on behalf of the Exchange, is able to access, as needed, trade information for the Rule 144A securities as well as certain other fixed income securities held by the Funds reported to TRACE. In addition, as stated in the Prior Corporate Bond Releases and the Prior Total Bond Releases, investors have ready access to information regarding the Funds' holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

The Exchange also represents that all statements and representations made in this filing and the Prior Corporate Bond Releases and Prior Total Bond Releases regarding (a) the description of the Funds' respective portfolios, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares of the Funds on the Exchange. The Adviser has represented to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

## III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal, as modified by Amendment Nos. 1 and 2 thereto, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[21] In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, is consistent with Section 6(b)(5) of the Exchange Act,[22] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission notes that transaction information relating to Rule 144A securities is available via TRACE. According to the Exchange, all of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE. The Commission believes that limiting Rule 144A securities in which a Fund invests as principal investments to corporate debt securities for which transactions are reported to TRACE would help to promote market transparency and provide an appropriate limit on the use of 144A securities as debt securities eligible for principal investment, provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities.

The Commission notes that, while the proposal would allow a Fund to consider Rule 144A securities as debt securities eligible for principal investment, subject to the 35% limitation referenced above, any investments in such securities would be required to comply with the restrictions under the 1940 Act and rules thereunder relating to investments in illiquid assets. As stated in the Prior Corporate Bond Notice and Prior Total Bond Notice, each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Manager or Sub-Advisers. The Manager or Sub-Advisers, who are responsible for the day-to-day decisions regarding the liquidity of securities, may consider various factors in determining the liquidity of a Fund's investments, including: (1) The frequency of trades and quotes for the asset; (2) the number of dealers wishing to purchase or sell the asset and the number of other potential purchasers; (3) dealer undertakings to make a market in the asset; and (4) the nature of the asset and the nature of the marketplace in which it trades (including any demand, put or tender features, the mechanics and other requirements for transfer, any letters of credit or other credit enhancement features, any ratings, the number of holders, the method of soliciting offers, the time required to dispose of the security, and the ability to assign or offset the rights and obligations of the asset). Ultimately, however, a Fund's Board of Directors has responsibility for determining the liquidity of securities (including Rule 144A securities) held by a Fund.

The Commission further notes that pursuant to the 1940 Act and rules thereunder, Funds are required to monitor their respective portfolio's liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and to consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of a Fund's net assets are held in illiquid assets. Moreover, the Exchange represents that each Fund does not currently intend to purchase any asset if, as a result, more than 10% of its net assets would be invested in assets that are deemed to be illiquid because they are subject to legal or contractual restrictions on resale or because they cannot be sold or disposed of in the ordinary course of business at approximately the prices at which they are valued.

Importantly, the Commission notes that the Funds will continue to be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange represents that, except for the change described above, all other representations made in the Prior Corporate Bond Releases and the Prior Total Bond Releases remain unchanged. The Commission finds that providing the Manager or Sub-Advisers of each Fund additional flexibility to consider Rule 144A securities as debt securities eligible for principal investment, given the protections discussed above, is consistent with the Act.

[20] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all of the components of the portfolio for a Fund may trade on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[21] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] 15 U.S.C. 78f(b)(5).

In support of this proposal, the Exchange represented that:

(1) The Funds will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

(2) Each Fund may include Rule 144A securities within a Fund's principal investments in debt securities (*i.e.,* debt securities in which at least 80% of a Fund's assets are invested), provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities.

(3) All of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE.

(4) Trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA, on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. These procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

(5) The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from such markets and other entities. The Exchange may obtain information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

(6) FINRA, on behalf of the Exchange, is able to access, as needed, trade information for the Rule 144A securities as well as certain other fixed income securities held by the Funds reported to TRACE. In addition, as stated in the Prior Corporate Bond Releases and the Prior Total Bond Releases, investors have ready access to information regarding the Funds' holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

(7) Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

(8) The Exchange represents that the Manager and the Sub-Advisers are not broker-dealers but are affiliated with one or more broker-dealers and have each implemented a fire wall with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the portfolios, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolios.

(9) The Exchange will obtain a representation from the issuer of the Shares that the net asset value (''NAV'') per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

(10) The Portfolio Indicative Value with respect to Shares of each Fund will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.

(11) On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, each Fund will disclose on the Trust's Web site the Disclosed Portfolio that will form the basis for a Fund's calculation of NAV at the end of the business day.

(12) The Trust's Web site will include a form of the prospectus for the Funds and additional data relating to NAV and other applicable quantitative information.

The Exchange also represents that all statements and representations made in this filing and the Prior Corporate Bond Releases and Prior Total Bond Releases regarding (a) the description of the Funds' respective portfolios, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares of the Funds on the Exchange. In addition, the Adviser has represented to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements.[23] If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice, as modified by Amendment Nos. 1 and 2 to the proposed rule change. The Commission notes that the Funds must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos.1 and 2 thereto, is consistent with Section 6(b)(5) of the Act[24] and the rules and regulations thereunder applicable to a national securities exchange.

## IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[25] that the proposed rule change (SR–NYSEArca–2016–70), as modified by Amendment Nos. 1 and 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

**Robert W. Errett,**

*Deputy Secretary.*

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[23] The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will ''surveil'' for compliance with the continued listing requirements. *See, e.g.,* Securities Exchange Act Release No. 77499 (Apr. 1, 2016), 81 FR 20428 (Apr. 7, 2016) (Notice of Filing of Amendment No. 2, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the SPDR DoubleLine Short Duration Total Return Tactical ETF of the SSgA Active Trust), available at: *http://www.sec.gov/rules/sro/bats/2016/34-77499.pdf.* In the context of this representation, it is the Commission's view that ''monitor'' and ''surveil'' both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view ''monitor'' as a more or less stringent obligation than ''surveil'' with respect to the continued listing requirements.

[24] 15 U.S.C. 78f(b)(5).

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79389; File No. SR–NYSEMKT–2016–107)]**

## Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 15—Equities Relating to Pre-Opening Indications

November 23, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 17, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Rule 15—Equities relating to pre-opening indications. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Rule 15—Equities (''Rule 15'') relating to pre-opening indications. The proposed rule changes would restore the obligation for a DMM to publish a pre-opening indication if a security has not opened by 10:00 a.m. Eastern Time and add a new parameter for when a pre-opening indication should be published for lower-priced securities.

Background

The Exchange recently amended Exchange rules to consolidate and amend requirements relating to pre-opening indications in Rule 15.[4] Rule 15(a) provides that a pre-opening indication will include the security and the price range within which the opening price is anticipated to occur and that a pre-opening indication will be published via the securities information processor and proprietary data feeds. Rule 15(b) specifies the conditions for publishing a pre-opening indication, and Rule 15(b)(1) provides that a DMM will publish a pre-opening indication, as described in Rule 15(e), before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the ''Applicable Price Range'' from a specified ''Reference Price'' before the security opens.

Under Rule 15(c), the Reference Price for a security, other than an ADR, is the securities last reported stale price on the Exchange, the security's offering price in the case of an initial public offering (''IPO''), or the security's last reported sale price in the securities market from which the security is being transferred to the Exchange. Rule 15(d)(1) provides that, except under conditions set forth in Rule 15(d)(2), the Applicable Price Range for determining whether to publish a pre-opening indication will be 5%. Rule 15(d)(2) provides that if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are +/− 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 80B—Equities, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market, the Applicable Price Range for determining whether to publish a pre-opening indication will be 10%.

Proposed Rule Change

The Exchange proposes to amend Rule 15(b)(1) to add another condition for when a DMM would be required to publish a pre-opening indication. As proposed, a DMM would be required to publish a pre-opening indication if a security has not opened by 10:00 a.m. Eastern Time. This requirement was previously set forth in rule text in Rule 123D(b)—Equities that was deleted in the Opening Filing.[5] The Exchange proposes to restore this requirement, as modified. Specifically, the Exchange would not retain the prior rule text that required Executive Floor Governor approval to extend the 30-minute time frame. The Exchange believes that current Rule 15(e)(1), which requires a Floor Governor to supervise and approve the publication of a pre-opening indication, provides for appropriate oversight of the publication of a pre-opening indication, including if such publication would be after 10:00 a.m.

The Exchange believes that restoring the requirement to publish a pre-opening indication if a security is not opened by 10:00 a.m. Eastern Time would promote transparency in the opening process for securities that do not open on either a trade or a quote by such time. The Exchange believes that there are limited circumstances when a security would not be opened by 10:00 a.m. and for which a pre-opening indication has not already been published. For example, if the reason a security has not opened by 10:00 a.m. is due to an order imbalance, the DMM would have already published a pre-opening indication, as required by current Rule 15(b)(1). By contrast, if there is no trading interest in a security, such as the first day of trading of a security listed on a when issued basis, the proposed requirement to publish a pre-opening indication for such security would provide investors with additional information regarding the indicative price for such security so they can evaluate whether to submit trading interest to participate in the opening. The Exchange believes that 10:00 a.m. is an appropriate time threshold for publishing a pre-opening indication in such circumstances as it would provide sufficient time for the DMM to gather pricing information for a security that may otherwise have no trading interest.[6]

To effect this proposed change, the Exchange proposes to amend Rule 15(b)(1) to add sub-numbering within the paragraph, delete the phrase ''before the security opens'' as duplicative of a prior reference to the same phrase, and add the new text, as follows (new text is in italics, deleted text bracketed):

(b) Conditions for publishing a pre-opening indication:

[4] *See* Securities Exchange Act Release No. 78673 (August 25, 2016), 81 FR 60038 (August 31, 2016) (SR–NYSEMKT–2016–79) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change) (''Opening Filing''). The Exchange implemented the changes described in the Opening Filing on September 12, 2016.

[5] *See* Opening Filing, *supra* note 4 at 60039. Before being amended in the Opening Filing, Rule 123D(b)—Equities provided: ''If an indication is disseminated after the opening bell, it must be considered a delayed opening. In addition, any stock that is not opened with a trade or a reasonable quotation within 30 minutes after the opening of business must be considered a delayed opening (except for IPOs) and requires Floor Official supervision, as well as an indication. That 30-minute time frame may only be extended by an Executive Floor Governor on a Floor-wide basis.''

[6] For example, a security that is listed on a when issued basis generally does not have an offering document that specifies a price for such security. In the absence of trading interest to provide an indication of how market participants would price such a security, a DMM would have to look to other sources, such as research analyst reports, to identify the appropriate pricing. The Exchange notes that in such scenarios, there may be wide fluctuations on the estimated price. The first published pre-opening indication therefore may be wide, but would serve the purpose of providing transparency regarding the potential pricing for such a security.

(1) A DMM will publish a pre-opening indication, as described in paragraph (e), *(i)* before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the ''Applicable Price Range,'' as specified in paragraph (d) of this Rule, from a specified ''Reference Price,'' as specified in paragraph (c) of this Rule[, before the security opens]; *or (ii) if a security has not opened by 10:00 a.m. Eastern Time*.

The Exchange also proposes to amend Rule 15(d) to add a new Applicable Price Range for securities priced $3.00 and lower. As proposed, for these securities, the Applicable Price Range would be $0.15 on regular trading days. To effect this proposed change, the Exchange proposes to amend Rule 15(d)(1) to provide that, except under the conditions set forth in Rule 15(d)(2), the Applicable Price Range for determining whether to publish a pre-opening indication would be 5% for securities with a Reference Price over $3.00 and $0.15 for securities with a Reference Price equal to or lower than $3.00. The Exchange proposes to make a related change to Rule 15(d)(2) to provide for what the Applicable Price Range would be for securities priced $3.00 and lower if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are +/− 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 80B [sic], or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market. As proposed, in such case, the Applicable Price Range would be $0.30.

The Exchange believes a price range movement of more than $0.15 for lower-priced securities on regular trading days, and more than $0.30 price range movement on more volatile trading days, would better reflect when an opening price for such securities is significantly away from the Reference Price, thus warranting a pre-opening indication. By contrast, the Exchange believes that the current 5% Applicable Price Range applicable to securities priced $3.00 and below is too narrow and would result in a disproportionate number of pre-opening indications for these securities as compared to how many pre-opening indications are required for securities priced above $3.00. Requiring pre-opening indications when they would not otherwise be warranted would also reduce the number of securities that would be eligible to be opened by a DMM electronically. For example, based on Exchange data from January 2016 through October 2016, if the Exchange had applied the 5% Applicable Price Range, there would have been 18 securities requiring a pre-opening indication. By contrast, using a $0.15 Applicable Price Change for this same period would have resulted in only two securities requiring a pre-opening indication.[7] This reduced number of required pre-opening indications would mean that more securities would have been eligible to be opened electronically by the DMM. The Exchange further notes that the proposed break point of which parameter would be used is based on the current price buckets used in the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'') (providing that securities priced $3.00 and below are subject to wider percentage parameters than securities priced above $3.00).[8]

* * * * *

There are no technology changes associated with this proposed rule change. However, because the proposed rule change would require DMMs to change behavior, the Exchange will announce the operative date by a Trader Update that describes the proposed changes. The Exchange will publish this Trader Update no later than 10 days after the operative date of this filing.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that amending Rule 15(b)(1) to restore the requirement that a pre-opening indication be published if a security has not opened by 10:00 a.m. Eastern Time would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide additional transparency to the opening process if a security has not opened by 10:00 a.m. As such, the Exchange believes that the proposal would advance the efficiency and transparency of the opening process, thereby fostering accurate price discovery at the open of trading. For the same reasons, the proposal is also designed to protect investors as well as the public interest.

The Exchange further believes that providing for a $0.15 Applicable Price Range for securities priced $3.00 and lower on regular trading days, and a $0.30 Applicable Price Range for such securities on more volatile trading days, would remove impediments to and perfect a free and open market and a national market system because it would require a wider range of price movement before a pre-opening indication must be published for these lower-priced securities. The Exchange believes that these proposed changes would balance the goal of providing price transparency if there would be significant price dislocation in the opening price of a security compared to the Reference Price with the manual process involved with publishing pre-opening indications. Moreover, the Exchange believes that any reduction in number of pre-opening indications published for these lower-priced securities would not result in less transparency because the Exchange would continue to publish Order Imbalance Information for such securities, as provided for in Rule 15(g).

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather promote greater efficiency and transparency at the open of trading on the Exchange.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section

[7] When applying the proposed double-wide Applicable Price Change for volatile trading days, as provided for in Rule 15(d)(2), to trade data from August 25, 2015, the change to a $0.30 Applicable Price Change instead of a 10% Applicable Price Change would have resulted in four securities requiring pre-opening indications instead of 63. Similarly, applying these Applicable Price Changes to June 24, 2016, a 10% move would have resulted in 55 securities requiring pre-opening indications, whereas a $0.30 parameter would have resulted in one security requiring pre-opening indication.

[8] *See* Securities Exchange Act Release No. 77679 (April 21, 2016), 81 FR 24908 (April 27, 2016) (File No. 4–631) (Order approving 10th Amendment to the LULD Plan).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change 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–NYSEMKT–2016–107 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–107. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–107 and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28779 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79388; File No. SR–NYSEArca–2016–136]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Amending NYSE Arca Equities Rule 7.35P To Provide for Widened Price Collar Thresholds for the Core Open Auction on Volatile Trading Days

November 23, 2016.

On September 28, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') 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 NYSE Arca Equities Rule 7.35P[3] to widen price collar thresholds for the Core Open Auction on volatile trading days. The proposed rule change was published for comment in the **Federal Register** on October 14, 2016.[4] The Commission received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act[5] 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 November 28, 2016. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates January

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission notes that the Exchange recently re-designated NYSE Arca Equities Rule 7.35P as NYSE Arca Equities Rule 7.35. *See* Securities Exchange Act Release No. 79078 (October 11, 2016), 81 FR 71559 (October 17, 2016) (SR–NYSEArca–2016–135).

[4] *See* Securities Exchange Act Release No. 79068 (October 7, 2016), 81 FR 71127.

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

12, 2017, 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 Number SR–NYSEArca–2016–136).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28778 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79383; File No. SR–NYSE–2016–77]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Section 907.00 of the Listed Company Manual

November 23, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 10, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 907.00 of the Listed Company Manual (the ''Manual'') to clarify how it will treat currently listed U.S. issuers and non-U.S. companies who qualify to receive Tier One or Tier Two services as a result of a corporate action completed between October 1 and December 31 of a particular calendar year. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

Pursuant to Section 907.00 of the Manual, the Exchange offers a suite of complimentary products and services to certain companies currently listed on the Exchange (''Eligible Current Listings''). A company qualifies to receive such complimentary products and services based on the number of shares of common stock in the case of U.S. companies or other equity security in the case of non-U.S. companies that it has outstanding. Presently, the Exchange determines eligibility to receive complimentary products and services for a calendar year based on the number of shares outstanding as of September 30 of the immediately preceding calendar year. If a company has the requisite number of shares outstanding on September 30, it will begin (or continue, as the case may be) to receive the suite of complimentary products and services for which it is eligible as of the following January 1.[4]

For planning and budgeting purposes, it is helpful for both the Exchange and listed companies to determine a reasonable period in advance the Tier One and Tier Two Eligible Current Listings that will receive complimentary products and services the following year.[5] Therefore, the Exchange has historically looked at a company's shares outstanding as of September 30 to determine qualification for the following year. On occasion, there is a company that does not qualify [sic] Tier One or Tier Two services based on its shares outstanding as of September 30, but that subsequently completes a corporate action (such as a share issuance or stock split) between October 1 and December 31 that would enable it to either (i) qualify for the first time or (ii) qualify for a higher tier of services if the Exchange made its eligibility determination as of a later date. Under existing Exchange rules, the unfortunate outcome for such companies is that they do not qualify to receive complimentary products and services for, in some cases, nearly 15 months after they became eligible.

The Exchange proposes to amend Section 907.00 of the Manual to clarify that, if a company becomes a Tier One or Tier Two Eligible Current Listing due to a corporate action completed between October 1 and December 31 of a particular year that results in an increased number of outstanding shares, such company will receive the suite of complimentary products and services to which it is entitled by virtue of that designation as of the immediately following January 1. The Exchange will continue to conduct its initial eligibility review as of September 30. This will enable the Exchange to capture the vast majority of Tier One and Tier Two Eligible Current Listings to assist both itself and listed companies in their planning and budget process for the following year. The Exchange will then conduct a secondary review each year towards the end of December to determine whether any additional companies have become eligible to receive services or have become eligible to receive a higher tier or [sic] services.

The Exchange notes that listed companies are subject to an annual fee that is billed each January 1 and is calculated based on the number of shares outstanding on the preceding December 31.[6] In this regard, under the Exchange's existing rules, a company that increases its shares outstanding due to a corporate action completed subsequent to September 30 would be billed a higher annual fee on the following January 1 but would not receive any complimentary products and services for which it may be eligible for an entire year. The Exchange's

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Eligible Current Listings that have 270 million or more shares issued and outstanding as of September 30 (each a ''Tier One Eligible Current Listing'') are presently offered (i) a choice of market surveillance or market analytics products and services, and (ii) Web-hosting and Web-casting products and services, on a complimentary basis. Eligible Current Listings that have between 160 million and 269.9 million shares issued and outstanding as of September 30 (each a ''Tier Two Eligible Current Listing'') are presently offered a choice of market analytics or Web-hosting and Web-casting products and services.

[5] *See* Securities Exchange Act Release No. 34–68143 (November 2, 2012), 77 FR 67053 (November 8, 2012) (SR–NYSE–2012–44). This provides qualifying issuers with nearly three months to select from the available services in their tier for the following calendar year as well as providing non-qualifying issuers with time to budget and plan for obtaining the service elsewhere.

[6] *See* Section 902.02 of the Manual.

current proposal seeks to address this anomaly by ensuring that companies obtain the benefits of listing normally provided to other issuers paying comparable annual listing fees.

In the event that a U.S. issuer or non-U.S. company that was eligible for Tier One or Tier Two services as of September 30, then completes a corporate action between October 1 and December 31 that reduces its shares outstanding and makes it no longer eligible, the Exchange proposes that it would not discontinue services as of the following January 1. Instead, the Exchange proposes that it would re-evaluate the following September 30 and determine to discontinue as of the following January 1 if the issuer remained ineligible.[7] The Exchange believes it could be unnecessarily harmful to an issuer that reduces its outstanding shares due to a corporate action in the fourth quarter to immediately discontinue providing services the following year. As described above, a significant reason for determining eligibility on September 30 is to provide ineligible issuers time to budget and plan to procure services from an alternative vendor. The Exchange believes that any company that undertakes a corporate action in the fourth quarter that results in a reduction in its shares outstanding is likely doing so for reasons other than to reduce its forthcoming annual listing fee. A company in that situation may have expected that it would be eligible for Tier One or Tier Two services based on its September 30 shares outstanding and the Exchange believes it could disadvantage them to discontinue services so close to the year end.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4)[9] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5)[10] of the Act in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that its proposed rule change is consistent with Section 6(b)(4) of the Act because it ensures that all companies that are subject to the same fee structure as of January 1 each year are also eligible to receive the same benefits of listing. Under existing rules, the Exchange charges companies an annual fee based on shares outstanding on December 31, but determines eligibility for complimentary products and services based on shares outstanding as of September 30. The proposed rule change will ensure that, for the vast majority of listed companies, the Exchange takes into account a company's shares outstanding on December 31 not only for purposes of charging annual listing fees but also for purposes of determining an issuer's eligibility to receive complimentary products and services or receive a higher tier of complimentary products and services.

The Exchange believes that its proposed rule change is consistent with Section 6(b)(5) of the Act because it prevents unfair discrimination between issuers by ensuring that no issuer is deprived of eligibility for services simply because they became a Tier One or Tier Two Eligible Current Listing in the last three months of a calendar year after the Exchange has made its eligibility determinations for the next calendar year. The Exchange believes that its proposal to continue offering Tier One or Tier Two services for one additional year to a company that became ineligible as a result of a corporate action undertaken in the fourth quarter does not unfairly discriminate between issuers. The Exchange believes this situation would occur very rarely and issuers in this situation would continue to receive services for only one additional year. The Exchange believes all issuers would benefit from knowing that their services would not be discontinued on short notice.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change simply clarifies how the Exchange will treat Tier One and Tier Two Eligible Current Listings who achieve that designation as a result of a corporate action completed after September 30, but prior to December 31 in a given year. As described above, except for a very small number of companies that may continue to receive services for an additional year despite losing eligibility in the fourth quarter, under the proposed rule change, all issuers that are similarly situated on January 1 will receive the same package of complimentary products and services and no issuer will be treated differently simply because it became a Tier One or Tier Two Eligible Current Listing in the final three months of the preceding year. The Exchange believes that its proposal that it continue to offer services for an additional year to companies that became ineligible during the fourth quarter does not significantly impact the public interest or impose any significant burden on competition. Such proposal simply offers all issuers a measure of protection against having their services discontinued on short notice.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[7] However, if a company remained ineligible on September 30, but regained eligibility between October 1 and December 31, it would continue to receive the package of services for which it became eligible.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2016–77 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–77. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–77, and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28773 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–79390; File No. SR–NYSE–2016–78]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 15 Relating to Pre-Opening Indications

November 23, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 17, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 15 relating to pre-opening indications. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Rule 15 relating to pre-opening indications. The proposed rule changes would restore the obligation for a DMM to publish a pre-opening indication if a security has not opened by 10:00 a.m. Eastern Time and add a new parameter for when a pre-opening indication should be published for lower-priced securities.

Background

The Exchange recently amended Exchange rules to consolidate and amend requirements relating to pre-opening indications in Rule 15.[4] Rule 15(a) provides that a pre-opening indication will include the security and the price range within which the opening price is anticipated to occur and that a pre-opening indication will be published via the securities information processor and proprietary data feeds. Rule 15(b) specifies the conditions for publishing a pre-opening indication, and Rule 15(b)(1) provides that a DMM will publish a pre-opening indication, as described in Rule 15(e), before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the ''Applicable Price Range'' from a specified ''Reference Price'' before the security opens.

Under Rule 15(c), the Reference Price for a security, other than an ADR, is the securities last reported stale price on the Exchange, the security's offering price in the case of an initial public offering (''IPO''), or the security's last reported sale price in the securities market from which the security is being transferred to the Exchange. Rule 15(d)(1) provides that, except under conditions set forth in Rule 15(d)(2), the Applicable Price Range for determining whether to publish a pre-opening indication will be 5%. Rule 15(d)(2) provides that if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are ± 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 80B, or if the Exchange

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release Nos. 78228 (July 5, 2016), 81 FR 44907 (July 11, 2016) (SR–NYSE–2016–24) (Approval Order) *and* 77491 (March 31, 2016), 81 FR 20030 (April 6, 2016) (SR–NYSE–2016–24) (''Opening Notice of Filing'') (''Opening Filing''). The Exchange implemented the changes described in the Opening Filing on September 12, 2016.

determines that it is necessary or appropriate for the maintenance of a fair and orderly market, the Applicable Price Range for determining whether to publish a pre-opening indication will be 10%.

Proposed Rule Change

The Exchange proposes to amend Rule 15(b)(1) to add another condition for when a DMM would be required to publish a pre-opening indication. As proposed, a DMM would be required to publish a pre-opening indication if a security has not opened by 10:00 a.m. Eastern Time. This requirement was previously set forth in rule text in Rule 123D(b) that was deleted in the Opening Filing.[5] The Exchange proposes to restore this requirement, as modified. Specifically, the Exchange would not retain the prior rule text that required Executive Floor Governor approval to extend the 30-minute time frame. The Exchange believes that current Rule 15(e)(1), which requires a Floor Governor to supervise and approve the publication of a pre-opening indication, provides for appropriate oversight of the publication of a pre-opening indication, including if such publication would be after 10:00 a.m.

The Exchange believes that restoring the requirement to publish a pre-opening indication if a security is not opened by 10:00 a.m. Eastern Time would promote transparency in the opening process for securities that do not open on either a trade or a quote by such time. The Exchange believes that there are limited circumstances when a security would not be opened by 10:00 a.m. and for which a pre-opening indication has not already been published. For example, if the reason a security has not opened by 10:00 a.m. is due to an order imbalance, the DMM would have already published a pre-opening indication, as required by current Rule 15(b)(1). By contrast, if there is no trading interest in a security, such as the first day of trading of a security listed on a when issued basis, the proposed requirement to publish a pre-opening indication for such security would provide investors with additional information regarding the indicative price for such security so they can evaluate whether to submit trading interest to participate in the opening. The Exchange believes that 10:00 a.m. is an appropriate time threshold for publishing a pre-opening indication in such circumstances as it would provide sufficient time for the DMM to gather pricing information for a security that may otherwise have no trading interest.[6]

To effect this proposed change, the Exchange proposes to amend Rule 15(b)(1) to add sub-numbering within the paragraph, delete the phrase ''before the security opens'' as duplicative of a prior reference to the same phrase, and add the new text, as follows (new text in italics, deleted text bracketed):

(b) Conditions for publishing a pre-opening indication:

(1) A DMM will publish a pre-opening indication, as described in paragraph (e), *(i)* before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the ''Applicable Price Range,'' as specified in paragraph (d) of this Rule, from a specified ''Reference Price,'' as specified in paragraph (c) of this Rule[, before the security opens]; *or (ii) if a security has not opened by 10:00 a.m. Eastern Time.*

The Exchange also proposes to amend Rule 15(d) to add a new Applicable Price Range for securities priced $3.00 and lower. As proposed, for these securities, the Applicable Price Range would be $0.15 on regular trading days. To effect this proposed change, the Exchange proposes to amend Rule 15(d)(1) to provide that, except under the conditions set forth in Rule 15(d)(2), the Applicable Price Range for determining whether to publish a pre-opening indication would be 5% for securities with a Reference Price over $3.00 and $0.15 for securities with a Reference Price equal to or lower than $3.00. The Exchange proposes to make a related change to Rule 15(d)(2) to provide for what the Applicable Price Range would be for securities priced $3.00 and lower if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are ± 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 80B, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market. As proposed, in such case, the Applicable Price Range would be $0.30.

The Exchange believes a price range movement of more than $0.15 for lower-priced securities on regular trading days, and more than $0.30 on more volatile trading days, would better reflect when an opening price for such securities is significantly away from the Reference Price, thus warranting a pre-opening indication. By contrast, the Exchange believes that the current 5% Applicable Price Range applicable to securities priced $3.00 and below is too narrow and would result in a disproportionate number of pre-opening indications for these securities as compared to how many pre-opening indications are required for securities priced above $3.00. Requiring pre-opening indications when they would not otherwise be warranted would also reduce the number of securities that would be eligible to be opened by a DMM electronically. For example, based on Exchange data from January 2016 through October 2016, if the Exchange had applied the 5% Applicable Price Range, there would have been 13 securities requiring a pre-opening indication. By contrast, using a $0.15 Applicable Price Change for this same period would have resulted in only four securities requiring a pre-opening indication.[7] This reduced number of required pre-opening indications would mean that more securities would have been eligible to be opened electronically by the DMM. The Exchange further notes that the proposed break point of which parameter would be used is based on the current price buckets used in the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'') (providing that securities priced $3.00 and below are subject to wider percentage parameters than securities priced above $3.00).[8]

* * * * *

There are no technology changes associated with this proposed rule

[5] *See* Opening Notice of Filing, *supra* note 4 at 20031. Before being amended in the Opening Filing, Rule 123D(b) provided: ''If an indication is disseminated after the opening bell, it must be considered a delayed opening. In addition, any stock that is not opened with a trade or a reasonable quotation within 30 minutes after the opening of business must be considered a delayed opening (except for IPOs) and requires Floor Official supervision, as well as an indication. That 30-minute time frame may only be extended by an Executive Floor Governor on a Floor-wide basis.''

[6] For example, a security that is listed on a when issued basis generally does not have an offering document that specifies a price for such security. In the absence of trading interest to provide an indication of how market participants would price such a security, a DMM would have to look to other sources, such as research analyst reports, to identify the appropriate pricing. The Exchange notes that in such scenarios, there may be wide fluctuations on the estimated price. The first published pre-opening indication therefore may be wide, but would serve the purpose of providing transparency regarding the potential pricing for such a security.

[7] When applying the proposed double-wide Applicable Price Change for volatile trading days, as provided for in Rule 15(d)(2), to trade data from August 25, 2015, the change to a $0.30 Applicable Price Change instead of a 10% Applicable Price Change would have resulted in six securities requiring pre-opening indications instead of 76. Similarly, applying these Applicable Price Changes to June 24, 2016, a 10% move would have resulted in 49 securities requiring pre-opening indications, whereas a $0.30 parameter would have resulted in one security requiring pre-opening indication.

[8] *See* Securities Exchange Act Release No. 77679 (April 21, 2016), 81 FR 24908 (April 27, 2016) (File No. 4–631) (Order approving 10th Amendment to the LULD Plan).

change. However, because the proposed rule change would require DMMs to change behavior, the Exchange will announce the operative date by a Trader Update that describes the proposed changes. The Exchange will publish this Trader Update no later than 10 days after the operative date of this filing.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that amending Rule 15(b)(1) to restore the requirement that a pre-opening indication be published if a security has not opened by 10:00 a.m. Eastern Time would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide additional transparency to the opening process if a security has not opened by 10:00 a.m. As such, the Exchange believes that the proposal would advance the efficiency and transparency of the opening process, thereby fostering accurate price discovery at the open of trading. For the same reasons, the proposal is also designed to protect investors as well as the public interest.

The Exchange further believes that providing for a $0.15 Applicable Price Range for securities priced $3.00 and lower on regular trading days, and a $0.30 Applicable Price Range for such securities on more volatile trading days, would remove impediments to and perfect a free and open market and a national market system because it would require a wider range of price movement before a pre-opening indication must be published for these lower-priced securities. The Exchange believes that these proposed changes would balance the goal of providing price transparency if there would be significant price dislocation in the opening price of a security compared to the Reference Price with the manual process involved with publishing pre-opening indications. Moreover, the Exchange believes that any reduction in number of pre-opening indications published for these lower-priced securities would not result in less transparency because the Exchange would continue to publish Order Imbalance Information for such securities, as provided for in Rule 15(g).

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather promote greater efficiency and transparency at the open of trading on the Exchange.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b 4(f)(6)(iii) thereunder.[13]

A proposed rule change filed under Rule 19b 4(f)(6)[14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change 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–NYSE–2016–78 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–78. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change;

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b 4(f)(6).

[13] In addition, Rule 19b 4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b 4(f)(6).

[15] 17 CFR 240.19b 4(f)(6)(iii).

[16] 15 U.S.C. 78s(b)(2)(B).

the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–78 and should be submitted on or before December 21, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016–28780 Filed 11–29–16; 8:45 am]

**BILLING CODE 8011–01–P**

## SOCIAL SECURITY ADMINISTRATION

**[Docket No: SSA–2016–0062]**

### Agency Information Collection Activities: 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 revisions and one extension 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–2016–0062].

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the 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 December 30, 2016. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

*1. Missing and Discrepant Wage Reports Letter and Questionnaire—26 CFR 31.6051–2—0960–0432.* Each year employers report the wage amounts they paid their employees to the Internal Revenue Service (IRS) for tax purposes, and separately to SSA for retirement and disability coverage purposes. Employers should report the same figures to SSA and the IRS; however, each year some of the employer wage reports SSA receives show wage amounts lower than those employers report to the IRS. SSA uses Forms SSA–L93–SM, SSA–L94–SM, SSA–95–SM, and SSA–97–SM to ensure employees receive full credit for their wages. Respondents are employers who reported lower wage amounts to SSA than they reported to the IRS.

*Type of Request:* Revision of an OMB-approved information collection.

| Modality of completion | Number of responses | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| SSA–95–SM and SSA–97–SM (and accompanying cover letters SSA–L93, L94) | 360,000 | 1 | 30 | 180,000 |

*2. Application for Supplemental Security Income—20 CFR 416.305–416.335, Subpart C—0960–0444.* SSA uses Form SSA–8001–BK to determine an applicant's eligibility for Supplemental Security Income (SSI) and SSI payment amounts. SSA employees also collect this information during interviews with members of the public who wish to file for SSI. SSA uses the information for two purposes: (1) To formally deny SSI for non-medical reasons when information the applicant provides results in ineligibility; or (2) to establish a disability claim, but defer the complete development of non-medical issues until SSA approves the disability. The respondents are applicants for SSI.

**Note:** This is a correction notice: SSA published the incorrect burden information for this collection at 81 FR 81224, on 11/17/16. We are correcting this error here.

*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) |
|---|---|---|---|---|
| MSSICS/Signature Proxy | 537,207 | 1 | 20 | 179,069 |
| iClaim/MSSICS | 162,945 | 1 | 20 | 54,315 |
| SSA–8001–BK (Paper Version) | 1,033 | 1 | 20 | 344 |
| Totals | 701,185 | | | 233,728 |

*3. Incorporation by Reference of Oral Findings of Fact and Rationale in Wholly Favorable Written Decisions (Bench Decision Regulation)—20 CFR 404.953 and 416.1453—0960–0694.* If an administrative law judge (ALJ) makes a

[17] 17 CFR 200.30–3(a)(12).

wholly favorable oral decision, including all the findings and rationale for the decision for a claimant of Title II or Title XVI payments, at an administrative appeals hearing, the ALJ sends a Notice of Decision (Form HA–82), as the records from the oral hearing preclude the need for a written decision. We call this the incorporation-by-reference process. In addition, the regulations for this process state that if the involved parties want a record of the oral decision, they may submit a written request for these records. SSA collects identifying information under the aegis of Sections 20 CFR 404.953 and 416.1453 of the Code of Federal Regulations to determine how to send interested individuals written records of a favorable incorporation-by-reference oral decision made at an administrative review hearing. Since there is no prescribed form to request a written record of the decision, the involved parties send SSA their contact information and reference the hearing for which they would like a record. The respondents are applicants for Disability Insurance Benefits and SSI payments, or their representatives, to whom SSA gave a wholly favorable oral decision under the regulations cited above.

*Type of Request:* Extension of an OMB-approved information collection.

| Modality of collection | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) |
|---|---|---|---|---|
| HA–82 | 2,500 | 1 | 5 | 208 |

*4. Request for Waiver of Special Veterans Benefits (SVB) Overpayment Recovery or Change in Repayment Rate—20 CFR 408.900–408.950—0960–0698.* Title VIII of the Social Security Act requires SSA to pay a monthly benefit to qualified World War II veterans who reside outside the United States. When an overpayment in this SVB occurs, the beneficiary can request a waiver of recovery of the overpayment or a change in the repayment rate. SSA uses the SSA–2032–BK to obtain the information necessary to establish whether the claimant meets the waiver of recovery provisions of the overpayment, and to determine the repayment rate if we do not waive repayment. Respondents are SVB beneficiaries who have overpayments on their Title VIII record and wish to file a claim for waiver of recovery or change in repayment rate.

*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–2032–BK | 450 | 1 | 120 | 900 |

*5. Consent Based Social Security Number Verification Process—20 CFR 400.100—0960–0760.* The Consent Based Social Security Number Verification (CBSV) process is a fee-based automated Social Security number (SSN) verification service available to private businesses and other requesting parties. To use the system, private businesses and requesting parties must register with SSA and obtain valid consent from SSN holders prior to verification. We collect the information to verify if the submitted name and SSN match the information in SSA records. After completing a registration process and paying the fee, the requesting party can use the CBSV process to submit a file containing the names of number holders who gave valid consent, along with each number holder's accompanying SSN and date of birth (if available) to obtain real-time results using a web service application or SSA's Business Services Online (BSO) application. SSA matches the information against the SSA master file of SSNs, using SSN, name, date of birth, and gender code (if available). The requesting party retrieves the results file from SSA, which indicates only a match or no match for each SSN submitted. Under the CBSV process, the requesting party does not submit the consent forms of the number holders to SSA. SSA requires each requesting party to retain a valid consent form for each SSN verification request. The requesting party retains the consent forms in either electronic or paper format.

SSA added a strong audit component to ensure the integrity of the CBSV process. At the discretion of the agency, we require audits (called ''compliance reviews'') with the requesting party paying all audit costs. Independent certified public accountants (CPAs) conduct these reviews to ensure compliance with all the terms and conditions of the party's agreement with SSA, including a review of the consent forms. CPAs conduct the reviews at the requesting party's place of business to ensure the integrity of the process. In addition, SSA reserves the right to perform unannounced onsite inspections of the entire process, including review of the technical systems that maintain the data and transaction records. The respondents to the CBSV collection are the participating companies; members of the public who consent to the SSN verification; and CPAs who provide compliance review services.

*Type of Request:* Revision of an OMB-approved information collection.

**Time Burden**

PARTICIPATING COMPANIES

| Requirement | Number of respondents | Frequency of response | Number of responses | Average burden per response (minutes) | Total estimated annual burden (hours) |
|---|---|---|---|---|---|
| Registration process for new participating companies | *13 | 1 | 13 | 120 | 26 |

PARTICIPATING COMPANIES—Continued

| Requirement | Number of respondents | Frequency of response | Number of responses | Average burden per response (minutes) | Total estimated annual burden (hours) |
|---|---|---|---|---|---|
| Creation of file with SSN holder identification data; maintaining required documentation/forms | 90 | ** 251 | 22,590 | 60 | 22,590 |
| Using the system to upload request file, check status, and download results file | 90 | 251 | 22,590 | 5 | 1,883 |
| Storing Consent Forms | 90 | 251 | 22,590 | 60 | 22,590 |
| Activities related to compliance review | 90 | 251 | 22,590 | 60 | 22,590 |
| Total | | | 90,373 | | 69,679 |

* One-time registration process/approximately 14 new participating companies per year.
** Please note there are 251 Federal business days per year on which a requesting party could submit a file.

PARTICIPATING COMPANIES WHO OPT FOR EXTERNAL TESTING ENVIRONMENT (ETE)

| Requirement | Number of respondents | Frequency of response | Number of responses | Average burden per response (minutes) | Total estimated annual burden (hours) |
|---|---|---|---|---|---|
| ETE Registration Process (includes reviewing and completing ETE User Agreement) | 20 | 1 | 1 | 180 | 60 |
| Web Service Transactions | 20 | 1 | 1 | 50 | 17 |
| Reporting Issues Encountered on Web service testing (e.g., reports on application's reliability) | 20 | 1 | 1 | 50 | 17 |
| Reporting changes in users' status (e.g., termination or changes in users' employment status; changes in duties of authorized users) | 20 | 1 | 1 | 60 | 20 |
| Cancellation of Agreement | 20 | 1 | 1 | 30 | 10 |
| Dispute Resolution | 20 | 1 | 1 | 120 | 40 |
| Total | 20 | | 104 | | 164 |

PEOPLE WHOSE SSNS SSA WILL VERIFY

| Requirement | Number of respondents | Frequency of response | Number of responses | Average burden per response (minutes) | Estimated annual burden (hours) |
|---|---|---|---|---|---|
| Reading and signing authorization for SSA to release SSN verification | 2,800,000 | 1 | 2,800,000 | 3 | 140,000 |
| Responding to CPA re-contact | 5,750 | 1 | 5,750 | 5 | 479 |
| Total | 2,805,750 | | 2,805,750 | | 140,479 |

There is one CPA respondent conducting compliance reviews and preparing written reports of findings. The average burden per response is 4,800 minutes for a total burden of 7,200 hours annually.

**Cost Burden**

The public cost burden is dependent upon the number of companies and transactions. SSA based the cost estimates below upon 90 participating companies submitting a total 2.8 million transactions per year.

One-Time Per Company Registration Fee—$5,000.

Estimated per SSN Transaction Fee—$1.40.[1]

Estimated per Company Cost to Store Consent Forms—$300.

Date: November 25, 2016.

**Naomi R. Sipple,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 2016–28822 Filed 11–29–16; 8:45 am]

**BILLING CODE 4191–02–**

[1] The annual costs associated with the transaction to each company are dependent upon the number of SSN transactions submitted to SSA by the company on a yearly basis. For example, if a company anticipates submitting 1 million requests to SSA for the year, its total transaction cost for the year would be $1.40 × 1,000,000, or $1,400,000. Periodically, SSA will calculate our costs to provide CBSV services and adjust the fee charged as needed. SSA notifies companies in writing and via **Federal Register** Notice of any changes and companies have the opportunity to cancel the agreement or continue service using the new transaction fee.

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[Docket No. FHWA–2016–0035]**

### Proposed Amendment to the Third Renewed Memorandum of Understanding (MOU) Assigning Certain Federal Environmental Responsibilities to the State of California, Including National Environmental Policy Act (NEPA) Authority for Certain Categorical Exclusions (CEs)

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of proposed amendment, request for comments.

**SUMMARY:** The FHWA and the State of California acting by and through its Department of Transportation (Caltrans), propose an amendment to the Memorandum of Understanding (MOU) authorizing the State's participation in the 23 U.S.C. 326 program. This program allows FHWA to assign to States its authority and responsibility for determining whether certain designated activities within the geographic boundaries of the State are categorically excluded from preparation of an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act. The parties propose to amend the MOU to make the litigation provisions consistent with the 23 U.S.C. 327 program MOU and to allow a 90 day suspension of the program, giving the State an opportunity to renew its waiver of sovereign immunity and acceptance of Federal court jurisdiction. The program will resume upon the State's recertification that the sovereign immunity waiver and acceptance of Federal court jurisdiction is in place.

**DATES:** Comments must be received on or before December 30, 2016.

**ADDRESSES:** You may submit comments by any of the methods described below. To ensure that you do not duplicate your submissions, please submit them by only one of the means below. Electronic or facsimile comments are preferred because Federal offices experience intermittent mail delays due to security screening.

*Federal eRulemaking Portal:* Go to Web site: *http://www.regulations.gov/.* Follow the instructions for submitting comments on the DOT electronic docket site (FHWA–2016–0035).

*Facsimile (Fax):* 1–202–493–2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590.

*Hand Delivery:* 1200 New Jersey Avenue SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except Federal holidays.

For access to the docket to view a complete copy of the proposed MOU, or to read background documents or comments received, go to *http://www.regulations.gov/* at any time or to 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Eastern Time, Monday through Friday, except for Federal holidays.

*Instructions:* You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Shawn Oliver; by email at *shawn.oliver@dot.gov* or by telephone at 916–498–5048. The FHWA California Division Office's normal business hours are 8 a.m. to 4:30 p.m. (Pacific Time), Monday–Friday, except for Federal holidays. For the State of California: Tammy Massengale; by email at *tammy.massengale@dot.ca.gov* or by telephone at 916–653–5157. State business hours are the same as above although State holidays may not completely coincide with Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Electronic Access*

Internet users may reach the Office of the Federal Register's home page at: *http://www.archives.gov/* and the Government Printing Office's database: *http://www.fdsys.gov/.* An electronic version of the proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at *http://www.regulations.gov/.*

## Background

Section 326 of Title 23 U.S. Code, creates a program that allows the Secretary of the U.S. Department of Transportation (Secretary) to assign, and a State to assume, responsibility for determining whether certain Federal highway projects are included within classes of action that are categorically excluded (CE) from requirements for Environmental Assessments or Environmental Impact Statements pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* In addition, this program allows the assignment of other environmental review requirements applicable to Federal highway projects, except with respect to government-to-government consultations with federally recognized Indian tribes (23 U.S.C. 326(b)(1)). The FHWA retains responsibility for conducting formal government-to-government consultation with federally recognized Indian tribes, which is required under some of the above-listed laws and Executive Orders. The State may assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation. The Secretary delegated his authority to FHWA, which acts on behalf of the Secretary with respect to these matters.

The FHWA renewed California's participation in this program for a third time on May 31, 2016. The original MOU became effective on June 7, 2007, for an initial term of three (3) years. The first renewal followed on June 7, 2010, and the second renewal followed on June 7, 2013. The third MOU renewal has an expiration date on May 31, 2019.

The FHWA and Caltrans propose three modifications to the MOU. First, the parties propose to modify Stipulations IV.G.5 and IV.G.9 with regards to coordination on settlements and appeals to make them consistent with the draft MOU for participation in the 23 U.S.C. 327 Surface Transportation Project Delivery Program. The draft MOU for that Program can be accessed in Docket No. FHWA–2016–0019.

Second, Stipulation V.B. of the MOU contains a termination clause stating that the State's authority to participate in the program will end on January 1, 2017, unless the California Legislature takes affirmative action to extend the sovereign immunity waiver under the Eleventh Amendment of the U.S. Constitution. The parties propose an amendment that establishes a process to address a possible temporary lapse in the State's statutory consent to Federal jurisdiction and waiver of sovereign immunity. If the State does not provide consent to Federal court jurisdiction and waive sovereign immunity by December 31, 2016, this MOU will be suspended and Caltrans will not be able to make any NEPA decisions or implement any of the environmental review responsibilities assigned under the MOU. The FHWA and Caltrans propose a temporary suspension not to exceed 90 days to provide time for the State to address the deficiency. In the event that the State does not take the necessary action and Caltrans does not provide adequate certification within the time period provided, the State's participation in the Program will be terminated. This language is the same as the one proposed in the draft MOU for the Surface Transportation Project Delivery Program (Docket No. FHWA–2016–0019).

Third, the parties propose an amendment to Stipulation language to eliminate unnecessary paperwork. The current MOU requires a **Federal Register** notice that announces the agency's decision and execution of the MOU. The parties believe that requiring publication in the **Federal Register** of the decision is unnecessary. Publication of the final MOU through other means, such as in the State's public Web site, would be a more effective means of disseminating the outcome of this process.

The FHWA will consider the comments submitted on the proposed

MOU when making its decision on whether to execute this renewal MOU. The FHWA will make the final, executed MOU publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

**Authority:** 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 49 CFR 1.85; 40 CFR 1507.3, 1508.4.

Issued on: November 23, 2016.

**Vincent Mammano,**

*California Division Administrator, Federal Highway Administration.*

[FR Doc. 2016–28800 Filed 11–29–16; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary of Transportation

**[DOT–OST–2016–0227]**

### Positioning, Navigation, and Timing (PNT) Service for National Critical Infrastructure Resiliency

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Request for information (RFI).

**SUMMARY:** This RFI provides an outline for the potential use by the Federal Government of one or more Positioning, Navigation, and Timing (PNT) technologies to back up signals from the Global Positioning System (GPS) and to ensure resiliency of PNT for U.S. Critical Infrastructure (CI) operations. As a co-chair and member of the National Executive Committee for Space-based PNT, and a provider and user of U.S. critical infrastructure services, the Department of Transportation is investigating opportunities by which the Federal Government may make use of service(s) which can provide the necessary backup capability or capabilities to ensure PNT continuity for U.S. CI in the event of a temporary disruption in GPS availability. Further, as the lead civil agency for PNT in the Federal Government, the Department of Transportation is interested in leveraging PNT service technology initiatives under consideration or currently undertaken by industry.

The Federal Government is presently documenting civil requirements for PNT capabilities to serve as the basis for potential future acquisition activity. The initial objective is to support sustainment of domestic CI timing continuity with the capability to extend service(s) in the future to provide positioning/navigation continuity as well.

**DATES:** Responses should be filed by January 30, 2017.

**ADDRESSES:** You may file responses identified by the docket number DOT–OST–2016–0227 by any of the following methods:

- *Federal eRulemaking Portal:* go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. 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 Ave. SE., between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

*Instructions:* You must include the agency name and docket number DOT–OST–2016–0227 at the beginning of your submission. All submissions received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Privacy Act:* Anyone is able to search the electronic form of all submissions received in any of our dockets by the name of the individual submitting the document (or signing the submission, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

*Docket:* For access to the docket and comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Karen L. Van Dyke, Director, Positioning, Navigation, and Timing & Spectrum Management, Office of the Assistant Secretary for Research and Technology, U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC, 20590, 202–366–3180, *karen.vandyke@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

#### 1. Overview

This RFI provides an outline for the potential use by the Federal Government of one or more PNT technologies to back up signals from GPS and to ensure resiliency of PNT for U.S. critical infrastructure operations. The national policy requirement to ensure resilient PNT capabilities is expressed in two Presidential policy documents. The National Space Policy of the United States of America, dated June 28, 2010, states, ''. . . the United States shall . . . Invest in domestic capabilities and support international activities to detect, mitigate, and increase resiliency to harmful interference to GPS, and identify and implement, as necessary and appropriate, redundant and back-up systems or approaches for critical infrastructure, key resources, and mission-essential functions.'' This follows a statement in U.S. Space-based PNT Policy dated December 15, 2004 (National Security Presidential Directive (NSPD)–39) that, ''. . . the United States Government shall . . . Improve the performance of space-based positioning, navigation, and timing services, including more robust resistance to interference for, and consistent with, U.S. and allied national security purposes, homeland security, and civil, commercial, and scientific users worldwide . . . and, Promote the use of U.S. space-based positioning, navigation, and timing services and capabilities for applications at the Federal, State, and local level, to the maximum practical extent.''

As defined in NSPD–39, the responsibility to ''. . . advise and coordinate with and among the Departments and Agencies responsible for the strategic decisions regarding policies, architectures, requirements, and resource allocation for maintaining and improving U.S. space-based PNT infrastructures, including the GPS, its augmentations, [and] security for these services . . .'' rests with the National Space-Based PNT Executive Committee, co-chaired by the Deputy Secretaries of the Department of Defense and the Department of Transportation. NSPD–39 also specifically requires that the Secretary of Transportation, in coordination with the Secretary of Homeland Security, ''. . . develop, acquire, operate, and maintain backup position, navigation, and timing capabilities that can support critical transportation, homeland security, and other critical civil and commercial infrastructure applications within the United States, in the event of a disruption of the GPS or other space-based positioning, navigation, and timing services . . .''

As a co-chair and member of the National Executive Committee for Space-based PNT, and a provider and user of U.S. CI services, the Department of Transportation is investigating opportunities by which the Federal

Government may make use of service(s) which can provide the necessary backup capability or capabilities to ensure PNT continuity for U.S. CI in the event of a temporary disruption in GPS availability. Further, as the lead civil agency for PNT in the Federal Government, the Department of Transportation is interested in leveraging PNT service technology initiatives under consideration or currently undertaken by industry.

The Federal Government is presently documenting civil requirements for PNT capabilities to serve as the basis for potential future acquisition activity. The initial objective is to support sustainment of domestic CI timing continuity with the capability to extend service(s) in the future to provide positioning/navigation continuity as well.

The government would be open to suggestions from industry regarding methods of accessing such services and associated cost-sharing arrangements, including, but not limited to Public-Private-Partnerships, Service Level Agreements, or other Cooperative Arrangements to alleviate or eliminate constraints to meet the general continuity requirements below. The government would also be interested in industry assessment of user participation in the backup GPS market. If a proposed solution or solutions assumes legislative and/or regulatory action on the part of the Federal Government, that should be noted in any response.

**2. Technical Information**

The Presidential Policy Directive on Critical Infrastructure Security and Resilience (PPD–21; February 12, 2013) designates sixteen CI sectors: Chemical; Commercial Facilities; Communications; Critical Manufacturing; Dams; Defense Industrial Base; Emergency Services; Energy; Financial Services; Food and Agriculture; Government Facilities; Healthcare and Public Health; Information Technology; Nuclear Reactors, Materials, and Waste; Transportation Systems; and Water and Wastewater Systems. To support the initial objective, CI sectors need access to timing information for both nationwide applications and, in some cases, for more stringent regional and local applications.

The Federal Government is interested in services which could be implemented to provide the following capabilities and ensure timing continuity for the domestic CI outlined below. Respondents must include information related to nationwide and regional CI Timing application coverage for GPS backup capabilities as described below. Respondents may also include information on CI timing applications additional to GPS capabilities if desired:

*Nationwide CI Timing Application Coverage for a GPS Backup*

- Timing Continuity—Sustained accuracy at 1 microsecond with respect to UTC
- Frequency Stability—Stratum 1 level or better ($1x10^{-11}$ over 24 hours)
- System Availability—95%–99%
- System Reliability/Holdover Capability (no access to GPS)—90 days
- Extent of service coverage area as a function of system architecture
- Considerations for receive antennas and integration with GPS devices (include estimated costs, user equipage requirements, and time-to-market information)
- Considerations for service to mobile vs. fixed users
- Rough order of magnitude cost estimate for service implementation and operation for at least ten years
- How quickly a demonstration of service functionality could be performed
- Scalability and considerations for extending service to a nationwide positioning/navigation capability
- Any off-shore coverage capability

*Regional/Local CI Timing Application Coverage for a GPS Backup*

- Timing Continuity—Sustained accuracy at 100 nanoseconds with respect to UTC
- Frequency Stability—Stratum 1 level or better ($1x10^{-11}$ over 24 hours)
- System Availability—99%
- System Reliability/Holdover Capability (no access to GPS)—30 days
- Extent of service coverage area as a function of system architecture
- Considerations for receive antennas and integration with GPS devices (include estimated costs, user equipage requirements, and time-to-market information)
- Considerations for service to mobile vs. fixed users
- Rough order of magnitude cost estimate for service implementation and operation for at least ten years
- How quickly a demonstration of service functionality could be performed
- Considerations for extending service to include positioning/navigation capability
- Any off-shore coverage capability

*Nationwide or Regional/Local CI Timing Application Coverage Additional to GPS Capabilities*

- Considerations for messaging capabilities in terms of data rate and message content (support operations, emergency notifications, etc.)
- Service availability in environments such as indoors, underwater, underground, and urban canyons not feasible with GPS
- Rough order of magnitude cost estimate for service implementation and operation for at least ten years

Respondents please advise if your company has developed and/or offered PNT services in the past and if you are marketing or providing similar services today in foreign markets.

*3. Requested Information*

Interested companies who believe they are capable of providing all or part of the information requested above are invited to indicate their interest by providing company information to include:

(a) Company name
(b) Company address
(c) CAGE code [if applicable]
(d) Business Point of Contact (POC) name, email address, and telephone
(e) Technical Point of Contact (POC) name, email address, and telephone

4. Responses may be submitted in respondent's preferred format. Abbreviations should be defined either on first use or in a glossary. Charts and graphics should have quantitative data clearly labeled. Assumptions should be clearly identified.

5. Proprietary and other sensitive information should be so marked with requested disposition instructions. Submitted materials will not be returned.

6. Responses are limited to fifteen (15) 8.5″ x 11″ pages with 1″ margins, and 12-point font (Arial or Times New Roman). Pages must be numbered and submitted electronically via email as Microsoft Word or Adobe Acrobat files. Please send responses to the contact information provided in the **FOR FURTHER INFORMATION CONTACT** section of the notice.

7. Submitted responses shall be UNCLASSIFIED unless prior arrangements are made with the Contracting Office.

This is a Request For Information (RFI) only. This request is for planning purposes, and shall not be construed as a solicitation announcement, invitation for bids, request for proposals, quotes or an indication that the Government will contract for the items contained in this notice. After reviewing the descriptions

currently posted to FEDBIZOPS, interested capable vendors are invited to provide responses. The Government will not reimburse respondents for any costs associated with the submission of the information being requested or reimburse expenses incurred to the interested parties for responses.

Additionally, your response will be treated only as information for the Government to consider. As previously stated, respondents will not be entitled to payment for direct or indirect costs that are incurred in responding to this RFI. Further, this request does not constitute a solicitation for proposals or the authority to enter into negotiations to award a contract. No funds have been authorized, appropriated or received for this effort. The information provided may be used by the Federal Government in developing an acquisition strategy, Statements of Work/Performance Work Statements and/or Statements of Objectives. Interested parties are responsible to adequately mark proprietary, restricted or competition sensitive information contained in their response accordingly.

Issued this day of November 23, 2016, in Washington, DC.

**Sophie Shulman,**

*Acting Assistant Secretary for Research and Technology.*

[FR Doc. 2016–28805 Filed 11–29–16; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

November 25, 2016.

The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

**DATES:** Comments should be received on or before December 30, 2016 to be assured of consideration.

**ADDRESSES:** Send comments regarding the burden estimates, or any other aspect of the information collections, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8142, Washington, DC 20220, or email at *PRA@treasury.gov.*

**FOR FURTHER INFORMATION CONTACT:** Copies of the submissions may be obtained by emailing *PRA@treasury.gov,* calling (202) 622–0934, or viewing the entire information collection request at *www.reginfo.gov.*

#### Internal Revenue Service (IRS)

*OMB Control Number:* 1545–1487.

*Type of Review:* Reinstatement without change of a previously approved collection.

*Title:* Failure To File Gain Recognition Agreements or Satisfy Other Reporting Obligations.

*Abstract:* Sections 367(e)(1) and 367(e)(2) provide for gain recognition on certain transfers to foreign persons under sections 355 and 332. Section 6038B(a) requires U.S. persons transferring property to foreign persons in exchanges described in sections 332 and 355 to furnish information regarding such transfers.

*Affected Public:* Businesses or other for-profits.

*Estimated Total Annual Burden Hours:* 2,471.

*OMB Control Number:* 1545–1675.

*Type of Review:* Reinstatement with change of a previously approved collection.

*Title:* Treatment of taxable income of a residual interest holder in excess of daily accruals.

*Abstract:* Sections 1.860E–1(c)(4)–(10) of the Treasury Regulations provide circumstances under which a transferor of a noneconomic residual interest in a Real Estate Mortgage Investment Conduit (REMIC) meeting the investigation, and two representation requirements may avail itself of the safe harbor by satisfying either the formula test or asset test.

*Affected Public:* Businesses or other for-profits.

*Estimated Total Annual Burden Hours:* 470.

*OMB Control Number:* 1545–1856.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* Consent To Disclosure of Return Information.

*Form:* 13362.

*Abstract:* The Consent Form is provided to external applicant that will allow the Service the ability to conduct tax checks to determine if an applicant is suitability for employment once they are determined qualified and within reach to receive an employment offer. Form 13362 can be sent and received electronically.

*Affected Public:* Individuals or Households.

*Estimated Total Annual Burden Hours:* 7,664.

*OMB Control Number:* 1545–2219.

*Type of Review:* Reinstatement with change of a previously approved collection.

*Title:* Form 14242—Reporting Abusive Tax Promotions or Preparer's, & Form 14242 (SP)—Informe las Presuntas Promociones de Planes.

*Forms:* 14242, 14242 (SP).

*Abstract:* Form 14242 and Form 14242 (SP) are both used to report an abusive tax avoidance scheme and tax return preparer's who promote such schemes (Form 14242 (SP) is the Spanish translation of Form 14242). The information is collected to combat abusive tax promoters. Respondents can be individuals, businesses and tax return preparer's.

*Affected Public:* Individuals or Households.

*Estimated Total Annual Burden Hours:* 77.

**Bob Faber,**

*Acting Treasury PRA Clearance Officer.*

[FR Doc. 2016–28813 Filed 11–29–16; 8:45 am]

**BILLING CODE 4830–01–P**


# FEDERAL REGISTER

Vol. 81 Wednesday,
No. 230 November 30, 2016

Part II

## Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 407, 430, 431, et al.
Medicaid and Children's Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP; Final Rule and Proposed Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Parts 407, 430, 431, 433, 435, and 457**

**[CMS–2334–F2]**

**RIN 0938–AS27**

# Medicaid and Children's Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements provisions of the Affordable Care Act that expand access to health coverage through improvements in Medicaid and coordination between Medicaid, CHIP, and Exchanges. This rule finalizes most of the remaining provisions from the ''Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing; Proposed Rule'' that we published in the January 22, 2013, **Federal Register**. This final rule continues our efforts to assist states in implementing Medicaid and CHIP eligibility, appeals, and enrollment changes required by the Affordable Care Act.

**DATES:** These regulations are effective on January 20, 2017.

**FOR FURTHER INFORMATION CONTACT:** Sarah deLone, (410) 786–0615.

## Executive Summary

This final rule implements provisions of the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act), and the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). This final rule codifies in regulation certain statutory eligibility provisions set forth in the Affordable Care Act; changes regulatory requirements to provide states more flexibility to coordinate Medicaid and the Children's Health Insurance Program (CHIP) eligibility notices, appeals, and other related administrative procedures with similar procedures used by other health coverage programs authorized under the Affordable Care Act; modernizes and streamlines existing rules, eliminates obsolete rules, and updates provisions to reflect the various Medicaid eligibility pathways; and codifies certain CHIPRA eligibility-related provisions, including eligibility for newborns whose mothers were eligible for and receiving Medicaid or CHIP coverage at the time of birth.

## Table of Contents

To assist readers in referencing sections contained in this document, we are providing the following table of contents.



## Acronyms and Terms

Because of the many organizations and terms to which we refer by acronym in this final rule, we are listing these acronyms and their corresponding terms in alphabetical order below:

ABP Alternative Benefit Plans
ACF U.S. Department of Health and Human Services, Administration for Children and Families
[the] Act The Social Security Act
AFDC Aid to Families with Dependent Children
Affordable Care Act The Affordable Care Act of 2010, which is the collective term for the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152)
APTC Advanced Payment of the Premium Tax Credit
BCCEDP Breast and Cervical Cancer Early Detection Program
BHP Basic Health Program
CDC Centers for Disease Control and Prevention
CE Continuous Eligibility
CHIPRA Children's Health Insurance Program Reauthorization Act of 2009
CHIP Children's Health Insurance Program
CMS Centers for Medicare & Medicaid Services
CNMI Commonwealth of the Northern Mariana Islands
COI Collection of Information
CSEA Child Support Enforcement Agency
CSR Cost-Sharing Reductions
DHS Department of Homeland Security
DOJ Department of Justice
DSH Federal Data Services Hub
EDL Enhanced Driver's License
EPSDT Early and Periodic Screening, Diagnosis, and Treatment
FFE Federally Facilitated Exchange
FFP Federal Financial Participation
FPL Federal Poverty Level
HHS Department of Health and Human Services
HIV Human Immunodeficiency Virus
ICR Information Collection Requirements
INA Immigration and Nationality Act
IRC Internal Revenue Code of 1986
IRS Internal Revenue Service
LTSS Long-Term Care Services and Supports
MAGI Modified Adjusted Gross Income
MNIL Medically Needy Income Level
MOE Maintenance of Effort
MOU Memorandums of Understanding
MSIS Medicaid Statistical Information System
OACT Office of the Actuary
OMB Office of Management and Budget
PE Presumptive Eligibility
PRA Paperwork Reduction Act of 1995
PRWORA Personal Responsibility and Work Opportunity Reconciliation Act of 1996
QHP Qualified Health Plan
RIA Regulatory Impact Analysis
SAVE Systematic Alien Verification for Entitlements
SBA Small Business Administration
SHO State Health Official
SMD State Medicaid Director
SPA State Plan Amendment
SSA Social Security Administration
SSI Supplemental Security Income
SSN Social Security Number
TAG Technical Advisory Groups
TMA Transitional Medical Assistance

## I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), was amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010). These laws are collectively referred to as the Affordable Care Act. The Affordable Care Act extends and simplifies Medicaid eligibility and, in the March 23, 2012, **Federal Register**, we issued a final rule entitled ''Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010'' (referred to as the ''March 23, 2012, Medicaid eligibility final rule'') addressing certain key Medicaid eligibility issues.

In the January 22, 2013 **Federal Register**, we published a proposed rule entitled ''Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing'' (78 FR 4594) (hereinafter referred to as ''January 22, 2013 proposed rule''), that addressed a number of Medicaid eligibility provisions not addressed in the March 23, 2012, Medicaid eligibility final rule. This proposed rule included additional requirements related to the statutory eligibility provisions created by the Affordable Care Act; proposed changes to provide states more flexibility to coordinate Medicaid and the Children's Health Insurance Program (CHIP) procedures related to eligibility notices, appeals, and other related administrative actions with similar procedures used by other health coverage programs authorized under the Affordable Care Act.

In the July 15, 2013 **Federal Register**, we issued the ''Medicaid and Children's Health Insurance Programs: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes, and Premiums and Cost Sharing; Exchanges: Eligibility and Enrollment; final rule'' (78 FR 42160) (referred to as the ''July 15, 2013 Medicaid and CHIP final rule'') that finalized certain key Medicaid and CHIP eligibility provisions included in the January 22, 2013 proposed rule. In this final rule, we are addressing most of the remaining provisions of the January 22, 2013 proposed rule. We will not be finalizing in this rule the definition of ''lawfully present'' in § 435.4, or provisions finalizing the option states have to cover lawfully residing children and pregnant women in Medicaid and CHIP under section 214 of the Children's Health Insurance Program Reauthorization Act (CHIPRA) at § 435.406(b) and § 457.320, or the provision relating to benefits for those individuals who are non-citizens proposed at § 435.406(c). We will consider addressing these provisions in future guidance. We also are not finalizing proposed technical changes to the introductory text in § 435.201(a).

We discuss below only those public comments associated with the provisions addressed in this final rule. For a complete and full description of the proposed Medicaid and CHIP eligibility and expansion provisions as required by the statute, see the January 22, 2013 proposed rule.

## II. Provisions of the Proposed Rule and Responses to Comments

We received a total of 741 timely comments to the proposed rule from individuals, state Medicaid agencies, advocacy groups, health care providers, employers, health insurers, and health care associations. The comments ranged from general support or opposition to the proposed provisions to very specific questions or comments regarding the proposed changes.

After careful consideration of the comments received we are revising some of the proposed regulations and finalizing other regulations as proposed. Many comments were addressed in the July 15, 2013 Medicaid and CHIP final rule Part I. Some comments were outside the scope of the proposed rule. In some instances, commenters raised policy or operational issues that will be addressed through future regulatory and subregulatory guidance to be provided subsequent to this final rule. Therefore, some, but not all, comments are addressed in this final rule.

Brief summaries of the provisions that are being finalized in this rule, a summary of the public comments we received on those provisions (except specific comments on the paperwork burden or the economic impact analysis), and our responses to the comments follows. Comments related to the paperwork burden and the impact analyses are addressed in the ''Collection of Information Requirements'' and ''Regulatory Impact Analysis'' sections in this final rule.

### *A. Appeals*

#### 1. Coordination of Appeals

Consistent with sections 1413 and 2201 of the Affordable Care Act, we proposed regulations to promote coordination of Medicaid fair hearings under section 1902(a)(3) of the Social Security Act (the Act) with appeals of eligibility determinations for enrollment in a Qualified Health Plan (QHP) and for advance payment of the premium tax credit (APTC) and cost-sharing reductions (CSR) under section 1411(f) of the Affordable Care Act, as well as appeals related to other insurance affordability programs. We proposed revisions to the CHIP regulations to achieve similar coordination of CHIP reviews under 42 CFR part 457 subpart K with Exchange-related appeals, as well as appeals related to other insurance affordability programs. In this final rule, we refer to an Exchange operating in the state in which the applicant has applied for coverage as ''an Exchange.'' We use the term ''Exchange-related appeal'' to refer both to an appeal of a determination of ineligibility to enroll in a QHP through an Exchange as well as an appeal of eligibility for, or an amount awarded of, APTC or CSRs. The terms ''Medicaid appeal'' and ''Medicaid fair hearing'' have the same meaning in this final rule. The terms ''CHIP appeal'' and ''CHIP review'' have the same meaning in this final rule.

To ensure the coordination of appeals when both an Exchange-related and a Medicaid appeal are pending, we proposed to permit Medicaid agencies to delegate authority to conduct fair hearings of eligibility denials for individuals whose income eligibility is based on the applicable modified adjusted gross income (MAGI) standard, to an Exchange or Exchange appeals entity (provided that an Exchange or Exchange appeals entity is a governmental agency, which maintains personnel standards on a merit basis). This proposal was finalized in revisions to § 431.10 and § 431.206(d) in the July 2013 Eligibility final rule, along with conforming changes to § 431.205(b)(1). Consistent with section 1902(a)(3) of the Act and § 431.10(c)(1)(ii), if the agency does delegate such authority to an Exchange or Exchange appeals entity, individuals must be given the choice to have their Medicaid appeal conducted by the Medicaid agency. As we explained in the proposed rule, states currently have broad flexibility under § 457.1120 to delegate the CHIP review process to other entities; thus, no revision of the CHIP regulations was needed to permit delegation of review authority to an Exchange or Exchange appeals entity.

We proposed several other revisions to regulations in 42 CFR part 431 subpart E that were not finalized in the July 2013 Eligibility final rule. These revisions would maximize coordination of appeals involving different insurance affordability programs and minimize

burden on consumers and states, regardless of whether the Medicaid of CHIP agency has delegated such authority to an Exchange or Exchange appeals entity, including:

• To avoid the need for individuals to request multiple appeals related to a MAGI-based eligibility determination, we proposed at § 431.221(e) that, whenever an individual who has been determined ineligible for Medicaid requests an appeal related to his eligibility for the APTC or CSR level, this Exchange-related appeal will automatically be treated as an appeal of the Medicaid denial, without the individual having to file a separate fair hearing request with the Medicaid agency. We proposed a similar provision for CHIP at § 457.1180.

• For simultaneous Exchange-related and Medicaid appeals in which an Exchange appeals entity is not adjudicating the Medicaid appeal, we proposed at § 431.244(f)(2) that the agency must take final administrative action on a Medicaid fair hearing request within 45 days from the date an Exchange appeals entity issues its decision relating to eligibility to enroll in a QHP and for APTC and CSRs. The purpose of proposed § 431.244(f)(2) was to enable the Medicaid agency to defer conducting the Medicaid fair hearing until an Exchange-related appeal had been decided, which could significantly reduce the burden on both consumers and states, particularly in the case of Medicaid fair hearing requests automatically triggered for individuals with income significantly above the applicable Medicaid income standard, many of whom would not likely choose to appeal their Medicaid denial or be found Medicaid eligible by the hearing officer. Recognizing the competing interests of consumers in different situations, we set forth several alternatives—including not modifying the 90-day timeframe at all—and solicited comments on the different approaches. Because there is broad flexibility under title XXI for reviews of CHIP determinations, we did not propose similar provisions for CHIP.

• We proposed revisions to the definition of ''electronic account'' in §§ 435.4 and 457.10 (to include information collected or generated as part of Medicaid fair hearing or Exchange appeals processes) and to § 431.242(a)(1)(i) (to ensure individuals would have access to the information in their electronic account, as well as the information in their ''case record''). (Current § 457.1140(d)(2) ensures individuals have the right to review their files and all other ''applicable information'' relevant to their eligibility or coverage for CHIP, which would include information in the individual's electronic account.)

• In situations in which the Medicaid agency has delegated to an Exchange or an Exchange appeals entity authority both to make eligibility determinations and to conduct Medicaid fair hearings, we proposed revisions at § 435.1200(c) to clarify that the Medicaid agency must receive and accept a decision of an Exchange appeals entity finding an individual eligible for Medicaid, just as it accepts a determination of Medicaid eligibility made by an Exchange. We also proposed revisions at § 435.1200(c)(3) to provide that, if an Exchange appeals entity has adjudicated both an Exchange-related and Medicaid appeal, an Exchange or Exchange appeals entity would issue a combined appeals decision. We proposed similar revisions for CHIP at § 457.348(c).

• For states that have not delegated authority to an Exchange to determine Medicaid eligibility, we proposed revisions at § 435.1200(d) (introductory text) to require that the agency treat an assessment of eligibility by an Exchange appeals entity in the same manner as an assessment of eligibility by an Exchange and, at § 435.1200(d)(4), to require that the Medicaid agency accept findings relating to a criterion of eligibility made by another insurance affordability program's appeals entity, if such findings were made in accordance with the same policies and procedures as those applied or approved by the Medicaid agency. We proposed similar revisions for CHIP at § 457.348(d).

• We proposed revisions to § 435.1200(e)(1) to provide that the agency must assess individuals for potential eligibility for other insurance affordability programs when they have been determined ineligible for Medicaid in the course of a fair hearing conducted by the Medicaid agency in the same manner as is required for individuals determined ineligible for Medicaid at initial application or renewal. We proposed similar revisions for CHIP at § 457.350(b) (introductory text).

• We proposed to add a new paragraph (g) to § 435.1200, to ensure coordination between appeals entities. Proposed paragraph (g)(1) requires that the Medicaid agency establish a secure electronic interface through which an Exchange appeals entity can notify the Medicaid agency of a Medicaid fair hearing request and can transfer the individual's electronic account and information contained therein between programs or appeals entities. Proposed § 435.1200(g)(2) requires that, in conducting a Medicaid fair hearing under part 431 subpart E, the Medicaid agency not request information or documentation from the individual already included in the individual's electronic account or provided to an Exchange or Exchange appeals entity. Proposed § 435.1200(g)(3) requires that the Medicaid agency transmit to an Exchange a Medicaid fair hearing decision issued by the agency when necessary to ensure an appellant is not enrolled in both programs (that is, when the appellant either had been denied Medicaid by an Exchange, or by the agency and transferred to an Exchange for a determination of eligibility for enrollment in a QHP and for APTC and CSRs). Similar provisions for CHIP were proposed at § 457.351.

• In addition, we proposed conforming amendments to § 435.1200(b)(1) related to the coordination of appeals between the Medicaid agency and an Exchange and Exchange appeals entity to incorporate new paragraph (g) in the delineation of general requirements that the Medicaid agency must meet to effectuate a coordinated eligibility system. We proposed revisions to § 435.1200(b)(3) to specify that the goal of minimizing burden on consumers through coordination of insurance affordability programs also relates to coordination of appeals processes and that the agreement entered into between the Medicaid agency and an Exchange per § 435.1200(b)(3) must also ensure compliance with new paragraph (g). We proposed similar revisions for CHIP at § 457.348(b).

We received the following comments on these proposed provisions, which are summarized below. We respond to comments and describe the provisions included in this final rule related to coordination of appeals processes across insurance affordability programs as they relate to coordination between Medicaid and Exchange-related appeals or appeals related to other insurance affordability programs. The policies discussed in this section and reflected in the final rule for Medicaid also apply to coordination between CHIP and Exchange-related appeals or appeals related to other insurance affordability programs.

*Comment:* Commenters generally supported the goal of coordinating the appeals processes across insurance affordability programs to reduce burden on consumers, states and the Exchanges. Several commenters noted particular support for the proposed revisions at § 435.1200(b)(3) that require the agreement(s) between the agency and other insurance affordability programs to delineate the responsibilities of each program to achieve a coordinated appeals process. One commenter

supported the proposed revisions at § 435.1200(c) specifying that the Medicaid agency must accept a decision of an Exchange appeals entity finding an individual eligible for Medicaid to the same extent as it accepts determination of Medicaid eligibility made by an Exchange. Another commenter commended the clarifications at proposed § 435.1200(d)(2), precluding duplicative information requests, and at proposed § 435.1200(d)(4), requiring the Medicaid agency to accept findings relating to a criterion of eligibility made by another insurance affordability program's appeals entity if such findings were made in accordance with the same policies and procedures as those applied or approved by the Medicaid agency.

Some commenters also supported the requirement at proposed § 431.221(e) to automatically consider an Exchange-related appeal to trigger a Medicaid fair hearing request when a determination of Medicaid ineligibility has been made by either an Exchange or the Medicaid agency (referred to below as the proposed ''auto-appeal'' provision). These commenters believed that this provision is important (1) to reduce burden and confusion for consumers, who otherwise would have to request two separate appeals of what they may perceive as a single adverse action, and (2) to ensure that consumers don't miss the deadline to appeal a denial of Medicaid. One commenter suggested technical revisions to proposed § 431.221(e) to ensure that an appeal to ''an Exchange'' (as well as to ''an Exchange appeals entity'') and an appeal involving eligibility for ''enrollment in a QHP'' (as well as an appeal related to eligibility for the ''advanced payment of premium tax credit or cost sharing reductions'') be treated as a request for a Medicaid fair hearing under this provision.

Other commenters cautioned against requiring a high degree of coordination, which they believed would not be consistent with existing state capacity and resources. Some of these commenters also stated that such coordination would be difficult given the variation in state laws, policies and operations. For example, one commenter stated that a high degree of coordination was unrealistic because Medicaid fair hearings are subject not only to federal law and regulations, but also to state administrative procedures acts, thereby creating differences in the rules applicable to appeals in each state. Accordingly, these commenters strongly opposed the ''auto appeal'' provision at proposed § 431.221(e). The commenters believe that the provision would result in a substantial increase in the number of Medicaid fair hearings that state agencies will have to conduct, adding further pressure on state Medicaid budgets, even though many applicants would not have been interested in having a Medicaid hearing, and in many cases the hearings would not likely result in a reversal of the Medicaid denial. The commenters noted that states do not have resources to expand their capacity to handle such an increased volume of appeals and recommended that the provision be removed from the final rule. A few commenters also believed that proposed § 431.221(e) would be inconsistent with the ability of states to retain responsibility for all Medicaid fair hearing requests (rather than delegating authority to an Exchange to decide any Medicaid appeals); the commenters suggested that in states that do not delegate fair hearing authority to an Exchange or Exchange appeals entity, requiring submission of a separate request to the Medicaid agency would be appropriate. Several commenters recommended that if we finalize § 431.221(e) as proposed, we delay implementation until January 1, 2015, or later. One commenter believed that such a delay also would allow states to gather experience in how administrative efficiencies can be achieved through technical efficiencies using the shared case file and the informal resolution process at an Exchange.

Some commenters recommended that an Exchange appeals entity be required to offer applicants an opportunity to request a fair hearing of a Medicaid denial. Another commenter suggested that only applicants and beneficiaries appealing an Exchange-related determination who were found to have income within a specified threshold of the applicable Medicaid standard be treated as automatically having requested a fair hearing of their Medicaid denial. In other situations, the commenter suggested that, if an Exchange appeals entity, in conducting the Exchange-related appeal, determines the appellant to be eligible for Medicaid, the Medicaid agency could accept such determination effective as of the date of application.

*Response:* The Affordable Care Act requires coordination between insurance affordability programs in determining eligibility. We interpret this statutory requirement to apply when simultaneous appeals related to eligibility for multiple programs are pending. The goal of such coordination is to reduce the burden on consumers, state agencies, and Exchanges that administer the programs; achieving the optimal balance requires that we take into consideration the interests and capacity of all parties.

We agree with commenters who voiced concerns, similar to those that we raised in the proposed rule, that proposed § 431.221(e) could result in a substantial increase in the volume of fair hearing requests that Medicaid agencies would be responsible for adjudicating, even though in many cases it would be unlikely that the appellant would have independently requested a Medicaid hearing in the absence of the ''auto-appeal provision'' or be found eligible for Medicaid as a result of the hearing. As stated in the proposed rule, our intent was to reduce the need for an individual to submit multiple appeal requests. To address the concerns of commenters, we have decided not to include proposed § 431.221(e) in the final rule. We provide instead an alternative simple mechanism for individuals appealing an Exchange-related appeal to also request a Medicaid fair hearing,

We are not accepting the commenter's suggestion that an Exchange-related appeal should trigger an automatic Medicaid fair hearing request when the appellant has income within a specified threshold of the applicable Medicaid standard. We do not believe it is feasible to establish an appropriate income threshold for all applicants and beneficiaries in light of the many factors that apply in determining income eligibility depending on each individual's circumstances. Instead, consistent with the policy objectives we identified in the proposed rule, this final rule provides that applicants and beneficiaries requesting an Exchange-related appeal who also want to appeal a Medicaid denial may do so by making a single ''joint fair hearing request'' to an Exchange or Exchange appeals entity when an Exchange has provided a combined eligibility notice which includes a Medicaid denial, as well as a determination of eligibility for enrollment in a QHP with (or without) an award of APTC. This policy is effectuated through the following provisions:

- We provide a definition of a ''joint fair hearing request'' in § 431.201 to mean a request for a Medicaid fair hearing that is included in an appeal request submitted to an Exchange or Exchange appeals entity under 45 CFR 155.520. We also add a cross-reference to the definition of ''joint fair hearing request'' in § 431.201 at § 435.1200(a)(2)(ii) of the final rule. Note that a ''joint fair hearing request'' may be made both in states that have elected and states that have not elected

to delegate authority to conduct Medicaid fair hearings to an Exchange or Exchange appeals entity. Note also that a joint fair hearing request does not constitute a request for the Medicaid and Exchange-related appeals to both be heard by an Exchange appeals entity in states which have delegated Medicaid fair hearing authority. The joint fair hearing request simply allows applicants and beneficiaries to request a Medicaid fair hearing at the same time as they file an Exchange-related appeal with an Exchange or Exchange appeals entity. If a joint fair hearing request is submitted and authority to conduct the Medicaid fair hearing has been delegated to an Exchange or Exchange appeals entity, the individual must be provided with a choice to have the Medicaid fair hearing conducted by the Medicaid agency, consistent with § 431.10(c)(1)(ii) and § 431.10(d)(4) of the July 2013 final eligibility rule.

- Revisions at paragraph (g)(1) of § 435.1200 of the final rule provide that the agency must include in the agreement consummated per § 435.1200(b)(3) that, if an Exchange (or other insurance affordability program) provides an applicant or beneficiary with a combined eligibility notice which includes a denial of Medicaid eligibility, an Exchange or Exchange appeals entity (or other insurance affordability program or appeals entity) will (1) provide the applicant or beneficiary with an opportunity to submit a joint fair hearing request, including an opportunity to request expedited review of his or her fair hearing request consistent with § 431.221(a)(1)(ii) of the final rule; and (2) notify the Medicaid agency of the request for a Medicaid fair hearing, unless the hearing will be conducted by an Exchange appeals entity in accordance with a delegation of Medicaid fair hearing authority under § 431.10(c)(1)(ii). Section 431.221(a)(1)(ii) (relating to requests for expedited review of a fair hearing request) is discussed in section I.A.(b) of this final rule.

Under the final regulation, if a combined eligibility notice, including a Medicaid denial, is not provided by an Exchange, but instead it is the Medicaid agency that provides notice of the Medicaid denial, the Medicaid agency is responsible for providing notice of fair hearing rights in accordance with existing regulations at § 435.917 and part 431 subpart E, and the individual would need to submit a fair hearing request to the agency in accordance with § 431.221. Note that, as discussed in section II.B. of this final rule, while states are permitted to implement a system of combined eligibility notices in coordination with an Exchange operating in the state at any time, we do not expect that states and Exchanges will be able to provide combined notices in all situations immediately, but will phase in increased use of single coordinated eligibility notices over time as systems mature and resources become available. Because provision of a joint fair hearing request is contingent upon issuance of a combined eligibility notice by an Exchange, the requirement to permit individuals to make a joint fair hearing request is effective only to the extent that a combined eligibility notice is provided. In some instances, an Exchange already may be providing a combined eligibility notice of a Medicaid denial together with notice of eligibility to enroll in a QHP and receive APTC and CSRs, even in the absence of a requirement that it do so. Where combined eligibility notices are being provided, the Medicaid agency must work with an Exchange operating in the state to ensure that the Exchange provides individuals receiving a combined notice with an opportunity to request a Medicaid fair hearing using a joint fair hearing request. In states that have delegated authority to make MAGI-based Medicaid eligibility determinations to the Federally-facilitated Exchange (FFE), for example, the FFE currently provides a combined eligibility notice to individuals who submit their application to the FFE and accepts joint fair hearing requests from individuals determined by the FFE to be ineligible for Medicaid based on MAGI.

- We add new paragraph § 435.1200(g)(3) to provide that the agency must accept and act on a joint fair hearing request submitted to an Exchange or Exchange appeals entity in the same manner as a request for a fair hearing submitted to the agency in accordance with § 431.221.
- Section 435.1200(g)(1)(i) of the proposed rule provided for the establishment of a secure electronic interface through which an Exchange or Exchange appeals entity would notify the Medicaid agency whenever an Exchange-related appeal is filed, because under the proposed rule, this would have triggered an automatic Medicaid appeal, as well as providing a mechanism through which the individual's electronic account could be transmitted. We are revising proposed § 435.1200(g)(1)(i), redesignated at § 435.1200(g)(2)(i) of the final rule, instead to provide that the state agency establish a secure electronic interface through which an Exchange or Exchange appeals entity can notify the agency that it has received a joint fair hearing request. Per § 435.1200(g)(2)(ii) of this final rule, the secure electronic interface also must support transmission of the individual's electronic account and other information relevant to conducting an appeal between the agency and an Exchange or Exchange appeals entity (or other insurance affordability program or appeals entity). Discussed in more detail below, § 435.1200(g)(2) is subject to a delayed compliance date, 6 months after the date we publish a **Federal Register** notice alerting states of the compliance date for paragraph (g)(2).

For individuals determined ineligible for Medicaid who have requested only an Exchange-related appeal, it also is critical to prevent any possibility of an ''appeals gap,'' if an Exchange appeals entity issues a decision finding an individual eligible for Medicaid. To prevent such a gap, § 435.1200(g)(6) of the final rule provides that, if an Exchange made the initial determination of Medicaid ineligibility in accordance with a delegation of authority under § 431.10(c)(1)(i)(A)(*3*), the agency must accept a decision made by an Exchange appeals entity that an appellant is eligible for Medicaid in the same manner as if the determination of Medicaid eligibility had been made by an Exchange. Per § 435.915 of the current regulations, the effective date of eligibility will be based on the date the application was filed. If the Medicaid agency made the initial determination of Medicaid ineligibility, § 435.1200(g)(7) of the final rule provides the Medicaid agency with an option either to accept determinations of Medicaid eligibility made by an Exchange appeals entity in accordance with § 435.1200(c), or to accept such determinations as an assessment of potential Medicaid eligibility and to then re-determine the individual's Medicaid eligibility in accordance with § 435.1200(d). If the agency opts to re-determine the individual's eligibility, it must take into account any additional information obtained by an Exchange appeals entity in conducting an Exchange-related appeal. Such information should be provided by an Exchange appeals entity to the Medicaid agency, via the secure electronic interface established per § 435.1200(g)(2), in accordance with the agreement described in paragraph (b)(3) to minimize burden on consumers. However, if an Exchange appeals entity does not transmit or otherwise furnish information relevant to the agency's redetermination, the agency must attempt to obtain the information directly from the individual. We are finalizing proposed revisions to

§ 435.1200(d) (introductory text) and § 435.1200(d)(2), accordingly, to provide that, in making a determination of eligibility for an individual transferred from another insurance affordability program, the agency may not request information or documentation from the individual that is in the individual's electronic account or that has been provided to the agency by another insurance affordability program or appeals entity. Section 435.1200(d)(4) of the proposed rule, also finalized without revision in this final rule, similarly requires that the agency accept any finding relating to a criterion of eligibility made by another insurance affordability program or appeals entity, without further verification, if such finding was made in accordance with policies and procedures which are the same as those applied by the agency or approved by it in the agreement consummated with the other program or appeals entity described in § 435.1200(b)(3). Paragraphs (g)(4) and (g)(5) of § 435.1200 of the final rule are discussed below.

Note that the option provided in paragraph (g)(7) applies when the Medicaid agency has made the determination of ineligibility, regardless of whether or not the agency has authorized an Exchange to make Medicaid eligibility determinations in accordance with a delegation of authority under § 431.10(c)(1)(i)(A)(*3*). States must apply the option they elect consistently to all individuals in the situation described. Regardless of the option elected, for individuals ultimately approved for Medicaid in accordance with § 435.1200(g)(7), the effective date of eligibility is based on the date the application was filed, consistent with § 435.915.

We proposed revisions to the introductory text of § 435.1200(c) to require the agency to accept a determination of Medicaid eligibility by an Exchange appeals entity in adjudicating a Medicaid fair hearing in accordance with a delegation of fair hearing authority under § 431.10(c)(1)(ii). We did not receive comments on these proposed revisions, which are included in the final rule. We also include a cross-reference to new paragraphs (g)(6) and (7) in the introductory text of § 435.1200(c) to reflect the additional circumstances in which the agency must or may accept a determination of Medicaid eligibility by an Exchange appeals entity.

We note that in a state that has not delegated authority to make Medicaid eligibility determinations to an Exchange, if an Exchange assesses the individual as ineligible for Medicaid and the individual elects to withdraw his or her Medicaid application in accordance with § 155.302(b)(4), there is no possibility of a Medicaid fair hearing to be heard (by either the agency or an Exchange appeals entity) because there has been no determination of Medicaid ineligibility by an Exchange. Under the proposed revisions to the introductory text of § 435.1200(d), finalized as proposed, the Medicaid agency must accept and treat an assessment of Medicaid eligibility made by an Exchange appeals entity in the same manner as if the assessment had been made by an Exchange. Per § 435.907(h), finalized in the July 2013 Medicaid and CHIP eligibility final rule, if an Exchange appeals entity assesses such an individual as eligible for Medicaid, the individual's application is automatically reinstated and transferred to the Medicaid agency to make a final determination. If the agency denies Medicaid eligibility at that point, notice of fair hearing rights would be provided by the agency.

For consumers who request both a Medicaid and an Exchange-related appeal, coordination of the appeals processes can be achieved when an Exchange or Exchange appeals entity is able to conduct both appeals together in accordance with a delegation of authority under § 431.10(c)(1)(ii). However, in some cases, the Medicaid agency and Exchange appeals entity each will be responsible for adjudicating separate appeals. We appreciate the commenters' concern regarding the significant practical challenges to achieving the degree of coordination required under the proposed regulations. We therefore are revising the proposed § 435.1200(g)(2), redesignated at paragraph (g)(4) in the final rule, to require that, in conducting a fair hearing in accordance with subpart E or part 431, the agency must minimize, to the maximum extent possible consistent with guidance issued by the Secretary, any requests for information or documentation from the individual that is already included in the individual's electronic account or otherwise provided to the agency by an Exchange or Exchange appeals entity. Over time, as state system capabilities increase, we anticipate that the degree of coordination possible between the state and an Exchange or Exchange appeals entity will increase, and we will issue additional guidance on coordination procedures as appropriate.

To address potentially conflicting decisions issued by the two appeals entities, current Exchange regulations at § 155.345(h) provide that an Exchange and Exchange appeals entity must accept a fair hearing decision issued by the Medicaid agency regarding the appellant's Medicaid eligibility, even if it conflicts with the decision reached by an Exchange appeals entity.

We did not receive any comments on proposed revisions to the introductory text in § 435.1200(c), which is finalized without revision in this final rule.

We remind states that, while the decision to delegate appeals authority to an Exchange or Exchange appeals entity means that the agency must accept a decision regarding eligibility issued by an Exchange appeals entity under a delegation of authority, it does not relieve the agency of its responsibility to conduct any fair hearings requested by Medicaid applicants and beneficiaries in the state. For example, notwithstanding a delegation of appeals authority, per current § 431.10(c)(1)(ii), individuals who request a fair hearing are entitled to request that their hearing be conducted by the agency, and not by the delegated entity. In addition, Medicaid agencies are not required to delegate appeals authority to an Exchange or Exchange appeals entity and the Exchanges and Exchange appeals entities respectively are not obligated to accept such delegations. Per current § 431.10(c)(3)(ii), agencies that enter into an agreement with an Exchange or Exchange appeals entity to do so must exercise appropriate oversight over, and ultimately remain responsible for, the Medicaid fair hearing process.

As provided under § 435.1200(g)(4) of the final rule, in conducting a fair hearing in accordance with subpart E or part 431 of the regulations, the agency must minimize any requests for information or documentation from the individual which already are included in the individual's electronic account or otherwise provided to the agency by an Exchange or Exchange appeals entity. However, in the event that the Medicaid agency has not received information from an Exchange or Exchange appeals entity needed to conduct a fair hearing, the agency would need to obtain such information directly from the individual, and would be authorized under the regulations to do so.

Commenters did not raise concerns with the following proposed revisions to § 435.1200(d) (introductory text), § 435.1200(d)(4) or § 435.1200(e)(1) (introductory text), which are finalized as proposed. Revisions to § 435.1200(d) require that the agency treat findings, assessments and decisions made by an Exchange appeals entity in the same manner and to the same extent as eligibility determinations made by an Exchange or Medicaid agency for the

purposes of the coordination described in § 435.1200(d). Revisions to § 435.1200(e) require that the agency treat fair hearing decisions made by the Medicaid appeals entity the same as determinations made by the Medicaid agency for purposes of the coordination described in § 435.1200(e). We also are finalizing as proposed conforming revisions to § 435.1200(b) relating to the basic responsibilities of the agency to minimize burden on consumers who have requested appeals related to more than one insurance affordability program and to address such coordination in an agreement between the agency and other applicable appeals entities.

The proposed revision at § 435.1200(c)(3) providing for a combined appeals decision when an Exchange or Exchange appeals entity adjudicates a fair hearing request in accordance with a delegation of authority is moved to a new paragraph (b)(3)(v) of § 435.1200. Consistent with the proposed rule, under § 435.1200(b)(3)(v) of the final rule, if the agency has delegated authority to conduct fair hearings to an Exchange or Exchange appeals entity, the agreement between the entities must provide for a combined appeals decision by an Exchange or Exchange appeals entity in the case of individuals whose fair hearing is conducted by an Exchange or Exchange appeals entity. Note that this requirement applies regardless of whether the Medicaid agency or Exchange made the underlying determination of Medicaid ineligibility.

The policies relating to coordination of appeals across insurance affordability programs previously discussed and codified in the final rule also apply to states' separate CHIP programs, except that the right to have to an appeal adjudicated by the state agency even if the agency has delegated authority to an Exchange or Exchange appeals entity does not apply in the case of any delegation of authority to conduct appeals of a CHIP determination. Table 1 provides a cross walk between the provisions of the final rule which accomplish the application of these policies to Medicaid and CHIP.

TABLE 1—CROSSWALK BETWEEN THE POLICIES TO MEDICAID AND CHIP

| Medicaid final regulation | CHIP final regulation |
|---|---|
| § 431.201 (Definition of "joint fair hearing request"). | § 457.10 (Definition of "joint review request"). |
| § 431.242 | No comparable provision. |
| § 435.4 (Definition of "electronic account"). | § 457.10 (Definition of "electronic account"). |
| § 435.1200(b)(3) | § 457.348(a). |
| § 435.1200(c) and (d) | § 457.348(b) and (c). |
| § 435.1200(e) | § 457.350(b) (introductory text). |
| § 435.1200(g) | § 457.351(a). |

Proposed revisions to § 457.1180, which would have provided for an automatic review of a CHIP denial based on a request for an Exchange-related appeal, are not included in this final rule for the same reason that proposed changes to § 431.221(e) are not finalized.

*Comment:* A commenter requested clarification regarding whether an assessment of Medicaid ineligibility by an Exchange is considered to be a Medicaid denial and, if so, whether an appeal of an Exchange-related determination to an Exchange appeals entity would trigger an automatic request for a Medicaid fair hearing when an Exchange had assessed the individual as not eligible for Medicaid. The commenter questioned how the Medicaid agency could conduct a fair hearing when it had not made an initial determination of ineligibility.

*Response:* As noted, we are not finalizing the auto-appeal provision at § 431.221(e) of the proposed rule. Therefore, no ''Exchange related appeal'' requests will result in automatic requests for Medicaid fair hearings. For assessments, we agree that, in a state that has not delegated authority to make Medicaid eligibility determinations to an Exchange, an assessment of Medicaid ineligibility by the Exchange does not constitute a denial of Medicaid subject to appeal. Per § 155.302(b)(4), an individual who has been assessed ineligible for Medicaid by an Exchange has the option either to accept that assessment and withdraw his or her Medicaid application or request that his or her Medicaid application be transferred to the Medicaid agency to make a final eligibility determination. If an individual who requests a final determination by the Medicaid agency is denied eligibility by the Medicaid agency, he or she at that point would have the right to request a fair hearing of the agency's denial. If an individual who chooses to withdraw his or her Medicaid application files an appeal relating to his or her eligibility for APTC and the Exchange appeals entity finds that the individual's income is at or below the applicable MAGI standard for Medicaid, per § 435.1200(d) the agency would accept such finding as an assessment of Medicaid eligibility and make a final determination of eligibility, in the same manner as if an Exchange had assessed the applicant as Medicaid eligible based on the initial application. The same result would ensue for CHIP per § 457.348(c).

*Comment:* A few commenters recommended that CMS clarify whether the regulatory requirements at § 435.1200 require only coordination of eligibility and enrollment between Medicaid and CHIP, or also require coordination of eligibility and enrollment between Medicaid and other insurance affordability programs, including the Basic Health Program (BHP) and APTC and CSRs for coverage through the Marketplace.

*Response:* At § 435.1200, which set forth the Medicaid agency's responsibilities to establish a seamless and coordinated system of eligibility and enrollment with respect both to an initial determination of eligibility and to any appeals of such initial determinations, we require Medicaid coordination with all other insurance affordability programs, including CHIP, BHP and APTCs and CSRs for coverage in a QHP. Similarly, the CHIP regulations at §§ 457.348 through 457.351, as revised in this final rule, provide for the coordination of eligibility determinations and appeals between CHIP and all other insurance affordability programs, not just for coordination between the CHIP and Medicaid programs.

*Comment:* A commenter believed that the establishment of an electronic interface between an Exchange appeals entity and the Medicaid eligibility system could take considerable time in some states, which would delay the ability of these states to come into full compliance with the policy reflected in the proposed rule.

*Response:* As noted in the proposed rule, the secure electronic interface required for use in exchanging information between the Medicaid agency and an Exchange appeals entity under proposed § 435.1200(g)(1) (redesignated at § 435.1200(g)(2) in this final rule) can be the same interface as that established between the Medicaid agency and Exchange for exchange of information related to the initial determination of eligibility; a separate secure interface directly between the Medicaid agency and Exchange appeals entity may be established, but is not required. Due to the considerable work which is ongoing in many states relating

to multiple aspects of their eligibility and enrollment systems, we agree that a delay in the compliance date of this requirement is appropriate. Thus, we are providing for a delayed compliance date of the requirement in § 435.1200(g)(2) to establish a secure electronic interface between the Medicaid agency and the Exchange appeals entity, which is incorporated at § 457.351(a) for CHIP. Under § 435.1200(i), states will be required to establish a secure interface for electronic transfer of information between insurance affordability programs and appeals entities within 6 months from the date of a published **Federal Register** notice alerting states of the compliance date for paragraph (g)(2).

*Comment:* In situations involving simultaneous Exchange-related and Medicaid appeals, no commenters supported the policy at proposed § 431.244(f)(2) to give state Medicaid agencies up to 45 days from the date an Exchange appeals entity issues an Exchange-related appeals decision to decide a Medicaid fair hearing. Some commenters were concerned that 45 days from the date of the Exchange appeals decision would not provide the Medicaid agency adequate time to conduct the Medicaid fair hearing. To meet the 45-day timeframe, the commenters stated that fair hearings may need to be scheduled prior to the issuance of a decision by an Exchange appeals entity, thereby undermining the goal to prevent duplication of effort. One commenter added that, if following the initiation of the Medicaid fair hearing process, the appellant withdraws his fair hearing request upon receiving an Exchange appeal decision, the State will have incurred unnecessary expense; this commenter recommended that CMS allow up to 90 days from the date of an Exchange appeal decision for the Medicaid agency to issue a decision on the fair hearing request. One commenter recommended that the timeframe generally permitted for fair hearing decisions be extended from 90 to 120 days, with the Medicaid agency receiving an Exchange's decision relating to eligibility for other insurance affordability programs no less than 60 days before the expiration of the 120-day period.

Others commenters were concerned that proposed § 431.244(f)(2) would result in excessive delays in fair hearing decisions for many individuals who were wrongfully denied Medicaid. Some of these commenters believed that the Medicaid fair hearing often should go first. Other commenters recommended that consumers should be given a choice as to whether their Exchange appeal or Medicaid fair hearing is conducted first. In support of a Medicaid-first policy, a few commenters pointed to the requirement at § 155.345(h) of the Exchange regulations that the Medicaid fair hearing decision must be accepted by an Exchange even if it conflicts with a decision rendered by an Exchange appeals entity.

*Response:* Proposed §§ 431.244(f)(2) and 431.221(e) represented two integral components of an overarching policy to achieve coordinated appeals processes across insurance affordability programs, in particular between Medicaid fair hearings and Exchange-related appeals. Because we were concerned that the automatic Medicaid appeals that would be generated under proposed § 431.221(e) would overwhelm the resources of Medicaid agencies' fair hearing processes, we proposed to permit Medicaid agencies to defer acting on such Medicaid fair hearing requests until the resolution of an Exchange-related appeal. Since we are not adopting the automatic appeal provision at proposed § 431.221(e) in this final rule, we do not believe this accommodation is necessary. Under this final regulation, a Medicaid fair hearing will be conducted only for individuals who affirmatively request such hearing—either through submission of a joint fair hearing request to an Exchange or directly to the agency. In this context, the potential harm to applicants and beneficiaries of delaying fair hearings as proposed at § 431.244(f)(2), outweighs the value of any potential administrative efficiencies gained. Accordingly, we are not finalizing proposed § 431.244(f)(2). Rather, this final rule, at § 431.244(f)(1)(ii), applies the standard 90 day time frame for taking final administrative action on all fair hearing requests, regardless of whether a simultaneous Exchange-related appeal has been filed, unless an expedited decision (discussed below) is required under § 431.244(f)(2). This overall time frame does not preclude the Medicaid agency and an Exchange from agreeing on the sequencing of related simultaneous appeals to maximize efficiency and reduce the burden on the agency and consumers. Protocols for sequencing of appeals can be included in the agreement between the two programs under § 435.1200(b)(3) of the final regulation, provided that the 90-day time frame for taking final administrative action in § 431.244(f) is met. As noted, because there is broad flexibility under CHIP regarding the timing of appeals decisions, we had not proposed similar changes in the CHIP regulations.

*Comment:* A commenter believed that the existence of two levels of the Exchange appeals process would make coordination of appeals between Medicaid and the Exchange difficult; the commenter believed that the Medicaid and Exchange appeal processes inevitably will diverge, and that expecting too much coordination could create confusion and the potential for someone to miss their opportunity to appeal, particularly in households in which one member has an appealable Exchange-related adverse action and another an appealable Medicaid-related adverse action. Another commenter recommended that we clarify that the informal review process runs concurrently with the timeframe for issuing a fair hearing decision, unless the appellant withdraws his request for a fair hearing. A third commenter sought clarification that the informal review process at the Exchange appeals entity may not interfere with an applicant's right to timely request a separate Medicaid appeal.

*Response:* The Exchange appeals process provides for an informal resolution process prior to the Exchange appeals entity engaging in a formal hearing process. Appellants who are not satisfied with the result of the informal resolution process are entitled to a hearing. (*See* § 155.535.)

We do not agree that the existence of such an informal resolution process will undermine coordination of the appeals process, or jeopardize individuals' right to request a Medicaid fair hearing. If an Exchange or Exchange appeals entity is conducting a Medicaid fair hearing in accordance with a delegation of authority under § 431.10(c)(1)(ii), the Exchange or Exchange appeals entity may choose to provide an informal resolution process for individuals appealing a Medicaid eligibility determination made by the Exchange. If an Exchange or Exchange Appeals Entity is providing an opportunity for informal resolution prior to a fair hearing, the process must be conducted consistent with Medicaid fair hearing rights and timeframes in accordance with part 431, subpart E, as required under the requirements of a delegation at § 431.10(c)(3)(i)(A). Thus, the time permitted to render a final decision (measured from the date of the appeal request) would not be affected. Appellants who are not satisfied with the result from the informal process at an Exchange or Exchange appeals entity would have the right to proceed to a formal hearing, as required under the Exchange regulations at § 155.535(a)(2).

Appellants satisfied with the result of the informal resolution process would need to withdraw their request for a Medicaid fair hearing in accordance with § 431.223(a); if the appellant is not satisfied, the Exchange appeals entity would proceed with a hearing. If the state has not delegated authority to conduct fair hearings to the Exchange or Exchange appeals entity, the informal resolution process established by the Exchange appeals entity will not be relevant, as the Medicaid agency will conduct the fair hearing in accordance with the processes established by the state agency.

We understand that a number of state Medicaid agencies employ informal resolution processes prior to holding a fair hearing. While not required, we believe informal resolution processes reflect an efficient mechanism to resolve appeals without incurring the cost or time needed for a formal hearing process. Whether employed by an Exchange or Exchange appeals entity or the Medicaid agency, use of an informal resolution process does not affect (1) the timeliness requirements set forth in in § 431.244(f) for issuance of a final fair hearing decision, measured against the date the fair hearing is requested; or (2) individuals' right to request that their fair hearing be conducted by the Medicaid agency, despite a delegation of fair hearing authority under § 431.10(c)(1)(ii).

*Comment:* Some commenters were concerned about an inconsistency in the period of time states must provide individuals to request a Medicaid fair hearing and the period of time permitted for individuals to file an Exchange-related appeal with an Exchange appeals entity. Commenters pointed to the regulation at § 431.221(d), which provides flexibility for state Medicaid agencies to allow applicants and beneficiaries ''a reasonable time, not to exceed 90 days'' to request a fair hearing, whereas under the proposed Exchange regulation at § 155.520(b), individuals are given 90 days to appeal an Exchange-related determination. Several commenters recommended that language be added at the end of proposed § 431.221(a)(5) to require that, for individuals receiving both a Medicaid and Exchange-related determination, any request for a Medicaid hearing be deemed timely if made within 90 days of the date of the notice relating to the individual's Exchange-related determination, regardless of the State's deadline for requesting a Medicaid hearing.

*Response:* In this final rule, we refer to the period of time individuals are provided to request an Exchange-related appeal or a Medicaid fair hearing as the ''appeals period.'' Current § 431.221(d) requires only that the agency establish an appeals period not to exceed 90 days. The 90-day Exchange appeals period provided at proposed § 155.520(b) was finalized, with revision, in the Exchange appeals final regulation which was published on August 30, 2013. Under § 155.520(b)(2) of that regulation, an Exchange or Exchange appeals entity may align the appeals period for an Exchange-related determination with the appeals period for a Medicaid fair hearing, provided that such period is not less than 30 days. This flexibility will enable, although not require, an Exchange appeals entity and Medicaid agency to adopt the same appeals period for both programs. States also have broad flexibility under § 457.1180 of the CHIP regulations to establish a reasonable appeal period, making alignment across all insurance affordability programs possible.

As previously discussed, we are not finalizing proposed § 431.221(e), which would have required the Medicaid agency to treat an Exchange-related appeal as automatically triggering a Medicaid fair hearing request in certain circumstances. Conversely, we agree that vastly different appeals periods could cause confusion, particularly for individuals who receive a single combined eligibility notice relating to their eligibility for multiple programs. However, we did not propose revisions to § 431.221(d) in the January 22, 2013 proposed rule. Therefore, to promote alignment between the appeals period permitted by all insurance affordability programs, we propose elsewhere in this **Federal Register**, revisions to § 431.221(d) under which the agency would be required to provide individuals with no less than 30 days nor more than 90 days to request a fair hearing. We also are proposing elsewhere in this **Federal Register** a similar requirement at a new § 457.1185(a)(3)(i) of the CHIP regulations.

We also agree with commenters that, when a combined eligibility notice including a Medicaid denial is issued, enabling the individual to submit a joint fair hearing request to an Exchange or Exchange appeals entity in accordance with § 435.1200(g)(1) of the final rule, a shorter appeals period for requesting a Medicaid fair hearing than that permitted for requesting an Exchange-related appeal could create confusion and result in someone inadvertently missing the deadline for requesting a Medicaid fair hearing. Therefore, we also are proposing elsewhere in this **Federal Register** a new paragraph (d)(2) in § 431.221, under which the Medicaid agency, whether or not it has delegated fair hearing authority to an Exchange or Exchange appeals entity, must accept as timely a request for a Medicaid fair hearing submitted to an Exchange or Exchange appeals entity (or to another insurance affordability program or appeals entity) as part of a joint fair hearing request within the time frame permitted for filing a timely appeal of an Exchange-related determination under § 155.520(b) (or for filing a timely appeal with such other insurance affordability program or appeals entity); a similar provision is proposed elsewhere in this **Federal Register** as a new § 457.1185(a)(3)(ii) of the CHIP regulations.

*Comment:* Several commenters supported the proposed regulation at § 431.221(a) to enable applicants and beneficiaries to request a Medicaid fair hearing via all the same modalities as are available for individuals to submit an application per § 435.907(a). Other commenters believed that requiring additional modalities (that is, other than by mail) for fair hearing requests was unnecessary, would impose undue burden on states, and should be available only at state option. A few noted their concern, in particular, about states' ability to track telephone requests, as well as the additional staff time required to gather information from individuals requesting a fair hearing in person or over the phone. They recommended that CMS eliminate the requirement that states accept hearing requests by phone or in person in favor of providing states with flexibility to determine their own capacity to offer these modalities for consumers to request hearings.

Some commenters suggested CMS include a requirement that the Medicaid agency be required to document and confirm all telephonic hearing requests in writing and that such confirmation occur within one business day of receipt of the telephonic hearing request. Some of these commenters believed that states should provide all individuals with confirmation of their fair hearing request, regardless of the modality through which the request was made. One commenter (mistakenly) stated that the Exchange regulations at § 155.520 do not allow individuals to submit a Medicaid hearing request via the Internet. The commenter, concerned that reliance on the Federally-facilitated Exchange might affect the permissibility of Medicaid fair hearing requests via the internet, encouraged CMS to amend the Exchange regulations to provide for appeal requests via the internet for both programs.

*Response:* We believe that facilitating consumers' ability to exercise their fair hearing rights through modernizing the means by which a fair hearing request can be made is as important as, and no more inherently burdensome to states than, modernizing the means by which an application can be filed. While individuals will be afforded an opportunity to request a fair hearing through the same modalities that can be used to submit an application, states retain flexibility in the mechanisms available to appellants to provide documentation supporting their position. For example, supporting documentation could be provided in connection with an informal resolution process, if applicable, or during the evidentiary hearing conducted by the hearing officer. Thus, we disagree with some commenters' concern regarding the particular burden of telephonic or in-person requests. Given the broad availability and use of the Internet for filing applications, we believe that this modality also should be available for appeals in all states. Therefore, we are finalizing the policy as proposed at § 431.221(a)(1) through (5) in the final rule. However, inasmuch as the modalities identified for submission of a fair hearing request at proposed § 431.221(a)(1) through (5) mirror the modalities that states must make available to applicants under § 435.907(a), we have revised proposed § 431.221(a)(1) through (5), redesignated at § 431.221(a)(1)(i) in the final rule, to instead provide a cross-reference to the modalities described in § 435.907.

We are aware that states will need time to upgrade their systems to accept fair hearing requests through these additional modalities. Thus, we are adding a delayed effective date for the new modalities for fair hearing requests required under the final rule. Per §§ 431.221(a)(1)(i) and 435.1200(i) of the final rule, telephonic and online fair hearing requests, as well as requests via other commonly available electronic means (if any) will not be required until 6 months from the date of the publication of the **Federal Register** notice requiring their implementation.

We note that our expectation is that the same modalities for requesting an appeal be available also in CHIP. However, we did not propose revisions to the CHIP regulations requiring that individuals applying for or receiving CHIP be able to request a review under subpart K of the CHIP regulations via all modalities available to individuals seeking to apply for CHIP. Therefore, we propose elsewhere in this **Federal Register** a new § 457.1185(a) to require that states must provide individuals with the opportunity to request a review of a denial or termination of CHIP or other CHIP-related matter via all such modalities. The proposed regulation at § 457.1185(a)(1)(ii) also includes a right to request an expedited completion of a review in accordance with current § 457.1160, similar to the right provided Medicaid applicants and beneficiaries at § 431.221(a)(1)(ii) of this final rule. Under the broad authority states currently have to establish a review process under part 457 subpart K, the option for states to accept review requests of CHIP-related matters through all modalities already is available.

We did not propose that the state Medicaid or CHIP agency provide confirmation of fair hearing requests and therefore we are not including such a requirement in this final rule. However, we agree that confirmation of fair hearing requests, which we note is required under the Exchange regulations at § 155.520(d), would strengthen the procedural protections afforded beneficiaries. Therefore, we propose elsewhere in this **Federal Register** further revisions to § 431.221(a) and a new § 457.1185(a)(2) to include this requirement.

*Comment:* A few commenters requested clarification regarding the ability of individuals to request a fair hearing through ''other commonly available electronic means.'' One commenter believed that the proposed regulation fails to address commonly available social media, which some might reasonably conclude are included in the definition of ''commonly available electronic means,'' which would be burdensome for states to accommodate. Another commenter recommended that § 431.221(a)(4) be revised to insert ''designated by the state'' after ''through other commonly available electronic means'' to make clear that it is states, not consumers, that have authority to designate what is considered to be a ''commonly available electronic means'' through which a fair hearing may be requested. Another commenter supported the requirement to make fair hearing requests available through other commonly available electronic means, but recommended delaying implementation of the requirement to allow time for the state to make the necessary systems changes to support such requests.

*Response:* We appreciate commenters' concern that the phrase ''commonly available electronic means'' may be interpreted differently by different states, consumers and other stakeholders. As noted, in proposing § 431.221(a), we intended to propose that the same modalities available for submission of applications under § 435.907 also be made available for individuals to request a fair hearing, and we have revised the final rule at § 431.221(a)(1)(i) to instead cross-reference the modalities listed in § 435.907. Since we did not propose revisions to the identical existing language in the regulations at § 435.907(a)(5) (requiring that agencies accept applications ''through other commonly available electronic means''), we are not revising the language we proposed in § 431.221(a)(4) pertaining to the modalities applicable to fair hearing requests in this rulemaking. However, we will take the comments under advisement in future rulemaking.

*Comment:* One commenter requested CMS to clarify its expectations regarding how states should ensure that requests made via telephone, the Internet or other commonly available electronic means are made only by the affected applicant beneficiary or a properly designated authorized representative.

*Response:* To ensure that fair hearing requests are submitted only by the affected applicant or beneficiary or person authorized to act on their behalf, states are expected to employ the same policies and practices regarding the authority of the individual submitting a fair hearing request as those applied by the state regarding the submission of applications and renewal forms by authorized representatives, under § 435.923. We believe it is important that a person or entity is not submitting an appeal request form on behalf of the individual without the consent of the individual. For example, it would not be permissible for a nursing home provider to submit an appeal request form on behalf of a beneficiary if no consent has been obtained from the individual. We also note that an individual serving in the role of an authorized representative under § 435.923 may limit the scope of his or her representation. For example, such an individual could be an attorney and only represent the individual in conducting the fair hearing or any informal resolution of that issue, but not receive an individual's notices or otherwise be responsible for filing change reporting or a renewal form. We have revised the introductory text of proposed § 431.221(a), redesignated at § 431.221(a)(1) of the final rule, to cross-reference the definition of ''authorized representative'' in § 435.923 for clarity.

*Comment:* Section 431.223 provides that a request for a hearing may be withdrawn in writing. One commenter sought clarification regarding whether a request to withdraw a fair hearing request can be effectuated in the same manner as a request for a fair hearing,

as provided at proposed § 431.221(a). A number of commenters recommended that § 431.223 be revised to provide additional protection against inadvertent or erroneous dismissals, similar to those provided in § 155.530(b) and (d), which requires an Exchange appeals entity to provide notice of dismissal, including information about how a dismissal may be vacated. The commenters believed that, given the inevitable complexity of states' hearing systems and changes that are being made to achieve greater coordination with an Exchange, there is a significant possibility that confusion on the part of individuals, as well as on the part of the navigators and insurance brokers helping them, will result in erroneous withdrawals. The commenters believed that individuals with both Exchange-related and Medicaid appeals pending would be particularly vulnerable to erroneous withdrawal. The commenters also recommended that dismissals not be accepted for individuals who have a disability and may therefore qualify in a category to which MAGI does not apply.

*Response:* In the proposed rule, we indicated our expectation that withdrawal of a Medicaid fair hearing request would be permitted through all of the modalities identified in § 435.907 (related to submission of an application); these modalities mirror those at proposed § 431.221(a) relating to a request for a Medicaid fair hearing. We provide in this final rule at § 431.223(a) that states must offer individuals who have requested a fair hearing the ability to withdraw their request via any of the modalities available in accordance with § 431.221(a)(1)(i). Under the regulation, the requirement to accept telephonic, online, or other electronic withdrawals is effective at the same time as the requirement to make those modalities available to individuals to make a fair hearing request. Under § 431.223(a), telephonic hearing withdrawals must be recorded, including the appellant's statement and telephonic signature. We expect the agency to retain as part of the individual's electronic file the voice signature recording along with either a voice recording of the appellant's complete statement requesting the withdrawal, a written transcript of the appellant's statement, or a summary statement indicating that the appellant requested his or hearing be withdrawn. For telephonic, online, and other electronic withdrawals, the agency must send the appellant a written confirmation of such withdrawal, via regular mail or electronic notification in accordance with the individual's election under § 435.918(a) of this chapter. We propose elsewhere in this **Federal Register** that such confirmation must be provided within 5 business days of the agency's receipt of a telephonic withdrawal. Appellants always will retain the right to request a withdrawal in writing, regardless of other modalities available.

States currently have the flexibility under subpart K of the CHIP regulations to accept withdrawal of a request for review via multiple modalities. We did not discuss our expectation in the proposed rule that states necessarily would be required to do so. Therefore, we propose a new § 457.1185(b) elsewhere in this **Federal Register** that states must accept a withdrawal of a request for review under CHIP via all modalities that are available to submit a request for review, and that the state provide the individual with written confirmation of such request within 5 business days.

*Comment:* A commenter sought clarification regarding the continuation of benefits pending an appeal when an individual is denied or terminated from Medicaid and transferred to an Exchange.

*Response:* The extent to which an individual is entitled to continued receipt of Medicaid pending the outcome of an appeal depends on whether the individual has been denied Medicaid eligibility at initial application or terminated from Medicaid during a regular renewal or eligibility redetermination triggered by a change in circumstance in accordance with regulations at § 435.916. Current §§ 431.230 and 431.231 provide for continuation of Medicaid benefits for beneficiaries who timely request a fair hearing of a termination of coverage or other action. Individuals who appeal a denial of Medicaid at initial application are not entitled to benefits pending the outcome of their hearing. Nothing in the Affordable Care Act affected the policies reflected in these existing regulations, and we did not propose any modifications in the January 22, 2013 proposed rule.

Codified at § 155.305(f)(1)(ii)(B) and (g)(1)(i)(B), individuals who are eligible for Medicaid are not eligible for APTCs or CSRs. Under § 155.345(h), an Exchange must adhere to an eligibility determination or fair hearing decision made by the Medicaid agency. There is no difference under the Exchange regulations between the treatment of individuals receiving Medicaid benefits pending the outcome of their fair hearing and the treatment of Medicaid beneficiaries generally.

Applicants determined ineligible for Medicaid and CHIP generally will be eligible for enrollment in a QHP (provided that they meet all requirements for QHP enrollment), and will be eligible for a determination of eligibility for APTCs and CSRs in accordance with Exchange regulations at 45 CFR part 155, subpart D. Per § 435.1200(e)(1) of the regulations (revised in this final rule), the agency must transfer to an Exchange the electronic account of applicants determined ineligible for Medicaid (irrespective of whether they appeal that determination) whom the agency determines potentially eligible for Exchange financial assistance, so that the Exchange can make a final determination of eligibility to enroll in a QHP and receive APTC and CSRs. Eligible applicants who appeal their Medicaid denial may enroll in a QHP and receive APTC and CSRs pending the outcome of their Medicaid appeal. Proposed § 435.1200(g)(3), redesignated at § 435.1200(g)(5) of this final rule, requires that the agency notify the Exchange or Exchange appeals entity operating in the state of the fair hearing decision for individuals transferred to the Exchange following a denial or termination of Medicaid. This requirement is retained in the final rule at § 435.1200(g)(5)(i)(C). If the Medicaid fair hearing results in approval of Medicaid eligibility, under the Exchange regulations, the individual no longer would be eligible for APTC or CSRs.

A different result ensues for Medicaid beneficiaries who appeal their Medicaid termination and are eligible for continuation of Medicaid benefits pending the outcome of their appeal. Per § 435.1200(e), the agency must transfer the electronic account of a beneficiary terminated from coverage to an Exchange for a determination of eligibility for enrollment in a QHP with APTC and CSRs. If the beneficiary makes a timely request for a fair hearing on his or her Medicaid termination, resulting in continued eligibility for Medicaid benefits pending the outcome of the fair hearing in accordance with § 431.230, the beneficiary will not be eligible for APTC or CSR unless and until the Medicaid termination is upheld following the conclusion of the Medicaid fair hearing.

Proposed § 435.1200(g)(3), redesignated at § 435.1200(g)(5) of this final rule, requires that the agency notify the Exchange or Exchange appeals entity operating in the state of the fair hearing decision for individuals transferred to the Exchange following a denial or termination of Medicaid. This

requirement is retained in the final rule at § 435.1200(g)(5)(i)(C). However, to ensure that Medicaid beneficiaries who are entitled to continued Medicaid coverage pending the outcome of their fair hearing are not inappropriately determined eligible for Exchange financial assistance, § 435.1200(g)(5) of the final rule also requires at clauses (g)(5)(i)(A) and (B) that the Medicaid agency notify the Exchange operating in the state (1) that an individual who has been transferred to the Exchange has requested a fair hearing and (2) whether or not such individual is entitled to Medicaid coverage pending the outcome of the hearing. If the individual's termination from Medicaid is upheld, per § 435.1200(e)(1) and (g)(5)(i)(C), the agency must notify the Exchange of the decision and that the individual has been terminated from Medicaid, at which point the Exchange would proceed with a determination of eligibility for enrollment in a QHP with APTC and CSRs.

*Comment:* A commenter was concerned that the proposed rules on the timing and sequencing of appeals could lead to overlapping program eligibility, resulting in confusion about payment responsibilities. The commenter recommended that CMS issue guidance about how administrative costs and payment of services will be handled during the appeal process when overlapping eligibility between programs occurs.

*Response:* As previously discussed, we are not finalizing proposed § 431.221(e) which would have facilitated, although not required, a sequencing of hearings. When an individual requests both an Exchange-related and Medicaid-related (or CHIP-related) appeal, there will be times when two appeals affecting the same individual will be pending before different appeals entities (because an Exchange appeals entity has not been delegated authority to hear the Medicaid or CHIP-related appeal or, because the individual requests that the Medicaid agency conduct the fair hearing when an Exchange appeals entity has been delegated authority to conduct certain Medicaid-related appeals). In such situations, each entity will bear its own costs of adjudicating the appeal before it. Payment for services provided to an individual pending the outcome of an appeal generally is borne by the program in which the individual is enrolled. However, because Medicaid eligibility may be retroactively effective as far back as the third month prior to the month of application, for any period of time involving dual coverage under Medicaid and a QHP, Medicaid would pay secondary to the QHP for any unpaid bills. Thus, if an applicant denied Medicaid elects to enroll in a QHP pending the outcome of his Medicaid fair hearing, the QHP will pay claims for covered services unless and until the individual is disenrolled from the QHP, subject to any applicable deductions or cost sharing charges associated with the QHP coverage. If the Medicaid fair hearing ultimately results in a determination of Medicaid eligibility, Medicaid coverage would be available to cover any unpaid medical expenses furnished by Medicaid providers back to the date or month of application, as well as during the 3 months prior to the month of application consistent with § 435.915.

In situations involving simultaneous Medicaid and Exchange-related appeals being adjudicated separately, there also could be a gap in time between the issuance of the two appeals decisions. As noted, under §§ 435.1200(g)(5)(i)(C) and 457.351(a), the Medicaid or CHIP agency must notify an Exchange of the Medicaid or CHIP appeals decision and if the decision results in approval of Medicaid or CHIP eligibility, per §§ 155.305(f)(1)(ii)(B), 155.305(g)(1)(i)(B), and 155.345(h), an Exchange must terminate APTC and CSR for the individual's enrollment in the QHP—regardless of the outcome of any Exchange-related appeal. (Individuals are responsible for termination of their enrollment in the QHP, which is requested through the Exchange. While we assume that individuals found Medicaid or CHIP eligible as a result of their appeal will not opt to continue their QHP enrollment without an APTC or CSR, they may do so.) If, as a result of the fair hearing, the individual is determined eligible for Medicaid, under § 435.915, Medicaid eligibility would be effective no later than the date of initial application (with up to 3 months of retroactive eligibility prior to the month of application, if the conditions specified in § 435.915 are met). For the period of time prior to disenrollment from the QHP, Medicaid would serve as a secondary payer, subject to general coordination of benefits requirements at section 1902(a)(25) of the Act. The Medicaid program will pay for services or costs covered under the state plan that were furnished by Medicaid providers and not covered by the QHP, including unpaid beneficiary cost-sharing amounts exceeding Medicaid limitations. Medicaid would have no liability to reimburse the QHP for any payments made or benefits provided for the individual pending the outcome of the fair hearing decision. If the individual choses to remain enrolled in the QHP despite termination of the APTC and CSR, Medicaid would continue to serve as a secondary payer consistent with section 1902(a)(25) of the Act. If the individual had not elected to enroll in a QHP pending the outcome of the Medicaid fair hearing, no coordination of benefits would be required, and Medicaid would be available for payment for covered services received pending the outcome of the appeal, back to the date or month of application (or up to 3 months before the month of application if the conditions set forth at § 435.915(a) are met). If, as a result of a CHIP appeal, the individual is determined eligible for CHIP, eligibility for CHIP would be effective under the policy adopted by the state in its CHIP state plan per § 457.340(f). Reflected in § 457.310(b)(2)(ii), individuals are not eligible for CHIP if they are enrolled in other coverage; therefore, an individual cannot be enrolled in a separate CHIP until QHP enrollment is terminated.

Per § 435.1200(e)(1)(i) and § 457.351(a) of this final rule, if the Medicaid or CHIP appeals entity upholds the initial denial, the agency is required to assess the appellant's eligibility for other insurance affordability programs and transfer the individual's account to the appropriate program. If assessed as eligible for enrollment in a QHP through an Exchange, per §§ 435.1200(g)(5)(i)(C) and 457.351(a), the agency must notify the Exchange or Exchange appeals entity of the outcome of the appeal. Per § 155.345(h) of the Exchange regulation, an Exchange and Exchange appeals entity must accept the Medicaid or CHIP appeals decision.

*Comment:* A commenter believed that the proposed rule assumes that all applicants will submit an online application to an Exchange. The commenter questioned whether that is the expectation and, if not, how applications filed with the Medicaid agency will be coordinated with an Exchange. The commenter also questioned whether there would be circumstances where the application will go to the Medicaid agency first, especially if the individual is just initially applying for Medicaid.

*Response:* Per § 435.907, as stated in the final eligibility regulation published on March 23, 2012, states must accept paper, electronic and telephonic single streamlined applications filed with the Medicaid agency via an internet Web site, mail, telephone or in person. The responsibilities of the agency to coordinate eligibility and enrollment

with the Exchange and other insurance affordability programs—set forth in § 435.1200, as revised in the July 2013 final eligibility rule as well as this rulemaking—are the same regardless of the modality through which an individual applies for coverage. We would expect that applications not submitted online will be converted by the agency into an electronic format so that it can become part of the individual's electronic account and the agency can fulfill the requirements set forth in § 435.1200. Similar provisions for CHIP are found at §§ 457.330, 457.348 and 457.350.

(2) Related Changes to Medicaid Fair Hearing Rules

We proposed various modifications to our fair hearing regulations at current § 431.200, *et seq.* to modernize our regulations and to clarify certain provisions for consistency with the March 23, 2012, Medicaid eligibility final rule. We also proposed to add a new regulation at § 431.224, ''Expedited Appeals,'' to provide for an expedited fair hearing process similar to the expedited process currently provided at §§ 431.244(f)(2), 438.408, and 438.410 (related to managed care). This would permit individuals who have urgent health needs to have their eligibility and fee-for-service related appeals addressed under expedited timeframes. Under the proposed rule, an expedited appeal process would be required if the time otherwise permitted under § 431.244(f)(1) could jeopardize the individual's life or health or ability to attain, maintain, or regain maximum function. We proposed to revise § 431.244(f)(2) to require that the agency take final administrative action within 3 working days when the standard for expedited review is met, the same timeframe provided for expedited appeals in the managed care context at § 431.244(f)(2). The proposed revisions are discussed in greater detail in section I.B.1(b) of the January 22, 2013 proposed rule. We received the following comments on these proposed provisions:

*Comment:* We proposed revisions *at* § 431.244(f)(1)(ii) to clarify that the 90-day timeframe to issue a decision after an individual files an appeal applies broadly to appeals decisions, not only to managed care appeals decisions. The application of the 90-day timeframe allowed for Medicaid fair hearing decisions generally (including fair hearings related to eligibility and fee-for-service matters) was inadvertently removed in a previous rulemaking.

*Response:* We received no comments on this provision and are finalizing the policy to apply the same standard 90-day timeframe for state Medicaid agencies to issue all types of fair hearing decisions (other than those which must be decided on an expedited basis). However, following publication of the January 22, 2013 proposed rule, we finalized other revisions to § 431.244(f)(1) in the ''Medicaid and Children's Health Insurance Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions Related to Third Party Liability; Final Rule,'' published in the May 6, 2016, **Federal Register** (hereinafter referred to as ''May 6, 2016 managed care final rule''). The revisions to § 431.244(f)(1) finalized in that rulemaking also are reflected in § 431.244(f)(1) of this final rule.

*Comment:* We proposed revisions at § 431.220(a)(1) to clarify that a hearing is required (if requested) when the Medicaid agency has denied eligibility, level of benefits, services, or has failed to act with reasonable promptness, as required under section 1902(a)(3) of the Act, and to specify that a determination of eligibility may include a determination of a spend down liability or a determination of income used for purposes of premiums, enrollment fees, or cost-sharing under part 447 of this chapter. To align with the modification of § 431.220, we also proposed revisions at § 431.201 (definition of ''action'') and § 431.206(c)(2) (when information in § 431.206(b) must be provided to applicants and beneficiaries). We also proposed cross-referencing § 431.220(a)(1) at § 431.241(a) (the issues to be considered at a hearing) for further alignment. We proposed to add a definition of ''local evidentiary hearing'' to § 431.201 and to add reference to section 1943 of the Act and section 1413 of the Affordable Care Act in § 431.200 (Basis and Scope).

Commenters overwhelmingly supported these proposed revisions and no commenters opposed our proposed revisions in these sections. However, some commenters recommended a few changes to our proposals that were technical or intended to further clarify the regulation text of our proposed modifications. A few commenters recommended that we adopt the same language used to describe income determinations for premium and cost-sharing purposes in § 431.220(a)(1)(ii) as that in proposed § 431.241(a)(3). Another commenter requested clarification regarding the term ''claim,'' which appeared in both §§ 431.220(a)(1) and 431.241(a). The commenter questioned if ''claim'' refers to a claim made on an application (that is, disability, blindness etc.), or to a claim for payment submitted by a provider. Some commenters were concerned that the revised definition of ''action'' does not include denials of eligibility, services, or benefits, and sought clarification that such denials do provide a basis for a fair hearing request. A few commenters also recommended a technical revision to the definition of ''action'' to insert the words, ''termination or suspension of, or'' prior to ''reduction in the level of benefits and services;'' the commenters believed this was important to ensure our revised definition is not read as excluding termination or suspension of a service or benefit. We did not receive any comments on the proposed definition of ''local evidentiary hearing'' or on the addition of section 1943 of the Act and section 1413 of the Affordable Care Act to § 431.200.

*Response:* We appreciate the support for the proposed revisions at § 431.220(a)(1), § 431.206(c)(2), § 431.241(a) and (b), and the definition of ''action'' in § 431.201, which we are finalizing as proposed with a few minor revisions. Specifically, we are streamlining the language in § 431.220(a)(1)(iii) to provide a cross-reference to the definitions of ''premiums'' and ''cost sharing'' in § 447.51 and are making revisions for clarity in §§ 431.206(c)(2), 431.220(a)(1) (introductory text) and 431.241(a). In § 431.220(a)(1), we are replacing the word ''applicant'' with ''individual'' to apply this provision to applicants and beneficiaries, when applicable. We are moving the content of current § 431.221(a)(2) (relating to beneficiaries) to paragraph (a)(1), removing paragraph (a)(2), and redesignating paragraphs (a)(3) to (a)(7) at paragraphs (a)(2) to (a)(6). Similarly, for clarity we have removed paragraph (b) of § 431.241 and placed the content regarding changes in type or amount of benefits and services in § 431.220(a)(1)(iv). We have also redesignated paragraphs (c) and (d) at paragraphs (b) and (c). We revise for clarity the reference to ''any determination of income for the purposes of imposing any premiums, enrollment fees or cost-sharing under subpart A of part 447'' in the definition of ''action'' in § 431.201 to apply if a beneficiary ''is subject to an increase in premiums or cost-sharing charges under subpart A of part 447 of this chapter'' and have added the phrase ''an increase in beneficiary liability'' to clarify the language related to spend down liability, premiums and cost-sharing amount. We are accepting commenters' suggestion to insert the words ''termination or suspension of, or'' prior

to the phrase ''reduction in the level of benefits or services'' in the definition of ''action'' in § 431.201.

We note that we have added the term ''benefits'' to encompass items or other Medicaid benefits for which individuals have a right to a fair hearing if a state terminates, suspends, reduces, denies, or delays such a benefit. Examples of ''benefits'' include prescription drugs, prosthetic devices or cost-sharing, which would not be ordinarily considered a ''service.'' Accordingly, the term ''benefit'' has been added to the following regulations § 431.201 (definition of action), § 431.206(c)(2) (informing applicants and beneficiaries), § 431.220(a)(when a hearing is required) and § 431.241 (matters to be considered at a hearing) (through cross-reference to § 431.220(a)(1)). Further, ''covered benefits and services'' as described in § 431.201, include any covered benefits or services provided for in the state plan or under a state's approved waiver. We note that we have also removed the term ''in the level of'' which we proposed as it relates to ''benefits'' as unnecessary and confusing, from the same regulations. We have made conforming modifications to align the language described above in §§ 431.206(c)(2) and 431.220(a)(1). We also clarify in §§ 431.206(c)(2), 431.220(a)(1)(v) and 431.241(a) (through cross-reference to § 431.220(a)(1)) that a denial of a request for exemption from mandatory enrollment in an Alternative Benefit Plan provides a basis for a fair hearing request. We finalize the definition of ''local evidentiary hearing'' in § 431.201 and the revisions to the basis and scope at § 431.200, as proposed.

The reference to a ''claim'' in §§ 431.220(a)(1) and 431.241(a) (through cross-reference to § 431.220(a)(1)) refers broadly to any claim by an applicant or beneficiary for Medicaid, whether such claim be for eligibility for coverage in general, or for a particular benefit or service, consistent with use of the term in section 1902(a)(3) of the Act. The definition of ''action'' does not include denials because beneficiaries are entitled to 10 days advance notice of an ''action'' under § 431.211 and, in the event a beneficiary requests fair hearing of an ''action,'' benefits must be continued in the circumstances described in § 431.230 and may be reinstated in in the circumstances described in § 431.231. Because denials of eligibility for new applicants and denials of a particular service or benefit for beneficiaries do not require advance notice, nor does a request for a fair hearing of such denials result in a continuation or reinstatement of benefits or services, it would be erroneous to include denials in the definition of ''action''. Under § 431.220 and § 431.241(through cross-reference to § 431.220(a)(1)), as revised in this rulemaking, we clearly specify that individuals are entitled to request a fair hearing of denials of eligibility, benefits and services. The term 'denial of a claim' in § 431.220(a)(1) includes situations in which the agency authorizes an amount, duration or scope of a service which is less than that requested by the beneficiary or provider. For example, if the individual has requested 20 physical therapy visits and the state denies the individual's coverage of 20 visits, covering instead only 10 visits—this is considered a denial of a service, which could be appealed under § 431.221(a)(1).

We had proposed revisions to the introductory text in § 431.206(b) (relating to information that must be provided to applicants and recipients) to add ''or entity'' after ''the agency.'' We did not receive any comments on this proposed revision. However, we are not including this proposed revision in the final regulation as it is unnecessary; generally, the Medicaid agency is responsible for providing information described in § 431.206. To the extent that responsibility is delegated to another entity, the delegated entity would be required to comply with all Medicaid rules in accordance with § 431.10(c)(3)(i)(A), including providing this information. If the Medicaid agency and the delegated entity agreed to have the Medicaid agency provide certain information, that would be specified in the agreement effectuating a delegation of fair hearing authority in accordance with § 431.10(d).

*Comment:* Several commenters supported our proposed regulation at § 431.205(e) to require that the hearing system be accessible to individuals who are limited English proficient and individuals with disabilities, in accordance with § 435.905(b). A few commenters raised concerns that phone hearings may be an inadequate hearing forum, particularly for individuals with certain disabilities. The commenters recommended that for such individuals, reasonable accommodations, including video conferencing, should be provided without cost to the appellant. These commenters recommended that our regulation specify that the agency shall not abridge an individual's right to confront and cross-examine adverse witnesses, or request an individual to waive any provisions of federal or state fair hearing regulations because of a request for a reasonable accommodation. They recommended our rules clarify that a request for reasonable accommodation cannot be used to limit the application of any other protections provided to individuals requesting a fair hearing under the regulations or otherwise alter the state's fair hearing rules, except as needed to accommodate the request for accommodation.

A number of commenters strongly recommended the addition of a new paragraph (f) to § 431.205 specifying that the hearing process may not discriminate on the basis of race, color, national origin, language, sex, sexual orientation, gender identity, age or disability and must comply with the relevant federal statutes, including Title VI of the Civil Rights Act of 1964, the Rehabilitation Act, the Americans with Disabilities Act, and section 1557 of the Affordable Care Act.

*Response:* We appreciate the support for our proposed addition of § 431.205(e), which we are finalizing as proposed. Under § 431.205(e) of the final rule, states must ensure accessibility to their fair hearing process for individuals with disabilities (including, but not limited to use of auxiliary aids) and for individuals with limited English proficiency through language assistance services, consistent with § 435.905(b). For states relying on telephonic hearings, the provision of video conferencing or an in-person hearing, use of which is common in states today, could be used to ensure access to effective communication for those individuals needing auxiliary aids and services. We are not accepting the commenters recommendation to add regulation text relating to protections for individuals requesting a reasonable accommodation, because we do not believe it is necessary. The rules do not provide a mechanism for states to waive any protections or to otherwise limit such protections for any reason. Moreover, we understand that the current regulations issued under Title II of the Americans with Disabilities Act, which apply to the state hearing system, address this issue. *See* 28 CFR 35.130(b)(1). For additional information on reasonable modifications and auxiliary aids and services to ensure accessibility of state and local government activities and services for individuals with disabilities, we direct readers to regulations at 28 CFR 35.101 *et seq.* An adverse action based on a request for a reasonable modification would violate the Title II regulations, as would setting aside or limiting the applicability of any protections provided in part 431, subpart E or in accordance with the state's fair hearing procedures. *See* 28 CFR 35.134 for more detail.

We are accepting the comment to add a new paragraph (f) to § 431.205, clarifying that the hearing system established under section 1902(a)(3) of the Act and part 431 subpart E must be conducted in a manner that complies with all applicable federal statutes and implementing regulations, including Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and section 1557 of the Affordable Care Act. This is consistent with the technical revisions, discussed in section D of this final rule, which we are making at § 435.901, that the state's eligibility standards and methods are consistent with the rights of individuals under all of these statutes and implementing regulations. We also note that, for individuals who believe they have been discriminated against in the appeals and hearings process, these individuals can use the grievance process established by each state agency operating a Medicaid program or CHIP. This grievance process must operate in accordance with Section 1557 of the Affordable Care Act and implementing regulations, among other existing Federal civil rights authorities. These individuals may also file complaints of discrimination directly with the HHS Office for Civil Rights at *www.HHS.gov/OCR*.

*Comment:* Several commenters supported our proposed addition of paragraph (e) to § 431.206 to require that information provided to applicants and beneficiaries be accessible to individuals who are limited English proficient and individuals with disabilities, consistent with section § 435.905(b) of this chapter. A number of commenters suggested that more detailed requirements be added at paragraph (e) related to accessibility of information for individuals who are limited English proficient and individuals with disabilities.

*Response:* We appreciate the support for proposed paragraph (e) to require that information be provided accessibly, which we are finalizing as proposed. We note that we added paragraph (e) to § 431.206 in the July 2013 final eligibility rule to authorize states to provide electronic notices in accordance with § 435.918. Section 431.206(e) of this final rule amends paragraph (e) to also require that states provide information (whether in electronic or paper form) in a manner that is accessible to individuals who are limited English proficient and to individuals with disabilities. We also are making a technical modification to this provision, replacing the word ''section'' with ''subpart'' to apply the accessibility requirements as well as the permissibility of electronic notices under paragraph (e) to all appeals notices described in part 431, subpart E, as intended. We address the comment to add more specific requirements related to accessibility in section D of this final rule, relating to accessibility of program information under § 435.905(b).

*Comment:* A number of commenters recommend amending § 431.220(a) to add the specific phrase ''*de novo*'' to the regulation to specify that the state agency must grant an opportunity for a *de novo* hearing before the agency, consistent with *Goldberg* v. *Kelly* and constitutional due process principles, as all individuals have the right to a *de novo* hearing.

*Response:* The comment is beyond the scope of this rulemaking. However, we agree all applicants and beneficiaries who request a fair hearing are entitled to a *de novo* hearing, which must take place either before the agency or an entity to which fair hearing authority has been delegated under § 431.10(c)(1)(ii) or an ICA waiver. This is consistent with current regulations at §§ 431.240 through 431.244, which require that hearings be conducted by an impartial official; that individuals be afforded an opportunity to submit evidence and arguments without interference; and that hearing decisions be based only on evidence introduced at the hearing. Together, these provisions effectively require a *de novo* hearing. However, to further clarify the current policy, we propose elsewhere in this **Federal Register** to add the words ''de novo'' before hearing in § 431.205(b) to clarify that the fair hearing provided by the state's hearing system must be a ''*de novo*'' hearing, which is defined in current regulations at § 431.201.

*Comment:* A few commenters were concerned about individuals being denied fair hearing rights when there is a change in law or policy, even if the individual may have a factual or other issue that should be considered at a fair hearing. The commenters suggested that we modify the regulation (1) to clarify that cases can only be dismissed if there can be no disagreement regarding the application of that change to the appellant; (2) to permit only an impartial, independent hearing officer or administrative law judge to determine that a fair hearing can be denied under § 431.220(b); and (3) to require that an appellant be provided an opportunity to orally oppose the dismissal of the appeal.

*Response:* The comment is beyond the scope of this final rule. Please see proposed modification of § 431.220 elsewhere in this **Federal Register** for more discussion on this issue.

*Comment:* Several commenters supported proposed §§ 431.224 and 431.244(f)(3) to establish an expedited fair hearing process that aligns with Exchange appeals regulations at § 155.540 as well as with a similar process provided for Medicaid managed care enrollees at § 438.410. Commenters supported establishing an expedited fair hearing process that would provide applicants and fee-for-service beneficiaries the same right to an expedited hearing process of a Medicaid denial or other adverse action (as defined in § 431.201) when there is an urgent health need, as is provided under Exchange regulations at § 155.540, as well as to Medicaid beneficiaries enrolled in managed care and CHIP beneficiaries for whom coverage of a service is limited or denied in accordance with §§ 438.408(b)(3), 438.410 and 457.1160(b)(2). Several commenters supported this provision, which they believe was critical to ensuring the request is acted upon promptly. Many other commenters expressed concern about states' ability to implement an expedited fair hearing process within 3 working days, as required at proposed § 431.244(f)(3). These commenters disagreed that existing processes for expedited managed care appeals would make compliance with the proposed expedited appeals process easy, stating that Medicaid appeals entities generally do not possess the medical expertise needed to evaluate if an expedited hearing should be granted. Some commenters were also concerned that an appeals entity wouldn't be able to obtain sufficient information on which to base a fair hearing decision in a 3-day timeframe. One commenter supported the language at proposed § 431.244(f)(3) that expedited decisions be made ''as expeditiously as the individual's health condition requires,'' but expressed concern that 3 days may not allow time for the individual or agency to prepare properly for the hearing. Others commenters were concerned that a 3-day timeframe also may pose a burden on individual appellants to gather information necessary to prepare for the hearing. One commenter suggested that requiring a hearing within 3 working days and a decision 3 working days after that would be more reasonable. Another commenter recommended that the expedited timeframe for taking final action if the expedited hearing is granted, be changed from 3 days to at least 45 days. A few commenters were concerned that the proposed expedited

fair hearing process will require extensive staffing increases, including skilled medical personnel, as well as updates to current tracking mechanisms. One commenter recommended eliminating the proposed expedited fair hearing process.

One commenter requested clarification regarding the relationship between (1) the 2 days at proposed § 431.224(b) for the state to determine if an individual meets the standard for an expedited review and to inform the individual if his or her request for expedited review is denied, and (2) the 3-day timeframe to take administrative action on an expedited fair hearing. Some commenters also suggested that CMS require data reporting on the timeliness of Medicaid fair hearing decisions, and to make this information available to the public. We did not receive any comments regarding § 431.242(f), which adds the request of an expedited review to the procedural rights that must be afforded to individuals requesting a fair hearing.

*Response:* Exchange appeals regulations at § 155.540 provide for an expedited appeals process for individual eligibility appeals of determinations for coverage through the Marketplace, APTC, and CSRs. Medicaid regulations at §§ 431.244(f)(2), 438.408(b)(3) and 438.410 currently provide for an expedited appeals process when a beneficiary has been denied coverage of, or payment for, a benefit or service by a managed care organization and allowing the time generally permitted to resolve enrollee grievances could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function. Current CHIP regulations at § 457.1160(b)(2) provide for similar expedited review of health services matters, as defined at § 457.1130(b). The current regulations, however, do not apply to Medicaid applicants and beneficiaries who are denied eligibility or terminated from coverage, whose coverage is reduced, or for whom coverage of a benefit or service by the agency in a fee-for-service context is denied, terminated, reduced, or delayed. We agree with commenters supporting the proposed regulation that having an expedited review process is an important consumer protection for applicants and beneficiaries with urgent health care needs, regardless of the nature of the appeal or the type of delivery system employed. Therefore, we are including at § 431.224 of the final rule a requirement that states establish an expedited fair hearing process for individuals with appeals of eligibility determinations and fee-for service beneficiaries similar to the regulations currently in place for individuals enrolled in coverage through the Marketplace, as well as Medicaid managed care and CHIP. We note that such an expedited fair hearing process could be included in the delegation of fair hearings at § 431.10(c)(1)(ii) and addressed in an agreement between the agencies that would include responsibilities of the parties described at § 431.10(d).

At the same time, we appreciate the concerns raised regarding the operational challenges to implementing the proposed time frames and are revising proposed §§ 431.224 and 431.244(f)(3) to provide states with more flexibility in notifying individuals whether their request for an expedited hearing has been granted and in establishing a reasonable time frame for conducting expedited hearings. Under § 431.224(a)(1) of the final rule, states must establish and maintain an expedited fair hearing process for individuals who request an expedited fair hearing if the agency determines that the standard time permitted for resolution of an appeal in § 431.244(f)(1) could jeopardize the individual's life, health or ability to attain, maintain, or regain maximum function. We do not propose specific criteria which states may or must take into account in determining whether this standard is met. However, we note that, in addition to the medical urgency of an individual's situation, we believe appropriate considerations also could include whether the individual currently is enrolled in health insurance that will cover most of the costs of the requested treatment, whether or not the individual has a needed procedure or treatment scheduled, or whether the individual is unable to schedule a procedure or treatment due to lack of coverage. Paragraph (a)(2) of § 431.224 provides that states must take final administrative action within the time period established under § 431.244(f)(3) if the individual meets the urgent health standard described in § 431.224(a)(1). Under § 431.224(b) of the final regulation, the agency must inform individuals whether their request for an expedited fair hearing is granted or denied as expeditiously as possible, orally or through electronic means in accordance with the individual's election under § 435.918 (relating to receipt of electronic notices). If oral notice is provided, the state must follow up with written notification, which may be through electronic means if consistent with the individual's election under § 435.918. For individuals whose expedited fair hearing request is approved, the state must provide notice of a hearing date that allows adequate time for the individual to participate, consistent with current § 431.240(a)(2). States can inform the individuals that their request for expedited fair hearing has been granted and the date of such hearing in the same notice. Note that we propose elsewhere in this **Federal Register** further modification of § 431.224(b) regarding expedited fair hearing notices.

Section 431.244(f)(3)(i) of the final rule provides that, for individuals whose request for an expedited fair hearing related to an eligibility matter described in § 431.220(a)(1) or to any matter described in § 431.220(a)(2) or (3) is approved, the agency must take final administrative action as expeditiously as possible. Effective no earlier than 6 months after the release of a **Federal Register** notice described in § 435.1200(i) of the final rule, final administrative action for such hearings under § 431.244(f)(3)(i) must be taken as expeditiously as possible, but no later than 7 working days from the date the agency receives the expedited fair hearing request. Section 431.244(f)(3)(ii) of the final rule provides that, for individuals whose request for an expedited fair hearing related to a services or benefits matter described in § 431.220(a)(1) is approved, the agency must take final administrative action as expeditiously as possible. Effective no earlier than 6 months after the release of a **Federal Register** notice described in § 435.1200(i) of the final rule, final administrative action for such hearings under § 431.244(f)(3)(ii) must be taken as expeditiously as possible and within the timeframe specified in § 431.244(f)(2) of the current regulations (that is, within 3 working days from the date the agency receives the expedited hearing request). In § 431.244(f)(3)(iii), we provide that for individuals whose request for an expedited fair hearing of a claim related to a services or benefits matter described in § 431.220(a)(4) through (6) is granted, the agency must take final administrative action in accordance with § 431.244(f)(2).

We believe that the 7 working days timeframe provided (with a delayed effective date) under § 431.244(f)(3)(i) of the final rule results in comparable treatment for individuals appealing eligibility-related and managed care appeals. Individuals appealing a decision of a managed care plan are required in some states to exhaust their plan level appeal before requesting a fair hearing of the plan's decision before the agency. Under current § 438.408(b)(3), managed care plans must resolve

expedited appeals of an adverse action taken by the plan within 72 hours. Under current § 431.244(f)(2), the agency has 3 working days to take final administrative action if the individual appeals the plan's decision to the agency. Allowing for one working day for transmission of the case file from the plan to the agency, this results in a 7-day time frame for reaching final administrative action on expedited appeals filed by enrollees in a managed care plan who are appealing an action taken by the plan. In § 431.244(f)(3)(ii), we have aligned the timeframe to take final administrative action in an expedited fair hearing request between managed care and fee-for-service delivery systems (3 working days), so that all individuals appealing a service-related appeal will be able to get a resolution from at least a first-level review in 3 working days when there is an urgent health need, whether such review is at the level of the managed care plan or, for a fee-for-service appeal, before the agency. We believe that these timeframes strike a reasonable balance between needed consumer protections and state administrative concerns. Because we recognize that some claims (both those that meet the standard for expedited hearing in § 431.224(a)(1) and those that do not), are more urgent than others, elsewhere in this **Federal Register**, we also are proposing that states establish more detailed timeliness and performance standards for both expedited and non-expedited fair hearings. We also note that states may, within the limits provided at § 431.10 and subject to other legal requirements regarding the use of contractors by the single state agency, use contractors to perform clerical duties, such as receiving and tracking expedited hearing requests and preparing case files for hearing, which may help the state to meet applicable time frames.

Finally, we are finalizing the addition of new paragraph (f) in § 431.242, providing for the right of applicants and beneficiaries to request an expedited hearing; we have removed the words ''if appropriate'' from § 431.242(f) in the final rule, as there are no conditions which constrain an individual's right to request an expedited fair hearing. We also (1) add a conforming revision at § 431.221 (related to requests for hearing) to require that individuals be provided an opportunity to include a request for an expedited hearing in their request for a fair hearing; and (2) make similar conforming revisions in § 431.206(b)—revising § 431.206(b)(1) and adding paragraph (b)(4)—to provide that individuals must be informed of the opportunity to request an expedited review of their fair hearing request and of the time frames upon which the state will take final administrative action in accordance with § 431.244(f). We expect that the process established by a state under § 431.224(a)(1) for an individual to request an expedited fair hearing would include providing the opportunity for an individual to make such a request after the individual has requested their fair hearing, if the individual has not indicated a request for an expedited fair hearing in the initial fair hearing request in § 431.221(a)(1). No additional hearing would be required in response to a subsequent request for an expedited hearing, if a hearing on the initial request already had been held.

*Comment:* Some commenters recommended that CMS require data reporting on the timeliness of Medicaid fair hearing decisions, and that this information be made available to the public.

*Response:* We will take this suggestion, which is beyond the scope of this rulemaking, into future consideration.

*Comment:* Several commenters expressed concern about the proposed standard for when an expedited fair hearing would be required, that is, whenever the time otherwise permitted to take final administrative action on a fair hearing request would jeopardize the individual's ability to attain, maintain or regain maximum function. These commenters indicated that this standard is overbroad and would encompass many conditions.

*Response:* This standard for an expedited fair hearing is aligned with the standard used for Exchange eligibility appeals at § 155.540 and similar to the standard currently used in our managed care appeals rules at § 438.410. To maintain consistency and alignment across insurance affordability program eligibility appeals and similar treatment between FFS beneficiaries and managed care enrollees, we finalize the standard in § 431.224(a) as proposed.

*Comment:* A few commenters requested clarification regarding implementation of the expedited fair hearing process. One commenter questioned whether there needs to be an intermediate level of review of the expedited hearing request. Additionally, the commenter sought clarification about whether appeals staff would have to be available on an ''on-call'' basis. Another commenter questioned if individuals may appeal an adverse decision related to granting an expedited fair hearing request.

*Response:* There is no specific requirement for states to establish an intermediate level of review for an expedited fair hearing request, or to have staff on call at all times to receive requests for expedited review of a fair hearing. There is flexibility under the regulations for each state to establish policies and procedures best tailored to its own situation, provided that such policies and procedures comply with the requirements set forth in the regulations, including meeting the timeframe consistent with § 431.244(f)(2). Section 431.224(b) of the final regulation requires states to inform individuals whether the state is granting or denying their request for an expedited review, but does not require that the individual be given an opportunity to appeal the agency's denial of their request. We note that a denial of a request for an expedited hearing is not required under the definition of ''action'' at § 431.201 nor identified as a basis for requesting a fair hearing under § 431.220.

*Comment:* A few commenters recommended that we require individuals to provide medical evidence justifying the need for an expedited fair hearing process, which they believed would minimize the burden on states. One commenter requested clarification whether individuals can be required to submit the medical records as part of the expedited hearing request or whether self-attestation must be accepted.

*Response:* States have flexibility under the regulations to establish policies and procedures for an expedited review process, and we neither require nor preclude submission of medical documentation as may be appropriate. We note that elsewhere in this **Federal Register**, we propose that states will be required to establish an expedited appeals plan, which must discuss when an individual requesting an expedited fair hearing would need to provide medical documentation of their urgent health need.

*Comment:* A few commenters requested clarification about the individuals for whom the expedited fair hearing process applies. One commenter requested clarification regarding whether the expedited fair hearing process would only apply to beneficiaries, and only when there is a denial of services, not when an adverse eligibility determination has been made. Another commenter questioned whether the requirement for expedited fair hearing process applies also to non-MAGI populations whose Medicaid eligibility may be based upon multiple criteria such as assets, disability status,

and functional level of care, many of which may be difficult to verify or adjudicate on an expedited basis.

*Response:* The expedited review process established in § 431.224 is available when warranted based on an urgent health need for all individuals who can request a fair hearing of an action, as defined in § 431.201, or when a hearing is required under § 431.220 (which includes denials of eligibility, benefits or services, as well as when a claim is not acted upon with reasonable promptness). The expedited review process is available both to those enrolled in, or seeking coverage under, a MAGI-related eligibility category and to those enrolled in, or seeking coverage under, a non-MAGI based category.

*Comment:* Several commenters supported our proposed revisions to § 431.232 to provide that the agency must inform an applicant or beneficiary that he or she has 10 days from the notice of an adverse decision of a local evidentiary hearing to appeal that decision to the state agency and to adopt language similar to that proposed at §§ 431.231 and 435.956 and finalized in the July 2013 eligibility final rule, regarding the date an individual is considered to receive a notice sent by the agency.

*Response:* We appreciate the support for our proposed regulation at § 431.232(b) which we are finalizing as proposed, except for a grammatical revision for clarity to move reference to the requirement that the notice required be ''in writing.''

*Comment:* We received many comments in support of our proposed modification to § 431.242(a)(1) that gives an appellant access to the content in his or her electronic account, in addition to his or her case file.

*Response:* We appreciate the commenters' support and are finalizing § 431.242(a)(1) as proposed. We note that access to this content could be provided in a variety of methods, including providing electronic access to this information or mailing copies of the information contained in the electronic account to an appellant or other authorized individual who requests it.

*Comment:* We proposed revisions to the definition of ''electronic account'' in § 435.4 to include information collected or generated as part of a fair hearing process. One commenter suggested that the specific data elements that will be added to the electronic account be defined so that states can build or modify their systems accordingly.

*Response:* There are many data elements that must or may be included in an electronic account, and we do not believe that this level of specificity is appropriate for inclusion in the regulations. Specific data elements for inclusion in an electronic account are discussed in relevant technical documents related to account transfers of eligibility determinations between Exchanges and state agencies.

*Comment:* Several commenters recommended adding language in § 431.244(g), to require that the public must have ''*free*'' access to all hearing decisions. The commenters also suggested clarifying that the agency may satisfy this requirement by making hearing decisions available through a free indexed and searchable database posted online.

*Response:* The comment is beyond the scope of this final rule. However, elsewhere in this **Federal Register**, we propose revisions to § 431.244(g) relating to public access to hearing decisions. We also note that, because hearing decisions may contain confidential information about the appellant, any disclosure would need to adhere to privacy protections and disclosure rules at section 1902(a)(7) of the Act and part 431 subpart F. We understand that a number of states redact Personally Identifiable Information (PII) and information otherwise subject to privacy and disclosure protections to provide public access to hearing decisions in accordance with current § 431.244(g).

*Comment:* A commenter suggested that CMS identify areas in which requirements could be established to promote greater consistency in state Medicaid appeals processes for beneficiaries and permit Medicaid health plans to maintain efficient systems to provide beneficiary appeal rights across the country.

*Response:* We appreciate the comment suggesting consistency in Medicaid fair hearings rules across states. Section 431.205 sets out broad requirements that fair hearing procedures must be consistent with *Goldberg* v. *Kelly,* and federal authorities including the Civil Rights Act of 1964, Americans with Disabilities Act, and section 1557 of the Affordable Care Act and implementing regulations. Although there are areas of state flexibility in operationalizing and implementing the fair hearing process (for example, flexibility regarding how to organize hearing functions within the state agency or to delegate appeals functions to an Exchange or Exchange appeals entity per § 431.10(c) or another state agency through an Intergovernmental Cooperation Act of 1968 waiver), much of the regulations in part 431 subpart E reflect standard definitions and requirements that must be applied across states, including a common definition of ''action'' in § 431.201; when a hearing is required at § 431.220; requirements relating to the procedural protections during a hearing at § 431.242; and standards governing various aspects of hearing decisions at § 431.244. In revising the regulations in part 431 subpart E, we also have worked to establish, to the extent possible, consistency and coordination with the regulations for Exchange-related appeals, as well as comparability between the protections afforded to Medicaid beneficiaries in a FFS and managed care environment.

*Comment:* A commenter suggested that we include a cross-reference in § 431.221(a) to § 435.923 (added to the regulations in the July 2013 final rule) to clearly define who can request a fair hearing on behalf of another person as their ''authorized representative.''

*Response:* We are accepting the comment and adding the recommended cross-reference to § 431.221(a). We also make a technical revision to § 457.340(a) to add a cross-reference to § 435.923 (relating to authorized representatives) to the list of Medicaid regulations which apply equally to the state in administering a separate CHIP. Application of the regulations to authorized representatives was inadvertently excluded from the January 22, 2013 Eligibility and Appeals proposed rule and the July 15, 2013 Medicaid and CHIP final rule Part I.

*B. Notices*

1. Content Standards (§§ 435.917 and 431.210)

Effective notices must be clear and understandable to consumers and deliver appropriate, comprehensive eligibility information that enables the reader to understand the action being taken, the reason for the action, any required follow-up, and the process to appeal. Such notices are a key component of a coordinated and streamlined eligibility and enrollment process required under section 1943 of the Act and 1413 of the Affordable Care Act. Therefore, we proposed (1) to revise § 431.210(b) to provide that notices must contain a clear statement of the specific reasons supporting an intended adverse action; and (2) to revise § 435.913, redesignated at proposed § 435.917, to clarify the agency's responsibilities to communicate specific content in a clear and timely manner to applicants and beneficiaries when issuing notices affecting their eligibility, benefits or services, including notices involving the approval, denial or suspension of

eligibility and the denial or change in benefits and services.

We proposed at § 435.917(a) that eligibility notices must be written in plain language, be accessible to individuals who are limited English proficient and individuals with disabilities consistent with § 435.905(b), comply with regulations relating to notices in part 431 subpart E and, if the notice is provided in electronic format, comply with § 435.918(b). Proposed paragraph (b) sets forth the specific content required for notices. Proposed paragraph (c) provides that eligibility notices relating to a determination of eligibility based on the applicable MAGI standard include a plain language description of other potential bases of eligibility (for example, eligibility based on being aged, blind or disabled or eligibility for medically needy coverage based on incurred medical expenses), and how to request a determination on such other bases. Under proposed paragraph (d), the agency's responsibility to provide notice is satisfied by a combined eligibility notice (defined in proposed § 435.4 and discussed in section II.B.2 of this final rule) provided by another insurance affordability program, provided that the agency provide supplemental notice of certain information required under § 435.917(b)(1) if the information is not included in the combined notice provided by the other program. Similar policies were proposed for CHIP through proposed revisions to § 457.340(e). We are also finalizing as proposed the removal of §§ 435.913 and 435.919 pertaining to timely and adequate notice concerning adverse actions and moved the provisions therein to § 435.917. We also make a conforming technical revision in § 435.945(g) to remove the cross reference to § 435.913.

The provisions, except as noted below, are finalized as proposed. We received the following comments on these proposed provisions:

*Comment:* A commenter stated that detailed information on out-of-pocket costs across insurance affordability programs should be included in the eligibility notice. Another commenter noted that states should be given flexibility in terms of additional benefit and cost-sharing information that could be included in the eligibility notice and the format in which such information can be provided, such as in a brochure.

*Response:* States need to customize eligibility notices to deliver sufficient information on benefits and cost sharing, without creating overly-complex and lengthy notices. We are revising proposed § 435.917(b)(1)(iv) to clarify that eligibility notices must contain *basic* information regarding the level of benefits available and the cost-sharing obligations associated with the eligibility status that has been determined, as well as how the individual can receive more detailed information, which could be provided in another format, such as a brochure. We also are revising § 435.917(b)(1)(iv) in this final rule to provide that a notice of eligibility also include, if applicable, basic information regarding the differences in coverage available to individuals enrolled in benchmark or benchmark-equivalent coverage or in an Alternative Benefit Plan as opposed to coverage available to individuals described in § 440.315 (relating to exemptions from mandatory enrollment in benchmark or benchmark-equivalent coverage). The agency could provide more detailed information in a brochure included with the eligibility notice or make it available online, through a supplemental mailing or upon request.

*Comment:* A commenter noted that the information on potential eligibility on non-MAGI bases which must be included in notices involving a determination of eligibility or ineligibility based on MAGI under proposed § 435.917(c) should explain the eligibility rules for these other groups, including any applicable resource test, so that individuals can know whether to pursue eligibility under these categories or seek coverage elsewhere. The commenter recommended that eligibility notices for individuals found eligible under the new adult group described in § 435.119 should explain that the individual may be eligible for different benefits based on their healthcare condition and how they should request a review of their status.

*Response:* We agree with the commenter that eligibility notices approving eligibility based on MAGI need to include information regarding other bases of eligibility. However, the amount of detail provided must also take into account the need to provide a clear and understandable notice. We believe that proposed § 435.917(c), which is finalized as proposed, strikes the right balance. A notice of approval, denial, or termination of eligibility based on MAGI must contain basic information sufficient to enable the individual to pursue a determination on a non-MAGI basis, without undermining the goal of clarity and simplicity.

Through our efforts to provide support and technical assistance to states in modernizing eligibility notices, we developed Medicaid and CHIP model notices to include content depicting how information on non-MAGI bases of eligibility could be written and displayed. Our model notices, while not required, include information describing non-MAGI eligibility criteria and suggest that individuals who believe they are potentially eligible on a non-MAGI basis contact the state Medicaid agency for further information. These model notices can be obtained at *http://www.medicaid.gov/State-Resource-Center/MAC-Learning-Collaboratives/Learning-Collaborative-State-Toolbox/State-Toolbox-Expanding-Coverage.html.*

*Comment:* A commenter recommended that approval notices should be required to include a clear explanation of any restrictions based on the availability of medical treatment that may be in place if the individual is in a managed care plan, including utilization control mechanisms and whether the plan has stated any moral or religious exceptions. The commenter requested that CMS further clarify a state's responsibility to notify all potential enrollees of these limits and provide information about how to access covered services.

*Response:* Due to the variation which may exist between managed care plans, we do not believe such detailed plan-specific information should be included in eligibility notices. This information is more appropriate to include in a subsequent notice regarding the individual's enrollment options, which is the subject of regulations relating to managed care at § 438.10.

*Comment:* We received a few comments regarding our proposed revisions to § 431.210(b) to require that an adverse action notice contain ''a clear statement of the specific reason supporting the intended action.'' One commenter supported the proposed paragraph, noting that agencies often provide only a regulation citation to justify an action, which is not meaningful to most consumers. Another commenter was concerned that proposed § 431.210(b) would lead to litigation because notices would lack the clarity required. No comments were received on proposed revisions at § 431.210(a) (replacing reference to ''the State'' with ''the agency'' and requiring adverse notices to include the effective date of the action) or § 431.210(d)(1) (adding the word ''local'' before ''evidentiary'').

*Response:* Providing both a clear statement, as well as specific legal authority (required per current § 431.210(c)) for an adverse action is critical to enable consumers to understand an agency's decisions

regarding their case. Therefore, we are finalizing § 431.210(b) as proposed. Current § 431.210(c) (which is not revised in this rulemaking) continues to require that a notice of adverse action include specific legal authority supporting the action. Under the regulations, such notices must include both a plain language description and a specific citation supporting why the agency has determined that an individual's eligibility is denied or terminated, or whose benefits are reduced, suspended or terminated. Sections § 431.210(a) and (d)(1) are finalized as proposed. We remind states operating Medicaid and CHIP programs that in addition to the program notice requirements discussed in this final rule, states must comply with other applicable notice requirements, such as those under Section 1557 of the Affordable Care Act and implementing regulation.

2. Combined and Coordinated Notices (§§ 435.4, 435.917, 435.1200, 457.10, 457.348, and 457.350)

A coordinated system of notices is important to a high quality consumer experience and a coordinated eligibility and enrollment system, as provided for under section 1413 of the Affordable Care Act and section 1943 of the Act. We proposed a coordinated system of notices across all insurance affordability programs to maximize the extent to which individuals and families receive a single notice communicating the determination or denial of eligibility for all applicable insurance affordability programs and for enrollment in a QHP through the Exchange. This is regardless of where the individual initially submits an application or renews eligibility or whether the Exchange is authorized to make Medicaid and CHIP eligibility determinations or for which program an individual ultimately is approved eligible. In support of this policy objective, we proposed to add definitions in § 435.4 of ''combined eligibility notice'' (to mean an eligibility notice that informs an individual, or household of his or her eligibility for multiple insurance affordability programs) and ''coordinated content'' (to refer to information included in an eligibility notice relating to the transfer of an individual's or household's electronic account to another program). We explained that coordinated content is needed when the eligibility determination for all programs cannot be finalized for inclusion in a single combined eligibility notice. Definitions of ''combined eligibility notice'' and ''coordinated content'' were proposed for CHIP in § 457.10.

We proposed various revisions to § 435.1200 specifying the circumstances in which a coordinated eligibility notice or coordinated content would be required for Medicaid determinations and similar revisions at § 457.348 and § 457.350 for CHIP. In § 435.1200, we proposed to redesignate paragraph (a) at paragraph (a)(1) and to add a new paragraph (a)(2) to provide cross-references to the definitions added at § 435.4. We proposed a new paragraph § 435.1200(b)(3)(iv) to provide that the agreements between the Medicaid agency and other insurance affordability programs delineate the responsibilities of each program to provide combined eligibility notices (including a combined notice for multiple household members to the extent feasible) and coordinated content, as appropriate. At § 435.1200(b)(4) we proposed that if a combined eligibility notice cannot be provided for all members of the same household, the coordinated content must be provided about the status of other members. Proposed § 435.1200(c)(3) provides that when an Exchange or other insurance affordability program makes a final determination of Medicaid eligibility or ineligibility, the agreement between the agency and Exchange or other program consummated under § 435.1200(b)(3) must stipulate that the Exchange or other program will provide the applicant with a combined eligibility notice including the Medicaid determination. Similar provisions for CHIP were proposed at § 457.348(a), (b)(3)(i) and (ii), and (c)(3).

We proposed incorporating, for clarity, the content of § 435.1200(d)(5) (relating to notification of the receipt of an electronic account transferred to the agency) into § 435.1200(d)(1). We proposed to add new language at § 435.1200(d)(3)(i) specifying that, when an individual is assessed by an Exchange or other program as potentially Medicaid eligible and the account is transferred to the Medicaid agency for a final determination, if the Medicaid agency approves eligibility, the Medicaid agency will provide the combined eligibility notice for all applicable programs. We proposed revisions to § 435.1200(e) to provide at new paragraph (e)(1)(ii) and (e)(1)(iii)(B) that, effective January 1, 2015, or earlier, at state option, the Medicaid agency include in the agreement consummated under § 435.1200(b)(3) that the Exchange or other program will issue a combined eligibility notice, including the Medicaid agency's denial of Medicaid eligibility, for individuals denied eligibility by the agency at initial application (or terminated at renewal) and assessed and transferred to the Exchange or other insurance affordability program as potentially eligible for such program. Per proposed § 435.1200(e)(1)(iii)(A), prior to January 1, 2015, the agency would provide notice of a Medicaid denial or termination and coordinated content relating to the individual's transfer to another insurance affordability program if such other program would not be providing a coordinated eligibility notice containing such denial or determination. Finally, under proposed § 435.917(d) the agency's responsibility to provide notice of an eligibility determination, as required under § 431.210 or proposed § 431.917, is satisfied by a combined notice provided by an Exchange or another insurance affordability program in accordance with an agreement between the agency and the Exchange or such program. Similar revisions were proposed for CHIP at §§ 457.348(d)(1) and (d)(3)(i), 457.350(i)(2) and (3).

The proposed policy of a single combined eligibility notice would not apply in the case of individuals determined ineligible for Medicaid on the basis of MAGI but being evaluated for eligibility on a non-MAGI basis, because the Medicaid agency typically would be continuing its evaluation of the individual's eligibility on the non-MAGI bases at the same time that the individual was being evaluated for, and potentially enrolled in, another insurance affordability program. In this situation, under proposed § 435.1200(e)(2)(ii), the Medicaid agency would provide notice to the individual explaining that the agency has determined the individual ineligible for Medicaid on the basis of MAGI and that the agency is continuing to evaluate Medicaid eligibility on other bases. This notice also would contain coordinated content advising the applicant that the agency has assessed the individual as potentially eligible for, and transferred the individual's electronic account to, the other program. Proposed § 435.1200 (e)(2)(iii) requires the agency to provide the individual with notice of the final eligibility determination on the non-MAGI bases considered. If the individual is later determined eligible for Medicaid on a basis other than MAGI, proposed paragraph (e)(2)(iii) provides that that agency include coordinated content in the notice of eligibility on the non-MAGI basis that the agency has notified the applicable insurance affordability program of the Medicaid determination, as well as the impact that the Medicaid determination

will have on the individual's eligibility for the other program. For CHIP, we proposed to redesignate § 457.350(j)(3) at § 457.350(j)(4) and to add a new paragraph (j)(3) providing for the coordination of notices for individuals assessed by the CHIP agency as not eligible for Medicaid based on having income below the applicable MAGI standard, but as potentially eligible for Medicaid on a non-MAGI basis.

*Comment:* We received many comments regarding our proposed policy to establish a coordinated system of notices across insurance affordability programs. Commenters generally supported the policy goal as an important part of a coordinated eligibility and enrollment system and we received no comments recommending specific revisions to the proposed regulations. Many commenters, however, were concerned about current systems capabilities to coordinate single combined notices between different insurance affordability programs. One commenter was concerned that the need to provide a combined eligibility notice could undermine provision of timely notice. Commenters also found the proposed regulations confusing and were unsure of exactly when a combined eligibility notice is required.

*Response:* We appreciate commenters' support of the goal of achieving a coordinated system of notices, as well as the concerns about the ability of multiple programs to provide a single combined eligibility notice to the extent envisioned in the proposed rule, particularly in states that do not operate a shared service for determining eligibility for all programs, including all states which rely on the FFE to determine eligibility for enrollment in a QHP and for APTC and CSRs. We also agree with commenters that the regulatory provisions implementing a coordinated system of notices proposed in § 435.1200, which were spread across several paragraphs of that section, are confusing. We make two basic changes in the final rule to address commenters' concerns. First, we are not finalizing the key provisions relating to coordinated notices as proposed at paragraphs (b)(4), (c)(3), (d)(3)(i), (e)(1)(ii) and (e)(1)(iii) in § 435.1200. Instead, the final rule anticipates that states and Exchanges will phase in increased use of single coordinated eligibility notices, to be provided by the last entity to ''touch'' an application or renewal, more gradually over time, as provided in a new paragraph § 435.1200(h) of the final rule. Specifically, § 435.1200(h)(1) of the final rule provides that the agency include in the agreements with other programs, under § 435.1200(h)(1) that, to the maximum extent feasible, the agency, Exchange or other insurance affordability program will provide a combined eligibility notice to individuals, as well as to multiple members of the same household included on the same application or renewal form. Section 435.1200(h)(2) provides that, for individuals and other household members who will not receive a combined eligibility notice, the agency must include appropriate coordinated content in the notice it provides under § 435.917. To ensure that applicants and beneficiaries are fully informed of the status of their application or renewal, we clarify in the definition at § 435.4 of the final rule that, in addition to information relating to the transfer of an individual's or household's electronic account to another program, coordinated content also includes, if applicable, any notice sent by the agency to another insurance affordability program regarding an individual's eligibility for Medicaid, the ways in which eligibility for the different programs may impact each other, and the status of household members on the same application or renewal form whose eligibility is not yet determined.

For example, because applicants and current beneficiaries determined ineligible for Medicaid have different rights—both in terms of the continuation of benefits pending an appeal of the Medicaid agency's determination, as well as the right to a special enrollment period in the Exchange—we do not expect that states necessarily will be able to provide for a combined notice right away for individuals determined ineligible for Medicaid by the Medicaid agency and transferred to an Exchange that does not share a common eligibility system. As systems mature, and the communication between the programs can differentiate individuals denied eligibility by the agency at initial application from those being terminated at renewal or due to a change in circumstances, a combined notice would be required under § 435.1200(h)(1).

Rather than finalize the amendments to § 435.1200(e)(2) pertaining to notices as proposed, existing § 435.1200(e)(2) remains unchanged and we have specifically accounted for one particularly complex situation, involving the need for multiple notices, in the final regulation at § 435.1200(h)(3). We did not finalize as proposed §§ 435.1200(e)(2)(ii) and 435.1200(e)(2)(iii), but added § 435.1200(h)(3), which describes the notice requirements for individuals determined ineligible for Medicaid based on having household income above the applicable MAGI standard (at initial application or renewal), but who are undergoing a determination on a basis other than MAGI. Section 435.1200(h)(3) directs the agency to first provide notice to the individual, consistent with § 435.917, that the agency has determined that the individual is not eligible for Medicaid based on MAGI, but is continuing to evaluate eligibility on other bases. This notice must include a plain language explanation of the other bases being considered and coordinated content that the agency has transferred the individual's electronic account to the Exchange or other insurance affordability program (as required under § 435.1200(e)(2)) and an explanation that eligibility for or enrollment in the other program will not affect the determination of Medicaid eligibility on a non-MAGI basis. Once the agency has made a final determination of eligibility on all bases, per § 435.1200(h)(3)(ii), the agency must provide the individual with notice of the final determination of eligibility on all bases, consistent with § 435.917. The notice must also contain coordinated content that the agency has notified the Exchange or other program of its final determination (required under § 435.1200(e)(2)(ii)) and, if applicable, an explanation of any impact that the agency's approval of Medicaid eligibility may have on the individual's eligibility for the other program or the transfer of the individual's electronic account to the Exchange or other program (required under § 435.1200(e)(1) if the agency ultimately denies or terminates the individual's eligibility).

Initially, under the standard established at § 435.1200(h)(1) of this final rule, we expect that states that have delegated authority to the FFE to make MAGI-based eligibility determinations will provide in the agreement entered into per § 435.1200(b) that the FFE will provide a combined eligibility notice for all applicants it determines are eligible for Medicaid, as well as applicants that it determines are ineligible for Medicaid based on MAGI whose account is not transferred to the Medicaid agency for a full determination of eligibility including non-MAGI bases. States currently operating a state-based Exchange in which all insurance affordability programs access shared services for determining eligibility are expected to provide a single combined eligibility notice in all instances. As systems mature, we expect that all

states, including both assessment and determination states using the FFE, as well as states operating a state-based Exchange both with and without a shared eligibility service, will develop more integrated notices capabilities able to provide combined eligibility notices in a wider range of circumstances. Enhanced federal match is available for Medicaid agencies to develop such capabilities and we will work with states through the Advance Planning Documents associated with obtaining federal match for systems development to achieve this goal.

Finally, we make conforming revisions in the final rule at § 435.1200(b)(3)(ii) to cross-reference paragraphs (d) though (h) (rather than (d) through (g)) and to streamline the language in proposed § 435.1200(b)(3)(iv) (relating to the general requirement that the agreements between insurance affordability programs provided for a combined eligibility notice and opportunity to submit a joint fair hearing request consistent with the regulations). Proposed § 435.917(d) is finalized as proposed, with a non-substantive modification replacing ''through'' with ''and''.

We note that in proposing new § 435.1200(c)(3) in the proposed rule, we neglected to propose that current § 435.1200(c)(3) (relating to the responsibility of an agency electing to delegate eligibility determination authority to maintain oversight of the Medicaid program) be redesignated at § 435.1200(c)(4). We did not intend to remove current § 435.1200(c)(3), which is retained (without revision or redesignation) in this rulemaking.

We have made similar revisions to the proposed provisions relating to establishment of a coordinated system of notices in CHIP, as well as similar reorganizational changes. Thus, we revise the definitions of ''combined eligibility notice'' and ''coordinated content'' at § 457.10 to align with the definitions finalized at § 435.4. Proposed § 457.348(b)(3)(i) and (ii) (relating to the requirement that the agreements between the state and other insurance affordability programs delineate the responsibilities of each to effectuate a coordinated system of notices) are finalized at § 457.348(a)(4) of the final rule. We are not finalizing the addition of proposed § 457.348(a) or revisions to current regulations proposed at § 457.348(b)(3)(i) and (ii), (c)(3) and (d)(3)(i) and § 457.350(i)(2) and (3) and (j)(3). Instead, we are adding a new paragraph at § 457.340(f) adopting the same coordinated policy for CHIP as is adopted for Medicaid at § 435.1200(h)(1) and (2) of the final rule.

Similar to § 435.1200(h)(3) of the final rule, we are revising § 457.350(i)(3) (redesignated at § 457.350(i)(2) in this final rule) to provide that, in the case of individuals subject to a period of uninsurance under § 457.805, the state must (1) notify the Exchange or other insurance affordability program to which the individual was referred in accordance with § 457.350(i) of the date on which the individual's required period of uninsurance ends and the individual will be eligible to enroll in CHIP; and (2) provide the individual with an initial notice that the individual is not currently eligible to enroll in CHIP (and why); the date on which the individual will be eligible to enroll in the CHIP; and that the individual's account has been transferred to another insurance affordability program for a determination of eligibility to enroll in such program pending eligibility to enroll in CHIP. Such notice also must contain coordinated content informing the individual of the notice provided to an Exchange or other program to which the individual's account was sent and the impact that the individual's eligibility to enroll in the CHIP will have on the individual's eligibility for the other program. Prior to the end of the period of uninsurance, the state must send a second notice reminding the individual of the information contained in the first notice, as appropriate. The notice must be sent sufficiently in advance of the date the individual is eligible to enroll in CHIP such that the individual is able to disenroll from the insurance affordability program to which the individual's account was transferred prior to that date. We also make a technical revision to redesignated § 457.350(i)(2) to add a cross-reference to § 457.805 (relating to periods of uninsurance as a strategy to ameliorate substitution of coverage) and to clarify that the state must transfer individuals subject to a period of uninsurance to the Exchange or other insurance affordability program (that is, the BHP, in a state which has implemented a BHP).

In the case of individuals identified as potentially eligible for Medicaid on a non-MAGI basis, we are revising § 457.350(j)(3) of the final rule to provide that states must include in the notice of CHIP eligibility or ineligibility provided by the state coordinated content relating to (1) the transfer of the individual's electronic account to the Medicaid agency (for a full Medicaid determination); (2) if applicable, the transfer of the individual's account to another insurance affordability program (that is, to the Exchange or BHP if the state determines the individual is not eligible for CHIP); and (3) the impact that an approval of Medicaid eligibility will have on the individual's eligibility for CHIP or the insurance affordability program to which the individual's account was transferred, as appropriate. We make a technical revision at § 457.350(j)(2) to reflect the requirement that, if an individual identified as potentially eligible for Medicaid on a non-MAGI basis is determined not eligible for CHIP, the state must identify whether the individual may be eligible for other insurance affordability programs.

We are not finalizing the proposed redesignation of current § 457.350(f)(2) and (3) or the addition of a new paragraph (f)(2) in § 457.350, which would have required the Medicaid agency to issue a combined eligibility notice for individuals assessed by the State as eligible for Medicaid based on MAGI and transferred to the Medicaid agency, because such assessments and transfers do not constitute a denial of CHIP. We neglected to include regulation text in the proposed CHIP regulations similar to the proposed provision at § 435.917(d), specifying that the provision of a combined eligibility notice including a determination of CHIP eligibility or ineligibility satisfies the state's responsibility to provide such notice under § 457.340(e). This proposal was implied in the proposed rule. We are revising § 457.340(e)(2) in this final rule to finalize the policy implied in the proposed rule.

*Comment:* Several commenters supported our proposal to include the content of § 435.1200(d)(5) in §§ 435.1200(d)(1) and 457.348(d)(5) in § 457.348(d)(1), respectively.

*Response:* We are finalizing §§ 435.1200(d)(1) and 457.348(d)(1) as proposed. Proposed §§ 435.1200(d)(5) and 457.348(d)(5), finalized in the July 2013 final eligibility rule at §§ 435.1200(d)(6) and 457.348(c)(6), are redesignated at §§ 435.1200(d)(5) and 457.348(d)(5) in this final rule, accordingly.

*Comment:* A number of commenters were concerned about the effective date (January 1, 2015, in the proposed rule) for the requirement to provide combined notices, including an eligibility determination made by another program. The commenters recommended that additional time is needed for the systems builds needed to support this policy.

*Response:* We appreciate the concerns that combined notices will be

challenging to implement in states with a state-based Exchange that do not have a shared eligibility service, as well as all states using a Federally-Facilitated Exchange and agree that additional time is needed for the development, testing and deployment of the systems needed to support provision of such notices. We are not providing for a delayed effective date of the regulations relating to coordinated notices *per se.* However, as explained above, §§ 435.1200(h) and 457.340(f) of the final rule require the use of combined eligibility notices to the extent feasible, taking into account whether the state uses a shared eligibility service or the FFE, whether the FFE is determining or assessing eligibility for Medicaid and CHIP, and the maturity of the eligibility and enrollment systems operated by the state and the Exchange. As state and Exchange systems mature, greater use of combined eligibility notices is required. Under the final regulations, it should be feasible for a state using a shared eligibility service for all insurance affordability programs to provide a single combined eligibility notice, which therefore is required under the final rule. Similarly, when the FFE has been authorized to make and has made a final determination of eligibility for Medicaid or CHIP for applicants who have applied for coverage through the Exchange, the agreement between the state and the FFE must provide for a combined eligibility notice from the FFE. We may revisit these requirements in future rulemakings as states' systems develop and states gain more experience with issuing combined notices.

*Comment:* While supporting the ability to provide combined eligibility notices to consumers, several commenters, noting the complexity of the policy, recommended that CMS provide guidance and technical assistance to states. Another commenter recommended that notices need to clearly state whom the notice is for, such as for one individual or multiple people in the household. The commenters recommended CMS consult with states and stakeholders to develop guidance on combined and coordinated notices and to conduct consumer testing on model notices.

*Response:* We agree with the commenters and, since issuing the proposed rule, we have developed a tool kit to provide states with consumer-tested model notices for Medicaid and CHIP, as well as guidance on developing, and a framework for structuring, effective notices in a coordinated and streamlined eligibility and enrollment system. The tool kit also includes resources on key messages based on communication requirements and eligibility scenarios, and consumer tested best practices and tips. In developing these resources, we worked closely with the Medicaid and CHIP Coverage Expansion Learning Collaborative, which includes representatives from a dozen states, and with consumer advocates and other stakeholders. The tool kit can be obtained at *http://www.medicaid.gov/State-Resource-Center/MAC-Learning-Collaboratives/Learning-Collaborative-State-Toolbox/State-Toolbox-Expanding-Coverage.html.*

*Comment:* A commenter noted the importance of providing denial notices in a timely manner to individuals when appropriate, especially in cases where the individuals may be eligible for other insurance affordability programs.

*Response:* Per § 431.210 (revised in this final rule) and § 457.340(e), Medicaid and CHIP agencies are required to provide notice whenever an applicant or beneficiary is determined ineligible for coverage and, if such determination is made by the state agency, such applicant or beneficiary must be assessed for eligibility for, and transferred as appropriate to, other insurance affordability programs, consistent with §§ 435.1200(e) and 457.350. If a coordinated eligibility notice is not provided by another program under an agreement between the agency and such other program, the state agency must provide the notice required under the regulations; per §§ 435.1200(h)(2) and 457.340(f)(2), such notice must contain coordinated content explaining that the individual's account has been transferred to the other insurance affordability program for consideration. We remind states operating Medicaid and CHIP programs and Exchanges that in addition to the program notice requirements discussed in this final rule, states and Exchanges must comply with other applicable notice requirements, such as those under Section 1557 of the Affordable Care Act and its implementing regulation.

3. CHIP Notice and Information Requirements (§§ 457.110 and 457.350)

We proposed to redesignate § 457.350(f)(2) at (3) and to revise redesignated § 457.350(f)(3) to clarify that the requirement to find an individual ineligible, provisionally ineligible, or suspend the individual's application for CHIP unless and until the Medicaid application for the individual is denied, applies only at application. We proposed revisions at § 457.350(g) to clarify that the requirement to provide information sufficient to enable families applying for CHIP to make an informed choice about applying for Medicaid also applies to providing such information about other insurance affordability programs. We proposed to revise § 457.350(h)(2) to clarify that the responsibility to inform applicants placed on a waiting list for enrollment in a separate CHIP that, if their circumstances change while on such list, they may be eligible for Medicaid or other insurance affordability programs. Finally, we proposed a technical correction in § 457.805(b)(3)(v) to replace ''and'' with ''or''.

We received no comments on these proposed provisions and we are revising §§ 435.350(g), 435.350(h)(2) and 457.805(b)(3)(v) as proposed, except that we are making a technical revision at § 457.350(h), as revised in the July 2013 Eligibility final rule, to redesignate paragraph (h)(2) at (h)(3) and add a new paragraph (h)(2), providing that the procedures developed by states which have instituted a waiting list or enrollment cap or otherwise closed enrollment ensure that affected children placed on a waiting list or for whom action on their application is otherwise deferred are transferred to another appropriate insurance affordability program in accordance with § 457.350 (i). As discussed above, we are not adding a new paragraph (f)(2) at § 457.350 or redesignating current § 457.350(f)(2) at (3). We had proposed revisions to current § 457.350(f)(2) to clarify that the requirement to find an individual ineligible, provisionally ineligible, or suspend the individual's application for CHIP unless and until the Medicaid application for the individual is denied, applies only at application in response to concerns expressed by states that at renewal such a requirement could result in a gap in coverage. However, we do not believe that the current § 457.350(f)(2), which refers explicitly to ''applicants'' is unclear, and therefore, we are not revising § 457.350(f)(2) in the final rule.

We also are making a technical revisions to § 457.110, which was finalized in the July 15, 2013 Medicaid and CHIP final rule. Paragraph (a)(1) is revised to clarify that the state must (instead of ''may'') provide, at beneficiary option, notices to applicants and beneficiaries in electronic format, as long as the state establishes safeguards in accordance with § 435.918 of this chapter.

*C. Medicaid Eligibility Changes Under the Affordable Care Act*

1. Former Foster Care Children (§ 435.150)

We proposed new § 435.150 to implement section 1902(a)(10)(A)(i)(IX) of the Act, added by sections 2004 and 10201(a) and (c) of the Affordable Care Act, under which states must provide Medicaid coverage starting in 2014 to a new eligibility group for ''former foster care children.'' Under proposed § 435.150, this mandatory group covers individuals under age 26 who were in foster care under the responsibility of ''the State'' or Tribe and were enrolled in Medicaid under ''the State's'' Medicaid State plan or section 1115 demonstration upon attaining either age 18 or a higher age at which an individual will age out of foster care based on the state's or Tribe's election under title IV–E of the Act. We proposed to provide states with the option to cover under this group individuals who aged out of foster care while receiving Medicaid in ''any state'' at either of the relevant points in time. For additional discussion, see section I.B.3.(a) of the proposed rule. We received no comments on proposed §§ 435.150 (a) (basis), (b)(1) (age required for coverage), and (b)(2) (limitation on eligibility for individuals eligible for mandatory coverage under another group described in part 435 subpart A, other than the adult group described in § 435.119), which are finalized as proposed.

*Comment:* Several commenters suggested we make the ''any state'' option in proposed § 435.150(b)(3) a requirement, so that states would be required to cover individuals under this group if they aged out of foster care while receiving Medicaid in ''any state'' at either of the relevant points in time. Some commenters were particularly concerned about children in foster care under the responsibility of one state, who were placed in another state and either were enrolled in Medicaid in the receiving state or chose to remain in the receiving state when they aged out of foster care. These commenters believe that former foster youth should be eligible for coverage regardless of changes in state of residence. One commenter recommended that states ensure eligibility in either the state placing the youth in foster care or the state in which the child was placed, whichever is the child's state of residence upon leaving foster care. A few commenters supported retaining the ''any state'' option as a state option. Another commenter recognized the challenge of states confirming eligibility for youth who were in foster care in another state.

*Response:* Section 1902(a)(10)(A)(i)(IX) of the Act provides that, to be eligible under this group, an individual must have been ''in foster care under the responsibility of the State'' and to have been ''enrolled in the State plan under this title or under a waiver of the plan while in such foster care[.]'' Because the statute mandates coverage specifically for individuals in foster care in *the* state—not in *a* or *any* state—who were receiving Medicaid under *the* state plan or waiver of such plan—not *a* state plan or *any* state plan—we do not have flexibility to require that states provide coverage to individuals who aged out of foster care while under the responsibility of, or receiving Medicaid in, another state. Based on this specific statutory language, we also do not believe that the statute supports providing states with the option to do so under this eligibility group. Therefore, we are removing the ''any state'' option that was proposed. We remain committed to working with states to continue coverage of these individuals. States that wish to continue existing coverage or to extend eligibility to former foster care children from another state may do so through 1115 demonstration authority, and we are releasing concurrently with this final rule subregulatory guidance providing additional detailed information on state flexibility to cover these individuals, including releasing an 1115 waiver template to help states to transition this group to 1115 authority without any gaps in coverage.

To provide state flexibility in other respects, we are revising § 435.150(c) in the final rule to provide states with new options to provide coverage under this group. States may elect to provide coverage to individuals who meet the requirements in § 435.150(b)(1) and (2), were in foster care under the responsibility of the state or a tribe located within the state, at either of the ages specified in § 435.150(b)(3)(i) and (ii), and were:

- Enrolled in Medicaid under the state's Medicaid state plan or under a section 1115 demonstration project at some time during the period in foster care during which the individual attained such age; or
- Placed by the state or tribe in another state and, while in such placement, were enrolled in the other state's Medicaid state plan or under a section 1115 demonstration project.

*Comment:* One commenter believed that requiring that the child be receiving Medicaid at the time he or she turned 18 or aged out of foster care was unnecessarily restrictive. The commenter stated that the statute requires only that the child have been enrolled in Medicaid in the state at some point during his or her receipt of foster care assistance.

*Response:* We agree that clauses (cc) and (dd) of section 1902(a)(10)(A)(i)(IX) of the Act can be read independently such that, under clause (cc) to be eligible for coverage under the former foster care group, an individual must be in foster care on the date of attaining the age described in clause (cc), whereas clause (dd) would require only that the individual have been enrolled in Medicaid ''while in such foster care,'' but not necessarily that the individual have been enrolled in Medicaid at the time of attaining the age described in clause (cc). However, we do not believe it appropriate to finalize this interpretation in this final rule without opportunity for broader public comment. Therefore, we are including the commenter's suggestion as an option for states in § 435.150(c) of this final rule and will consider proposed revised revisions to § 435.150 to require only that an individual must have been enrolled in the state's Medicaid program at some point during the period in foster care which ended upon the individual's attaining the age described in § 435.150(b)(3)(i) or (ii). We note that the option provided states at § 435.150(c) of the final rule would extend coverage in the state responsible for foster care placement under § 435.150 to former foster care youth who were enrolled in Medicaid when they ran away from a foster care placement. Runaway youth may remain in foster care (receiving child locator services), even though their Medicaid coverage may lapse, and, if remaining in a foster care status upon attaining age 18, they could be eligible for coverage in such state under § 435.150 of the final rule provided that the other criteria are met.

*Comment:* Several commenters requested CMS to issue guidance to assist states in establishing procedures to ensure automatic or passive eligibility verification and enrollment, and to recommend various outreach procedures to identify current and former foster care children. Several specific ways to conduct this outreach were suggested, including establishing a toll-free number for former foster youth to call and ensuring that child welfare agencies are informing youth about their eligibility and assisting with their enrollment during foster care transition planning. One commenter suggested HHS should encourage states to enact procedures to ensure that verification of

eligibility and enrollment for former foster youth be as automatic as possible. The commenter included outreach strategies and recommended that state Medicaid agencies take steps to identify former foster youth and collaborate with child welfare agencies in their state plans and in the healthcare oversight plan that child welfare agencies develop with state Medicaid agencies. Another commenter supported automatic enrollment upon eligibility, continuing until the individual's 26th birthday. Three commenters raised concerns regarding the difficulty states will have in verifying past foster care placements and Medicaid eligibility for youths from another state.

*Response:* Under § 435.916(f)(1) of the current regulations, states may not determine a current beneficiary to be ineligible before considering all bases of eligibility. In the case of individuals aging out of foster care on or after January 1, 2014 (the effective date for coverage under the former foster care group), this means that states cannot terminate Medicaid eligibility of an individual in foster care who attains age 18 or otherwise ages out of their foster care status without determining first whether such individual retains eligibility under another eligibility group. Individuals who age out or leave foster care may be eligible under the mandatory group for children under § 435.118, as a disabled individual under § 435.120 or § 435.121, as a pregnant woman under § 435.116, or as a parent or other caretaker relative under § 435.110. If the state can determine that an individual who otherwise satisfies the requirements for coverage under the former foster care group at § 435.150 is eligible for any of these other mandatory eligibility groups, it should transfer the individual to such group. If the individual is eligible for the former foster care group and either the state determines the individual is ineligible for these other mandatory groups or does not have sufficient information to determine eligibility under the other groups, the state should transition the individual to the former foster care group without interruption in Medicaid coverage or need to submit additional information. If a state does not know whether the individual remains a state resident upon leaving foster care and cannot electronically verify state residency, the state may require attestation and/or documentation of state residency, consistent with the state's verification plan developed per § 435.945(j). We recommend the use of automated transition of individuals to the former foster care group within a state, and we remind states of the availability of enhanced federal funding for Medicaid eligibility and enrollment systems (''90/10'' funding) to support such automated systems. If automated transition is not possible, a manual process is acceptable at this time. A manual process may involve caseworker action at the state foster care agency.

Some individuals who may be eligible for coverage under this group may need to apply with a new application—for example, because they left foster care prior to January 1, 2014. For such individuals, states may accept attestation of their former status under § 435.945(a). If the state does not accept self-attestation, electronic verification of the individual's former foster care status, as well as his or her receipt of Medicaid while in foster care is required if available or if establishing an electronic data match would be effective within the meaning of § 435.952(c)(2)(ii). If electronic verification is not available or establishing a data match would not be effective, states may require that applicants provide documentation of their former status. We note that the verification procedures followed in each state should be set forth in the verification plan developed by the state in accordance with § 435.945(j).

*Comment:* A few commenters recommended that a specific Medicaid benefits package be established for former foster care youth, rather than the adult benefits package, due to their unique health concerns.

*Response:* While the statute does not authorize us to require a specific Medicaid benefit package for former foster care youth, individuals eligible under the former foster care group are exempt from mandatory enrollment in benchmark or benchmark-equivalent coverage under section 1937(b)(2)(B)(viii) of the Act. Thus, while a state may establish benchmark or benchmark equivalent coverage for individuals enrolled in this group, which the state believes is better tailored to their needs, the state cannot require enrollment in such coverage. We note also that individuals enrolled in the former foster care group who are under age 21 are entitled to early and periodic screening, diagnosis, and treatment (EPSDT) services under part 441 subpart B.

*Comment:* Several commenters stated that coverage under this group also should include individuals who at their 18th birthday were receiving Medicaid coverage through an adoption or guardianship subsidy. One commenter stated that eligibility should be expanded to include youth who left foster care at age 16 or older when they were adopted or placed in legal guardianship with kin, and that eligibility requirements for foster care should be universal among states.

*Response:* Section 1902(a)(10)(A)(i)(IX) of the Act limits eligibility under this group to individuals who were in foster care at the specified ages; therefore, we do not have the authority to expand Medicaid coverage under this group to include individuals who were not in foster care at either of the relevant points in time but were instead receiving adoption or guardianship assistance, nor do we have the authority to require uniform foster care eligibility requirements across all states. Adopted children up to age 26 generally may be covered as dependents under their adoptive parents' insurance.

2. Individuals Excepted From MAGI (§§ 435.601 and 435.602)

We proposed technical amendments to § 435.601 and § 435.602 necessitated by the Affordable Care Act's requirements that MAGI-based financial methodologies be applied in determining Medicaid eligibility, unless the individual is excepted from application of MAGI-based methods under § 435.603(j). We proposed to redesignate § 435.601(b) at §§ 435.601(b)(2) and 435.602(a) at § 435.602(a)(2) and to add new paragraphs § 435.601(b)(1) and § 435.602(a)(1) to clarify that the methodologies set forth in § 435.601 (related to application of the methodologies of the most closely-related cash assistance program) and § 435.602 (related to financial responsibility of relatives and other individuals) apply only to individuals excepted from application of MAGI-based methodologies in accordance with § 435.603(j). A conforming revision to the heading for redesignated § 435.601(b)(2) also was proposed. We also proposed to remove § 435.601(d)(1)(i) and (ii) (relating to pregnant women and children, who are not excepted from application of MAGI-based methods) and to redesignate § 435.601(d)(1)(iii) through (vi) at § 435.601(d)(1)(i) through (iv). We received no comments on these revisions, which are finalized as proposed. We also make a non-substantive revision for clarity in redesignated § 435.602(a)(2)(ii) to replace reference to ''the State's approved AFDC plan'' with reference to ''the State's approved State plan under title IV–A of the Act in effect as of July 16, 1996.'' Discussed in section II.A.3 of this final rule, we make other revisions

at redesignated § 435.601(b)(2) and (d)(1) related to revisions made to § 435.831 related to financial methodologies for medically needy individuals.

*Comment:* One commenter requested clarification about the rules for post-eligibility treatment of income for an institutionalized individual. The commenter also questioned whether the eligibility requirements for payment of long-term care services will apply to MAGI individuals whose coverage includes long-term care services, such as nursing homes.

*Response:* On February 21, 2014, we issued State Medicaid Director (SMD) letter #14–001 regarding the application of transfer-of-asset rules and post-eligibility treatment of income rules to individuals eligible for Medicaid on the basis of MAGI. The commenter is directed to this letter, available at *http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD-14-001.pdf.*

3. Family Planning (§§ 435.214, 435.603, and 457.310)

We proposed to add § 435.214, codifying a new optional family planning eligibility group for non-pregnant individuals under sections 1902(a)(10)(A)(ii)(XXI) and 1902(ii) of the Act, as added by section 2303 of the Affordable Care Act. Benefits for individuals enrolled in this group are limited to family planning or family planning-related services under the first clause (XVI) in the matter following section 1902(a)(10)(G) of the Act. Section 1902(ii)(3) of the Act permits states to consider only the income of the individual applying for coverage in determining eligibility for this group, and we proposed to codify that option by adding a new paragraph (k) to § 435.603. We also proposed to amend the definition of a targeted low-income child at § 457.310(b)(2)(i) to provide that eligibility for limited coverage of family planning services under § 435.214 would not preclude an individual from being eligible for CHIP. We received several comments on these provisions.

*Comment:* Several commenters supported the proposed regulations to codify this new group. Several commenters strongly supported the amendment to § 457.310(b)(2)(i) to ensure that eligibility for family planning coverage under Medicaid will not undermine eligibility for comprehensive coverage under CHIP. Other commenters expressed strong support for inclusion of the income eligibility standards for pregnant women under section 1115 demonstration projects in determining the highest income standard for purposes of setting income eligibility for services under this section.

*Response:* We appreciate the commenters' support and are finalizing § 435.214, § 435.603(k) and the revisions to § 457.310(b)(2)(i) as proposed, with the exception of minor technical revisions. We are revising the section heading and the introductory text in § 435.214(b) to reflect that individuals eligible for Medicaid under § 435.214 are eligible only for the limited family planning services described in § 435.214(d); removing the phrase ''meet all of the following requirements;'' and adding a parenthetical clarifying that coverage is provided to individuals ''of any gender.''

*Comment:* A commenter stated that CMS should finalize the proposed provision so that states can consider only the income of the applicant or recipient when determining eligibility for coverage under a family planning State Plan Amendment (SPA). Another commenter requested that the final rule provide a detailed explanation as to why eligibility for a particular service should be treated differently than others. The commenter believed that such exceptions result in greater confusion and costs.

*Response:* Under section 1902(ii)(3) of the Act, states have the option to consider only the individual applicant's or beneficiary's income. The statute thus specifically authorizes, at state option, a deviation from the household composition and household income rules associated with MAGI-based methodologes for this population only, at state option. This option is codified at § 435.603(k) of the final rule. In addition, we note that under pre-Affordable Care Act rules, many states applied this methodology under their section 1115 family planning demonstration programs, finding it critical to enable vulnerable populations, such as women experiencing domestic abuse and teens to obtain family planning services based on their own income. We note that states that elect to cover more than one group under § 435.214 may exercise the options provided at § 435.603(k) differently for each group adopted under § 435.214.

*Comment:* A commenter requested clarification on how coverage under this group will be coordinated between the Medicaid agency and the Exchange, since family planning is not full Medicaid coverage.

*Response:* We are not certain whether the commenter is questioning about coordination of benefits for individuals who may be eligible for APTC and CSR for enrollment in a QHP and also for Medicaid coverage of family planning benefits under the state plan or whether the commenter is questioning about coordination of the application process to obtain coverage for family planning benefits. We therefore will respond to both questions.

For individuals who are eligible for enrollment in a QHP and also for coverage of family planning benefits under the state plan, Internal Revenue Service (IRS) regulations at 26 CFR 1.5000A–2(b)(ii)(A) provide that coverage of family planning services under section 1902(a)(10)(A)(ii)(XXI) of the Act is not minimum essential coverage. Therefore, individuals who are eligible for coverage of family planning services under the optional state plan group per § 435.214 may also be eligible to receive APTC and CSR for enrollment in a QHP through the Exchange. For individuals enrolled in both, the rules governing coordination of benefits and third party liability section 1902(a)(25) of the Act and implementing regulations would apply, with Medicaid serving as a secondary payer for covered family planning services furnished by Medicaid-participating providers.

For the application process, to apply for coverage through the Exchange, an individual must submit a single streamlined application. The Exchange regulations at § 155.302(b)(1) and § 155.305(c) require that, in assessing or determining an applicant's financial eligibility for Medicaid, the Exchange must use the applicable Medicaid MAGI standard, as defined in § 435.911(b) of the Medicaid regulations. See the definition of ''applicable Medicaid MAGI-based income standard'' in § 155.300. The applicable MAGI standard under § 435.911(b), in turn, represents the highest income standard under which an applicant may be determined eligible for coverage under the MAGI-based eligibility groups for adults under age 65 at § 435.119; parents and caretaker relatives at § 435.110 or § 435.220; pregnant women at § 435.116; children at § 435.118; or individuals under 65 with income over 133 percent of the FPL at § 435.218. The income standard for several optional MAGI-based eligibility groups—including the new family planning group at § 435.214—is not taken into account in establishing the applicable MAGI standard which is used by the Exchange in assessing or determining the Medicaid eligibility of new applicants. Therefore, while the Exchange regulations do not preclude the Exchange from determining or making an assessment of eligibility for coverage

under the family planning group, they do not require that it do so.

The FFE is not currently programmed to assess or determine eligibility under the optional family planning group. If the FFE does not assess or determine an applicant as eligible for Medicaid based on the applicable MAGI standard, the applicant can request a full determination by the Medicaid agency per §§ 155.302(b)(4)(i)(A) and 155.345(c), and if the applicant requests such determination or if the FFE identifies the applicant based on information provided on the application as potentially eligible for Medicaid on a MAGI-exempt basis (that is, based on being aged, blind or disabled or having high medical expenses), the FFE must transfer the applicant to the Medicaid agency under §§ 155.302(b)(4)(ii) and 155.345(d).

Under § 435.911(c)(2), if the Medicaid agency finds that an applicant is not eligible on the basis of the applicable MAGI standard, the agency is directed to evaluate eligibility on bases other than the applicable MAGI standard, which includes not only eligibility on a basis excepted from application of MAGI-based methods per § 435.603(j), but also eligibility for MAGI-based groups which are not reflected in the applicable MAGI standard, such as the family planning group. If additional information not collected on the single streamlined application submitted to the FFE is needed, the agency would request such information per § 435.911(c)(2).

While the FFE does not have immediate plans to determine or assess eligibility for optional family planning coverage, we encourage states using a State-Based Exchange to do so. But we understand that the experience of states with section 1115 family planning demonstrations indicates that most individuals who are enrolled for family planning coverage were not determined for this coverage following submission of a regular application, but as a result of a referral from clinics and other providers of family planning services, using a designated application. To maximize access to this coverage, we allow the use of a targeted application designed for the family planning group, which can be distributed through providers of family planning services and submitted directly to the state Medicaid agency, regardless of the capacity of the Exchange to determine eligibility under § 435.214. As an alternative to the single streamlined application described in § 435.907(b)(1), such targeted applications must be approved by the Secretary per § 435.907(b)(2).

4. Determination of Eligibility (§ 435.911)

We proposed several revisions to the regulations at § 435.911. We proposed revisions at § 435.911(b)(1)(i) to reflect that, in states that have adopted coverage for parents and caretaker relatives under the optional group at § 435.220 with an income standard above the standard for coverage under the mandatory group at § 435.110, the applicable MAGI standard for parents and caretaker relatives will be the standard adopted for coverage under the optional eligibility group (unless the state also has adopted and phased in coverage of parents and caretaker relatives under the optional group described at § 435.218 for individuals with income over 133 percent FPL up to a higher standard, in which case the applicable MAGI standard for parents and caretaker relatives will be the standard applied to coverage under that optional group, as set forth at § 435.911(b)(1)(iv), added by the March 23, 2012, Medicaid eligibility final rule).

We also proposed to revise the introductory text in § 435.911(b)(1), to add new paragraph (b)(2), and to revise paragraph (c)(1) of § 435.911, added by the March 23, 2012, Medicaid eligibility final rule, to extend use of the MAGI screen to elderly adults, as well as adults who are eligible for Medicare and excluded from coverage in the adult group on that basis. Individuals who are age 65 or older may be eligible based on MAGI as a parent or caretaker relative, but were unintentionally excluded from the MAGI screen rules established in the March 23, 2012, Medicaid eligibility final rule. (A proposed technical revision in the introductory text of paragraph (c) relating to the cross-reference to the reasonable opportunity period for documentation of citizenship and immigration status is discussed in section 6(b) of this final rule.) We received the following comments on these proposed provisions which are summarized below.

*Comment:* Several commenters supported, and no commenters opposed, the proposed revisions. Several commenters expressed support for the requirement that Medicaid agencies furnish Medicaid to eligible individuals consistent with timeliness standards under § 435.912 and recommended that we issue guidance explaining this requirement and clarifying the applicability of timely determinations for non-citizen applicants. The commenters also recommended that CMS apply the timeliness standards in § 435.912 to individuals undergoing non-MAGI eligibility determinations by adding a cross-reference to § 435.912(c)(2).

*Response:* We appreciate the commenters' support and are finalizing the regulation as proposed, except as noted below. We also agree with the importance of the timeliness requirements for eligibility determinations at § 435.912, as added by the March 23, 2012 Medicaid eligibility final rule. The timeliness requirements in § 435.912 apply both to determinations of eligibility based on MAGI, as well as to determinations of eligibility for individuals excepted from application of MAGI-based methods. Therefore, we are making a technical revision to include a cross-reference to § 435.912 at § 435.911(c)(2), as suggested. We note that the single streamlined application generally does not provide sufficient information for states to make a determination of eligibility on a non-MAGI basis. For an applicant to be approved on a non-MAGI basis, the state will need to request, and applicants will need to provide, additional information in accordance with § 435.911(c)(2). We will take into consideration the commenters' suggestion that we issue interpretive guidance on the timeliness requirements at § 435.912.

*Comment:* A commenter requested clarification of the relationship between § 435.110(c) and § 435.911(b)(2). The commenter interpreted § 435.911(b) as setting a minimum applicable MAGI income standard floor of 133 percent FPL, whereas § 435.110(c) establishes both a minimum and maximum permissible income standard for the mandatory parent and caretaker relative eligibility group, which may be lower than 133 percent FPL.

*Response:* In addition to establishing a minimum and maximum permissible income standard for mandatory coverage of parents and caretaker relatives § 435.110(c) requires that each state adopt in its state plan an income standard between the minimum and maximum levels permitted, and this standard may be—indeed, in most states is—less than 133 percent FPL. As a general rule, the minimum applicable MAGI income standard under § 435.911(b) is 133 percent FPL. This will be the case for parents and caretaker relatives who are under age 65 and not eligible for Medicare, who may be eligible under the mandatory group for parents and caretaker relatives at § 435.110, the adult group at § 435.119 or the optional group for parents and caretaker relatives at § 435.220, but for whom the minimum applicable MAGI standard will be the 133 percent FPL standard for coverage under the adult

group. For parents and caretaker relatives who are 65 years of age or older or who are eligible for Medicare, the applicable MAGI standard will be the income standard established by the state per § 435.110(c) or § 435.220(c), if the state has adopted the optional group under § 435.220. The proposed addition to the introductory text in § 435.911(b)(1) (which reads, ''Except as provided in paragraph (b)(2) of this section'') allows for an exception to the general rule that the minimum applicable MAGI standard is 133 percent FPL. This exception is set forth in proposed paragraph (b)(2), which establishes the applicable MAGI standard for adults who are not eligible for coverage under the adult group because they either are eligible for Medicare or they are age 65 or older. For such adults who are parents or caretaker relatives, the applicable MAGI standard per paragraph (b)(2)(ii) is the income standard established by the state under § 435.110(c) or, if higher, the standard established by the state under § 435.220(c).

*Comment:* A commenter suggested that the word ''and'' following the phrase ''individuals who are at least 65 and 19'' in proposed § 435.911(b)(2) should be changed to ''or.''

*Response:* We disagree with the suggestion. The purpose of proposed § 435.911(b)(2) is to define an applicable MAGI standard for individuals excluded from application of the MAGI screen in § 435.911 because they are ineligible for coverage under the adult group based either on being at least age 65 or eligible for Medicare. Individuals who are under age 19 are eligible for coverage under the MAGI-based eligibility group for children, described in § 435.118, regardless of whether or not they are eligible for Medicare, and should not be impacted by the addition of paragraph (b)(2) to § 435.911. The commenter's suggestion, if adopted, would result in the applicable MAGI standard for such children being established in paragraph (b)(2) instead of paragraph (b)(1)(iii), as is the case under the current regulations.

*Comment:* The same commenter also suggested that the word ''and'' at the end of proposed paragraph (b)(2)(i) should be changed to ''or.''

*Response:* We agree with this comment and are replacing ''and'' with ''or'' at the end of paragraph (b)(2)(i) in the final regulation.

*Comment:* A commenter requested that CMS address disabled children in § 435.911. The commenter stated that disabled children should first be placed in the MAGI-based eligibility group for children at § 435.118, similar to disabled parents and caretaker relatives who may be eligible based on MAGI under § 435.110.

*Response:* We believe that children with disabilities were correctly addressed in the March 23, 2012 Medicaid eligibility final rule and did not make any proposed revisions to the treatment of disabled children in § 435.911 in the proposed rule. Children, whether disabled or not, may be eligible under § 435.118. A child applying for coverage using the single streamlined application must be evaluated for eligibility using the applicable MAGI standard for children, which is based on the income standard adopted for children of the relevant age group under § 435.118(c) (unless the state has adopted the optional eligibility group at § 435.218 to a higher income standard and has phased in coverage of children under that group) and, under § 435.911(c)(1), must be promptly enrolled in Medicaid if eligible on that basis. Under § 435.911(c)(2), if the child may be eligible on the basis of disability and enrollment on such basis would be better for the child or the family requests such determination, the state must proceed with evaluating the child's eligibility on that basis. We note that, if a disabled child is eligible for mandatory coverage as an SSI recipient under section 1902(a)(10)(A)(i)(II) of the Act and § 435.120 or meets the more restrictive criteria applied for mandatory coverage as a disabled individual in a 209(b) state in accordance with section 1902(f) of the Act and § 435.121, then the child should be enrolled in the mandatory group for disabled individuals in the state. However, it would be unusual for a child already receiving SSI to apply for coverage using the single streamlined application, and we would not expect that disabled children who do not receive SSI but are determined eligible and enrolled for coverage on the basis of the applicable MAGI standard per § 435.911(c)(1) would have any reason to complete a determination based on disability.

*Comment:* A commenter requested that we clarify that, in accordance with the definition of ''applicable MAGI standard'' in § 435.911(b), some aged and disabled adults will be subject to the MAGI screening process required under § 435.911.

*Response:* We agree that some aged and disabled adults will be determined eligible on the basis of MAGI and the applicable MAGI standard in accordance with the MAGI screen established at § 435.911, as revised in this rulemaking. Under § 435.911, disabled adults who are not eligible for Medicare and who submit the single streamlined application may be determined eligible and enrolled in Medicaid on the basis of MAGI using the applicable MAGI standard, which will be the 133 percent FPL standard for the new adult group or the higher standard applied under the optional group described in § 435.218, if adopted by the state and if adults have been phased into coverage under that group. In accordance with § 435.911(c)(2), for those adult applicants who are identified, based on information in the single streamlined application, as potentially eligible based on disability or who otherwise request such determination, the state must make the disability-based determination, provided that the applicant provides all information necessary and completes the disability determination process. Because of the longer period of time typically required to make a determination based on disability, disabled adults often may be enrolled temporarily in coverage based on MAGI (for example, under the adult group) pending a final determination based on disability. In other cases, such adults may choose not to complete the disability determination or may not be eligible on that basis, in which case they will remain enrolled in coverage based on MAGI. Under the proposed revisions to § 435.911, finalized in this final rule, elderly parents and caretaker relatives, as well as disabled parents and caretaker relatives who are eligible for Medicaid similarly may be determined eligible and enrolled in Medicaid on the basis of MAGI using the applicable MAGI standard, which will be the standard applied in the state for mandatory coverage of parents and caretaker relatives under § 435.110 or, if adopted by the state, the higher income standard applied to optional coverage of parents and caretaker relatives under § 435.220. As with disabled adults not eligible for Medicare, such parents and caretakers may also then be determined eligible on the basis of disability in accordance with § 435.911(c)(2).

*D. Medicaid Enrollment Changes Under the Affordable Care Act Needed To Achieve Coordination With the Exchange: Accessibility for Individuals Who Are Limited English Proficient (§§ 435.901 and 435.905)*

We proposed to revise regulations relating to the provision of information to persons who are limited English proficient to ensure access to coverage for eligible individuals and to achieve alignment with existing Exchange regulations at § 155.205(c). We proposed to specify at § 435.905(b)(1) that

providing language services for individuals who are limited English proficient means providing oral interpretation, written translations, and taglines, which are brief statements in a non-English language that inform individuals how to obtain information in their language. We also proposed to apply the accessibility requirements in § 435.905(b) to the provision of a hearing system and hearing procedures under §§ 431.205 and 431.206, to the notices required under proposed § 435.917, and to the notice of a reasonable opportunity period required under proposed § 435.956(b)(1) by adding a cross-reference to § 435.905(b) at proposed §§ 431.205(e), 431.206(e), 435.917(a)(2), and 435.956(b)(1). We received the following comments concerning our proposed provisions.

*Comment:* Several commenters supported our proposal to specify certain types of language services that must be provided to individuals who are limited English proficient. Some commenters recommended additional requirements related to providing language services, including requiring that states hire bilingual staff and provide taglines in 15 languages. Several commenters suggested that we add a requirement that, for any individual who the agency knows or should reasonably know is limited English proficient, the agency must provide information in that individual's language. A number of commenters also recommended that we include specific types of services which must be provided to make information accessible to individuals with visual impairments or other disabilities.

Other commenters sought more detailed explanation of what steps states must take to satisfy the general accessibility requirements set forth in the regulation. One commenter requested that we clarify that states are not required to provide written translations of applicable forms in more languages than is their current practice. Some commenters recommended that we provide additional guidance on how to implement this requirement in the future. One commenter suggested that we refer states to guidance issued by the HHS Office of Civil Rights for federal financial aid recipients.

We received similar comments on other sections of the proposed rule regarding accessibility for individuals with disabilities and individuals who are limited English proficient in §§ 431.206, 435, 917, 435.918, and 435.956.

*Response:* We appreciate the support for the proposed revisions to § 435.905(b)(1), which are finalized as proposed, except that the requirement to provide taglines proposed in paragraph (b)(1) has been moved to paragraph (b)(3). Individuals who are limited English proficient must be provided information accessibly through language services, which means providing oral interpretation and written translations. The purpose of the proposed rule was to specify the approaches used to provide language services, through oral interpretation and written taglines, and to require that states must inform individuals that such accessible information is available. Our modification to § 435.905(b) is consistent with requirements in the Medicaid managed care regulations at § 438.10(c) and the Exchange regulation relating to accessibility standards at § 155.205(c). We will consider more detailed accessibility requirements in future rulemaking. States should consult the guidance issued on August 8, 2003, by the HHS Office for Civil Rights for recipients of federal financial assistance, which include Medicaid and CHIP agencies, related to provision of services to limited English proficient persons, available at *http://www.gpo.gov/fdsys/pkg/FR-2003-08-08/pdf/03-20179.pdf*, and regulations implementing section 1557 of the Affordable Care Act at 45 CFR 92.201, 92.8(a)(3) and 92.8(d) though (h), regarding meaningful access for individuals with limited English proficiency, language assistance and the use of taglines. The latter regulations were issued by the HHS Office for Civil Rights on May 18, 2016 (81 FR 31375).

*Comment:* Several commenters supported the inclusion of proposed § 435.905(b)(3), which requires individuals be informed of the accessibility services available, in accordance with § 435.905(b)(1) and (2), to individuals with disabilities and individuals who are limited English proficient. We received one technical comment recommending that our proposed language at § 435.905(b)(3), should be redesignated at paragraph (c) of this section.

*Response:* We appreciate the support for § 435.905(b)(3), which we are finalizing as proposed, except to move the requirement relating to taglines from proposed § 435.905(b)(1) to paragraph (b)(3), as discussed above, because taglines are a method to inform individuals of the availability of, and how to access, language services through a brief statement in a non-English language.

*Comment:* Commenters supported the application of the accessibility requirements described in § 435.905(b) to the accessibility and availability of the hearing system, processes, and notices described in §§ 431.205, 431.206, § 435.917 and 435.956(b)(1).

*Response:* We appreciate the commenters' support and are finalizing inclusion of a cross-reference to § 435.905(b) at §§ 431.205(e), 431.206(e), 435.917(a), and 435.956(g) (redesignated at § 435.956(b)), as proposed. We note that the accessibility requirements in § 435.905(b), as revised in this rulemaking, also apply to the availability of applications and supplemental forms, renewal forms and notices per the cross cite in current §§ 435.907(g) and 435.916(g), as well as to the Web site and any interactive kiosks and other information systems established by the state to support Medicaid information and enrollment activities per the cross-reference to § 435.905(b) at § 435.1200(f)(2).

*Comment:* Several commenters recommended inserting a reference to section 1557 of the Affordable Care Act, in addition to the citations to the Civil Rights Act and the Rehabilitation Act in the regulation, as other federal statutes with which states must comply in administering their programs.

*Response:* We agree that reference to these federal statutes is appropriate and are revising § 435.901 to add reference to the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, and section 1557 of the Affordable Care Act and their respective implementing regulations.

*Comment:* Several commenters also suggested renaming § 435.905 as ''Accessibility for Individuals who are Limited English Proficient and Individuals with Disabilities,'' noting that the scope of § 435.905 is broader than accessibility of program information to individuals who are limited English proficient.

*Response:* Section 435.905 prescribes what information generally must be provided to applicants and beneficiaries in writing (electronically and in paper), and orally as appropriate, as well as the accessibility of that information. Thus, we agree with the commenters to a limited degree and have revised the title to § 435.905 to read, ''Availability and accessibility of program information.'' We do not believe it is appropriate to include reference to individuals with limited English proficiency or to disabled individuals in the title, as this would suggest a narrower scope of the provision than it actually has.

*E. Medicaid Eligibility Requirements and Coverage Options Established by Other Federal Statutes*

1. Coverage of Children and Families

a. Mandatory Coverage of Children With Adoption Assistance, Foster Care, or Guardianship Care Under Title IV–E (§ 435.145)

We proposed to amend § 435.145 of the current regulations to reflect that children for whom kinship guardianship assistance payments are made under title IV–E of the Act are entitled to automatic Medicaid eligibility to the same extent as children for whom an adoption assistance agreement under title IV–E is in effect or for whom foster care maintenance payments under title IV–E are made, in accordance with the statutory requirement under section 473(b)(3)(C) of the Act. Per § 435.403(g), such children are eligible for Medicaid in the state where the child resides without regard to whether the child would be eligible for kinship guardianship assistance under title IV–E in that state. For example, if State A provides kinship guardianship payments under title IV–E for a child now living with a relative in State B, State B must automatically enroll the child in its Medicaid program regardless of whether State B has elected to provide title IV–E kinship guardianship assistance payments or it ends such assistance at an earlier age than State A. We also proposed revisions of the description of eligibility for Medicaid based on receipt of adoption assistance under title IV–E, included in current § 435.145 and redesignated at § 435.145(b)(1) of the proposed rule, for consistency with the statutory language at section 473(b)(3) of the Act. Proposed new § 435.145(a) provides the basis for eligibility under this section. No comments were received on the proposed revisions to § 435.145, which are finalized without modification.

b. Families With Medicaid Eligibility Extended Because of Increased Collection of Spousal Support (§ 435.115)

Sections 408(a)(11)(B) and 1931(c)(1) of the Act, implemented at § 435.115, require a 4-month Medicaid extension for low-income families eligible under section 1931 of the Act who otherwise would lose coverage due to increased income from collection of child or spousal support under title IV–D of the Act. We proposed to revise § 435.115 to eliminate increased income from collection of child support as a reason for a 4-month Medicaid extension because child support is not counted as income under MAGI-based methodologies; to remove obsolete, duplicative, and unnecessary paragraphs; to replace references to eligibility under AFDC with references to coverage under the regulations implementing section 1931 of the Act; and generally to streamline and simplify the regulatory language.

*Comment:* One commenter believed that, because states cannot terminate pregnant women from Medicaid due to a change in income under section 1902(e)(6) of the Act, implemented at proposed § 435.170, the 4-month extension under § 435.115 should not apply to pregnant women.

*Response:* We agree with the commenter that, under § 435.170 and sections 1902(e)(5) and (6) of the Act, pregnant women are covered at least for pregnancy-related services through the end of the month in which their post-partum period ends, regardless of changes in income (including increased spousal support). We are revising § 435.115 to remove proposed paragraph (b)(2)(i), accordingly.

*Comment:* A commenter disagreed with the proposed revision to limit the extension required under § 435.115 to individuals losing coverage due to increased spousal support.

*Response:* We do not agree with the comment. Because child support is not counted in the MAGI-based income used in determining eligibility for coverage under section 1931 of the Act, an increase in child support cannot result in loss of eligibility under section 1931 of the Act, and therefore, can never trigger the 4-month extension available under § 435.115.

*Comment:* A commenter requested guidance on how transitional assistance would work in the case of an adult moving from the section 1931-related group to the adult group under section 1902(a)(10)(A)(i)(VIII) of the Act, implemented at § 435.119, because of an increase in earnings. Specifically, the commenter questioned whether such an individual would be eligible for TMA under section 1925 of the Act, or if the individual would only be eligible if his or her MAGI exceeded the income standard of 133 percent of the FPL for the adult group.

*Response:* Transitional Medical Assistance under section 1925 of the Act or the 4-month Medicaid extension provided under § 435.115 is required only if the individual would otherwise lose Medicaid. For example, if a parent who loses coverage under § 435.110 due to an increase in income becomes eligible for coverage under the adult group, TMA would not be required, unless the individual subsequently lost eligibility under the adult group prior to the end of the 12-month TMA period, measured from the point at which the parent lost eligibility under § 435.110.

c. Extended and Continuous Eligibility for Pregnant Women (§ 435.170) and Hospitalized Children (§ 435.172)

(1) Pregnant Women Eligible for Extended or Continuous Eligibility (§ 435.170)

Current § 435.170 implements section 1902(e)(5) of the Act, relating to extended eligibility for pregnant women postpartum. We proposed revisions to § 435.170 to include implementation of section 1902(e)(6) of the Act, relating to continuous coverage of pregnant women for pregnancy-related services until the end of the month that the post-partum period ends, regardless of changes in income. We also proposed new paragraph § 435.170(d) to clarify that neither extended nor continuous eligibility applies to pregnant women covered only during a period of presumptive eligibility.

*Comment:* Several commenters noted that this extended coverage under § 435.170 is limited to ''pregnancy-related'' services, which are defined in § 435.116(d)(3), and which means that states could provide benefits less comprehensive than the benefits provided under other categorically needy groups. The commenter recommended that CMS do as much as it can to ensure that pregnant women receive benefits that are at least equal to the services they would be entitled to receive if they were not pregnant. Another commenter recommended that the authority used by CMS under § 435.116 to consolidate the eligibility groups for pregnant women into one group should also be applied to require that a full set of benefits be available in the prenatal and post-partum periods.

*Response:* Section 1902(e)(5) of the Act expressly provides that women eligible under that section are covered for pregnancy-related and postpartum services and section 1902(e)(6) of the Act provides that women eligible under that section are treated as a pregnant women eligible under section 1902(a)(10)(A)(10)(i)(IV) or 1902(a)(10)(A)(ii)(IX) of the Act; per clause (VII) in the matter following section 1902(a)(10)(G) of the Act, coverage for such pregnant women is limited to pregnancy-related and postpartum services. Therefore, we cannot require states to provide full coverage for pregnant women described in sections 1902(a)(10)(A)(i)(IV) or 1902(a)(10)(A)(ii)(IX) of the Act or

eligible under sections 1902(e)(5) or (e)(6) of the Act. However, because the health of a pregnant woman and the fetus are inextricably intertwined, we have made it clear that we expect pregnancy-related services to constitute a robust benefit package (see the discussion in the preamble to March 23, 2012 Medicaid eligibility rule at 77 FR 17144, 17149). We have also made clear at § 435.116(d)(1) that states can provide all state plan benefits as ''pregnancy-related,'' and most states have elected to do so. States that seek approval of limited benefit packages for pregnant women must explain how the services excluded from the benefit are not ''pregnancy-related.''

*Comment:* One commenter expressed strong support for the provisions in § 435.170. Another commented that the cross-reference to § 435.116(d)(3) in proposed § 435.170(b) and (c) does not align with the flexibility states have to provide full Medicaid benefits to all pregnant women.

*Response:* We agree with the commenter and are revising § 435.170 to clarify that if a state elects to provide full coverage for all pregnant women eligible under § 435.116, the state would also provide full coverage during an extended or continuous eligibility period for pregnant women under § 435.170. If a state elects to provide pregnancy-related services to pregnant women whose income exceeds the applicable income limit adopted by the state per § 435.116(d)(4) for full coverage, it would provide the same pregnancy-related services to women covered during an extended or continuous eligibility period for pregnant women under § 435.170. Paragraph (a) (basis) is finalized as proposed. Proposed paragraph (d)(1) (applicability to pregnant women covered during a presumptive eligibility period) is redesignated at § 435.170(e) of the final rule.

(2) Continuous Eligibility for Hospitalized Children (§ 435.172)

We proposed a new regulation of § 435.172 implementing section 1902(e)(7) of the Act, which requires states to continue eligibility for children who are eligible under § 435.118 when admitted to a hospital through the end of the inpatient stay if they would otherwise lose eligibility due to age.

*Comment:* One commenter expressed strong support for the provisions in § 435.172. Another commented that the cited authority of section 1902(e)(7) of the Act does not authorize continued coverage for children who otherwise would lose eligibility due to household income, because the cited authority requires that the individual would remain eligible ''but for attaining such age.'' The commenter also requested clarification regarding duration limits and commented that, as written, the regulation would provide that an individual could remain eligible as a hospitalized child for 20 years regardless of age and income.

*Response:* We agree with the commenter and are removing reference to ''household income'' from § 435.172 of the final rule, which otherwise is finalized as proposed. Under the statute, the duration of this extended eligibility period lasts until the end of the inpatient stay during which the child would have lost Medicaid eligibility under § 435.118 solely due to age. We do not have flexibility to limit the extension of eligibility provided under the statute to a shorter period, though we note that a single inpatient stay for a period as long as that suggested by the commenter seems highly unlikely.

d. Optional Eligibility Groups and Coverage Options

(1) Optional Medicaid Eligibility Groups and Coverage Options (§§ 435.213, 435.215, § 435.220, 435.222, 435.226, 435.227, 435.229, and 435.926)

We proposed to codify new regulations or revise existing regulations for optional Medicaid eligibility to implement statutory requirements, including the use of MAGI effective in 2014 for individuals not excepted from MAGI. We proposed a new regulation § 435.213 for individuals needing treatment for breast or cervical cancer (implementing section 1902(a)(10)(A)(ii)(XVIII) of the Act) and clarified that men may be covered under this group if they meet the eligibility requirements. We proposed new § 435.215 for individuals infected with tuberculosis who are not eligible for enrollment under a group which covers full Medicaid benefits (including an alternative benefit or benchmark benefits plan); § 435.226 for independent foster care adolescents; and § 435.926 for states' option to provide continuous eligibility for children. We proposed revisions to § 435.220 to replace an obsolete optional group with provisions for an optional eligibility group for parents and other caretaker relatives. We proposed revisions to the following regulations to implement the shift from an AFDC-based net income standard to an equivalent MAGI-based income standard, to revise the language for clarity, and to remove any obsolete language: § 435.222 (optional eligibility for individuals under age 21 or for reasonable classifications thereof); § 435.227 (state adoption assistance children); and § 435.229 (optional targeted low-income children). We also proposed to remove inclusion of pregnant women, ''specified relatives'' (that is, parents and other caretaker relatives), and individuals under age 21 from the list of categorical populations for whom states may opt to provide coverage under § 435.210, since optional coverage of these individuals is provided at current § 435.116 (pregnant women) and § 435.220 and § 435.222, as revised in this rulemaking. This proposed revision results in § 435.210 applying only to optional SSI-related eligibility groups for aged, blind and disabled individuals. We received the following comments on these provisions, which, except as noted below, we are finalizing as proposed without substantive modification. We also make several non-substantive revisions for clarity.

*Comment:* A commenter believes that the addition of § 435.226 for independent foster care adolescents appears unnecessary because such persons will be covered in the new mandatory group for former foster care children under § 435.150.

*Response:* While there is significant overlap, there are also differences between these eligibility groups, which we explained in the proposed rule. While the definition of the optional group described at § 435.226 requires that an individual be in foster care upon attaining age 18, the mandatory group requires that an individual be in both foster care and Medicaid upon attaining either age 18 or any higher age adopted by the state for federal foster care assistance under title IV–E of the Act. For the optional group, the individual may have been in foster care in any state, while the mandatory group requires that the individual was in foster care and Medicaid in ''the'' state where the individual now resides. The optional group covers individuals up to age 19, 20, or 21, as specified by the state; the mandatory group covers individuals up to age 26.

*Comment:* A commenter noted that proposed § 435.226 imposes an income limit on the optional group for independent foster care adolescents, but the governing statutory language provides states with flexibility not to require an income test.

*Response:* Upon review of the statutory requirements for this group at section 1905(w)(1)(C) of the Act, we agree with the commenter. Therefore, we are revising § 435.226 to provide that a state may elect to have no income standard for this group. If the state

elects to establish an income standard, it may be no lower than the state's income standard under § 435.110 for the mandatory group of parents and other caretaker relatives under section 1931 of the Act.

Although we did not receive comments on proposed § 435.227, we realize that the reference in paragraph (c) to the payment standard in every state under the former AFDC program will never be higher than the highest income standard which would have been applied to children under the state plan as of March 23, 2010 or December 31, 2013. This is because since 1990 the lowest income standard permitted for any age group of children under section 1902(l)(2) of the Act was 100 percent FPL. Therefore, we have removed reference to the AFDC payment standard in § 435.227(c) of the final rule. We also have streamlined the regulation text in paragraph (c) for increased readability.

*Comment:* Several commenters supported applying MAGI-based methodologies to the eligibility group for individuals infected with tuberculosis at proposed § 435.215, provided that states convert their current net income standard to a MAGI-equivalent standard. The commenters requested CMS to apply continuous eligibility for tuberculosis patients throughout the course of their treatment, since losing coverage substantially increases the chance of abandoned or interrupted treatment. A few commenters requested clarification on whether a state may continue to apply a resource test for this group, as has historically been required, unless a state chose to disregard all assets under section 1902(r)(2) of the Act.

*Response:* Because individuals infected with tuberculosis are not included in the list of exceptions from MAGI specified under section 1902(e)(14)(D) of the Act, implemented at § 435.603(j), effective January 1, 2014, determinations of financial eligibility under this optional group are subject to MAGI-based methodologies set forth at § 435.603, including the elimination of any resource test, as specified at § 435.603(g)(1). Each state's previous net income limits for this and other MAGI-related eligibility groups have been converted to a MAGI-equivalent standard. Because maintenance of effort ended in 2014 for eligibility groups for which being a child is not a condition of eligibility, states may elect to lower their income standard for coverage under § 435.215 of the final rule. The statute does not authorize continuous eligibility for this group under the state plan. We are willing to work with states interested in pursuing demonstration authority under section 1115 of the Act to support continuous eligibility for this group.

The statute and proposed regulation provide that individuals eligible for coverage under a mandatory eligibility group are not eligible under this optional group for individuals infected with tuberculosis. We are making a technical revision at § 435.215 in the final rule to specify that an individual is only eligible for this group (which only covers treatment for tuberculosis) if the individual is not eligible for full coverage under the state plan, defined as all services which the state is required to cover under § 440.210(a)(1) and all services which it has opted to cover under § 440.225, or an approved alternative benefits plan under § 440.325, whether such full coverage is available through enrollment in a mandatory or optional categorical eligibility group under the state's Medicaid plan. Full coverage necessarily will include the services available to individuals enrolled under § 435.215. Therefore, consistent with section 1902(a)(19) of the Act, it will be in beneficiaries' best interests to be enrolled in this limited-scope benefits group only if they are not eligible for full coverage.

We received no comments on proposed § 435.229. However, we are making technical revisions at § 435.229 in the final rule for consistency with the statute; specifically, the option to cover, under section 1902(a)(10)(A)(ii)(XIV) of the Act, ''optional targeted low-income children,'' as defined in section 1905(u)(2)(B) of the Act. The definition in section 1905(u)(2)(B) of the Act cross-references the definition of a ''targeted low-income child'' for purposes of a separate CHIP in section 2110(b)(1) of the Act. Per section 2110(b)(1)(B) of the Act, the definition of a ''targeted low-income child,'' in turn, incorporates the applicable maximum income standard permitted under a state's separate CHIP. Thus, the maximum income standard a state may adopt for the optional group of optional targeted low-income children under sections 1902(a)(10)(A)(ii)(XIV) and 1905(u)(2)(B) of the Act is not the net income standard for this optional group under the Medicaid state plan or waiver prior to January 1, 2014, converted to an equivalent MAGI-based standard; rather, if higher, it is the maximum income standard, converted for MAGI, now permitted for eligibility under a separate child health plan in the state. Therefore, we are revising paragraph (c)(3) of § 435.229 in the final rule to reference the highest effective income level under a CHIP state plan or 1115 demonstration, in addition to Medicaid, converted to a MAGI-equivalent standard. This revision is key to preserve the option for states to transition children from coverage under a separate CHIP program to coverage under a Medicaid expansion program up to an income level higher than coverage of children under the mandatory children's group at § 435.118.

We also are making technical revisions at § 435.213 in the final rule for optional eligibility for individuals needing treatment for breast or cervical cancer. Proposed § 435.213(c) provided that an individual is considered to need treatment for breast or cervical cancer if the Centers for Disease Control and Prevention (CDC) screen determines that the individual needs treatment for breast or cervical cancer. Because need for such treatment is a condition for eligibility under this group, we clarify in § 435.213(c) of the final rule that an individual is considered to need treatment for breast or cervical cancer if the initial screen by the CDC's breast and cervical cancer early detection program determines that the individual needs treatment for breast or cervical cancer. For eligibility subsequent to the initial eligibility period, the individual's treating health professional would determine that the individual needs treatment for breast or cervical cancer.

(2) Continuous Eligibility Under CHIP (§ 457.342)

We proposed to adopt a new regulation at § 457.342 to codify states' option to elect continuous eligibility for children under their separate CHIP. Consistent with existing policy, we proposed the same policies at § 457.342 as those at proposed § 435.926, except that states also may elect to terminate CHIP during a continuous eligibility period due to non-payment of a premium or enrollment fee required under the CHIP state plan. In addition, in this final rule, we are clarifying in proposed paragraph (a) that continuous eligibility under CHIP is subject to a child remaining ineligible for Medicaid, as required by section 2110(b)(1) of the Act and § 457.310, relating to the definition and standards for being a targeted low-income child, and the requirements of section 2102(b)(3) of the Act and § 457.350, relating to eligibility screening and enrollment. Thus, if a state has elected the option of continuous eligibility in CHIP, but during the continuous eligibility period receives information regarding a change in household size or income that would potentially result in eligibility of the

child for Medicaid, the state would redetermine eligibility using this information and enroll the child in Medicaid, if found to be eligible.

*Comment:* Several commenters expressed strong support for proposed § 457.342. The commenters also recommended that for children disenrolled due to non-payment of a premium, a new continuous eligibility period begins when the child is reenrolled in CHIP following payment of the unpaid premiums or at the end of a lock-out period.

*Response:* If a child is subject to requirements for payment of premiums or an enrollment fee at § 457.510, the state may terminate the child from CHIP for failure to pay the required amounts at the end of a premium grace period (of at least 30 days), as permitted under section 2103(e)(3)(C) of the Act. States may also impose a premium lock-out period (which may not exceed 90 days per §§ 457.10 and 457.570) on individuals terminated for failure to pay premiums or enrollment fees. If the state requires a new application following disenrollment due to unpaid premiums or enrollment fees after payment is made or at the end of a premium lock-out period, and the individual is determined to be eligible for CHIP based on that application, a new continuous eligibility period would begin. However, if the state does not require a new application in these circumstances, then the previous continuous eligibility period would resume, extending through the same date as would have been the case had the individual not been terminated and then reenrolled.

We are clarifying at proposed paragraph (b) that the continuous eligibility period may be terminated for failure to pay premiums or enrollment fees, subject to a premium grace period of at least 30 days and the disenrollment protections at section 2103(e)(3)(C) of the Act and § 457.570.

2. Presumptive Eligibility

a. Proposed Amendments to Medicaid Regulations for Presumptive Eligibility

We proposed to revise Medicaid regulations in part 435 subpart L related to basis, definitions, and the option for states to cover services for children during a presumptive eligibility period at §§ 435.1100 through 435.1102; to add a new § 435.1103, implementing the state option to provide presumptive eligibility for pregnant women and individuals needing treatment for breast or cervical cancer, as well as six new options for Medicaid presumptive eligibility provided by the Affordable Care Act; to add a new § 435.1110, implementing section 1902(a)(47)(B) of the Act, added by the Affordable Care Act, which gives hospitals the option to make presumptive eligibility determinations for Medicaid; and to revise §§ 435.1001 and 435.1002 in subpart K, regarding the availability of federal financial participation (FFP) related to presumptive eligibility. In the July 2013 Eligibility final rule, we finalized the proposed revisions to § 435.1102, as well as the addition of new § 435.1103 and § 435.1110. In this final rule, we finalize the proposed revisions at §§ 435.1001, 435.1002, 435.1100, and 435.1101.

(1) FFP for Administration and for Services (§§ 435.1001 and 435.1002)

We proposed to amend §§ 435.1001 and 435.1002 to clarify that, consistent with current policy and federal statutory authority, FFP is available for the necessary administrative costs a state incurs in administering all types of presumptive eligibility and for services covered for individuals determined presumptively eligible for any type of presumptive eligibility, not just for such costs associated with presumptive eligibility for children.

*Comment:* A commenter requested that for individuals determined presumptively eligible, a state receive 100 percent federal funding for services provided unless and until the individual completes the eligibility determination process for Medicaid. The commenter stated that this is particularly important for states expanding Medicaid to the new adult group under § 435.119, as it will be difficult to determine whether the presumptively eligible individual should be claimed at 100 percent federal funding for those ''newly eligible'' or the state's regular Medicaid match rate.

*Response:* There is no federal statutory authority to reimburse states at a higher match rate than the state's regular Medicaid match under title XIX of the Act for services covered for individuals determined to be presumptively eligible, including those determined presumptively eligible for the adult group at § 435.119. However, if the individual submits a regular application and is subsequently determined to be Medicaid eligible, the state may claim the regular or enhanced match, as appropriate, for services provided beginning on the effective date of eligibility based on the regular application, including during any period of retroactive eligibility. For example, if an adult under age 65 is determined presumptively eligible under the adult group, the state would claim services provided during the presumptive eligibility period at the state's regular match. If, based on a regular application, the individual subsequently is determined to be retroactively eligible during the presumptive eligibility period and is determined to meet the definition of a ''newly eligible'' individual for purposes of claiming enhanced FFP under part 433, subpart E, the state may adjust its claims to reflect the newly eligible enhanced match for services provided during the overlapping retroactive and presumptive eligibility periods. Similarly, if the individual is determined retroactively eligible as a Medicaid expansion child meeting the definition of optional targeted low-income child at § 435.4, the state may claim the title XXI enhanced match for services provided during the period of retroactive eligibility. No comments were received on proposed § 435.1101. We are finalizing both §§ 435.1001 and 435.1002 as proposed.

(2) Basis for Presumptive Eligibility (§ 435.1100)

We proposed to revise § 435.1100 to include the statutory basis for provision of presumptive eligibility for all populations who may receive services during a period of presumptive eligibility under part 435 subpart L, as revised in the July 15, 2013 Medicaid and CHIP eligibility final rule. No public comments were received. We are finalizing § 435.1100 as proposed.

(3) Definitions (§ 435.1101)

We proposed to revise § 435.1101 to replace the definition of ''application form'' with ''application'' for consistency with terminology used in § 435.907 and to clarify that the definition of ''qualified entity'' includes a health facility operated by the Indian Health Service, a Tribe or Tribal organization, or an Urban Indian Organization.

*Comment:* One commenter recommended that safety net health plans, defined in section 9010(c)(2)(C) of the Affordable Care Act, be clearly identified in § 435.1101 as a type of ''qualified entity'' eligible to conduct presumptive eligibility determinations.

*Response:* We are not accepting this comment since safety net health plans are not specifically included in the definition of ''qualified entity'' in section 1920A of the Act. We note, however, that, as reflected in the current definition of ''qualified entity'' in § 435.1101, and subject to approval by the Secretary, states may designate entities other than those specifically identified as a qualified entity authorized to make presumptive

eligibility determinations in accordance with §§ 435.1102 and 435.1103. We are finalizing the proposed revisions to the definition in § 435.1101 without modification.

b. Proposed Amendments to CHIP Regulations for Presumptive Eligibility (§§ 457.355 and 457.616)

To align the regulations governing presumptive eligibility for children under CHIP with Medicaid, we proposed to revise § 457.355 to specify that presumptive eligibility for children under a separate title XXI CHIP program is determined in the same manner as Medicaid presumptive eligibility for children under §§ 435.1101 and 435.1102 of this chapter. In addition, we proposed to revise § 457.355 and to remove § 457.616(a)(3) to implement the amendment to section 2105(a)(1) of the Act that was made by the CHIPRA. Prior to the passage of CHIPRA, states were authorized to claim enhanced federal matching funds under their title XXI allotment for coverage of children during a Medicaid presumptive eligibility period. This authority was implemented in current §§ 457.355 and 457.616(a)(3). Section 113(a) of CHIPRA, however, amended section 2105(a)(1) of the Act to eliminate this authority and, effective April 1, 2009, states must claim their regular FFP under title XIX for services provided to all children determined presumptively eligible for Medicaid (including those eligible for a Medicaid expansion program) during a presumptive eligibility period. We proposed to implement this change in the federal statute through the deletion of §§ 457.355(b) and 457.616(a)(3).

*Comment:* We received no comments on the proposed revisions to § 457.355(a), which are finalized at § 457.355 with technical revisions for consistency with the Medicaid regulation at § 435.1102 of this chapter. Several commenters requested that we revise the proposed § 457.355 to clarify that states may claim title XXI funds for children covered during a presumptive eligibility period under either a title XXI-funded Medicaid expansion program or a separate title XXI child health program. Another commenter requested clarification on whether regular Medicaid match rather than enhanced CHIP match must be claimed for children ages 6 through 18 with income over 100 percent FPL and at or below 133 percent FPL who would have been eligible under the state's separate title XXI CHIP prior to implementation of the expansion of Medicaid for this age group up to 133 percent FPL under the Affordable Care Act.

*Response:* As previously explained, prior to passage of CHIPRA, states were authorized to claim enhanced federal matching funds under their title XXI allotment for coverage of children during a Medicaid presumptive eligibility period. CHIPRA, however, eliminated this authority and, effective April 1, 2009, states must claim their regular FFP under title XIX for services provided to all children determined presumptively eligible for Medicaid during a presumptive eligibility period. This includes children determined presumptively eligible based on having family income in the range of a state's Medicaid expansion program for optional targeted low-income children. We proposed to implement this change in the federal statute through the deletion of § 457.355(b) and § 457.616(a)(3), which we finalize in this rulemaking as proposed. If a child, who is determined presumptively eligible for Medicaid and subsequently approved for Medicaid eligibility (based on a regular application), meets the definition of optional targeted low-income child at § 435.4, the state may claim enhanced title XXI match for services received on or after the effective date of regular Medicaid eligibility, including during a period of retroactive eligibility described in § 435.915. This includes uninsured children covered under the Medicaid state plan effective January 1, 2014, as a result of the expansion of coverage for children ages 6 through 18 up to 133 percent FPL under the Affordable Care Act, but it does not include expanded coverage of insured children, since insured children do not meet the definition of an ''optional targeted low-income child'' under section 1905(u)(2)(B) of the Act or § 435.4. Section 435.1002(c) of the Medicaid regulations, as revised in this rulemaking and discussed above, is consistent with this policy.

3. Financial Methodologies for Medically Needy (§§ 435.601 and 435.831)

In determining financial eligibility for medically needy pregnant women, children, parents, and other caretaker relatives, the methodologies of the former AFDC program historically have been applied as the cash assistance program most closely related to these populations. Under section 1902(r)(2) of the Act and current § 435.601(d), states also have the flexibility to adopt other reasonable methodologies, provided that for aged, blind and disabled individuals such methodologies are less restrictive than the SSI methodologies applied to medically needy aged, blind and disabled individuals per section 1902(a)(10)(C)(iii) of the Act and § 435.601, and for medically needy children, pregnant women, parents and caretaker relatives, such methodologies are less restrictive than the AFDC-based methods. Because of the elimination of the AFDC program in 1996 and the replacement under the Affordable Care Act of AFDC-based methodologies with MAGI-based methodologies for determining financial eligibility for categorically needy pregnant women, children, parents, and other caretaker relatives, we proposed revisions at § 435.831 to provide states with flexibility to apply, at state option, either AFDC-based methods or MAGI-based methods for determining income eligibility for medically needy children, pregnant woman, and parents and other caretaker relatives.

However, section 1902(a)(17)(D) of the Act prohibits state plans from taking into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is the individual's spouse or the individual's child who is under age 21, blind or disabled. In requiring the adoption of MAGI-based methodologies for most individuals, section 1902(e)(14)(A) of the Act provides for an exception to the limitations on financial responsibility in section 1902(a)(17)(D) of the Act, and under section 1902(e)(14)(D)(i)(IV) of the Act, medically needy individuals are exempt from the mandatory application of MAGI-based methods. Therefore, the limitation on deeming to an applicant or beneficiary the income of individuals other than the applicant's or beneficiary's spouse or parents under section 1902(a)(17)(D) of the Act continues to apply to the medically needy, and states must ensure that there is no deeming of income or attribution of financial responsibility that would conflict with the requirements of that section of the Act. We suggested possible ways that states could apply MAGI-based methodologies in determining eligibility for the medically needy without violating section 1902(a)(17)(D) of the Act. We suggested, for example, that when application of the MAGI-based methodologies set forth in § 435.603 would result in impermissible deeming, the state could subtract from total household income the income of the individual which may not be counted under section 1902(a)(17)(D) of the Act. Alternatively, we suggested that the state could remove the individual whose income may not be counted under section1902(a)(17)(D) of the Act, from

the household altogether, such that the individual's income would not be counted in total household income and the individual himself or herself would not be included in household size. Under the proposed rule, per section 1902(r)(2) of the Act and § 435.601(d), states would have the option to apply methodologies to medically needy parents and caretaker relatives, pregnant women and children that are less restrictive than either AFDC-based methods or the MAGI-based methodologies permitted under the proposed revisions at § 435.831.

To meet the MOE requirement in section 1902(gg) of the Act, we explained in the proposed rule that states would have to ensure that the application of MAGI-based methodologies to medically needy populations would be no more restrictive than the AFDC-based methodologies applied by the state prior to enactment of the Affordable Care Act. Because the MOE has expired for adults, this requirement currently applies only to the determination of eligibility of medically needy children until the expiration of the MOE for children in 2019. We explained that, for purposes of the MOE, states may replace current AFDC-based disregards applied to medically needy individuals with a single block-of-income disregard such that in the aggregate the same number of people are covered, which will satisfy the MOE.

Finally, we noted that, under the regulations adopted in the March 23, 2012, Eligibility final rule, eligibility under section 1931 of the Act, like all other bases of eligibility, is determined on an individual basis. For consistency, we proposed to remove the reference to ''family'' in § 435.831(c) so that parents and other caretaker relatives similarly will be evaluated for medically needy eligibility as individuals, as currently is the case for medically needy pregnant women and children.

Nothing in the proposed rule would change the methodologies applied to determining medically needy eligibility for aged, blind, and disabled individuals, when being aged, blind or disabled also is a condition of such eligibility.

*Comment:* Commenters were generally supportive of states having the option to apply MAGI-based methods in determining eligibility for medically needy children, pregnant women, and parent/caretaker relatives. Commenters also supported the policy in the proposed rule that states must ensure there is no deeming of income or attribution of financial responsibility that would conflict with requirements in section 1902(a)(17)(D) of the Act, but noted that this requirement would complicate development of streamlined systems of eligibility rules and procedures. One commenter expressed concern that AFDC-based rules relating to financial responsibility of relatives would continue to be required, even in states electing to use MAGI-like methods under § 435.831(b)(1)(ii).

*Response:* We appreciate the support, and are finalizing the policy described in the proposed rule. We are making some revisions to proposed § 435.831 to more clearly reflect the policy and options described in the proposed rule. First, as explained in the proposed rule, the revisions to § 435.831 were intended to provide states with an option to adopt the financial methodologies used to determine household income for MAGI-based eligibility groups, except where application of the MAGI-based methodologies would violate the limitation on deeming to an applicant or beneficiary income from anyone other than a spouse or, in the case of an individual under age 21, a parent living with the applicant or beneficiary. Proposed § 435.831(b)(1) provided only that states could apply the MAGI-based methodologies in § 435.603(e), which provides generally for application of the methodologies set forth in section 36B(d)(2)(B) of the IRC in calculating the income attributed to a given individual. The rules governing household composition, family size and household income described in paragraphs (b), (c), (d) and (f) of § 435.603 are also integral to the determination of income eligibility using MAGI-based methodologies; indeed, it is household composition and deeming rules in § 435.603(d) and (f), not the income methods at § 435.603(e), which may conflict with the limits on deeming set forth in section 1902(a)(17)(D) of the Act. Therefore, we are replacing the reference to the ''MAGI-based methodologies defined in § 435.603(e)'' in proposed § 435.831(b)(1) with reference to the ''MAGI-based methodologies defined in § 435.603(b) through (f)'' in the final rule.

Also, to ensure compliance with section 1902(a)(17)(D) of the Act, we proposed at § 435.831(b)(1) that states electing to apply MAGI-like methodologies to medically needy parents and caretaker relatives, pregnant women and individuals under age 21, also comply with § 435.602 (relating to the financial responsibility of relatives and other individuals), as revised in this rulemaking. We agree with the commenter, however, that the reference to all of § 435.602 was overly broad.

Under section 1902(a)(17)(D) of the Act, except as provided in paragraphs (e)(14), (l)(3), (m)(3) and (m)(4), in determining an individual's financial eligibility for Medicaid, the state may consider only the income and resources of the individual, the individual's spouse (if living with the individual) and, in the case of individuals under age 21, the individual's parents (if living with the individual). Under § 435.602(a)(2)(ii), the income and resources of parents and spouses of individuals under age 21 is considered only if the parent's or spouse's income would have been counted under the state's approved AFDC state plan for a dependent child. Thus, for example, under § 435.602(a)(2)(ii), the income of a child's stepparent is considered only to the extent to which stepparent income was counted under AFDC. This is more limiting, however, than the restrictions on deeming provided under section 1902(a)(17)(D) of the Act, which does not prohibit stepparent deeming. Accordingly, we are revising § 435.831(b)(1) in the final rule to accurately reflect the terms of the limitation under section 1902(a)(17)(D) of the Act. Under § 435.831(b)(1)(ii) of the final rule, if the state exercises the option to apply MAGI-based methodologies defined in § 435.603(b) through (f) to certain medically needy individuals, the state must comply with the terms of § 435.602, except that in applying § 435.602(a)(2)(ii) to individuals under age 21, the agency may, at state option, include in the individual's household all parents as defined in § 435.603(b) (including stepparents) who are living with the individual without regard to whether such parent's or stepparent's income and resources would have been counted under AFDC if the individual would be considered a dependent child under the AFDC State plan.

Under the final rule, states may elect to apply more stringent limitations on deeming for individuals under age 21 applied in effect under the state's AFDC program, but are not required to do so. In determining financial eligibility of medically needy parents and caretaker relatives, pregnant women and individuals under 21, this will provide states with greater latitude to adopt either the household composition and deeming rules applied under the state's AFDC state plan or the MAGI-based household composition and deeming rules set forth in § 435.603(b), (c), (d) and (f), subject to the specific limitation on deeming set forth at section 1902(a)(17)(D) of the Act. Thus, under the final regulation, states may not

count the income of a child in determining the medically needy eligibility of a parent or another sibling. States may, however, count a stepparent's income in determining the medically needy eligibility of a child if the state elects to apply MAGI-like methodologies to such individuals in accordance with § 435.831(b)(1)(ii) of the final rule.

We agree with the commenters that compliance with the deeming provisions in section 1902(a)(17)(D) of the Act adds some complication to the streamlined system of eligibility rules. However, as the commenters noted, this limitation is grounded in statute. For this reason, we suggested two relatively simple approaches (noted above) which we believe states could use to integrate medically needy coverage into a streamlined eligibility system for MAGI-based coverage without running afoul of the deeming restrictions.

We also are making a technical revision to paragraph (b)(2) of § 435.601 (relating to application of financial methodologies for individuals excepted from application of MAGI-based methodologies, discussed earlier in this final rule) to cross-reference the state option to apply MAGI-like methodologies to certain medically needy individuals under § 435.831.

*Comment:* For states electing application of MAGI-like methodologies to medically needy pregnant women, parents and caretaker relatives and children, several commenters questioned exactly what methodology we envision states using to convert their current AFDC-based net medically needy income level (MNIL) into MAGI-equivalent standards to comply with the MOE requirement in section 1902(gg) of the Act. Several commenters questioned whether we intend to require application of the guidance we provided to states in the December 28, 2012, State Health Official (SHO) Letter (SHO #12–003 and Affordable Care Act #22) regarding Conversion of Net Income Standards to MAGI Equivalent Income Standards. The commenters noted that in the proposed rule we stated that states may replace current disregards applied for medically needy eligibility under an AFDC-related group with a block-of income disregard to satisfy the MOE in the aggregate, but the preamble does not require that they do so. The commenters requested clarification that states wishing to take up the option to apply a MAGI-based methodology to medically needy pregnant women, parents and caretaker relatives and children, must convert current AFDC income standards according to approved methodologies, and suggested that we reconsider use of the average disregard method and consider instead a methodology that would minimize the number of persons who would potentially lose eligibility under a MAGI-based standard. One commenter stated that it is unclear how states could calculate the block disregard in a way that would definitively show that it is not more restrictive than the current methodology. Another commenter supported use of a conversion methodology to establish an equivalent MAGI-based MNIL that satisfies the MOE requirement in the aggregate. A few commenters expressed support of the requirement that states must comply with the maintenance of effort requirement for medically needy children.

*Response:* To comply with the MOE at section 1902(gg) of the Act, which remains applicable to children through September 30, 2019, states that elect to adopt MAGI-based methodologies for medically needy parents and caretaker relatives, pregnant women and children will need to ensure that the application of MAGI-based standards and methodologies to medically needy children will be no more restrictive than the AFDC-based standards and methodologies applied by the state prior to enactment of the Affordable Care Act. As noted, one way for a state to satisfy this provision would be to retain the MNIL currently established in the state plan and replace the disregards applied to children in establishing medically needy eligibility as of the enactment of the Affordable Care Act (or, if less restrictive, applied subsequent to that date) with a single block-of-income disregard such that, in the aggregate, children are no worse off when the MAGI-based methods are applied. States could also apply this method to medically needy pregnant women, parents and other caretaker relatives (since the MOE for adults has expired, states would not be required to do so for these populations.) Alternatively, a state could raise the MNIL by a conversion factor—as was done in accordance with the December 28, 2012, SHO in converting the pre-Affordable Care Act net income standards for previously AFDC-related categorically needy groups to a MAGI-based equivalent standard—such that children in the aggregate would not be harmed. We note, however, that states cannot adopt a different converted MNIL for each medically needy group: The same MNIL must be applied to the medically needy groups for pregnant women and children and the same MNIL must be applied to the medically needy groups for parents and other caretaker relatives, or aged, blind, and disabled individuals. In addition, under section 1903(f)(1) of the Act, the MNIL cannot exceed 133⅓ percent of the former AFDC payment standard. These limitations likely make the first approach, replacing current disregards with an in-the-aggregate-equivalent block-of-income disregard, though not required, more practical.

The December 28, 2012, SHO was not issued with conversion of the MNIL for medically needy groups in mind, and its terms are not uniformly applicable to the present situation, in which a state may elect to replace current AFDC-based methodologies with MAGI-based methodologies for certain medically needy individuals. However, we believe the basic principles outlined in the SHO are relevant, and that the standardized MAGI conversion methodology described in the SHO can be applied in this situation to yield a converted medically needy income level that satisfies the MOE requirements under section 1902(gg) of the Act, and we have worked with states with medically needy programs to determine an appropriate conversion factor for their medically needy programs using that methodology. We also believe that states should have the option to suggest an alternative state proposed methodology, as we also had permitted in the December 28, 2012, SHO for converting the income standards applied to categorically needy eligibility groups, and we will work with any state interesting in applying an alternative method to ensure compliance with the MOE set forth in section 1902(gg) of the Act, as well as other applicable provisions of the statute and regulations relating to coverage of medically needy individuals.

*Comment:* Several commenters requested clarification on whether states may continue to apply a resource test for medically needy eligibility. The commenters state that because other, less vulnerable populations subject to MAGI-based methodologies under the Affordable Care Act will be exempt from asset tests, the same exemption should apply to medically needy populations.

*Response:* Section 1902(a)(10)(C)(i)(III) of the Act, implemented for resources at §§ 435.840 through 435.845, provides that states electing to cover medically needy individuals establish a resource standard and methodologies for determining resource eligibility for all medically needy groups. In giving states the option to align the income methodologies used in determining medically needy eligibility for the historically AFDC-related populations

of parents and caretaker relatives, pregnant women and children with the new MAGI-based income methodologies now used for determining the categorically-needy eligibility of these same populations, we did not eliminate the ability of states to apply a resource test to all of their medically needy groups, nor could we have done so, as there is nothing in the Affordable Care Act which supersedes section 1902(a)(10)(C)(i)(III) of the Act. Thus, while section 1902(e)(14)(C) of the Act prohibits application of a resource test to any individual for whom the state is required to apply MAGI-based methodologies under section 1902(e)(14) of the Act, providing states with the option to apply MAGI-like income methodologies established per paragraphs (G) and (H) of section 1902(e)(14) of the Act, as implemented in § 435.603, to certain medically needy groups does not result in full application of section 1902(e)(14)(C) of the Act or the elimination of any applicable resource test in states electing that option. As there is no resource test under MAGI, we did not propose any revisions to existing regulations relating to permissible medically needy resource standards and methodologies, and these regulations remain in effect. States may, at their option, elect to effectively eliminate the resource test for any or all medically needy eligibility groups by adopting a less restrictive methodology to disregard all of an individual's resources under section 1902(r)(2) of the Act and § 435.601(d).

Similarly, as explained in the proposed rule, a state's election to apply MAGI-like income methodologies under § 435.831 does not eliminate the option states currently have under section 1902(r)(2) of the Act and § 435.601(d) to adopt less restrictive financial methodologies in determining the financial eligibility of medically needy parents and caretaker relatives, pregnant women and children. In this final rule, we are making a conforming revision to the introductory text of § 435.601(d)(1) to reflect the state flexibility available under the statute.

4. Deemed Newborn Eligibility (§§ 435.117 and 457.360)

Section 1902(e)(4) of the Act, implemented in current § 435.117, provides that babies born to mothers eligible for and receiving covered services under the Medicaid state plan for the date of birth (including during a period of retroactive coverage in accordance with § 435.915) be automatically deemed eligible for Medicaid without an application until the child's first birthday. Before the year of deemed newborn eligibility ends, the agency is required, in accordance with § 435.916, to determine whether the child remains Medicaid eligible for any other eligibility groups, such as for the mandatory children's group under § 435.118. Section 211 of CHIPRA made several revisions to section 1902(e)(4) of the Act and also added a new requirement at section 2112 of the Act, relating to deemed eligibility for babies born to targeted low-income pregnant women covered under CHIP. We proposed to revise § 435.117 and to add a new § 457.360 implementing the CHIPRA amendments, as follows:

- In accordance with section 1903(x)(5) of the Act, as added by section 211(b)(3)(A)(ii) of CHIPRA, we proposed revisions at § 435.117(b) to require that a child born to a mother covered by Medicaid for labor and delivery as an emergency medical service in accordance to section 1903(v)(3) of the Act is automatically eligible until the child's first birthday under § 435.117 (in the same manner as any infant born to a mother eligible for and receiving full Medicaid benefits on the date of birth).
- We proposed revisions at § 435.117(b) to eliminate the requirement, based on a previous provision of statute, that deemed newborn eligibility continue only as long as the baby is a member of the mother's household and the mother either remained eligible for Medicaid or would remain eligible if still pregnant, as these limitations were removed from section 1902(e)(4) of the Act by section 113(b)(1) of CHIPRA.
- Section 2112(e) of the Act, as added by section 111 of CHIPRA, requires that babies born to pregnant women covered by a state as targeted low-income pregnant women under a separate CHIP similarly be deemed automatically eligible for Medicaid or CHIP, as appropriate. We proposed to amend § 435.117(b) and to add a new § 457.360 implementing this requirement, based on whether household income at the time of the birth is at or below or above the income standard established by the state for eligibility of infants under § 435.118.
- Consistent with section 1902(a)(19) of the Act to promote simplicity of administration and the best interest of beneficiaries, we proposed at § 435.117(b)(1)(iii) and (iv) that states be provided with the option to cover as deemed newborns under Medicaid or CHIP, as appropriate based on the mother's household income, babies born to mothers covered for the date of the child's birth as a targeted low-income child under a separate CHIP state plan or to mothers covered under a Medicaid or CHIP demonstration waiver under section 1115 of the Act. The state would have to provide an assurance that, based on the income levels of eligibility, the state believes that the children would meet the applicable eligibility standard if a full eligibility determination were performed.
- We proposed at § 435.117(c) that states be provided with the option to provide deemed newborn eligibility under Medicaid to babies born to mothers receiving Medicaid in another state and at § 457.360(c) that states be provided with the option to provide deemed newborn eligibility under CHIP to babies born to mothers receiving CHIP or coverage under a CHIP or Medicaid section 1115 demonstration program in another state.
- Finally, we proposed at §§ 435.117(d) and 457.360(d) that states be required to use the mother's Medicaid or CHIP identification number for a deemed newborn unless and until the state assigns a separate identification number to the child, as provided at section 1902(e)(4) and section 2112(e) of the Act.

*Comment:* Several commenters strongly supported the option at §§ 435.117(b) and 457.360(b) for states to extend automatic enrollment to babies born to mothers covered as a targeted low-income child under a separate CHIP state plan, but recommended that we require states to provide deemed newborn eligibility for such babies, as well as to babies born to mothers who are eligible through a section 1115 demonstration (rather than simply providing states with the option to do so). A few commenters encouraged us to require that states alert women who become pregnant while enrolled under a section 1115 demonstration of the importance of informing the state of their pregnancy to be evaluated for eligibility under the state plan, including the opportunity to receive a year of stable coverage for their newborns. Some commenters stated that states that take up the option to cover targeted low-income pregnant women under a separate CHIP should be required to provide automatic deemed eligibility to the newborns of mothers enrolled in CHIP as targeted-low income children. Two commenters, who supported the option to deem eligibility to a newborn of a mother who was covered as a targeted low-income child under a separate CHIP, indicated that this option would eliminate the administrative burden that is otherwise involved in the process of enrolling the baby in Medicaid or CHIP if a new

application for the newborn is required. One of these commenters maintained that virtually all of these newborns (who are born to a targeted low-income child in a separate CHIP) meet Medicaid eligibility requirements, and should automatically be deemed eligible for Medicaid, while the other took the position that all such newborns should automatically be deemed eligible for CHIP.

Several commenters stated that the proposed §§ 435.117(c) and 457.360(c) would violate the woman's right to travel because they would not require deemed newborn eligibility when the mother had been enrolled in Medicaid or CHIP in another state. One commenter encouraged CMS to work with states to avoid the disruptions to coverage that may result from leaving this at state option. Another commenter supported making deemed newborn eligibility for infants born in another state optional. The commenter stated that, for such infants, a new application and verification of citizenship is important.

*Response:* We are finalizing the extension of deemed newborn eligibility beyond the statutory requirements at state option, as proposed. Since eligibility levels for pregnant women and children vary between the states, we are revising proposed § 435.117(b)(1)(ii) and (iii) to provide an additional option for states to deem Medicaid eligible a newborn child of a mother covered under another state's CHIP state plan (as a targeted low-income pregnant woman or child) for the date of the child's birth. We also are moving the content of proposed paragraph (c) to § 435.117(b)(1)(i), and redesignating paragraph (d) at paragraph (c). In addition, we are revising paragraph (b)(2) to be clearer that newborns who must be deemed under paragraph (b)(1) are not optional for deeming under paragraph (b)(2).

Under § 457.360, we are making organizational revisions to be consistent with the changes in Medicaid at § 435.117. We are redesignating the proposed paragraph (b)(2) as a new paragraph (b)(3) and moving the content of the proposed paragraph (c) to a new paragraph at § 457.360(b)(2)(i). Also, we are adding a new paragraph at § 457.360(b)(2)(ii) to include a requirement that states electing CHIP optional newborn deeming provisions must also elect the comparable options in Medicaid. This clarification is designed to ensure that states deem newborns to the appropriate program and prevent the claiming of enhanced federal matching funds under their title XXI allotment for coverage of newborns who are eligible for Medicaid. We are also redesignating the proposed paragraph (d) regarding the CHIP identification number as paragraph (c).

*Comment:* A commenter stated that proposed §§ 435.117(d) and 457.360(d), requiring states to use the mother's Medicaid or CHIP identification number for a deemed newborn unless and until the state assigns a separate identification number to the child, are overly prescriptive and would require change to the states' current functionality. The commenter requested that this requirement be omitted from the final rule.

*Response:* This provision, which serves to ensure that deemed newborns do not experience any gap in coverage for needed services, is expressly required under sections 1902(e)(4) and 2112(e) of the Act. States are permitted to immediately assign a separate identification number to a deemed newborn, thereby avoiding any need for the mother's identification number to be used temporarily for the baby. We are retaining this provision in both Medicaid and CHIP, although moving the content proposed at §§ 435.117(d) and 457.360(d) to §§ 435.117(c) and 457.360(c), respectively, as previously discussed.

*Comment:* A commenter requested clarification about whether a newborn who was covered under the state's separate CHIP as an unborn child is deemed eligible for one year. The commenter also questioned about the availability of enhanced title XXI funding for postpartum care for the mothers of these newborns.

*Response:* A newborn who was covered as an unborn child under a separate CHIP, and whose mother was not covered by Medicaid for the date of the child's birth, cannot be deemed eligible for Medicaid or CHIP for the period extending until the child's first birthday, since the mother was not covered for the date of birth. Without coverage of the mother, there is no basis for providing deemed newborn eligibility. If a pregnant woman gives birth to a newborn who was covered as an unborn child under a separate CHIP state plan, and the woman is determined eligible for Medicaid for coverage of the labor and delivery, as authorized under section 401(b)(1) of PRWORA, codified at 8 U.S.C. 1611(b)(1), and sections 1903(v)(2) and 1903(v)(3) of the Act, the baby is entitled to be deemed eligible for Medicaid under § 435.117. Given (1) the requirements at § 457.626(a)(2) (prohibiting payment for services that can reasonably be expected to be paid under another federally-financed program) and § 457.626(a)(3) (specifically prohibiting payment for services that are payable under Medicaid as a service to a pregnant woman), (2) the express requirement added at section 1903(x)(5) of the Act by section 211(b)(3)(A)(ii) of CHIPRA to provide deemed newborn eligibility to infants born to pregnant women covered only for labor and delivery for the child's birth, and (3) the enhanced degree of coordination required between the eligibility and enrollment systems for all insurance affordability programs per §§ 457.348 and 457.350, we expect states to evaluate whether the pregnant woman of an unborn child covered under a separate CHIP is eligible for Medicaid coverage for the labor and delivery of the baby as treatment of an emergency medical condition, consistent with § 435.139. If the woman is determined to be eligible for Medicaid coverage (including during a retroactive eligibility period), the state must deem the baby eligible for Medicaid under § 435.117 until the child's first birthday. In cases involving retroactive Medicaid coverage of the labor and delivery of the child and retroactive deemed eligibility for the child, states may make adjustments to claiming through the customary financial management processes. Once determined eligible for and enrolled in Medicaid, the child's eligibility for CHIP must be terminated. To ensure coordination of coverage and care, consistent with sections 2101(a) and 2102(b)(3)(E) of the Act, the child's eligibility may not be terminated prior to enrollment in Medicaid.

With regard to the coverage of postpartum care for mothers of newborns who had been covered in the state's separate CHIP under the unborn child option, section 2112(f)(2) of the Act permits states to provide postpartum services beginning on the last day of the pregnancy through the end of the month in which the 60-day postpartum period ends, in the same manner as provided in Medicaid, if the mother, except for age, would otherwise satisfy the eligibility requirements of the separate CHIP state plan. If the mother does not meet the eligibility requirements (other than age) for coverage under the CHIP state plan, FFP under title XXI is available to cover postpartum care only if the state usually pays for pregnancy and delivery services through a bundled payment or global fee method which includes postpartum care together with prenatal care, labor and delivery. (Global fees are commonly used in reimbursing for obstetrical care cover all prenatal visits, delivery, and at least one postnatal

visit.) FFP similarly is available for capitation rates that reflect the use of bundled payments or global fees by managed care entities. For states that do not pay using such a bundled payment or global fee methodology, FFP is not available for postpartum care. In addition, FFP is not available for post-hospitalization postpartum care that is not included in the bundled or capitated payment. As explained in SHO Letter #02–004 (November 12, 2002), the option to cover unborn children from conception to birth was not meant to alter existing payment methodologies, and states are not permitted to establish a bundled payment methodology applicable only to coverage for unborn children.

*Comment:* Several commenters did not understand why paragraph (b)(1)(iii) of § 435.301, relating to deemed newborns of medically needy mothers, is being deleted from the current rules. The commenters stated that this rule should be left in place, or, it should be clarified that mothers eligible for Medicaid as medically needy are considered to be covered under the state plan and, therefore, their babies would qualify as deemed newborns under § 435.117.

*Response:* Effective April 1, 2009, CHIPRA eliminated the Medicaid requirement at section 1902(e)(4) of the Act that the baby remains eligible as a deemed newborn only so long as the mother remains eligible for Medicaid (or would remain eligible if still pregnant). Removing this requirement means that all newborns born to women covered by Medicaid for the child's birth, including a mother covered as medically needy, are now covered as mandatory categorically needy deemed newborns. Therefore, all infants born to pregnant women who are eligible for Medicaid for the date of the child's birth, including pregnant women who are eligible as medically needy, are covered under §§ 435.117 and 435.301(b)(1)(iii) for medically needy deemed newborns no longer is consistent with the statute. SHO Letter 09–009, issued on August 31, 2009, provides additional explanation on the policy changes made by CHIPRA to deemed newborn eligibility, including the change for babies born to medically needy pregnant women (see *http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO083109b.pdf*).

*F. Verification Exceptions for Special Circumstances (§ 435.952)*

Under § 435.952(c), states are permitted to request additional information from individuals, including documentation, to verify most eligibility criteria if data obtained electronically by the state is not reasonably compatible with attested information or electronic data is not available. However, there are individuals for whom providing documentation even in such limited circumstances would create an insurmountable procedural barrier to accessing coverage. In accordance with section 1902(a)(19) of the Act (relating to simplicity of administration and best interest of individuals), we proposed revisions at § 435.952(c)(3) under which states must accept self-attestation (and may not require documentation) if documentation does not exist or is not reasonably available at the time of application or renewal, for example, as may be the case for victims of domestic violence or natural disasters and homeless individuals. Under the proposed revisions, this self-attestation policy would not apply, for example, in the case of citizenship or immigration status, when documentation is (or may be) expressly required under the Act.

*Comment:* A commenter requested clarification as to whether the exception at proposed § 435.952(c) requiring that states accept self-attestation in special circumstances applies to all individuals regardless of whether their eligibility is based on MAGI or non-MAGI methodologies.

*Response:* The regulations relating to verification of eligibility at §§ 435.940, *et seq.,* including § 435.952, as revised in this final rule, applies to all applicants and beneficiaries, regardless of the methodology used to determine financial eligibility. We note that the regulations relating to verification apply equally at application, as well as renewals and redeterminations due to a change in circumstances, and we have revised § 435.952(c)(3) in the final rule to clarify that the proposed revision also applies both at application and renewal.

*Comment:* Several commenters recommended that CMS amend § 435.952(c)(3) to permit states to apply the special circumstances exception to allow self-attestation of eligible immigration status and not require states to collect documentary evidence of eligible immigration status. Several commenters also suggested that the final rule require states to accept a photocopy, facsimile, scanned, or other copy of a document used to verify immigration status.

*Response:* Section 1137 of the Act requires states to verify a written declaration (made under penalty of perjury) of satisfactory immigration status. Section 1902(a)(46)(B) of the Act requires states to verify an attestation of citizenship in accordance with sections 1903(x) or 1902(ee) of the Act. Thus, we do not have authority, even under special circumstances, to permit states to accept self-attestation of these criteria. Neither section 1137 of the Act, DOJ guidance, the Systematic Alien Verification for Entitlements (SAVE), which is the Department of Homeland Security's (DHS) system of record used by agencies to verify immigration status, nor our regulations require individuals to submit original or certified copies of documents as evidence of satisfactory immigration status, and states may accept copies of documents if necessary to complete the verification of immigration status.

*Comment:* A commenter recommended CMS clarify that dependents may also qualify for an exception for special circumstances and be able to self-attest in lieu of providing documents at the time of application.

*Response:* Section 435.952, including the ''special circumstance exception'' at § 435.952(c)(3), does not distinguish between different members of a household or family, but applies to all individuals applying for or renewing coverage. In addition, the legal capacity of dependents who are minors or who have diminished cognitive ability to attest to information (which must be done under penalty of perjury) is a matter of state law. Therefore, we do not believe that further clarification in the regulation text is required. We also note that, under § 435.945, other specified individuals can attest to information on behalf of a child (or other individual), including an adult in the child's or other individual's household (as defined in § 435.603) or family (as defined in section 36(B)(d)(1) of the IRC), an authorized representative, or if a minor or incapacitated, someone acting responsibly for the individual.

*G. Verification Procedures for Individuals Attesting to Citizenship or Satisfactory Immigration Status (§§ 435.3, 435.4, 435.406, 435.407, 435.911, 435.956, 435.1008, 457.320, 457.380)*

In our proposed rule we noted that verification of citizenship and immigration status is governed by sections 1137, 1902(a)(46)(B), 1902(ee), and 1903(x) of the Act, and by section 1943 of the Act, which cites to section 1413(c) of the Affordable Care Act. Sections 1943 and 2107(e)(1)(O) of the Act and section 1413(c) of the Affordable Care Act require that there be a coordinated eligibility, verification, and enrollment system between Medicaid, CHIP, the Exchanges, and the BHP, if applicable. More specifically section 1413(c) of the Affordable Care Act, which is incorporated into titles

XIX and XXI via cross references at sections 1943(b)(3) and 2107(e)(1)(O) of the Act, requires that all insurance affordability programs verify certain information in a manner compatible with the method established under section 1411(c)(4) of the Affordable Care Act, that is by data matches with certain federal agencies, including the Social Security Administration (SSA), DHS, and the Internal Revenue Service (IRS), through an electronic service established by the Secretary (referred to as the ''federal data services hub'' or ''FDSH''). The requirement to use the FDSH is implemented at current § 435.949 for Medicaid and § 457.380(g) for CHIP. Current §§ 435.952(c) and 457.380(f) also require state Medicaid and CHIP agencies to rely on electronic data sources to verify eligibility information to the maximum extent possible and limit the instances when paper documentation can be requested.

The verification rules related to citizenship and immigration status as proposed in the January 22, 2013 proposed rule (78 FR 4615) were an extension of the current verification rules and were intended to develop a consistent and cohesive set of verification rules to the greatest extent possible for all factors of eligibility. These rules are part of the streamlined and coordinated eligibility, verification, and enrollment system that will be used among all health insurance affordability programs as required by section 1413 of the Affordable Care Act. In response to public comments, however, we are providing states greater flexibility in using an alternative mechanism to verify citizenship and immigration status under our final rule at § 435.956.

Prior to enactment of the Affordable Care Act, section 211 of CHIPRA also had made several important changes to the statute for verification of citizenship. Specifically, CHIPRA section 211 revised section 1902(a)(46) of the Act and added a new section 1902(ee) of the Act to provide states an option to verify citizenship through an electronic data match between the agency and SSA in lieu of requiring documentation in accordance with section1903(x) of the Act. Section 1903(x) was also revised to exempt infants deemed eligible for Medicaid under section 1902(e)(4) of the Act from the requirement to verify citizenship and to require that states provide individuals declaring U.S. citizenship with a ''reasonable opportunity period'' to provide documentation of their status, similar to the ''reasonable opportunity'' afforded individuals declaring satisfactory immigration status under section 1137(d) of the Act. Section 211 of CHIPRA also clarified the acceptability of documentation issued by a federally-recognized Indian tribe for purposes of citizenship verification and extended the requirements to verify citizenship to CHIP.

Implementation of the changes made by section 211 of CHIPRA and the establishment of a more streamlined and coordinated verification process through the FDSH for citizenship and immigration status among all insurance affordability programs are not yet addressed in the regulations, and we proposed various revisions and additions to current regulations as follows:

- Consistent with sections 1413(c) and 1411(c)(4) of the Affordable Care Act, and § 435.949, we proposed to add paragraph § 435.956(a) (reserved in prior rulemaking) to codify the requirement that states must verify citizenship and immigration status with SSA and DHS through the FDSH if available;
- We proposed regulations implementing a 90-day reasonable opportunity period for individuals declaring U.S. citizenship or satisfactory immigration status at § 435.956(a)(2) and (g) and a conforming amendment to § 435.1008 was proposed providing that states are entitled to receive FFP for benefits provided to individuals declaring citizenship or satisfactory immigration status during the reasonable opportunity period, regardless of whether eligibility ultimately is approved for such period.
- We proposed various revisions to § 435.406, § 435.407 and § 435.956, and a conforming revision at § 435.911(c), to streamline and revise the regulations for consistency, reduce administrative burden on states and individuals, and to implement revisions to section 1903(x) of the Act made by CHIPRA. We also proposed to simplify and streamline the regulations governing the documentation of citizenship under section 1903(x) of the Act, eliminating restrictions in the current regulations that are not required under the statute, reducing administrative burden and removing unnecessary barriers to successful documentation, without compromising program integrity.
- We proposed to extend the requirement to verify citizenship or nationality and immigration status to CHIP at § 457.320 and § 457.380; and
- We proposed to add definitions of ''citizenship,'' ''non-citizen,'' and ''qualified non-citizen'' at § 435.4, and to add applicable statutory references to the basis at § 435.3.
- We also proposed a technical correction at § 435.910(g), to put back the reference to the verification of SSNs with SSA, which was inadvertently removed in the March 2012 eligibility final rule and at § 435.911(c) to replace the reference in § 435.911(c) to section 1903(x), section 1902(ee) or section 1137(d) of the Act with a cross-reference to § 435.956(g), which implements the cited sections of the statute.

A complete description of the proposed revisions to § 435.407 and the terms of proposed § 435.956(a) and (g)—redesignated in this final rule as paragraph (b)—can be found in section I.B.7 of the January 22, 2013 proposed rule (78 FR 4615). We received the following comments concerning the proposed verification policies for individuals attesting to citizenship or satisfactory immigration status, which we are generally finalizing as proposed except as noted below as well as some technical revisions for clarity.

*Comment:* Several commenters supported the replacement of the terms ''alien(s)'' with the terms ''non-citizen(s).''

*Response:* We appreciate the commenters' support and have finalized the change we proposed from the terms ''alien(s)'' to the terms ''non-citizen(s).'' We also are finalizing the proposed definitions of ''non-citizen'' and ''qualified non-citizen,'' except to revise the language in the definition of ''qualified non-citizen'' in this final rule to provide that qualified non-citizen ''includes'' rather than ''has the same meaning as'' the term qualified alien, as defined in the Immigration and Nationality Act (INA) at 8 U.S.C. 1641(b) and (c). We are making this change because the Congress has made full Medicaid benefits available to other categories of non-citizens without making conforming changes to include the new categories in the definition of qualified alien in the INA. For instance, under 22 U.S.C. 7105 certain victims of a severe form of trafficking are eligible for Medicaid benefits to the same as extent as refugees (who are included in the definition of qualified alien in the INA) ''notwithstanding title IV of the Personal Responsibility and Work Opportunity Act of 1996.'' The use of the term ''includes'' is designed to ensure that the term qualified non-citizen for purposes of the Medicaid program will be broad enough to include all of the non-citizen groups that are expressly addressed in other Federal statutes and who may be eligible for Medicaid even though those groups are not expressly mentioned in 1641(b) and (c). We also are making non-substantive revisions to the proposed definition of ''citizenship'' in § 435.4 of the final rule to eliminate

redundant language in the proposed definition.

*Comment:* One commenter suggested that states should not be required to use the FDSH to verify citizenship and immigration status rather than using an existing interface with the SSA and the DHS, especially since information from the FDSH cannot be used to make eligibility determinations for other human services programs.

*Response:* We agree with the commenter that states should not be required to use only the FDSH to verify citizenship and immigration status rather than using an existing interface with SSA and DHS. Although our proposed rule stated that the agency must verify citizenship and immigration status through the electronic service established in § 435.949 if available, we also recognized alternative approaches that could be used if the FDSH was not available. Moreover, some flexibility is permitted under the current regulations at §§ 435.949 and 457.380. Those rules generally require use of the FDSH to obtain information from the Social Security Administration (SSA) and the Department of Homeland Security (DHS) which can be used to verify citizenship and immigration status, unless the state has obtained approval from the HHS Secretary to obtain needed information through another mechanism in accordance with § 435.945(k) or § 457.380(i). We have approved state requests to use other verification mechanisms under those rules. No commenters supported eliminating the flexibility for states to obtain approval to verify citizenship or immigration status through an alternative mechanism and we do not intend to eliminate the flexibility provided under those regulations in this final rule. In response to the comment, we are revising the regulation text to provide at § 435.956(a)(1)(i) and (a)(2)(i) of the final rule that states can verify citizenship and immigration status through the FDSH or alternative mechanism authorized in accordance with § 435.945(k), so that states would be able to use the existing interfaces with SSA and DHS.

*Comment:* A few commenters suggested that requiring additional electronic verification of citizenship or immigration status if verification through the FDSH fails is redundant.

*Response:* We understand the commenters to be raising a situation in which SSA or DHS has been queried, via the FDSH, and has sent a response that it has no information to verify the individual's declared status. SSA and DHS only return a response that the status is verified or that it cannot verify the status; neither will return a response that the individual is not a ''citizen'' or not in a satisfactory immigration status. We agree that in such situations, when verification via the FDSH fails, attempting electronic verification again with SSA or DHS would be redundant and is not required. Under § 435.956(a)(1)(ii) of the final regulation, if the state already has received a response to an electronic query from SSA through the FDSH, which was unable to verify citizenship based on the applicant's Social Security number, verification in accordance with section 1902(ee) would be redundant, and the state would need to verify citizenship status in accordance with § 435.407.

We are also making a change in the final regulation to simplify the language. Inasmuch as section 1902(ee) of the Act provides for verification of citizenship through a data match with SSA, we have replaced the reference to verifying ''citizenship in accordance with section 1902(ee) of the Act'' in proposed § 435.956(a)(1)(i) to refer more plainly to verifying citizenship ''through a data match with the Social Security Administration'' in § 435.956(a)(1)(ii)(A) of the final rule.

Unlike citizenship status, for which states are provided an option under title XIX to verify an individual's status with SSA or based on a number of other forms of documentation, states are required to verify immigration status with DHS in accordance with section 1137(d) of the Act. DHS has developed a service, the ''Systematic Alien Verification for Entitlements Program'' (SAVE) for states to use for this purpose. SAVE can be accessed electronically, either through the FDSH or via a direct interface with the state. Accordingly, we have revised proposed § 435.956(a)(1) for immigration status to provide in § 435.956(a)(2)(i) of the final rule that states must verify immigration status, in accordance with section 1137 of the Act, through the service established in accordance with § 435.949, or alternative mechanism authorized in accordance with § 435.945(k). If SAVE is unable to verify an individual's attested status, the state is not required to query SAVE a second time with the same information; instead, the individual must be provided with an opportunity to provide other documentation of status as discussed further below.

*Comment:* Several commenters supported requiring states to exhaust all available electronic data sources to verify citizenship and immigration status before requesting for paper documentation. One commenter believed that a data match with the state's vital statistics agency should be optional.

*Response:* Under section 1411(c) of the Affordable Care Act and section 1943 of the Act, incorporating section 1413 of the Affordable Care Act, states are required to first attempt verification of citizenship and immigration status via the FDSH, or through an alternative mechanism authorized in accordance with § 435.945(k) of the current regulations, which implements sections 1411(c)(4)(B) and 1413(c)(1) of the Affordable Care Act (applicable to Medicaid via section 1943(b)(3) of the Act). If such verification is not successful, we believe the cross reference in proposed § 435.952(a)(1) to § 435.952(c)(2)(ii) to require additional electronic verification before paper documentation is requested was in error, and we have eliminated this cross-reference in the final rule. If verification with SSA via the FDSH or alternative approved mechanism is not successful, states may obtain other evidence of citizenship by other means, as set forth in section 1903(x) of the Act. We do not have authority to nullify the choice provided to states under section 1902(a)(46)(B) of the Act. Thus, while a data match with a state's vital statistics agency is one source of permissible evidence, we agree with the commenter that states are not required to attempt such a match before requesting other types of documentary evidence under the statute. We note that § 435.407 of the proposed and final rule, provides a number of electronic evidentiary sources which states may use to obtain evidence of U.S. citizenship, including a data match with DHS (related to an individual's naturalized citizenship). If verification of immigration status with SAVE through the FDSH or alternative mechanism is not successful, states have the option under section 1137(d)(2) of the Act to require other proof of immigration status issued by DHS or such other documentation as the state determines constitutes reasonable evidence of satisfactory status.

*Comment:* A commenter questioned whether the FDSH would replace states' current processes to verify immigration status with the SAVE system. The commenter also questioned generally what processes states should follow to verify immigration status.

*Response:* Before responding to the commenter's questions, it will be helpful to explain the requirements under section 1137(d) of the Act for verification of immigration status. In general, section 1137(d) of the Act requires that non-citizens applying for Medicaid must provide a declaration of satisfactory immigration status and that

states, in determining eligibility for Medicaid, must verify such status with DHS. DHS has developed a service, the ''Systematic Alien Verification for Entitlements Program'' (SAVE) which can be accessed electronically and which is used for this purpose. SAVE includes 3 possible steps to complete verification of immigration status, all of which can be accessed through the FDSH or via a direct interface. The status of most non-citizens can be verified at step 1, which occurs in real-time and is effectuated by the agency sending a query through the FDSH or directly to SAVE. If verification is not obtained in Step 1, the process moves to Step 2, which generally takes 2–3 business days to complete. At the end of SAVE step 2, DHS will return a response to the state either verifying the individual's immigration or naturalized citizen status or indicating that the status was not verified in requiring the state to ''submit additional verification.'' If verification at SAVE step 2 is not successful, at SAVE step 3 the state must provide evidence of the individual's immigration document for DHS to review. Currently this can be done using a pre-populated form developed by DHS, the G845 form, or utilizing the ''scan and upload'' feature DHS has newly made available for states to initiate SAVE step 3. In May 2018, DHS has indicated that it will no longer accept the paper G845 form or any other paper alternative form at SAVE step 3. SAVE step 3, which requires a DHS employee to research paper records, generally takes 10 to 21 business days for DHS to complete and return a response to the state.

Prior to implementation of the Affordable Care Act, all states queried the SAVE system through a direct interface with SAVE. A web-based query system is also available. States can now query SAVE through the FDSH's Verify Lawful Presence (VLP) service, which can verify immigration status through all three steps of SAVE, as needed. States are required under § 435.949 of the current regulations to use the FDSH VLP service unless we have authorized the state to use an alternative mechanism (such as a pre-existing interface) in accordance with § 435.945(k). Over half of all states currently are or have been authorized by us under § 435.945(k) to use their own interface to query SAVE. Some states have received authorization to use their own interface for all three steps. Other states have received authorization to use their own interface only for steps 2 and 3; a few have received authorization to use their own interface only for step 3.

If a state uses the FDSH VLP service for all three steps of SAVE, the state could retire its own interface, which effectively would mean that the FDSH has replaced the state's previous connection to SAVE, although the three steps involved remain the same. In a state which receives approval under § 435.945(k) to continue to use its pre-existing connection for any step, the FDSH would not replace the state's previous connection. In addition, if the FDSH is down, a state which uses the FDSH but also has maintained a direct connection with SAVE, could use that connection rather than waiting for the FDSH to be available.

*Comment:* One commenter requested that the rules at proposed § 435.956(a), requiring states to use the FDSH to verify citizenship and immigration status if the data is available, and § 435.952(c), requiring the use of electronic data sources over documentation, not apply to individuals whose eligibility is determined manually.

*Response:* We are unclear what the commenter means by ''individuals whose eligibility is determined manually.'' It may be that the commenter is referring to individuals who have submitted a paper application by mail or in person. Or perhaps the commenter is referring to individuals for whom either DHS or SSA is unable to return a positive match verifying citizenship or immigration status. In either case, we note that the verification rules at §§ 435.940 through 435.956, apply equally to all applicants and beneficiaries, regardless of the mode through which they submit their application. Per § 435.956(a)(1) of the final rule, states first must attempt verification of citizenship or immigration status through the FDSH or alternative mechanism approved by us under § 435.945(k), regardless of the mode through which an application was filed. However, the state retains the option to request the individual to submit documentation if that attempt is not successful.

*Comment:* A commenter disagreed with the policy at proposed § 435.406(a)(iv)(E) to exempt individuals who received medical assistance as a deemed newborn in any state from the citizenship verification requirements because it would be more administratively burdensome for states to verify status as a deemed newborn in another state rather than conducting an electronic data match with SSA. The commenter also indicated that only exempting individuals who received eligibility based on such status after July 1, 2006 would represent a change in policy. Another commenter questioned what resources will be available to identify individuals who were deemed eligible as a newborn in other states.

*Response:* Section 1903(x) of the Act requires states to exempt deemed newborns from the citizenship verification requirements, which we implement at § 435.406(a)(1)(iii)(E) of the final rule. Under § 435.117(b) of the final rule, states have the option to provide deemed newborn eligibility to a child if the child's mother was eligible for and receiving Medicaid or CHIP in another state for the date of the child's birth. However, in response to the concern raised by the commenter, we are revising § 435.406(a)(1)(iii)(E), as redesignated in the final rule, to provide that states have the option to apply the exemption to individuals who were eligible as a deemed newborn in another state provided that the state has verified the individual was eligible as a deemed newborn in the other state. For example, if state A has taken up the option under § 435.117(b)(2)(i) of the final rule to provide deemed eligibility to babies born to pregnant women on Medicaid in another state, and accepts self-attestation of the deemed newborn status in the other state (state B), state A must verify the baby's citizenship in accordance with the regulations—for example, via the FDSH or alternative approved mechanism, or based on documentary evidence described in § 435.407 of the regulations. FFP at the administrative match (50 percent) is available to verify that an individual was eligible as a deemed newborn in another state.

We do not agree with the commenter that only exempting individuals who received deemed newborn status on or after July 1, 2006 would be a change in policy. As discussed in a SHO Letter issued in December 2009, SHO #09–016, the deemed newborn exemption added to section 1903(x) of the Act by section 211 of CHIPRA, went into effect on July 1, 2006, as if it had been included in the Deficit Reduction Act of 2005. We have consistently maintained that the exemption applies only to individuals deemed eligible under section 1902(e)(4) of the Act on or after July 1, 2006.

*Comment:* Several commenters supported proposed § 435.407 to consolidate and streamline the types of documents required to verify citizenship and identity in the event that citizenship cannot be verified through the FDSH. Several commenters also supported the proposal to allow individuals to present copies of documents rather than originals. One commenter questioned if states can start

accepting copies prior to January 1, 2014, to relieve the administrative burden of the current policy.

*Response:* We are finalizing with slight modification the list of acceptable documents in § 435.407 of the proposed rule, including the requirement that states accept copies of documents an effective date on or after the effective date of this final rule, except when the state has reason to question the validity of the document provided. Originals are not required under the statute and we are not aware of any evidence establishing that this requirement enhances program integrity. In a study conducted by the Government Accountaility Office (GAO) in 2007, states overwhelmingly reported that the requirement to obtain original documents was one of two aspects of the current regulations that significantly increased burden on states and beneficiaries (the other was the complexity of the list of acceptable documents provided in the regulations), with the primary result being not increased program integrity but an undue barrier to coverage for eligible individuals. Forty-two of 44 states reported to the GAO that original documents posed a barrier to eligible citizens proving their status. See *States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens,* Report to Congressional Requesters, United States Government Accountability Office, GAO–07–889, June 2007. Further, requiring original documents effectively results in a requirement to provide documentation in person for individuals who are reluctant to send an original through the mail and undermines achieving a real-time online application process. Many states are able to complete the electronic verification in real-time and notify the individual if documents are needed, which enables applicants to upload documents immediately. Requiring originals would greatly hamper realization of the real-time online application experience which the regulations are designed to facilitate. We note that over 90 percent of electronic queries to SSA result in successful verification, such that paper documentation is only necessary in limited circumstances.

We are making technical changes at § 435.407(b)(1), and retaining some of the language in the current rule related to establishing that an individual is a collectively naturalized citizen from Puerto Rico or CNMI. We had erroneously proposed to remove this language as no longer relevant. We are also making a technical change at § 435.407(b)(7) to refer more simply to ''A Northern Marianas Identification Card issued by DHS or a predecessor agency,'' removing the requirement that the individual have been born in the CNMI before November 4, 1986, because only collectively naturalized citizens who were born in the CNMI before that date will be issued such a card. We also are replacing the word ''satisfactory'' with ''sufficient'' in the introductory language in § 435.407(a) to be clearer that the documents listed in paragraph (a) are sufficient to document citizenship.

*Comment:* We solicited comments on whether two affidavits, rather than one as proposed should be required to verify citizenship under § 435.407(b)(18). Several commenters supported the proposed rule of requiring just one affidavit. No commenters supported retaining the requirement for two affidavits. Nor did any commenters oppose the other proposed changes to eliminate the administrative barriers to use of affidavits, such as eliminating language indicating that affidavits be used only as a last resort in rare circumstances.

*Response:* We agree with the commenters and are finalizing without modification the provision at § 435.407(b)(18) that only one affidavit is needed to verify citizenship. We also are finalizing the elimination of other limitations currently placed on the use of affidavits as compared to other forms of documentation listed in § 435.407. We previously limited states' flexibility to accept affidavits as a reliable source of documentation for individuals who do not have ready access to more common types of citizenship documentation, such as a passport or birth certificate. However, since the 2006 issuance of § 435.407 implementing section 1903(x) following passage of the Deficit Reduction Act of 2005, we are aware of no information to support the proposition that one affidavit is any less reliable than two, or that the other restrictions placed on use of affidavits in the current regulations enhance their reliability. Nor did any commenters point out any such information or concerns. Therefore, we are finalizing the revisions to § 435.407(d)(5) of the current regulations which were proposed at redesignated § 435.407(b)(18) in this rulemaking.

*Comment:* A commenter suggested that rules pertaining to the process for verification of citizenship used by the Exchange and Medicaid be consistent.

*Response:* We agree and believe the rules as finalized at § 435.956 do align with the citizenship verification rules applicable to the Exchange to the fullest extent possible. We note, in particular, that Medicaid and CHIP agencies and the Exchange must verify citizenship and immigration status through the FDSH (if available) or an alternative approved approach and provide a reasonable opportunity period (referred to in Exchange regulations as an ''inconsistency period'') of up to 90 days, with the provision of benefits pending the opportunity for applicants to resolve any inconsistencies and complete verification of their status. One notable difference is that, to receive Medicaid or CHIP benefits during a reasonable opportunity period, an applicant has to be determined to meet all other eligibility requirements (for example, income), whereas the Exchange regulations provide for APTC and CSR eligibility during a 90-day inconsistency period for other factors of eligibility (such as income), as well. However, this is not a matter of verification processes, but of the extent to which assistance is authorized under the separate statutory authorities governing Medicaid, CHIP and coverage through an Exchange. We note that we are revising the proposed paragraph at § 435.956(b)(2)(ii)(B), which provided states the option to extend the reasonable opportunity if the individual is making a good faith effort to provide documentation or the agency needs more time to complete the verification of citizenship or immigration status. In the final rule we are only allowing this option for individuals who declare satisfactory immigration status because we do not have the statutory authority to extend the reasonable opportunity period for citizenship verification beyond 90 days as prescribed in section 1902(ee) of the Act. Under section 1902(ee)(1)(B)(ii)(III) of the Act, individuals who have made a declaration of citizeship must be disenrolled from coverage within 30 days from the end of the 90 day period, if no such documentary evidence is presented or the inconsistency is not resolved. Section 1137 of the Act, which governs verification of immigration status does not prescribe a definitive time period for the reasonable opportunity period, so the flexibility exists for states to provide a good faith extension when necessary beyond the 90-day reasonable opportunity period defined in this rule.

*Comment:* A commenter questioned whether a state can accept as verification of citizenship and immigration status, information from SSA indicating that the individual

provided a declaration of citizenship or lawful presence when the person applied for SSI or low-income subsidies under Medicare Part D.

*Response:* Under section 1903(x) of the Act and § 435.406(a)(1)(v), redesignated at § 435.406(a)(1)(iii) of this final rule, individuals receiving SSI as well as individuals entitled to or enrolled in Medicare under title XVIII of the Act are exempt from the Medicaid citizenship verification requirements. Under 8 U.S.C. 1612(a)(2)(F), non-citizens receiving SSI payments are eligible for full Medicaid benefits to the same extent as citizens who are receiving SSI; thus, states do not need to verify the immigration status of non-citizens receiving SSI. The immigration status of non-citizens entitled to or eligible for Medicare, including those receiving low-income subsidies under Medicare Part D, must be verified consistent with the requirements in § 435.956.

*Comment:* A commenter suggested that neither § 435.406 nor § 435.407 address the verification of lawful presence, though section 1137(d)(2) of the Act appears to require that hard copy documentation of lawful presence be presented. The commenter requested confirmation that if DHS verifies that the person is lawfully present, the state is not required to obtain other documentation.

*Response:* ''Lawfully present' is not an immigration status *per* se, but rather a term we used in earlier guidance in interpreting the phrase ''lawfully residing in the United States'' in section 214 of CHIPRA, which added sections 1903(v)(4) and 2107(e)(1)(J) of the Act to provide states with an option to cover otherwise-eligible pregnant women and children who are ''lawfully residing in the United States.'' *See* the July 1, 2010 State Health Official Letter (SHO #10–006, CHIPRA #17) and the August 28, 2012 State Health Official Letter (SHO #12–002). Section § 435.956(a) addresses verification of immigration status for most non-citizens, regardless of whether they are declaring an immigration status qualifying them for coverage as a qualified non-citizen or as a lawfully present pregnant woman or child. Section 1137(d) of the Act requires that documentary evidence, which may include electronic confirmation of immigration status from DHS, be provided. We agree with the commenter that the proposed rule did not adequately convey that states must attempt to verify immigration status for both qualified non-citizens and other lawfully residing individuals through the FDSH or alternative mechanism approved under § 435.945(k). Therefore, we have added a new paragraph § 435.406(c) in the final regulation to provide that agency must verify a declaration of satisfactory immigration status in accordance with § 435.956; per § 435.956(a)(2) of the final rule, that is, through the FDSH or approved alternative mechanism. Under the final regulation, if the state is able to verify an individual is in satisfactory immigration status through SAVE, additional documentation is not required.

We also removed proposed § 435.406(a)(1)(ii), requiring that the agency verify a declaration of citizenship, and instead added a new paragraph (c) to consolidate the requirement to verify both a declaration of citizenship and satisfactory immigration status. We redesignated proposed § 435.406(a)(1)(iii) and (iv) at § 435.406(a)(1)(ii) and (iii) in the final rule accordingly.

*Comment:* One commenter was concerned that the proposed regulation requires that a 90-day reasonable opportunity period be given to individuals for whom the state is unable to promptly verify citizenship or immigration status, but does not specify that individuals must have first made a declaration that they are a citizen, national or lawfully residing non-citizen.

*Response:* Sections 1137(d) and 2105(c) of the Act requires individuals seeking coverage under Medicaid or CHIP to provide a declaration of citizenship or satisfactory immigration status under penalty of perjury; such declaration is generally provided on the single streamlined application for Medicaid, CHIP, and the Exchanges, either on paper with a signature in writing, over the phone using a telephonic signature, or online using an electronic signature. Such declaration is required whether an individual is in an immigration status included in the definition of ''qualified non-citizen'' or in a status which is included in the definition of ''lawfully present'' in the July 1, 2010 and August 28, 2012 State Health Official Letters. Consistent with the statute and the current regulations, § 435.406(a)(1)(i) of the proposed rule requires that individuals make a declaration of status as a citizen or national of the United States, and this requirement is retained in the final rule. The current regulations at § 435.406(a)(2)(i) require that qualified non-citizens (referred to in the current regulations as ''qualified aliens,'' using the term employed by PRWORA) make a declaration that they are in a satisfactory immigration status. Sections 1137(d)(4), 1902(ee)(1) and 1903(x)(1) are clear that individuals must first declare citizenship or satisfactory immigration status before a reasonable opportunity period is provided. However, the proposed regulation did not, as the commenter points out, clearly reflect this requirement. Therefore, we have revised § 435.956(b) to clarify that the agency must provide a reasonable opportunity period to otherwise eligible individuals who have made a declaration of citizenship or satisfactory immigration status in accordance with § 435.406(a), as revised in this final rule, but whose status the agency is unable to promptly verify following the process set forth in § 435.956(a) of the final rule.

*Comment:* A commenter questioned if the expectation is for states to check their records to ascertain whether citizenship has already been verified for an individual, and if so, block the citizenship verification request to the FDSH. The commenter is concerned that this would impede the expectation of a streamlined application and real-time eligibility determinations for most applicants.

*Response:* It is a longstanding policy, currently at § 435.407(i)(5) and maintained with slight modifications in the proposed and this final rule at § 435.956(a)(4), that verification of citizenship is a one-time occurrence and states should not re-verify citizenship at renewal or subsequent application for Medicaid or CHIP unless later evidence raises a question of the person's citizenship. As part of the state's dynamic online application process, states should check existing records for those who are known to the system and determine whether citizenship has already been verified. For individuals whose citizenship has already been verified, states should suppress sending a new verification request to SSA, unless the individual reports, or the state otherwise has learned of, a change in their citizenship status, in which case the state may act upon the information.

*Comment:* We solicited comments on the most appropriate procedures for verification of active duty service or veteran status for qualified non-citizens, as well as their spouses and dependents that are exempt from the 5-year waiting period applicable to certain qualified noncitizens on the basis of such service or veteran status. One commenter supported the approach of allowing states to accept self-attestation unless the state has information that is not reasonably compatible with such attestation, subject to the requirements of § 435.952. Another commenter suggested that the FDSH obtain this

information from the Department of Defense and Veteran's Administration.

*Response:* We believe that, if electronic verification of active duty or veteran status becomes available through the FDSH, states should be required first to attempt verification of this status through the FDSH. This is consistent both with the verification requirements for immigration status generally, finalized in § 435.956(a)(2) of this final rule, as well as the requirement under § 435.952(c) generally to access electronic verification sources before requiring other forms of documentation or additional information from the individual. Until electronic verification is available, we agree with the commenter that state flexibility to accept self-attestation of active duty or veteran status is appropriate, unless the state has information contrary to the individual's attestation. We, therefore, are adding a new paragraph at § 435.956(a)(3) to require states to verify through the FDSH (or alternative mechanism authorized under § 435.945(k)) that an individual is an honorably discharged veteran or in active military duty status, or the spouse or unmarried dependent child of such person as described in 8 U.S.C. 1612(b)(2), if such verification is available through the FDSH. If verification through the FDSH or alternative authorized mechanism is not available, § 435.956(a)(3) provides that states may accept attestation that an applicant, or the spouse or parent of an unmarried dependent child applying for coverage, is in active duty or veteran status for purposes of the exemption from the 5-year waiting period. Consistent with current regulations at § 435.952(c), if electronic verification via the FDSH or otherwise is not available, states also retain the flexibility to require documentation of active duty or veteran status.

*Comment:* A commenter suggested that permitting coverage under Medicaid or CHIP for individuals without an SSN or a verified SSN creates fiscal and program integrity risks. Another commenter opposed the policy that a reasonable opportunity period for verification of citizenship be triggered when an individual is unable to provide a SSN because a state cannot conduct electronic verifications without a SSN. One commenter recommended amending § 435.956(g)(1) to require a 90-day reasonable opportunity period pending verification of an individual's SSN.

*Response:* We do not agree with the comments and are finalizing the rule as proposed at § 435.956(b)(1) with the exception of minor revisions for clarity. While electronic verification with SSA cannot be done without an SSN, citizenship can be verified using other documentation specified in § 435.407; income and other eligibility criteria also can be verified without an SSN, in accordance with the state's verification plan. Indeed, section 1902(ee)(2)(C) of the Act specifically requires states to provide a reasonable opportunity period pending verification of citizenship when an individual has not submitted an SSN. Further, the requirement to enroll otherwise eligible individuals in Medicaid or CHIP pending receipt and verification of an SSN reflects longstanding Medicaid policy, codified at § 435.910(f), which is also applied to CHIP per § 457.340. This policy applies both to individuals whose citizenship or immigration status has been verified as well as to individuals in a reasonable opportunity period. Individuals determined eligible for Medicaid who do not have an SSN, or whose SSN cannot be verified at the time of application, must cooperate with the agency in obtaining an SSN or resolving any inconsistencies with SSA records, with the limited exceptions of those individuals exempt from furnishing an SSN per § 435.910(h). The eligibility of individuals whose citizenship or immigration status is verified (electronically or otherwise), but who fail to cooperate in obtaining or verifying their SSN when required may be terminated, provided that advance notice and fair hearing rights are afforded in accordance with part 431 subpart E.

*Comment:* A commenter questioned whether state agencies that issue drivers' licenses are held to the same standards of verification of citizenship or SSNs that apply to the Medicaid agency, and if so, whether states are required to accept a state-issued driver's license as documentary evidence of citizenship. Further, the commenter questioned if our regulations refer only to the Enhanced Driver's License (EDL) under the Western Hemisphere Travel Initiative or also to ''REAL IDs'' established under the REAL ID Act of 2005, and whether there is a standard that all states must use in designating that a driver's license meets the EDL or REAL ID requirements.

*Response:* Section 1903(x)(3)(B)(iv) of the Act, implemented at current § 435.407(a)(4), requires states to accept a driver's license as proof of citizenship if the state issuing the license requires proof of U.S. citizenship, or obtains and verifies a social security number from the applicant who is a citizen before issuing such license. The state Medicaid agency is responsible for determining if the state agency issuing drivers' licenses meets the requirements of § 435.407(a)(4), and if so, such licenses must be accepted as proof of citizenship. The DHS has issued regulations governing EDLs and REAL IDs at 8 CFR 235.1 and 6 CFR part 37 respectively. An EDL issued in accordance with the DHS regulations would meet the requirements in § 435.407(a)(4). We understand that a REAL ID may be issued to non-citizens and therefore would not constitute evidence of citizenship under § 435.407(a)(4).

*Comment:* A commenter requested that states be allowed to maintain a 45-day timeframe to process applications prior to beginning a 90-day reasonable opportunity period, including the provision of benefits, to resolve inconsistencies and verify citizenship and immigration status. The commenter suggests that requiring states to begin benefits and provide notice to applicants sooner creates administrative burden and expense if the inconsistency is resolved within 45 days. The commenter believes that states should have flexibility to determine when the 90-day reasonable opportunity period should begin. Another commenter opposed the policy to require states to fund benefits for individuals during the reasonable opportunity period pending verification of citizenship and immigration status.

*Response:* As discussed in previous guidance (SHO #09–016, December 2009), the reasonable opportunity period pending verification of citizenship and immigration status is a statutory requirement that is distinct from the 45-day timeliness standard under § 435.912, which refers to the maximum period of time in which most applicants are entitled to an eligibility determination. Per sections 1137(d), 1902(ee) and 1903(x) of the Act, implemented at § 435.956(a)(5)(ii), for applicants declaring citizenship or satisfactory immigration status, whose status the state is unable to verify electronically in accordance with § 435.956(a)(1), benefits must be furnished as soon as the state determines that the applicant meets all other eligibility requirements; per conforming revisions at § 435.1008, which we finalize as proposed, FFP is available for benefits provided during a reasonable opportunity. The determination of such other eligibility requirements is subject to the same timeliness standards as apply to applicants generally under § 435.912. Once a state has completed its review of the application, and conducted other

relevant verifications—which often will be much sooner than 45 days—it must promptly enroll applicants who have made a declaration of citizenship or satisfactory immigration status, even if the verification of such status is still pending. Resolution of an inconsistency relating to verification of citizenship or immigration status which takes more than 45 days does not trigger a violation of the timeliness standards provided that benefits are not delayed or denied during the reasonable opportunity period because of such inconsistency. States have the option under current regulations at § 435.915(b) to begin furnishing benefits to applicants determined eligible for Medicaid effective the date of application or the first day of the month of application. Reflected at § 435.956(a)(5)(iii) of the final rule, the agency must apply the same election made under § 435.915(b) to applicants who have been provided a reasonable opportunity to provde citizenship or immigration status once they are determined otherwise-eligible for coverage—that is, the agency must provide benefits during a reasonable opportunity period to applicants determined otherwise eligible for coverage effective the date of application or the first day of the month of application, consistent with the agency's election under § 435.915(b). Retroactive eligibility during the 90 days preceding the month of application is not available to individuals during a reasonable opportunity period, but would be available once their status is successfully verified and the determination of eligibility is complete.

*Comment:* A commenter questioned whether the electronic data source or paper documentation provided by the applicant takes precedence if the two conflict. Further, the commenter questioned if the paper source can be used to initiate the 90-day reasonable opportunity with provision of benefits so the recipient can attempt to resolve the discrepancy with the federal agency providing the electronic data.

*Response:* If data obtained through an electronic data match is inconsistent with attested information provided by the individual, § 435.952(c)(2) requires that the agency obtain additional information from the individual, including paper documentation. The very purpose of such additional information is to substantiate the individual's claim despite the existence of electronic data to the contrary. In the case of income, for example, if quarterly wage data through an electronic match is not reasonably compatible with an individual's attested wages, pay stubs showing current wages would take precedence over the quarterly wage data (unless the agency had reason to question their authenticity). In the case of citizenship, SSA will never respond to an electronic query with a finding that an individual is not a citizen. Rather, SSA will respond to an electronic query with a response that the individual's citizenship status is verified or that SSA cannot verify citizenship status. Similarly, an electronic query at Step 1 or 2 to SAVE status will never return a finding that a non-citizen is not in a qualified or otherwise lawfully-present status; rather, SAVE will only return a positive verification, or indicate that it cannot verify the individual's status. The reasonable opportunity period is triggered under the statute and § 435.956(a)(5) of the final rule if the individual's status cannot be promptly verified through either the FDSH or alternative mechanism. Paper documentation typically serves to verify the status of an individual once a reasonable opportunity has been triggered, and states may not wait until receipt of paper documentation of citizenship or immigration status to initiate benefits during a reasonable opportunity period.

*Comment:* We solicited comments on when states should begin the reasonable opportunity period for citizenship and immigration status when inconsistencies arise from an electronic data source. One commenter suggested that states should be allowed to resolve data or process inconsistencies prior to triggering the reasonable opportunity period, including time to verify through SAVE. The commenter also supports an alternative to the proposed policy, in which the reasonable opportunity period would begin after electronic verifications have been exhausted. The commenter also disagreed that a reasonable opportunity should be triggered if the FDSH or SSA or DHS databases are unavailable because technological difficulties should not drive policy decisions, especially if the result may be inappropriate costs to the state. Another commenter stated that a reasonable opportunity period should be allowed when there is a discrepancy with a data source, as well as when electronic verifications are unavailable. Several commenters recommend not allowing states more than 1 or 2 business days to resolve inconsistencies before the reasonable opportunity period is triggered so benefits are not unnecessarily delayed.

*Response:* Both sections 1137(d) and 1902(ee) of the Act require states to provide a reasonable opportunity period with the provision of benefits to otherwise eligible individuals pending verification of immigration status or citizenship, respectively, if the state is unable to verify the individual's declaration with SSA or DHS. Section 1903(x)(4) of the Act provides that individuals who make a declaration of citizenship or national status be provided at least the reasonable opportunity to present documentation of citizenship status as is provided non-citizens under section 1137(d) of the Act. At § 435.956(g)(1) of the proposed rule, we proposed that notice of such reasonable opportunity period must be provided if the individual's status cannot be ''promptly verified'' with these data sources through the FDSH or alternative mechanism authorized in accordance with § 435.945(k). We explained that we believed this struck the right balance between applicants' interests in accessing coverage in a timely manner and states' interests in not being required to take steps to enroll someone in coverage immediately whenever electronic verification cannot be achieved in real time, if inconsistencies preventing successful verification with SSA or DHS can be quickly resolved.

We are not persuaded by the commenters to change the proposed policy, which is finalized at § 435.956(a)(5) of the final rule. We agree that states should be given time to resolve simple inconsistencies preventing successful verification of status with SSA or DHS prior to initiating the reasonable opportunity period, such as correcting inverted numbers in an individual's SSN or immigrant identification number or a misspelled name, and we have moved the text at proposed § 435.956(g)(1)(ii) to § 435.956(a)(1)(i)(B) and (a)(2)(ii) of the final rule, which makes clear that efforts to resolve inconsistencies through such measures must be done promptly, and that initiation of the reasonable opportunity period occurs after such attempts are made. However, if inconsistencies preventing a successful match cannot be promptly resolved, resolution could take days or even weeks. We do not believe that delaying start of a reasonable opportunity period, including the provision of benefits to otherwise-eligible individuals, while the state continues more time-consuming efforts to verify the individual's status with SSA or DHS is consistent with the intent of the statute, or that such a policy would strike the right balance between administrative efficiency and best interests of beneficiaries.

We also do not believe that it is in the interests of either states or applicants that states be limited to 2–3 days to

resolve inconsistencies preventing a successful match. Applicants whose status cannot be promptly verified with SSA or DHS are given 90 days to establish their status. During this time states are required under § 435.956(b)(1) to continue its efforts to complete verification of the individual's status, or request documentation if necessary. We agree with the commenter who stated that a reasonable opportunity period should be allowed when there is a discrepancy with a data source, as well as when electronic verifications are unavailable; a reasonable opportunity is provided under proposed § 435.956(g)(1), finalized at § 435.956(a)(5) of the final rule.

*Comment:* A commenter was concerned that the proposed rules could be interpreted to allow multiple (and unlimited) reasonable opportunity periods through subsequent applications despite failure by the individual to provide proof of citizenship or immigration status. Another commenter questioned if CMS considered limiting the number of reasonable opportunity periods that can be provided.

*Response:* The reasonable opportunity period may only be granted based on an attestation by the applicant that he or she is a citizen or in a satisfactory immigration status which cannot be promptly verified because (1) the individual does not have the necessary information to conduct an electronic data match; (2) electronic data is not available and the state must collect additional information from the individual; or (3) there is an inconsistency between the individual's attestation and information from an electronic data source. An attestation that the applicant knows to be untrue could result in criminal or other penalties for fraud. If fraud is suspected, states should rely on the program integrity measures they have in place to deal with such situations. In response to the comment, we are adding § 435.956(b)(4) to the final rule to allow states to request approval from CMS to place limitations on the number of reasonable opportunity periods to verify citizenship and immigration status that a given person may receive if the state can demonstrate a program integrity concern related to applicants receiving multiple reasonable opportunity periods.

*Comment:* A commenter recommended that CMS allow a reasonable opportunity period for other factors of eligibility beyond citizenship and immigration status to align with the policies of the Exchanges.

*Response:* We do not have the statutory authority to apply a reasonable opportunity for factors other than citizenship and immigration status.

*Comment:* A commenter suggested that CMS also allow for self-attestation of membership in a tribe to provide cost sharing and other protections during the 90-day reasonable opportunity period.

*Response:* The 90-day reasonable opportunity period only applies to verification of citizenship and immigration status and is not relevant to cost sharing protections for American Indians. Cost sharing exemptions are outside the scope of this regulation but are discussed in the July 15, 2013 Medicaid and CHIP final rule.

*Comment:* A commenter supported proposed § 435.956(g)(4), giving states the option whether or not to provide continuation of benefits if an appeal is filed following a termination of eligibility at the end of the reasonable opportunity period because citizenship or immigration status had not been verified. One commenter suggested adding ''during any appeal process'' to the list of triggers for a reasonable opportunity period.

*Response:* We are maintaining in the final rule the option, redesignated at § 435.956(b)(3), for states to continue to furnish benefits during the appeals process if an individual is terminated due to citizenship or immigration status not being verified before the reasonable opportunity period ends. We do not agree with the commenter that ''during any appeal process'' should be added to the list of what triggers a reasonable opportunity period. Generally an appeals process would come after the reasonable opportunity period has been exhausted and a final eligibility determination has been made, so it is not a relevant ''trigger'' of a reasonable opportunity period.

*Comment:* We solicited comments on how long states should be expected to retain records indicating that citizenship and immigration status of a given applicant has been previously verified. Several commenters recommended that the records should be kept indefinitely. Several commenters recommended that states be required to retain documentation of citizenship for a period of no less than 10 years. One commenter stated states should not be required to retain records of citizenship indefinitely, but rather for a more limited time period, such as 5 years.

*Response:* We appreciate the suggestions that verification records for citizenship and immigration status be retained by states for specific periods of time. The suggested comments provided a range of options from 5 years to indefinitely. In light of the diverse opinions concerning the optimal time period, we are finalizing proposed § 435.956(a)(3), redesignated at § 435.956(a)(4), without revision and are not prescribing a specific length of time for which states must maintain such records. We note that, while a hardcopy of a document verifying citizenship or immigration status need not be retained, states should maintain a notation in their electronic case records of responses received from the FDSH or other electronic sources, or that paper documentation was furnished, verifying citizenship or immigration status, so that the individual's status will not need to be re-verified following a break in coverage, unless the individual's particular status is subject to change. States must maintain an electronic record of successful citizenship or immigration status verification in accordance with the record retention policies generally applied by the state in accordance with § 431.17.

*Comment:* Several commenters recommended prohibiting states from re-verifying immigration status at renewal because the status for most lawfully present immigrants does not change from year to year, and existing change reporting requirements already obligate individuals to report any change in immigration status.

*Response:* We did not propose and are not finalizing a prohibition on states re-verifying immigration status at renewal for those statuses that are subject to change, such as non-citizens with Temporary Protected Status. States are not required to verify immigration status at renewal if an individual has a permanent status, unless a change is reported.

*Comment:* Several commenters stated that the additional requirement at proposed §§ 435.406(a)(3) and 457.320(d) that the application filer attest that he or she has a reasonable basis for making the declaration of citizenship or immigration status on behalf of another applicant is an unnecessary burden. The commenters stated that if someone is ''acting responsibly'' for the applicant, then by definition he or she would have a reasonable basis for declaring an applicant's immigration status.

*Response:* We disagree than someone acting responsibly for a minor or incapacitated individual necessarily is competent to make a sworn declaration of citizenship or immigration status on their behalf. In order to make such declaration on behalf of another person, someone must actually know the person's status. We therefore are

finalizing the provision proposed at 435.406(a)(3). However, we are revising the language in the final rule to be clear that to make a declaration on another person's behalf, someone must attest to having knowledge of the other person's status, not merely to having a ''reasonable basis'' for their status, as proposed. We also are removing the word ''family'' from §§ 435.406(a)(3) and 457.320(d), as proposed because it is redundant and are making minor revisions to § 457.320(d) to clarify that an individual applying for CHIP must make a declaration of citizenship or immigration status. Examples of individuals who might have knowledge of another person's citizenship or immigration status on behalf, and could make the declaration permitted under §§ 435.406(a)(3) and 457.320(d) of the final rule, include a parent, spouse or other family member, friend or acquaintance who can attest to knowing the individual's status. We would not generally expect application assistors, who are not personally acquainted with the applicant, to have the requisite knowledge to make such a declaration.

*Comment:* A commenter questioned whether the FDSH will provide verification of domestic violence for applicants who attest to being a qualified alien.

*Response:* The FDSH will provide responses indicating whether SAVE has verified that the individual has a satisfactory immigration status for purposes of full Medicaid and/or CHIP benefits, whether the individual is subject to the 5-year bar, and whether the 5-year bar has been met. While domestic violence *per se* is not verified, SAVE does verify if the individual meets the criteria as a qualified non-citizen under 8 U.S.C. 1641(c) (relating to treatment of certain ''battered aliens'' as a qualified non-citizen), or is the spouse or child of such an individual.

*Comment:* A commenter questioned what type(s) of assistance states are expected to provide under proposed § 435.407(e) and how community-based organizations assisting these clients can maximize such assistance. The commenter suggested that states be required to pay for or waive the cost of obtaining documents from federal government agencies or other states needed to verify citizenship. Several commenters suggested the assistance required be limited to persons who are limited English proficient and individuals with disabilities.

*Response:* We believe it is appropriate to provide states with flexibility to determine when applicants need assistance with securing documentation, as well as the best means for providing that assistance, and we are finalizing § 435.407(e) as proposed. Examples of individuals who may need such assistance are discussed in section I.B.7 of the January 22, 2013 proposed rule, which may include, but is not limited to, individuals with limited English proficiency and individuals with disabilities. We also encourage states to work with community-based organizations to assist individuals in obtaining needed documentation.

*Comment:* One commenter recommended CMS offer federal assistance to states to ensure that their electronic verification systems are in good working order and able to access the FDSH in a timely manner.

*Response:* Subject to limitations, enhanced federal funding is available to assist states with the modernizing or building new eligibility systems in accordance with § 433.112.

*Comment:* Several commenters also recommended adding a paragraph at § 435.956 to prescribe specific parameters states must follow when providing a notice of reasonable opportunity period to individuals who are limited English proficient and individuals with disabilities.

*Response:* Proposed § 435.956(g)(1) requires that the notice of the reasonable opportunity period be accessible to persons who are limited English proficient and individuals with disabilities consistent with § 435.905(b), and we are finalizing that provision at § 435.956(b)(1), with minor editorial revision. Accessibility standards under § 435.905(b) are discussed in section II.D of this final rule.

*Comment:* Several commenters recommended requiring states to have Memorandums of Understanding (MOU) with DHS that protect applicants' due process and privacy rights under section 1137(d) of the Act before directly verifying information with DHS in the event verification is not done through the FDSH.

*Response:* Current statute and regulations already provide safeguards which protect applicants' privacy. Section 1137(d) of the Act requires states to protect an individual's privacy when conducting a match with SAVE. Section 435.945(i) requires Medicaid agencies to execute written agreements with other agencies before releasing data to, or requesting data from, those agencies. In addition, § 431.300 requires safeguards to be in place when agencies exchange information to verify eligibility.

*Comment:* Several commenters suggested that Medicaid and CHIP agencies and the Exchange be required to establish agreements for sharing information about verified citizenship or immigration status to minimize duplicative verification requirements.

*Response:* Current § 435.1200 requires all insurance affordability programs to transfer all information obtained by the program that is relevant to eligibility for other programs, which would include an individual's verified citizenship or immigration status. Under §§ 435.1200(d)(4), 457.348, 600.330 and 155.345, findings related to a criterion of eligibility made by one program must be accepted without further verification.

*Comment:* A commenter recommended that § 435.406 be revised to indicate that beneficiaries who are no longer exempt from citizenship verification requirements must make a declaration of citizenship and have it verified, such as former foster care children.

*Response:* We do not completely agree with the commenter. While we recognize that applicants will need to make a declaration of citizenship, section 1903(x)(2)(C) of the Act exempts individuals from the requirement to present satisfactory documentation of citizenship for whom child welfare services are made available under part B of Title IV, or adoption or foster care assistance is made available under part E of title IV of the Act. We interpret this to mean that such services or assistance was made available at some time, not that the individual must currently be receiving them to qualify for the exemption. However, if the state received information that Title IV–B or E services or assistance was terminated due to citizenship, the exemption would no longer apply and the state wound need to verify the individual's status. In contrast, sections 1903(x)(2)(A) and (B) of the Act explicitly require that individuals must be currently entitled to or enrolled in Medicare, or receiving SSI or Title II disability benefits. Therefore, we believe it would be appropriate for states to verify the citizenship of individuals no longer entitled to or enrolled in Medicare or receiving SSI or Title II disability benefits. We note that per § 435.407(d) of the final rule, states may rely on verification of citizenship by a federal agency or another state agency, if such verification was done on or after July 1, 2006.

*Comment:* Several commenters stated that § 435.910 was not clear in describing how states should verify SSNs, or what procedures states must follow in the event that a different SSN is found to have been issued to the individual. The commenters also suggested that the regulations should, but currently do not, require that the agency must provide clear notice to

applicants and beneficiaries if there is a problem in verifying their SSN, and that individuals be given a reasonable opportunity period to verify his or her SSN. Finally, the commenters stated the regulations should be revised to require the state to provide clear instructions or assistance to the applicant or beneficiary to correct his or her SSA records in the event of an inconsistency with the attested to SSN.

*Response:* We did not propose revisions to § 435.910, except to remedy the inadvertent deletion in prior rulemaking of the identification of the statute as the source for states to verify SSNs, which identification is restored at § 435.910(g) in the final rule. Therefore, the comment is beyond the scope of this rulemaking.

*Comment:* Several commenters recommended deleting § 435.910(g) and conducting future rulemaking that fully addresses the requirements for verification of SSN, in particular what protections and procedures the state is required to provide an applicant or beneficiary in the event of a problem with his or her SSN verification.

*Response:* We did not propose to remove § 435.910(g) and do not agree that any further rulemaking is necessary. Section 435.910, in conjunction with the verification regulations at §§ 435.940 through 435.956 provides comprehensive guidance on who must present an SSN, the procedures for verification of an SSN, and the obligations of states to assist individuals who do not have or cannot remember their SSN or to resolve inconsistencies between their attested SSN and information received from SSA.

*H. Elimination or Changes to Unnecessary and Obsolete Regulations (§§ 407.42, 435.113, 435.114, 435.201, 435.210, 435.211, 435.220, 435.223, 435.310, 435.401, § 435.510, 435.522, 435.909, and 435.1004)*

We proposed to revise or eliminate various regulations, in whole or in part, as obsolete or no longer applicable due to the expansion of Medicaid coverage under the Affordable Care Act to most individuals with income at or below 133 percent FPL, the previous de-linkage of Medicaid eligibility from receipt of AFDC cash assistance, the replacement of AFDC-based with MAGI-based financial eligibility methodologies effective January 1, 2014, the simplification of multiple eligibility groups, and the streamlining of eligibility determinations. We received no public comments on these proposed revisions. We are finalizing these revisions without modification with one exception. We are not finalizing proposed changes to introductory language in *§ 435.201(a) because, in removing the obsolete reference to AFDC cash assistance, we proposed alternative regulation language that is not consistent with the statute. Specifically, we proposed that* the agency may choose to cover under an optional eligibility group individuals who are ''not eligible and enrolled for mandatory coverage'' under state plan. Section 1902(a)(10)(A)(ii) of the Act, however, precludes coverage under an optional group as long as an individual is be eligible for coverage under a mandatory group, whether or not the individual has actually enrolled under the mandatory group. We will address revisions to the introductory language in *§ 435.201(a) in future guidance. We are finalizing revisions to § 435.201(a)(4), (5) and (6) as proposed.*

*J. Electronic Submission of the Medicaid and CHIP State Plan (§§ 430.12, 457.50 and 457.60)*

We proposed to revise §§ 430.12, 457.50, and 457.60 to reflect our implementation of an automated transmission process for the Medicaid and CHIP state plan amendment (SPA) business process. Historically, we have accepted state plan amendments on paper, using a pre-printed template supplemented by additional state-specific paper submissions. This process was not transparent to states or other stakeholders because it was not easily shared in an increasingly electronic environment. To move to a more modern, efficient and transparent business process, in consultation with states, we are developing the MACPro (Medicaid and CHIP Program) system to electronically receive and manage state plan amendments, as well as other Medicaid and CHIP business documents. The proposed revisions direct states to use the automated format for submission of SPAs, replacing previous paper based state plan pages and documents, and give states a period of time to make the transition to the new system with technical support from CMS. We received the following comments concerning the proposed automated transmission process for the Medicaid and CHIP business process provisions, which are revised in the final rule as indicated:

*Comment:* Several commenters supported the requirement for the electronic submission of SPAs, as a step toward increased transparency. Commenters encouraged CMS to add a provision to the final rule specifying that Medicaid and CHIP state plans, including amendments, be made available to the public at the time that they are submitted, providing consumers and advocates acting on their behalf, as well as researchers and policy analysts, with access to the basic, descriptive information contained in state plans and amendments as soon as they become available. Commenters further recommended that there be a 30-day public notice and comment period followed by a 15-day period of state review of the comments received.

*Response:* We appreciate the comment and share the commenters' interest in increased transparency. CHIP State Plans and Medicaid SPAs are currently posted on the *Medicaid.gov* Web site and are available for consumers, advocates, researchers, and others once approved, and we are exploring whether, under the new automated system, the entire approved Medicaid state plan can be made publicly available. Providing public access and an opportunity to comment on SPA submissions prior to approval is outside the scope of this final rule, which narrowly addresses the modality through which SPAs are submitted to CMS.

*Comment:* Several commenters expressed concern that the requirement for states to convert from approved paper state plans to the automated format in one year would cause undue hardship on the states. The commenters believe that it will take individuals knowledgeable about the program areas to input the state plan, necessarily diverting limited state resources from the many tasks associated with implementing provisions of the Affordable Care Act. While some were not opposed to the conversion of state plans to MACPro, they noted that completion of this target would depend on the availability of timely technical assistance from CMS.

*Response:* We understand states' concerns about use of limited resources and have removed the specific timelines for implementation of the automated templates described in proposed §§ 430.12(a)(1) and (2) and 457.50 and 457.60 from the final rule, under which the Secretary will provide further guidance when the MACPro templates are issued. We also have delayed full implementation of the MACPro system as states and we have focused on other priorities related to implementation of the Affordable Care Act, instead employing an interim solution that collects the data for the MAGI-related SPAs in a structured format so that the information can be converted later to MACPro. We also intend to release templates incrementally, to give states time to adapt to the new format. As the

system and templates become available, we will provide technical assistance to help states meet applicable deadlines.

*Comment:* Several commenters recommended that paper state plan formats be allowed until such time that states are required to submit a state plan amendment electronically through MACPro.

*Response:* As noted above, we have revised the expectations under the final rule for states' transition to use of standardized state plan templates and a fully automated SPA submission process. As the new electronic templates are released, states will be expected to transition from the current to the new formats, consistent with future guidance to be provided by the Secretary. We will provide states with technical support needed to ensure a successful transition.

*K. Changes to MAGI (§ 435.603)*

We proposed several revisions to § 435.603 in the January 22, 2013, proposed rule. First, we proposed to add definitions of ''child,'' ''parent'' and ''sibling'' in paragraph (b) to include natural, adopted, step and half relationships, and to streamline regulation text throughout § 435.603 to use these terms. We finalized inclusion of the definitions of ''parent'' and ''sibling'' in § 435.603(b) of the July 15, 2013, Eligibility final rule (78 FR 42160), but did not respond to comments on the definitions, nor did we finalize use of the newly-defined terms elsewhere in § 435.603. We will do so in this final rule. Second, we proposed to clarify the exception from application of MAGI-based financial methodologies provided in section 1902(e)(14)(D)(iv) of the Act and implemented at paragraph (j)(4) of § 435.603 for individuals needing long-term care services. Specifically, we proposed to clarify that the exception from application of MAGI-based methods at § 435.603(j)(4) applies only in the case of individuals who request coverage for long-term care services and supports (LTSS) for the purpose of being evaluated for an eligibility group for which meeting a level-of-care need is a condition of eligibility or under which long-term care services not covered for individuals determined eligible using MAGI-based financial methods are covered. The proposed clarification was to make clear that the exception does not apply to someone who could be determined eligible using MAGI-based methodologies under a MAGI-based eligibility group which covers the needed long-term care services, simply because the individual requests such services.

Although we did not propose specific changes to the regulation text, we also requested comments on whether we should make other revisions to the household composition provisions of the March 23, 2012, Eligibility final rule at § 435.603(f) to address potential inequities in situations in which an individual is included as a member of two households for purposes of determining each household's Medicaid eligibility, such that the individual's income is ''double counted'' as being wholly available to the members in each household, when, in reality, only a portion of the individual's income may actually be available to each household.

Finally, we also had proposed revisions to the application of the 5 percent disregard under section 1902(e)(14)(I) of the Act. Those proposed revisions were finalized in the July 15, 2013, Medicaid and CHIP final rule (78 FR 42160).

*Comment:* Commenters supported the technical corrections to how parents and siblings are defined in determining households for Medicaid eligibility, noting that the proposed definitions were consistent with the treatment of families under the IRC for purposes of eligibility for the premium tax credits and cost-sharing reductions and that such consistency was important for achieving coordination between all insurance affordability programs. Another commenter stated that changing the definition of parent will impact the assistance unit determinations and budgeting methodologies, requiring changes to systems already in design.

*Response:* We appreciate the commenters' support and, as noted above, we finalized the definitions of ''child,'' ''parent,'' and ''sibling'' in the July 15, 2013 Medicaid and CHIP final rule. We are finalizing in this regulation use of these terms in § 435.603(f)(2)(i), (f)(3)(ii) and (f)(3)(iii), as proposed. We neglected to propose a similar use of the word parent in place of reference to the term ''natural, adopted or step parent'' in § 435.603(d)(2)(i) of the March 23, 2012, Medicaid eligibility final rule, but also are making this technical streamlining revision to the regulation text in this final rule.

*Comment:* Several commenters responded to our request for comment on the situation involving individuals who are included in more than one household.

*Response:* We have decided not to revise the regulations to address this issue at this time, but will consider this issue again, and the comments received, in subsequent rulemaking.

*Comment:* We received a few comments on the proposed revisions to the exception from application of MAGI-based methods at proposed § 435.603(j)(4). One commenter supported the proposed clarification that an individual who is otherwise eligible under a MAGI-based category is not exempted from MAGI-based methodologies simply because he or she requests certain long-term care services. Another commenter appreciated the clarification, but expressed continued concerns about the clarity of the proposed revision. The commenter requested clarification on: (1) Whether and how the exception at proposed § 435.603(j)(4) relates to eligibility under sections 1915(i) and 1915(k) of the Act; and (2) the interaction of this exception from application of MAGI-based methods with the spousal anti-impoverishment requirements in section 2404 of the Affordable Care Act.

*Response:* The revisions to § 435.603(j)(4) clarify when MAGI-based financial methodologies may be applied to individuals who will receive certain LTSS. We interpret section 1902(e)(14)(D)(iv) of the Act as providing that seeking coverage for LTSS or meeting a level-of-care need for such services does not necessarily result in the exception of an individual from application of MAGI-based financial methodologies. An exception to MAGI-based methods applies under the statute based on our analysis only to the extent that an eligibility determination requires that the individual be institutionalized or is made for purposes of receiving LTSS.

Under proposed paragraph § 435.603(j)(4), individuals who are eligible under a MAGI-based eligibility group (that is, an eligibility group to which MAGI-based methodologies generally apply, for example, the eligibility groups for parents and other caretaker relatives, pregnant women, children and adults under age 65 at §§ 435.110, 435.116, 435.118 and 435.119) are not excepted from application of MAGI-based methodologies simply because they require LTSS covered for the MAGI-based group in which they are enrolled. Individuals are excepted from MAGI-based methodologies only if the need for LTSS or institutional status results in application for coverage under a different eligibility group related to that need or status. For example, an individual who meets the requirements for eligibility under the adult group at § 435.119 is not excepted from application of MAGI-based methods simply because of a need for LTSS. If the LTSS needed are covered under the

ABP adopted by the state for the adult group, and the individual does not have to establish financial eligibility for such services (as would be the case if the state has elected to cover home and community-based services similar to those described in section 1915(i)(1) of the Act under an ABP for individuals enrolled in the adult group), the individual's need for LTSS provided under the ABP does not result in an exception from MAGI for purposes of determining eligibility for coverage generally under the adult group. (Discussed below, determinations of financial eligibility for services described in section 1915(i)(1) of the Act are excepted from mandatory application of MAGI-based methods under § 435.603(j)(4)). Similarly, if an individual enrolled in the adult group becomes institutionalized and is eligible for coverage of the institutional services needed through the adult group, she does not become exempt from MAGI-based methods due to her institutionalization. Conversely, if the individual is unable to access needed institutional care or other LTSS through enrollment in the adult group or could obtain services more appropriate to his needs through enrollment in another eligibility group for which being in an institution or meeting a level-of-care need for LTSS is required, MAGI-based methodologies would not apply for purposes of determining eligibility for such other eligibility group.

We realize that the text of proposed § 435.603(j)(4) could be read in a way that would result in application of MAGI-based methodologies to individuals being determined for eligibility under the ''Special Income Level'' group described in section 1902(a)(10)(A)(ii)(V) of the Act and § 435.236 because meeting a level-of-care need is not *per se* a condition of eligibility for this group (rather, being institutionalized is). Similarly, proposed § 435.603(j)(4) could be read to require that eligibility under section 1915(i), implemented at § 435.219 of the regulations (relating to optional coverage for individuals meeting an institutional level of care or satisfying defined needs-based criteria for home and community based services) must be determined using MAGI-based methodologies. Such result clearly would be contrary to the exception for LTSS individuals from application of MAGI-based methods provided in section 1902(e)(14)(D)(iv) of the Act as well as the flexibility afforded to states to adopt SSI-related or other financial methodologies, if approved by the Secretary, for coverage under section § 435.219(c). Therefore, we are making a technical revision for increased clarity and consistency with the statute in § 435.603(j)(4) to include within the scope of the exception from MAGI described therein individuals being evaluated for an eligibility group for which being institutionalized, meeting an institutional level of care, or satisfying needs-based criteria for home and community based services is a condition of eligibility. We note that states typically require that an individual be in a medical institution or nursing facility for at least 30 days to be considered ''institutionalized,'' which we note is consistent with the standard for institutionalized status under the Supplemental Security Income (SSI) program (see 20 CFR 416.414(a)(1)), as well as the definition of ''institutionalized spouse'' in section 1924(h) of the Act (relating to eligibility and post-eligibility treatment of income for certain married individuals who need long-term services and supports).

Section 1915(i) of the Act, implemented in the Home and Community-Based Services final rule (79 FR 2947) published in the January 16, 2014, **Federal Register** (''January 16, 2014 HCBS final rule''), enables states to cover home and community-based services under the state plan instead of through a waiver. First, implemented at § 440.182 of the regulations, section 1915(i) of the Act, authorizes states to cover home and community-based services described in section 1915(i)(1) of the Act (''1915(i) services'') to individuals who meet needs-based criteria, are eligible under the Medicaid state plan and have income at or below 150 percent FPL. Notwithstanding the general requirement in section 1902(a)(10)(B) of the Act and § 440.240 (relating to comparability of services), states are permitted to cover section 1915(i) services for individuals eligible under one or more categorically needy eligibility groups described in section 1902(a)(10)(A) of the Act and 42 CFR part 435 subparts B and C, without covering the services for individuals eligible under all other categorically needy eligibility groups. (If a state covers section 1915(i) services for medically needy individuals, it must cover such services for all individuals eligible under the state plan, with the exception of individuals eligible for the adult group described in § 435.119 who are enrolled in an ABP which does not cover the services in question.) States also can opt to cover section 1915(i) services for a defined subset of individuals eligible under a given eligibility group. In addition, states that elect to cover section 1915(i) services in accordance with § 440.182 may also elect to cover individuals in one or both categories described in § 435.219. Meeting needs-based criteria is a requirement for coverage under the category described in § 435.219(a); meeting a level-of care need is a requirement for coverage under the category described in § 435.219(b).

Section 1915(k) of the Act, implemented at § 441.500 *et seq.,* authorizes states to cover certain home and community-based services (''section 1915(k) services'') for individuals eligible under the state plan. States exercising the option provided at section 1915(k) of the Act must comply with the comparability of services requirements in section 1902(a)(10)(B) of the Act and § 440.240 such that, if section 1915(k) services are covered for individuals eligible under any categorically needy eligibility group, the services must be covered for individuals eligible under all categorically needy eligibility groups which are covered under the state plan. However, under § 441.510(b)(2), if an individual is enrolled in an eligibility group for which nursing facility services are not covered, an additional income test is applied, and the individual's income must be at or below 150 percent FPL to receive coverage of the section 1915(k) services.

If a state has opted to cover section 1915(i) services for a MAGI-based eligibility group that is not restricted to benchmark benefits, or to cover section 1915(i)-like benefits in an ABP provided to an individual in the new adult group, the state would apply MAGI to determine financial eligibility. Similarly, in a state that has opted to cover section 1915(k) services for a MAGI-based eligibility group not restricted to benchmark benefits or to cover section 1915(k)-like services through an ABP for medically frail individuals in a group that is restricted to benchmark benefits, MAGI would apply. Other than eligibility groups which confer only a limited set of benefits (for example, coverage of family planning services under section 1902(a)(10)(A)(ii)(XXI) of the Act and § 435.214 of this rulemaking), coverage of nursing facility services is mandatory for all MAGI-based eligibility groups. Therefore, as a practical matter, the 150 percent FPL income test for section 1915(k) services provided to individuals eligible for coverage under a group that does not cover nursing facility services (for example, under a group for medically needy individuals) will never be applicable.

We interpret the needs-based criteria which must be met as a condition of eligibility for receipt of section 1915(i) services under § 435.219(a) of the January 16, 2014, HCBS final rule to be a level-of-care requirement for purposes of the exception from mandatory application of MAGI-based methodologies in § 435.603(j)(4). Accordingly, states are not required to apply MAGI in determining eligibility under either option described in § 435.219. We note that under §§ 435.219(c) and 441.715(d)(2) of the January 16, 2014, HCBS final rule, states have flexibility to apply reasonable income methodologies in determining eligibility under § 435.219(a), which could include MAGI-like methodologies, subject to the limitations on deeming income described in section 1902(a)(17)(D) of the Act and Secretarial approval in an approved state plan amendment.

We intend to address in future guidance the interaction of MAGI-based methods, including the exception from application of such methods at § 435.603(j)(4), with the spousal impoverishment rules of section 1924 of the Act.

*Comment:* A commenter believed that the definition of ''long-term care services'' contained in § 435.603(j)(4) is confusing. The commenter noted that section 1902(e)(14)(D)(iv) of the Act, upon which proposed § 435.603(j)(4) is based, incorporates, by reference, the services described in section 1917(c)(1)(C)(ii) of the Act, but that the proposed § 435.603(j)(4) does not do so. The commenter believes that our proposed definition omits 2 services which should be reflected in the regulation by virtue of the cross-reference to section 1917(c)(1)(C)(ii) of the Act. The commenter suggests that we revise proposed § 435.603(j)(4) to explicitly cross-reference section 1917(c)(1)(C)(ii) of the Act, or explain the rationale for excluding some of the services identified therein.

*Response:* We did not propose revisions to the definition of ''long-term care services and supports'' contained in § 435.603(j)(4), which generally tracks the definition of services provided in section 1902(e)(14)(D)(iv) of the Act, except that section 1902(e)(14)(D)(iv) of the Act cross-references services described in section 1917(c)(1)(C)(ii) of the Act, whereas the regulatory definition at § 435.603(j)(3) refers instead to home health services as described in sections 1905(a)(7) of the Act and personal care services described in sections 1905(a)(24) of the Act. We replaced the statutory reference to section 1917(c)(1)(C)(ii)of the Act for clarity; we did not eliminate any LTSS from inclusion in the definition used for purposes of § 435.603(j)(4) in so doing.

The commenter's concern may relate to the omission, from the definition of LTSS in the regulation, of the services described in section 1905(a)(22) of the Act. Section 1905(a)(22) of the Act permits states to include in their definition of ''medical assistance'' home and community care for ''functionally disabled elderly individuals,'' to the extent described and allowed under section 1929 of the Act. However, inasmuch as FFP for these services under section 1929 of the Act expired at the end of federal fiscal year 1995 per section 1929(m) of the Act, home and community care services are no longer authorized for coverage under section 1905(a)(22) of the Act.

Other optional long-term care services are those that can be covered under section 1915 of the Act and are reflected in the definition contained in § 435.603(j)(4). Therefore, we are not accepting the comment. We note, however, that proposed § 435.603(j)(4) inadvertently replaced the phrase ''Long-term services and supports'' at the beginning of the second sentence in § 435.603(j)(4) with the phrase ''Long-term care services.'' The first sentence in § 435.603(j)(4) uses the phrase ''long-term care services and supports.'' No substantive difference was intended in these different variations and we are making a technical change in this final rule for consistency to use the language contained in the first sentence of § 435.603(j)(4) in the second sentence as well.

*L. Medical Support and Payments (§§ 433.138, 433.145, 433.147, 433.148, 433.152 and 435.610)*

We proposed to amend § 433.148(a)(2) to provide that, consistent with the practice in many states today, individuals (unless exempt per existing regulations) must agree to cooperate in establishing paternity and obtaining medical support at application, but that further action to pursue support, as appropriate, will occur after enrollment in coverage.

We proposed to make technical corrections to §§ 433.138, 433.145, 433.147, and 435.610 to update references to eligibility of pregnant women under section 1902(a)(10)(A)(i) of the Act with a reference to § 435.116 and to update or eliminate references to verification regulations in subpart J of part 435 which were eliminated or revised in the March 23, 2012, Medicaid eligibility final rule.

We proposed to remove § 433.152(b)(1) because 45 CFR part 306 no longer exists. We also proposed to revise § 433.147(c)(1) and remove § 433.147(d) to eliminate references to factors applicable to waiving the cooperation requirement contained in 45 CFR part 232 because 45 CFR part 232 was removed from the regulations following with the passage of the PRWORA. Finally, we proposed to remove § 435.610(c) as no longer necessary.

We received a number of comments concerning the proposed changes to the medical support and payments provisions, which are finalized as proposed except as indicated below.

*Comment:* Many commenters recommended that the requirement to cooperate with establishing paternity not apply in situations where the child was conceived through assisted reproduction by a donor or that a good cause exception be provided. Further, the commenters recommended leaving ''assisted reproduction'' undefined, and that the language of these provisions be made gender neutral by referring to the child's other ''parent'' rather than the ''father'' because they believe this language creates confusion about whether this requirement is met by establishing the maternity of another mother rather than the child's father when the child has same-sex female parents.

*Response:* We agree with the recommendation that gender-neutral language should be used and are revising §§ 433.145(a)(2), 433.147 and 433.148 in the final rule, accordingly. In addition, we note that state law applies in determining who meets the definition of parent under federal Medicaid regulations, including in instances of assisted reproduction.

*Comment:* One commenter was concerned with the requirement that states must determine whether a parent is cooperating with child support enforcement only after determining eligibility. The commenter believed this post-eligibility requirement could create a churning effect whereby a parent who is enrolled and then subsequently terminated from Medicaid for failing to cooperate with the state child support enforcement agency, subsequently reapplies for Medicaid, requiring that the state must enroll the parent again, creating a repeating cycle. The commenter recommended that when there is a previous finding of non-cooperation, the applicant be determined ineligible for Medicaid if they reapply.

*Response:* We appreciate the concern raised by the commenter, but are finalizing the rule as proposed. As discussed in the January 22, 2013

proposed rule, states must align the eligibility rules for all insurance affordability programs to the maximum extent possible, to achieve a highly coordinated and streamlined eligibility and enrollment system. Because all insurance affordability programs will use the same streamlined application and eligibility determinations and enrollment will be coordinated, an eligibility determination for Medicaid should not be delayed by the cooperation requirements. Parents must only be required to agree to cooperate with medical support enforcement during the application process. States may pursue administrative and operational solutions to expedite the determination of noncooperation with child support enforcement or to suspend, rather than terminate, eligibility of an individual who refuses to cooperate without cause, until the required cooperation is offered.

*Comment:* One commenter questioned what is considered a concerted effort by the state to establish paternity, and whether states must document written and verbal attempts to communicate with the parent in attempting to establish paternity. The commenter also requested clarification on how often the state must attempt to contact the absent parent. The commenter suggested that states should be able to define what constitutes a concerted effort to establish paternity.

*Response:* Rules governing establishment of paternity are outside the scope of the proposed regulations. We note, however, that states have been required to implement laws regarding paternity establishment beginning with the Family Support Act of 1988. HHS' Administration for Children and Families (ACF) regulations address state programs for establishment of paternity. Under § 433.152, as revised in this final rule, agreements between the state Medicaid agency and the child support enforcement agency in the state must provide for the Medicaid agency to reimburse the state CSEA for those child support services that are not reimbursable by the federal Office of Child Support Enforcement and which are necessary for the collection of medical support for the state Medicaid program.

*Comment:* One commenter was concerned that any change in policy to deny or terminate Medicaid coverage of a child for parental non-cooperation without good cause would violate MOE requirements for children.

*Response:* Children cannot be denied or terminated from coverage under the statute due to lack of parental cooperation in obtaining medical child support. This prohibition is reflected at § 433.148(b)(1) and (b)(2), under which the agency must provide Medicaid to any individual who cannot legally assign his or her own rights to medical support payments and who would otherwise be eligible for Medicaid but for the refusal of another person to assign the individual's rights or to cooperate in obtaining medical support.

**III. Provisions of the Final Regulations**

We are finalizing the provisions of the January 22, 2013 proposed rule as proposed with the following exceptions:

Change to § 407.42

- Remove the reference to § 435.114, which is an obsolete regulation.

Changes to § 430.12

- Revised to reflect changes to the Medicaid state plan template.

Changes to § 431.201

- Provided definition of a ''joint fair hearing request.''
- Revised for clarity the definition of ''action.''

Change to § 431.205

- Added a new paragraph (f), clarifying that the hearing system established under section 1902(a)(3) of the Act and part 431 subpart E, must be conducted in a manner that complies with applicable federal statutes and implementing regulations.

Changes to § 431.206

- Revised paragraph (b)(1) and added paragraph (b)(4) to provide that individuals must be informed of the opportunity to request an expedited review of their fair hearing request, and informed of the timeframes upon which the state will take final administrative action.
- Made non-substantive revisions for clarity in paragraph (c)(2).

Changes to § 431.220

- Revised paragraph (a)(1) to allow an individual to request a fair hearing if an agency takes an action erroneously.
- Added a cross-reference to the definitions of ''premiums'' and ''cost sharing'' in § 447.51.
- Added paragraph (a)(1)(v) to clarify that a hearing is required when an individual's request for exemption from mandatory enrollment in an Alternative Benefit Plan is denied or not acted upon with reasonable promptness.
- Added paragraph (a)(1)(iv) to clarify that a change in the amount or type of benefits or services is another basis on which the agency must grant a hearing.
- Made other non-substantive revisions for clarity in paragraph (a)(1).

Changes to § 431.221

- Redesignated and combined proposed paragraphs (a)(1) through (5) at paragraph (a)(1)(i).
- Revised paragraph (a)(1)(ii) to provide that a fair hearing request made in any modality under § 431.221(a)(1) must include an opportunity to request an expedited review of such a request.
- Paragraph (e) is not included in the final rule.

Change to § 431.223

- Revised this section to reflect that states must offer a withdrawal of a fair hearing in all modalities that it offers a request for a fair hearing in accordance with § 431.221(a). When a state offers a telephonic hearing withdrawal, it must record appellant's statement and telephonic signature. For telephonic, online and other electronic withdrawals, the agency must send the individual written confirmation, via regular mail or electronic notification in accordance with the individual's election.

Changes to § 431.224

- Revised paragraph (a) with minor revisions for clarity on the expedited appeals standard.
- Revised paragraph (b) to provide clarity that the state must inform an individual whether an expedited review will be granted as expeditiously as possible and shall do so orally or through electronic means in accordance with § 435.918.

Change to § 431.232

- Made minor revisions for clarity in paragraph (b).

Changes to § 431.241

- Made revisions to cross-reference § 431.220(a)(1) for clarity in paragraph (a).
- Removed changes to paragraph (b) and placed content regarding changes in the amount or type of benefits or services in § 431.220(a)(1)(iv).

Change to § 431.244

- Made revisions to paragraph (f)(1) to incorporate changes to this paragraph finalized in the May 6, 2016 managed care final rule.
- Added paragraph (f)(3) to provide that —

++ For individuals whose request for expedited appeal is based on an eligibility issue, the state must take final administrative action as expeditiously as possible, but no later than 7 working days from the date the agency receives the expedited fair hearing request;

++ For individuals whose request for an expedited appeal is based on a

benefits or services related fee-for-service issue, the state must take final administrative action in accordance with the time frame at current (f)(2) (which is 3 working days);

++ For individuals whose request for an expedited appeal is based on a managed care appeal, the state must take final administrative action, in accordance with current rules at paragraphs (f)(2) of this section.

• The expedited time frame in paragraph (f)(3)(i) and (f)(3)(ii) are subject to a delayed effective date in accordance with the policy described in § 435.1200(i) of this rule.

• Proposed paragraph (f)(2) is not being finalized in this rule.

• Added paragraph (f)(4) to discuss exceptional circumstances when the agency does not have to take the final action within the required time frame.

Change to § 433.145

• Amended paragraph (a)(2) to reflect that medical support and payments may be obtained or derived from the non-custodial parent of the child, regardless of the gender of the non-custodial parent.

Changes to § 435.4

• Modified the definitions of ''non-citizen'' and ''qualified non-citizen,'' to use the word ''includes'' rather than the phrase ''has the same meaning as'' to further simplify the regulation text.

• Modified the definition of ''citizenship'' to eliminate repetitive language.

Change to § 435.115

• Removed paragraph (b)(2)(i) concerning pregnant women because they retain Medicaid eligibility until the end of the postpartum period through § 435.170.

Changes to § 435.117

• Redesignated paragraph (b)(2) as (b)(3) and redesignated and revised paragraphs (b)(1)(iii) and (iv) as (b)(2)(ii), including revised introductory language in (b)(2).

• Added at paragraph (b)(2)(ii)(B) the state option to cover as a deemed newborn the child of a mother covered under another state's CHIP state plan for the date of birth.

• Redesignated paragraph (c) as paragraph (b)(2)(i).

• Redesignated paragraph (d) as (c).

Change to § 435.150

• Revised paragraph (b)(3) to clarify the requirements.

• Removed the parenthetical in paragraph (b)(3) with the state option to determine an individual eligible under this group if in foster care and/or Medicaid in any state upon attaining either age 18 or any higher age that title IV–E foster care ends in the state.

• Revised paragraph (c) to provide additional state options for coverage under the former foster care group.

Change to § 435.170

• Revised this section to reference § 435.116(d)(2) and (4), rather than just § 435.116(d)(3) to clarify that if a state elects to provide full coverage for all pregnant women eligible under § 435.116, it would also provide full coverage during an extended or continuous eligibility period for pregnant women.

Change to § 435.172

• Removed ''or household income'' from paragraph (b)(1), for consistency with the requirements at section 1902(e)(7) of the Act.

Changes to § 435.213

• Revised paragraph (c) to clarify that a screen based on which an individual is determined to need treatment for breast or cervical cancer is either an initial screen under the Centers for Disease Control and Prevention breast and cervical cancer early detection program or a subsequent screen by the individual's treating health professional.

Changes to § 435.214

• Revised section heading to be more descriptive.

• Redesignated paragraph (b) as paragraph (b)(1).

• Removed the phrase ''meet all of the following requirements'', added a phrase to describe that eligibility is limited to the covered services under paragraph (d), and added a parenthetical clarifying that this coverage is provided to individuals ''of any gender''.

Changes to § 435.215

• Revised paragraph (b)(2) to clarify that an individual is only eligible for this group (which only covers treatment for tuberculosis) if the individual is not eligible for full coverage under the state plan.

Changes to § 435.226

• Revised paragraphs (b) and (c) to clarify that a state may elect to have no income standard for this group or may elect any income standard that is equal to or more than the state's income standard for parents and other caretaker relative under § 435.110.

Changes to § 435.227

• Revised paragraph (b)(3)(i) to specify eligibility ''under the Medicaid state plan of the state with the adoption assistance agreement''.

• Revised paragraph (c) to remove reference to the state's AFDC payment standard as of 1996 and made other streamlinine revisions for increased readability.

Changes to § 435.229

• Revised paragraph (c)(2) to clarify that the income standard established by a state under this group is a MAGI-equivalent standard.

• Revised paragraph (c)(3) to reference a CHIP State plan or 1115 demonstration, in addition to Medicaid, as a technical correction consistent with state flexibility provided by federal statute.

Changes to § 435.406

• Revised paragraph (a)(1)(iii)(E) to require states to allow states to exempt deemed newborns from another state from the citizenship verification requirements if the state has verified that the individuals were eligible as deemed newborns in the other state.

• Revised paragraphs (a) and added a new paragraph (c), to clearly state that the declaration of citizenship and immigration status must be presented and verified in accordance with § 435.956(b), redesignated from § 435.956(g) in this final rule.

Changes to § 435.407

• Added paragraph (a)(6) to allow a data match with SSA as stand-alone evidence of citizenship and identity.

• Revised paragraph (b)(7) to read as, ''A Northern Marianas Identification Card issued by the U.S. Department of Homeland Security (or predecessor agency).''

• Removed the proposed language requiring the individual having to be born in the CNMI before November 4, 1986, because only collectively naturalized citizens who were born in the CNMI before that date will be issued such a card.

Changes to § 435.603

• Made a technical streamlining revision to use the word ''parent'' in place of reference to ''natural, adopted or step parent'' in § 435.603(d)(2)(i)

• Made a technical modification to clarify that the exception from mandatory application of MAGI-based methods described in § 435.603(j)(4) applies only to individuals who are seeking coverage either in an eligibility group that requires applicants to meet a level-of-care need or that covers long-term care services and supports not otherwise available through a MAGI-based group.

Change to § 435.901

• Revised to provide clarity that information provided to applicants and beneficiaries and eligibility standards and methods must reflect all appropriate federal laws.

Changes to § 435.905

• Revised the requirement to provide taglines in paragraph (b)(1) to include this requirement in paragraph (b)(3) of this section.

• Modified the current title of the regulation to clarify that the regulation is also related to providing accessible information to applicants and beneficiaries by adding the term ''accessibility'' in the title. The finalized regulation title of § 435.905 reads ''Availability and accessibility of program information.''

Changes to § 435.911

• Made a technical revision to include a cross-reference to § 435.912 at § 435.911(c)(2).

• Replaced ''and'' with ''or'' at the end of paragraph (b)(2)(i).

Change to § 435.952

• Modified the proposed regulation to clarify who can provide attestation of information when there is a special circumstance.

Changes to § 435.956

• Added an option for states to verify citizenship status through the electronic service established in accordance with § 435.949 or an alternative mechanism authorized in accordance with § 435.945(k).

• For purposes of exemption of the 5-year waiting period, added a new § 435.956(a)(3) to require states to verify that an individual is an honorably discharged veteran or in active military status, or the spouse or unmarried dependent child of such person as described in 8 U.S.C. 1612(b)(2), through the FDSH or other electronic data source if and when available and permitting states to accept self-attestation if electronic verification is not available.

• Redesignated paragraph (g) as paragraph (b) and revised paragraph (b) to clarify that the agency must provide a reasonable opportunity period to otherwise eligible individuals who have made a declaration of citizenship or immigration status in accordance with § 436.406(a), to limit the option for states to extend the reasonable opportunity if the individual is making a good faith effort to provide documentation or the agency needs more time to complete the verification to only those individuals attesting to satisfactory immigration status, and to allow states to place reasonable limits on the number of reasonable opportunity periods if the agency demonstrates a program integrity risk.

Changes to § 435.1200

• Added new paragraph at § 435.1200(i) in the final rule, to provide that the notice of applicability date for the compliance of §§ 435.1200(g)(2), 431.221(a)(1)(i), and 431.244(f)(3)(i) and (ii) of this chapter is 6 months from the date of a published **Federal Register**, which at its earliest, will be published May 30, 2017.

• In paragraph (a)(2)(iii), added a cross-reference to the definition of ''joint fair hearing request'' in § 431.201.

• Revised paragraph (g)(1) to provide that the agency must include in the agreement consummated per § 435.1200(b)(3) between the agency and the Exchange that, if the Exchange or other insurance affordability program provides an applicant or beneficiary with a combined eligibility notice which includes a denial of Medicaid eligibility, the Exchange or Exchange appeals entity (or other insurance affordability program or appeals entity) will (1) provide the applicant or beneficiary with an opportunity to submit a joint fair hearing request; and (2) notify the Medicaid agency of such request for a Medicaid fair hearing (unless the hearing will be conducted by the Exchange appeals entity per a delegation of authority under § 435.10(c)(1)(ii).

• Revised proposed § 435.1200(g)(2), redesignated at § 435.1200(g)(4) in the final rule, to establish a more dynamic standard in this final rule such that, in conducting a fair hearing in accordance with subpart E or part 431, the agency must minimize, to the maximum extent possible consistent with guidance issued by the Secretary, any requests for information or documentation from the individual which are already included in the individual's electronic account or which have been provided to the Exchange or Exchange appeals entity.

• Revised proposed § 435.1200(g)(1)(i), redesignated at § 435.1220(g)(2)(i), to provide that the state agency establish a secure electronic interface through which the Exchange or Exchange appeals entity can notify the agency that it has received a joint fair hearing request.

• Added new paragraph (g)(3), which requires the agency to accept and act on a joint fair hearing request submitted to the Exchange or Exchange appeals entity in the same manner as a request for a fair hearing submitted to the agency in accordance with § 431.221.

• Added new paragraph (g)(6) to provide that, if the Exchange made the initial determination of Medicaid ineligibility in accordance to a delegation of authority under § 431.10(c)(1)(i)(A)(3), the agency must accept a decision made by the Exchange appeals entity that an appellant is eligible for Medicaid in the same manner as if the determination of Medicaid eligibility had been made by the exchange.

• Included a cross-reference in new paragraphs (g)(6) and (g)(7) in the introductory text of § 435.1200(c) to require that the agency also accept a determination of Medicaid eligibility by the Exchange appeals entity in the situations described.

Change to § 457.50

• Amended to include periodic updates to CHIP state plan format.

Change to § 457.60

• Amended to include periodic updates to the format of CHIP state plan amendments.

Change to § 457.110

• Amended paragraph (a)(1) to clarify that it is a requirement that the state provide, at beneficiary option, notices to applicants and beneficiaries in electronic format.

Change to § 457.342

• Clarified, in paragraph (a), that continuous eligibility in CHIP is subject to a child remaining ineligible for Medicaid, as required by section 2110(b)(1) of the Act and § 457.310 (related to the definition and standards for being a targeted low-income child) and the requirements of section 2102(b)(3) of the Act and § 457.350 (related to eligibility screening and enrollment).

• Clarified, in paragraph (b), that the continuous eligibility period may be terminated for failure to pay premiums or enrollment fees, subject to a premium grace period of at least 30 days and the disenrollment protections at section 2103(e)(3)(C) of the Act and § 457.570.

Change to § 457.355

• Made technical revisions to the wording for consistency with the Medicaid regulation at § 435.1102.

Changes to § 457.360

• Made organizational revisions to be consistent with the changes in Medicaid at § 435.117.

• Redesignated the proposed paragraph (b)(2) as a new paragraph (b)(3).

• Moved the content of the proposed paragraph (c) to a new paragraph at § 457.360(b)(2).

• Added a new paragraph at § 457.360(b)(2)(ii) to provide that states may elect the CHIP optional newborn deeming provisions only if they have also elected the same options in Medicaid.

• Redesignated the proposed paragraph (d) regarding the CHIP identification number as paragraph (c).

Changes to § 457.380

• Made technical revisions to expand the proposed paragraph (b)(1) to include introductory text and new paragraphs at § 457.380(b)(1)(i) and (ii).

• Amended the regulatory cross-reference to newborns exempt from citizenship verification to be consistent with changes made to § 435.406 in Medicaid.

• Clarified that benefits must be provided during the reasonable opportunity period.

## IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), 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. 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.

• Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We solicited public comment on each of these issues for the following information collection requirements (ICRs) within our January 22, 2013 (78 FR 4594) proposed rule. While extensive comments were received on various provisions within that rule, we did not receive any PRA-specific comments.

This final rule codifies provisions set out in the January 22, 2013 (78 FR 4594) proposed rule that were not adopted in the July 15, 2013 (78 FR 42159) final rule. Overall, this final rule will result in a reduction in burden for individuals applying for and renewing coverage, as well as for states, since the Medicaid program and CHIP will be made easier for states to administer and for individuals to navigate by streamlining and simplifying Medicaid and CHIP eligibility rules for most individuals. Even though there are short-term burdens associated with the implementation of this final rule, the Medicaid program and CHIP will be easier for states to administer over time due to the streamlined eligibility and coordinated efforts for Medicaid, CHIP, and the new affordable insurance exchanges.

### *A. Wage Estimates*

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' May 2015 National Occupational Employment and Wage Estimates for all salary estimates (*http://www.bls.gov/oes/current/oes_nat.htm*). In this regard, Table 2 presents the mean hourly wage, the cost of fringe benefits (calculated at 100 percent of salary), and the adjusted hourly wage.

TABLE 2—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

| Occupation title | Occupation code | Mean hourly wage ($/hr) | Fringe benefit ($/hr) | Adjusted hourly wage ($/hr) |
|---|---|---|---|---|
| Business Operations Specialist | 13–1000 | 35.48 | 35.48 | 70.96 |
| Computer Programmer | 15–1131 | 40.56 | 40.56 | 81.12 |
| General and Operations Managers | 11–1021 | 57.44 | 57.44 | 114.88 |
| Lawyer | 23–1011 | 65.51 | 65.51 | 131.02 |
| Training and Development Manager | 11–3131 | 53.69 | 53.69 | 107.38 |
| Training and Development Specialist | 13–1151 | 30.03 | 30.03 | 60.06 |
| Management Analyst | 13–1111 | 44.12 | 44.12 | 88.24 |

As indicated, we are adjusting our employee hourly wage estimates by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly from employer to employer, and because methods of estimating these costs vary widely from study to study. Nonetheless, there is no other practical alternative and we believe that doubling the hourly wage to estimate total cost is a reasonably accurate estimation method.

### *B. Burden Related to ICRs Carried Over From the January 22, 2013 Proposed Rule*

Many provisions codified in this final rule do not set out any new or revised burden estimates because the burden is exempt from the PRA or is currently approved by OMB. Additional information on these provisions can be found below under section IV.D. The burden associated with all other provisions codified in this final rule is set out below.

1. ICRs Regarding Individuals Who Are Ineligible for AFDC Because of Requirements That Do Not Apply Under Title XIX of the Act (§ 435.113), Individuals Who Would Be Eligible for AFDC Except for Increased OASDI Income Under Public Law 92–336 (July 1, 1972) (§ 435.114), and Individuals Who Would Be Eligible for AFDC if Coverage Under the State's AFDC Plan Were as Broad as Allowed Under Title IV–A (§ 435.223)

We are removing the following state plan amendment (SPA) related provisions from current regulation: The provision of Medicaid to individuals denied AFDC based on certain policies (§ 435.113), the provision of Medicaid to certain individuals entitled to OASDI (§ 435.114), the provision of Medicaid to certain group or groups of individuals (§ 435.223), and the determination of dependency for families with certain dependent children who are not receiving AFDC (§ 435.510). Because we are eliminating these regulations, states will no longer be required to submit these SPAs to CMS. The SPA provisions are approved by OMB under control number 0938–0193 (CMS–179). This final rule will remove the portion of the burden related to the requirements of §§ 435.113, 435.114, 453.223, and 435.510.

2. ICRs Regarding Adverse Action (§ 431.210), Notice of Agency's Decision Concerning Eligibility (§ 435.917), and Application for and Enrollment in CHIP (§ 457.340)

In § 431.210, 435.917, and 457.340, the agency is required to provide a timely combined notice to individuals regarding their eligibility determination or any adverse action.

Current § 431.210(a) has been amended to require that the notice provide the effective date of the action. In § 431.210(b), the notice must provide a clear statement that supports the reasons for the intended action. In § 431.210(d)(1), the explanation must communicate the right to request a local evidentiary hearing.

Section 435.917(b) has been added to clarify the agency's responsibilities to communicate specific content in a clear and timely manner when issuing a notice of approved eligibility, denial, or suspension. In § 435.917(c), the notice must contain information regarding the basis of eligibility (other than MAGI) so individuals can make an informed choice as to whether they should request a determination on another basis. The notice must include reasons for the action, the specific supporting action, and an explanation of hearing rights.

Section 457.340(e) has been revised to align the content of CHIP notices with that of Medicaid notices.

The burden associated with the preceding requirements is the time for the state staff to: Review the requirements related to notices; develop the language for approval, denial, termination, suspension, and change of benefits notices; and program the language in the Medicaid and CHIP notice systems so that the notice can be populated and generated based on the outcome of the eligibility determination or adverse action.

We estimate 56 state Medicaid agencies (the 50 states, the District of Columbia, and 5 Territories) and 42 CHIP agencies (in states that have a separate or combined CHIP), totaling 98 agencies are subject to the preceding requirements. We estimate that it will take each Medicaid and CHIP agency 194 hours to develop and automate the notice of eligibility determination or adverse action. Of those hours, we estimate it will take a business operations specialist 138 hours at $70.96/hr, a general and operations manager 4 hours at $114.88/hr, a lawyer 20 hours at $131.02/hr, and a computer programmer 32 hours at $81.12/hr to complete the notices. The estimated one-time cost for each agency is $15,468.24. In aggregate, the total estimated cost is $1,515,888 (rounded), while the total time is 19,012 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 6,337 hr (19,012 hours/3 years) at a cost of $505,296 ($1,515,888/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. The preceding requirements and burden estimates will be submitted to OMB for approval under control number 0938-New (CMS–10456).

The provision of the written notices under § 431.206(b) and (c)(2) is an information collection requirement that is associated with an administrative action pertaining to specific individuals or entities (5 CFR 1320.4(a)(2) and (c)). Consequently, the burden for forwarding the notifications is exempt from the requirements of the PRA.

3. ICRs Regarding Presumptive Eligibility (§§ 435.1101(b) and 457.355)

In §§ 435.1101(b) and 457.355 (by reference to § 435.1101) states are required to provide qualified entities with training in all applicable policies and procedures related to presumptive eligibility. The burden associated with this provision is the time and effort necessary for the states and territories to develop training materials and to provide training to application assistors.

We estimate 50 states and the District of Columbia will be subject to this requirement. As part of this estimate, we assumed that state Medicaid agencies and CHIP agencies, when they are separate agencies, will develop and use the same training.

We also estimate it will take a training and development specialist 40 hours at $60.06/hr and a training and development manager 10 hours at $107.38/hr to develop training materials for the qualified entities, for a total time burden of 2,550 hours. The estimated cost for each state or territory is $3,476.20 while the total estimated cost is $177,286.20.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 17 hr (50 hours/3 years) at a cost of $59,095 ($177,286/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires.

We also estimate that each state or territory will offer 50 hours of annual training sessions to qualified entities, for a total burden of 2,550 hours. We also estimate it will take a training and development specialist 50 hours at $60.06/hr to train the application assistors. While the cost for each agency is estimated at $3,003, the total (aggregate) cost is approximately $153,153.

The preceding burden estimates will be submitted to OMB for their approval under control number 0938-New (CMS–10456).

4. ICRs Regarding the Submittal of State Plans and Plan Amendments (§ 430.12), State Plan (§ 457.50), and [State Plan] Amendments (§ 457.60)

Historically, we have accepted state plan amendments on paper following paper-pre-prints. This process was not transparent to states or other stakeholders. To move to a more modern, efficient and transparent business process, in consultation with states, we are developing the MACPro (Medicaid and CHIP Program) system to electronically receive and manage state plan amendments, as well as other Medicaid and CHIP business documents.

While the amendments to §§ 430.12, 457.50, and 457.60 direct states to use the automated format to submit SPAs, full implementation of the MACPro system is being phased in over time. The phase-in will provide states with the time needed to successfully transition to the new system with technical support from CMS. The burden associated with the transition from paper-based to electronic SPA processing is the time and effort necessary for states and territories to be trained on use of the MACPro system, to establish user roles and access to MACPro for each user, and to review data imported into MACPro from other formats. As new templates become available, states will be required to utilize the new electronic system if they are seeking to amend their state plans. We believe that the time, effort, and financial resources required for future SPA submissions will be incurred in the absence of this final rule during the normal course of Medicaid and CHIP agency activities, and therefore, should be considered as a usual and customary business practice.

We estimate 56 state Medicaid agencies (the 50 states, the District of Columbia, and 5 Territories) and 42 CHIP agencies (in states that have a separate or combined CHIP), totaling 98 agences are subject to the new electronic SPA submission requirements. We estimate that it will take each agency approximately 64 hours to implement the new electronic SPA submission process. Of those hours, we estimate it will take a business operations specialist 2 hours at $70.96/hr and a general and operations manager 2 hours

at $114.88/hr to establish user roles for the agency. We estimate that 4 hours of training will be required for each staff member utilizing the new system. With an estimated 6 business operations specialists requiring 4 hours of training at $70.96/hr, 3 management analysts requiring 4 hours of training at $88.24/hr and 1 general and operations manager requiring 4 hours of training at $114.88/hr. And we estimate that it will take 2 management analysts 10 hours each at $88.24/hr to review the data initially imported in the system. The estimated cost burden for each agency is $5,357.92. The total estimated cost burden is $525,076.16, while the total time is 6,272 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 2,091 hours (6,272 hours/3 years) at a cost of $175,025.39 ($525,076.16/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. The preceding requirements and burden estimates will be submitted to OMB for approval under control number 0938-New (CMS–10456).

As new SPA templates become available in MACPro, states will be required to utilize the new electronic system when they seek to amend their state plans. We believe that the time, effort, and financial resources required for future SPA submissions will be incurred in the absence of this final rule during the normal course of Medicaid and CHIP agency activities, and therefore, should be considered as a usual and customary business practice.

5. ICRs Regarding Deemed Newborn Children (§§ 435.117 and 457.360)

In §§ 435.117(b) and 457.360(b), states have the option to cover babies (as deemed newborns under the Medicaid or CHIP state plan, as appropriate) born to mothers covered on the date of birth as targeted low-income children under a separate CHIP state plan or to mothers covered under a Medicaid or CHIP demonstration waiver under section 1115 of the Act.

In § 435.117(b)(1)(ii) and (iii), states have the option to cover (as a deemed newborn) the child of a mother covered under another state's CHIP state plan on the date of birth.

In §§ 435.117(c) and 457.360(c), states have the option to recognize deemed newborn status from another state without requiring a new application for enrolling babies born in another state.

Eligibility for deemed newborn children is already included in both Medicaid and CHIP state plans. This information can be found at Attachment 2.2–A, page 6, of the current state Medicaid plan, which is approved under control number 0938–0193 (CMS–179), and CS13 of the current CHIP state plan, which is approved under control number 0938–1148 (CMS–10398). These templates are planned for inclusion in the electronic state plan being developed by CMS as part of the MACPro system. When the MACPro system is available, these Medicaid and CHIP SPA templates will be updated to include all of the options described in §§ 435.117 and 457.360 and will be submitted to OMB for approval with the revised MACPro PRA package under control number 0928–1188 (CMS–10434).

Prior to release of the new MACPro templates, states may need to make changes to their Medicaid or CHIP state plans to reflect adoption of the new options finalized in this rule. States electing these options will use the current state plan templates. For the purpose of the cost burden, we estimate it will take a management analyst 1 hour at $88.24 an hour and a general and operations manager 0.5 hours at $114.88 an hour to complete, submit, and respond to questions regarding the state plan amendment. The estimated cost burden for each agency is $145.68. We anticipate 15 state Medicaid agencies and 5 state CHIP agencies may submit amendments to reflect changes to eligibility for deemed newborn children. The total estimated cost burden is $2,913.60, while the total time is 30 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 10 hours (30 hours/3 years) at a cost of $971.20 ($2,913.60/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. Because the currently approved state plan templates are not changing at this time, the preceding requirements and burden estimates will be submitted to OMB for approval under control number 0938-New (CMS–10456).

In §§ 435.117(d) and 457.360(d), states are required to issue separate Medicaid identification numbers to covered babies as ''deemed newborns'' if the mother, on the date of the child's birth, was receiving Medicaid in another state, was covered in the state's separate CHIP, or was covered for only emergency medical services. Also, the state must issue a separate Medicaid identification number to a deemed newborn prior to the effective date of any termination of the mother's eligibility or prior to the date of the child's first birthday, whichever is sooner. Under such circumstances, a separate Medicaid identification number must be assigned to the infant so the state may reimburse providers for covered services, document the state's expenditures, and request FFP.

While states are required to issue Medicaid identification numbers to these children, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). The time, effort, and financial resources necessary to issue identification numbers will be incurred in the absence of this final rule by persons during the normal course of their activities and should, therefore, be considered a usual and customary business practice.

6. ICRs Regarding Income Eligibility (§ 435.831)

Section 435.831(b) has been amended by providing states with the option to apply either AFDC-based methods or MAGI-based methods for determining income eligibility for medically needy children, pregnant woman, and parents and other caretaker relatives. States electing to use an MAGI-based methodology for these populations must ensure that there is no deeming of income or attribution of financial responsibility that would conflict with the requirements that prohibit counting the income of a child in determining the eligibility of the child's parents or siblings or deeming the income of a parent to a child if the parent is not living with the child.

The financial methodologies used to determine eligibility for medically needy individuals are currently described in the Medicaid state plan on Attachment 2.6–A, page 14a, which is approved under control number 0938–0193 (CMS–179). This template is planned for inclusion in the electronic state plan being developed by CMS as part of the MACPro system. When the MACPro system is available, this Medicaid state plan template will be updated to include the new option described in § 435.831 and will be submitted to OMB for approval with the revised MACPro PRA package under control number 0928–1188 (CMS–10434).

Prior to release of the new MACPro templates, states may need to make changes to their Medicaid state plan to reflect election of the MAGI methodology and they would submit such changes using the currently approved template. For the purpose of the cost burden, we estimate it will take a management analyst 1 hour at $88.24 an hour and a general and operations manager 0.5 hours at $114.88 an hour to

complete, submit, and respond to questions regarding the state plan amendment. The estimated cost burden for each agency is $145.68. We anticipate 8 state Medicaid agencies may submit state plan changes to elect to utilize MAGI-based methods for determining income eligibility for medically needy children, pregnant woman, and parents and other caretaker relatives. The total estimated cost burden is $1,165.44, while the total time is 12 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 4 hours (12 hours/3 years) at a cost of $388.48 ($1,165.44/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. Because the currently approved state plan templates are not changing at this time, the preceding requirements and burden estimates will be submitted to OMB for approval under control number 0938-New (CMS–10456).

7. ICRs Regarding Former Foster Care Children (§ 435.150), Eligibility for Family Planning Services (§ 435.214), Application of Financial Eligibility Methodologies (§ 435.601), Financial Responsibility of Relatives and Other Individuals (§ 435.602), and [the] Determination of Eligibility (§ 435.911)

States must submit a state plan amendment for any new eligibility groups or changes to existing eligibility groups. Mandatory groups, such as Former Foster Care Children (§ 435.150), require a state plan amendment from every Medicaid agency. Optional eligibility groups, including the new Family Planning group (§ 435.214), only trigger the need for a state plan amendment in states that choose to offer them. Because the mandatory eligibility group for former foster care children became effective on January 1, 2014, all states have already included this new group in their state plan on page S33, which is approved under control number 0938–1148 (CMS–10398). Similarly, the optional eligibility group limited to family planning coverage also became effective on January 1, 2014, and a number of states have elected this group in their state plan on page S59, which is approved under control number 0938–1148 (CMS–10398). The state plan templates for the former foster care children and family planning eligibility groups are planned for inclusion in the electronic state plan being developed by CMS as part of the MACPro system. When the MACPro system is available, these templates will be updated to include all of the options described in §§ 435.150 and 435.214 and will be submitted to OMB for approval with the revised MACPro PRA package under control number 0928–1188 (CMS–10434).

Prior to release of the new MACPro templates, amendments to the Medicaid state plan may be necessary to reflect a state's adoption of the new options finalized in this rule. States electing these options will use the current state plan templates. For the purpose of the cost burden, we estimate it will take a management analyst 1 hour at $88.24 an hour and a general and operations manager 0.5 hours at $114.88 an hour to complete, submit, and respond to questions regarding the state plan amendment. The estimated cost burden for each agency is $145.68. We anticipate that 25 state Medicaid agencies may submit state plan amendments to modify their coverage of the former foster care group, and we anticipate that 3 state Medicaid agencies may submit state plan changes to elect or modify coverage of the family planning group. The total estimated cost burden is $4,079.04, while the total time is 42 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 14 hours (42 hours/3 years) at a cost of $1,359.68 ($4,079.04/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. Because the currently approved state plan templates are not changing at this time, the preceding requirements and burden estimates will be submitted to OMB for approval under control number 0938-New (CMS–10456).

*C. Summary of Annual Burden Estimates*

TABLE 3—ANNUAL REPORTING AND RECORDKEEPING REQUIREMENTS

| Section(s) in Title 42 of the CFR | OMB control number (CMS ID number) | Respondents | Responses (per respondent) | Burden per response (hours) | Total annual burden (hours) | Labor cost of reporting ($/hr) | Total cost ($) |
|---|---|---|---|---|---|---|---|
| 431.210, 435.917, and 457.340. | 0938-New (CMS–10456). | 98 | 1 | 194 | [1] 6,337 | varies [2] | [1] 505,296 |
| 435.1101(b) and 457.355 (dev. training materials). | 0938-New (CMS–10456). | 51 | 1 | 50 | [1] 17 | varies [3] | [1] 59,095 |
| 435.1101(b) and 457.355 (provide training). | 0938-New (CMS–10456). | 51 | 1 | 50 | 2,550 | 60.06 | 153,153 |
| 430.12, 457.50 and 457.60. | 0938-New (CMS–10456). | 98 | 1 | 64 | [1] 2,091 | varies [4] | [1] 175,025 |
| 435.117 and 457.360 | 0938-New (CMS–10456). | 20 | 1 | 1.5 | [1] 10 | varies [5] | [1] 971 |
| 435.831 | 0938-New (CMS–10456). | 8 | 1 | 1.5 | [1] 4 | varies [5] | [1] 388 |
| 435.150 and 435.214 | 0938-New (CMS–10456). | 28 | 1 | 1.5 | [1] 14 | varies [5] | [1] 1,360 |
| Total | | 98 | 1 | 362.5 | 11,023 | | 898,288 |

[1] One-time estimate annualized over OMB's 3-year approval period (see text for details).

[2] 138 hr at $70.96/hr for a business operations specialist, 4 hr at $114.88/hr for a general and operations manager, 20 hr at $131.02/hr for a lawyer, and 32 hr at $81.12/hr for computer programmer.

[3] 40 hours at $60.06/hr for a training and development specialist and 10 hours at $107.38/hr for a training and development manager.

[4] 26 hours at $70.96/hr for business operations specialists, 32 hours at $88.24/hr for management analysts, and 6 hours at $114.88 for a general and operations manager.

[5] 1 hour at $88.24/hr for a management analyst and 0.5 hours at $114.88/hr for a general and operations manager.

*D. Other ICRs Carried Over From the January 22, 2013 Proposed Rule*

Unlike section IV.B. of this final rule, which sets out burden for this rule's final provisions, this section IV.D. does not provide any burden estimates. Instead, the burden under this section is either exempt from the PRA, is currently approved by OMB, or will be submitted to OMB at a later date (independent from this rule).

1. ICRs Regarding Informing Applicants and Beneficiaries (§ 431.206)

Section 431.206(b) has been amended to require any agency taking action on an eligibility claim, or setting type or level of benefits or services, to inform every applicant or beneficiary in writing of his or her right to a hearing or expedited review and the date by which the agency must take administrative action. Section 431.206(c)(2) has been amended to clarify that the responsible agency/entity must provide notice to individuals regarding adverse actions.

The burden for developing the notice is set out above in our estimates under §§ 431.210, 435.917, and 457.340.

The provision of the written notices under § 431.206(b) and (c)(2) is an information collection requirement that is associated with an administrative action pertaining to specific individuals or entities (5 CFR 1320.4(a)(2) and (c)). Consequently, the burden for forwarding the notifications is exempt from the requirements of the PRA.

Section 431.206(e) requires that the notices issued under this subpart E are accessible to individuals who are limited English proficient and to individuals with disabilities, and may be provided in electronic format.

States must administer their programs in compliance with federal civil rights law. This includes ensuring that states receiving federal financial assistance from CMS take reasonable steps to provide persons with limited English proficiency meaningful access to States' programs. States also have specific legal obligations for serving qualified individuals with disabilities. Consequently, we believe that the time, effort, and financial resources necessary to comply with this requirement will be incurred in the absence of the provisions in this final rule by persons during the normal course of their activities, and therefore, should be considered a usual and customary business practice.

2. ICRs Regarding the Availability of Program Information for Individuals Who Are Limited English Proficient (§§ 431.206(e) and 435.905(b))

While states are required to provide language services to individuals who are limited English proficient, this regulation clarifies the approaches to providing these services. Specifically, the identified approaches (oral interpretation, written translations, and taglines) are standard practice for the provision of services to those with limited English proficiency. We believe that the time, effort, and financial resources necessary to comply with this requirement will be incurred in the absence of this final rule by persons during the normal course of their activities and should, therefore, be considered a usual and customary business practice. Consequently, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2).

3. ICRs Regarding the Denial or Termination of Eligibility (§ 433.148)

Section 433.148(a)(2) has been amended to specify that individuals must agree to cooperate in establishing paternity and obtaining medical support at application as a condition of eligibility unless cooperation has been waived, but that further action to pursue support, as appropriate, will occur after enrollment in coverage. Individuals are required by § 435.610 to provide information to assist in securing payment from third parties unless the individual establishes good cause for not cooperating.

The provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements are addressed as part of the single streamlined application that is approved by OMB under control number 0938–1191 (CMS–10440).

4. ICRs Regarding Verification Exceptions for Special Circumstances (§ 435.952)

Section 435.952 has been amended to permit self-attestation (on a case-by-case basis) in special circumstances for individuals who do not have access to documentation (for example: victims of natural disasters). The provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements are addressed as part of the single streamlined application that is approved by OMB under control number 0938–1191 (CMS–10440).

5. ICRs Regarding Verification Procedures for Individuals Attesting to Citizenship or Satisfactory Immigration Status (§§ 435.3, 435.4, 435.406, 435.407, 435.940, 435.952, 435.956, 457.320, and 457.380)

The provisions establish guidelines for the verification of Medicaid and CHIP eligibility based on citizenship or immigration status.

The provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements are addressed as part of the single streamlined application that is approved by OMB under control number 0938–1191 (CMS–10440).

6. ICRs Regarding Adoption Assistance Agreements (§§ 435.145 and 435.227)

In §§ 435.145 and 435.227, we have amended Medicaid eligibility group provisions to be consistent with statutory requirements. Among the eligibility requirements and alternatives for these groups is that an adoption assistance agreement must be in effect. Importantly, this final rule is not making any revision to states' adoption assistance agreements. These agreements are between state agencies and the adoptive parents and are specific to the rules and laws in place in each state. We do not govern these agreements; therefore, we are not setting out any burden associated with these provisions.

7. ICRs Regarding Citizenship and Non-Citizen Eligibility (§ 435.406)

Section 435.406(a) and (c) has been amended to require that the declaration of citizenship and immigration status must be presented and verified in accordance with § 435.956(g). The provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements are addressed as part of the single streamlined application that is approved by OMB under control number 0938–1191 (CMS–10440).

8. ICRs Regarding the Types of Acceptable Documentary Evidence of Citizenship (§ 435.407)

Section 435.407(a)(4) has been amended by specifying that states must accept a driver's license as proof of citizenship, only if the state issuing the license requires proof of U.S.

citizenship or if that state obtains and verifies a social security number from the applicant who is a citizen before issuing such license. In § 435.407(b)(18), only one affidavit can be required to verify citizenship if it cannot be verified electronically and the individual does not have any of the documents listed in § 435.407. In § 435.407(f), states must accept copies of documents rather than limiting documentation to originals.

The provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements are addressed as part of the single streamlined application that is approved by OMB under control number 0938–1191 (CMS–10440).

9. ICRs Regarding the Verification of Other Non-Financial Information (§ 435.956)

Section 435.956(a)(1)(ii) has been amended by specifying that states may accept self-attestation that an individual is an honorably discharged veteran or in active military duty status, or the spouse or unmarried dependent child of such person as described in 8 U.S.C. 1612(b)(2) for purposes of exemption from the 5-year waiting period until such time as verification can be conducted through the Hub or through another electronic data source.

Section 435.956(g) has been amended by specifying that the agency must provide a reasonable opportunity period to otherwise eligible individuals who have made a declaration of citizenship or immigration status in accordance with § 435.406(a) or (b).

Section 435.956 has been amended by specifying that states must first attempt to verify citizenship and immigration status electronically in accordance with § 435.949 and, if unable, to verify citizenship in accordance with § 435.407 and immigration status is accordance with § 435.406 and section 1137(d) of the Act. In § 435.956(a)(4), the agency must maintain a record of having verified citizenship or immigration status for each individual in a case record or electronic database.

If a reasonable opportunity period is provided, § 435.956(b) has been amended by providing states with the option to furnish benefits to otherwise eligible individuals prior to the date described in § 435.956(g)(2)(i). This date could extend back to and include the date the notice in § 435.956(g)(1) is sent, the date of application, or the first day of the month of application.

The preceding provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements and burden are addressed as part of the single streamlined application that is approved by OMB under control number 0938–1191 (CMS–10440).

10. ICRs Regarding Eligibility Screening and Enrollment in Other Insurance Affordability Programs (§ 457.350)

In § 457.350(i)(2)(i), states must notify the other insurance affordability program of the date on which the period of uninsurance ends and the individual is eligible to enroll in CHIP. In § 457.350(i)(2)(ii) states must also provide the individual with an initial notice indicating: That the individual is not currently eligible to enroll in the state's separate child health plan and the reasons thereof; the date on which the individual will be eligible to enroll in the state's separate child health plan; and that the individual's account has been transferred to another insurance affordability program for a determination of eligibility to enroll in such program during the period of underinsurance. The notice also must contain coordinated content informing the individual of the notice being provided to the other insurance affordability program and the impact that the individual's eligibility to enroll in the state's separate child health plan will have on the individual's eligibility for such other program.

Prior to the end of the individual's period of uninsurance the individual must be provided notice that reminds the individual of the information described in § 457.350(i)(2)(i)(A), as appropriate.

In § 457.350(j), the notice of CHIP eligibility or ineligibility must contain coordinated content, as applicable, relating to: The transfer of the individual's electronic account to the Medicaid agency, the transfer of the individual's account to another insurance affordability program, and the impact that an approval of Medicaid eligibility will have on the individual's eligibility for CHIP or another insurance affordability program, as appropriate.

The preceding provisions do not create any new or revised reporting, recordkeeping, or third party disclosure requirements or burden. The requirements and burden are addressed under § 457.340 which is approved by OMB under control number 0938–0841 (CMS–R–308).

*E. Submission of PRA-Related Comments*

We submitted a copy of this 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.

To obtain copies of the supporting statement and any related forms for the proposed collections discussed above, please visit CMS' Web site at *www.cms.hhs.gov/Paperwork@cms.hhs.gov*, or call the Reports Clearance Office at 410–786–1326.

We invite public comment on these potential information collection requirements. If you wish to comment, please submit your comments to the OMB desk officer via one of the following transmissions and identify the rule (CMS–2334–F2):

OMB, Office of Information and Regulatory Affairs.

*Attention:* CMS Desk Officer.

*Fax Number:* (202) 395–5806 OR.

*Email: OIRA_submission@omb.eop.gov*.

PRA-related comments must be received on/by December 30, 2017.

## V. Regulatory Impact Analysis

*A. Overall Impact*

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for rules with economically significant effects ($100 million or more in any 1 year). The OMB has determined that this final rule is ''economically significant'' within the meaning of section 3(f)(1) of Executive Order 12866, because it is likely to have an annual effect of $100 million in any one year. Accordingly, we have prepared a Regulatory Impact Analysis that presents the costs and benefits of this final rule.

*B. Estimated Impact of the Medicaid and CHIP Eligibility Provisions*

The RIA published with the March 23, 2012, Medicaid eligibility final rule detailed the impact of the Medicaid eligibility changes related to implementation of the Affordable Care Act. The majority of provisions included in this final rule were described in that detailed RIA. It included a comparison of estimates prepared by the CMS Office of the

Actuary (OACT) and the Congressional Budget Office (CBO) regarding the new Medicaid coverage groups, simplified eligibility policies for Medicaid and CHIP, streamlined eligibility and enrollment processes, and coordination of eligibility procedures with those of the Exchanges. OACT estimated that by 2016, an additional 24 million people would be enrolled in Medicaid, while CBO estimated that an additional 16 million people would be enrolled in Medicaid. Those impacts are not repeated in this section.

1. Anticipated Effects on Medicaid Enrollment

With the exception of the new eligibility groups for former foster care children and family planning, the Affordable Care Act's anticipated effects on Medicaid enrollment were described in the March 23, 2012, RIA of the final rule. The former foster care group and the family planning group were not covered in the March 23, 2012, Medicaid eligibility final rule, and therefore, were not included in the RIA for that rule. Estimates for both new groups are provided below. We note that the estimates for the family planning group were inadvertently left out of the proposed rule RIA. In addition, the estimates included in the March 23, 2012 RIA of the final rule, and those for the former foster care group and the family planning group, reference the Medicaid baseline for the FY 2013 President's Budget.

As described in Table 4, the CMS Office of the Actuary (OACT) estimates that by 2018, an additional 75,000 individuals will be enrolled in Medicaid under the new eligibility group for former foster care children. An additional 359,000 individuals will be enrolled under the family planning group with benefits limited to family planning and family planning related services.

TABLE 4—ESTIMATED EFFECTS OF THIS FINAL RULE ON MEDICAID ENROLLMENT, FISCAL YEAR 2016–2018

[In thousands]

| Enrollment | 2016 | 2017 | 2018 |
|---|---|---|---|
| Former Foster Care Group | 73 | 74 | 75 |
| Family Planning Group | 348 | 354 | 359 |

Source: CMS Office of the Actuary (OACT).

The estimates for the former foster care group were developed at the time of the passage of the Affordable Care Act. OACT used data from the Medicaid Statistical Information System (MSIS) for 2007, which was the most recent available data at that time. The MSIS data was used to calculate the number of children in foster care and enrolled in Medicaid up to age 18 (and up to age 21 in states that allowed children to remain in foster care at older ages), and to calculate the Medicaid expenditures per enrollee for adults ages 19 to 20 and 21 to 44.

The number of children in foster care and enrolled in Medicaid that would be eligible to receive Medicaid coverage was estimated to be about 190,000 in 2007. The number of potential persons eligible under this section was projected forward by the projected growth rate in the U.S. population (about 1 percent per year) to 2016 through 2018. To calculate the number of new Medicaid enrollees, OACT estimated the number of persons who would not be new Medicaid enrollees because they either would already have been enrolled in Medicaid (as they would have been eligible under paragraphs (I) through (VIII)) or would decline to enroll in Medicaid (which would include those who would have other forms of coverage, such as employer-sponsored insurance, or would otherwise not enroll in Medicaid). After these adjustments, OACT estimated that there would be about 55,000 new enrollees (on a person-year equivalent basis) for FY 2014 (which would include 9 months of eligibility) and about 75,000 new enrollees by FY 2018. In projecting the new population that would be served under the family planning group, OACT used data available from Pennsylvania, allowing for assumptions about the number of states that would elect to cover this group and the proportion of the population those states that would seek coverage and would meet the income guidelines. These enrollment estimates also allow for a phase-in period. OACT notes that any enrollment estimates are inherently uncertain, since they depend on future economic, demographic, and other factors that cannot be precisely determined in advance. Moreover, the actual behavior of individuals and the actual operation of the new enrollment processes and Exchanges could differ from OACT's assumptions.

The net increase in enrollment in the Medicaid program and the resulting reduction in the number of uninsured individuals will produce several benefits. For new enrollees, eligibility for Medicaid will improve access to medical care. Evidence suggests that improved access to medical care will result in improved health outcomes and greater financial security for these individuals and families. Evidence on how Medicaid coverage affects medical care utilization, health, and financial security comes from a recent evaluation of an expansion of Oregon's Medicaid program.[1] In 2008, Oregon conducted a lottery to expand access to uninsured adults with incomes below 100 percent of the FPL. Approximately 10,000 low-income adults were newly enrolled in Medicaid as a result. The evaluation is particularly strong because it was able to compare outcomes for those who won the lottery with outcomes for those who did not win, and contains an estimate of the benefits of Medicaid coverage. The evaluation concluded that those enrolled in Medicaid had ''substantial and statistically significantly higher health care utilization, lower out-of-pocket medical expenditures and medical debt, and better self-reported health.''

While there are limitations on the ability to extrapolate from these results to the likely impacts of the Affordable Care Act's expansion of Medicaid coverage, these results provide evidence of health and financial benefits associated with coverage expansions for a population of non-elderly adults.

The results of the Oregon study are consistent with prior research, which has found that health insurance coverage improves health outcomes. The Institute of Medicine (2002) analyzed several population studies and found that people under the age 65 who

[1] Amy Finkelstein & Sarah Taubman & Bill Wright & Mira Bernstein & Jonathan Gruber & Joseph P. Newhouse & Heidi Allen & Katherine Baicker, 2012. ''The Oregon Health Insurance Experiment: Evidence from the First Year,'' The Quarterly Journal of Economics, Oxford University Press, vol. 127(3), pages 1057–1106.

were uninsured faced a 25 percent higher risk of mortality than those with private coverage. This pattern was found when comparing deaths of uninsured and insured patients from heart attack, cancer, traumatic injury, and Human immunodeficiency virus (HIV) infection.[2] The Institute of Medicine also concluded that having insurance leads to better clinical outcomes for diabetes, cardiovascular disease, end-stage renal disease, HIV infection and mental illness, and that uninsured adults were less likely to have regular checkups, recommended health screening services and a usual source of care to help manage their disease than a person with coverage. Other research has found that birth outcomes for women covered by Medicaid are not different than those achieved for privately insured patients, adjusting for risk variables.[3]

In addition to being able to seek treatment for illnesses when they arise, Medicaid beneficiaries will be able to more easily obtain preventive care, which will help maintain and improve their health. Research demonstrates that when uninsured individuals obtain coverage (including Medicaid), the rate at which they obtain needed care increases substantially.[4] [5] [6] Having health insurance also provides significant financial security. Comprehensive health insurance coverage provides a safety net against the potentially high cost of medical care, and the presence of health insurance can mitigate financial risk. The Oregon study found people who gained coverage were less likely to have unpaid medical bills referred to a collection agency. Again, this study is consistent with prior research showing the high level of financial insecurity associated with lack of insurance coverage. Some recent research indicates that illness and medical bills contribute to a large and increasing share of bankruptcies in the United States.[7] Another recent analysis found that more than 30 percent of the uninsured report having zero (or negative) financial assets and uninsured families at the 90th percentile of the asset distribution report having total financial assets below $13,000—an amount that can be quickly depleted with a single hospitalization.[8] Other research indicates that uninsured individuals who experience illness suffer on average a loss of 30 to 50 percent of assets relative to households with insured individuals.[9]

2. Anticipated Effects on States

The major state impacts from this final rule were covered in the RIA of the March 23, 2012, Medicaid eligibility final rule. However, OACT estimates that state expenditures on behalf of the additional individuals gaining Medicaid coverage as a result of the establishment of the new eligibility group for former foster care children and the new eligibility group for family planning coverage will total $51 million in FY 2016 and $162 million over 3 years (2016–2018), as described in Table 5.

TABLE 5—ESTIMATED STATE BUDGETARY EFFECTS OF INCREASED MEDICAID BENEFIT SPENDING FY 2016–2018

[In millions of dollars]

| Net effect on Medicaid benefit spending | 2016 | 2017 | 2018 | 2016–2018 |
|---|---|---|---|---|
| Former Foster Care Group | 109 | 117 | 125 | 351 |
| Family Planning Group | −58 | −63 | −68 | −189 |
| Total | 51 | 54 | 57 | 162 |

Source: CMS Office of the Actuary.

In developing the estimates for the former foster care group, per enrollee costs were first estimated by calculating the per enrollee costs for adults ages 19 to 20 and 21 to 44 from the 2007 MSIS data; OACT assumed that the new enrollees under this section of the law would have similar costs. The costs were projected forward to 2016 through 2018 using the projected growth rate of Medicaid expenditures per enrollee for adults in the Mid-Session Review of the President's FY 2010 Budget (which was the basis for the estimates used by OACT to estimate the impacts of the Affordable Care Act). The average per enrollee costs for these enrollees were projected to be about $3,000 in 2014 and about $3,900 in 2018. The total costs for these new enrollees were calculated by multiplying the projected number of enrollees by the projected expenditures per enrollee for each year. The federal costs, which are discussed below, were calculated by multiplying the total costs by the average federal share of Medicaid expenditures (about 57 percent).

The costs of the family planning group are based on data available from Pennsylvania. Utilizing this data, OACT projected the cost of the program providing family planning services, as well as savings from reduced delivery costs and infant care services.

These cost estimates do not take into account the reduced administrative burden which will result from simplifying Medicaid and CHIP eligibility policies, such as by eliminating obsolete and unnecessary eligibility groups and establishing streamlined verification procedures and notice and appeals processes. The coordination of Medicaid and CHIP eligibility policy and processes with those of the new Exchanges, including processes to allow for consistency in the provision of notices and appeal rights, and the movement to simplify verification processes with less reliance on paper documentation should all result in a Medicaid eligibility system that is far easier for states to administer than Medicaid's current, more complex system. These changes could generate administrative savings and increase efficiency. The new system through which states will verify certain information with other federal agencies, such as income data from the IRS, will

[2] Institute of Medicine, *Care without coverage: too little, too late* (National Academies Press, 2002).

[3] E. A. Anum, et al, ''Medicaid and Preterm Birth and Low Birth Weight: The Last Two Decades'' *Journal of Women's Health* Vol. 19 (November 2010).

[4] S.K. Long, et al., ''How well does Medicaid work in improving access to care?'' *HSR: Health Services Research* 40:1 (February 2005).

[5] Henry J. Kaiser Family Foundation, ''Children's Health—Why Health Insurance Matters.'' Washington, DC: KFF, 2002.

[6] C. Keane, et al., ''The impact of Children's Health Insurance Program by age,'' *Pediatrics* 104:5 (1999).

[7] D.U. Himmelstein, et al., ''Medical bankruptcy in the United States, 2007: Results of a National Study,'' *The American Journal of Medicine* 122 no. 8, (2009).

[8] ASPE. The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills. (2011).

[9] Cook, K. et al., ''Does major illness cause financial catastrophe?,'' *Health Services Research* 45, no. 2 (2010).

also relieve state Medicaid agencies of some current responsibilities, creating further efficiencies for the states. Currently more than 40 states use an electronic data match with the SSA in lieu of requiring paper documentation, and many states have found savings from this electronic verification process. In addition, the option to provide electronic notices, combined with coordination of notice processes among all insurance affordability programs, may improve consumer access to information while decreasing burden and costs to the states.

These administrative simplifications are expected to lower state administrative costs, although we expect that states may incur short term increases in administrative costs (depending on their current systems and practices) as they implement these changes. States that elect new options finalized in this rule with respect to eligibility for deemed newborns (§§ 435.117 or 457.360), former foster care youth (§ 435.150), or family planning (§ 435.214), and those states that elect to apply MAGI-based methods when determining eligibility for medically needy children, pregnant women, and parents will need to submit a state plan amendment (SPA) to formalize those elections. Submission of a new SPA would result in minimal administrative costs for personnel to prepare the SPA submission and respond to questions, as described in section IV, Collection of Information Requirements. However, election of certain options, such as the application of MAGI-based methods for the medically needy will also result in simplification of the application and enrollment process, which may result in future cost savings. Implementation of the electronic SPA submission process is expected to result in additional administrative simplification once fully implemented, though during the initial phase-in states will incur both administrative costs and staff training costs to complete the transition. The extent of these initial costs will depend on current state policy and practices. As described in section IV of this final rule, the estimated cost for all states is $175,000 per year for 3 years.

Federal support is available for administrative costs and to help states finance system modifications. Notably, in previous rulemaking, we increased federal funding to states to better support state efforts to develop significantly upgraded eligibility and enrollment systems. To anticipate and support these efforts, we published the ''Federal Funding for Medicaid Eligibility Determination and Enrollment Activities'' final rule (75 FR 21950) in the April 19, 2011, **Federal Register**. That rule amended the definition of Mechanized Claims Processing and Information Retrieval Systems to include systems used for eligibility determination, enrollment, and eligibility reporting activities by Medicaid, and made this work eligible for enhanced funding with a federal matching rate of 90 percent for development and 75 percent for ongoing maintenance and operations costs. Systems must meet certain standards and conditions to qualify for the enhanced match.

3. Anticipated Effects on Providers

As expansion and simplification of Medicaid and CHIP eligibility could result in more individuals obtaining health insurance coverage, health centers, hospitals, clinics, physicians, and other providers are likely to experience a significant increase in their insured patient volume. We expect providers that serve a substantial share of the low-income population to realize the most substantial increase in insured patients. Providers, such as hospitals that serve a low-income population, may financially benefit from having a higher insured patient population and providing less uncompensated care, and the establishment of a PE option for hospitals will further simplify access to coverage for patients. In addition, we expect continuity of coverage to improve providers' ability to maintain their relationship with patients and to reduce provider administrative burdens such as time spent helping patients to access information on coverage options and to apply for Medicaid or CHIP.

The improved financial security provided by health insurance also helps ensure that patients can pay their medical bills. The Oregon study found that coverage significantly reduces the level of unpaid medical bills sent to a collection agency.[10] Most of these bills are never paid, so this reduction in unpaid bills means that one of the important effects of expanded health insurance coverage, such as the coverage that will be provided through the Exchanges, is a reduction in the level of uncompensated care provided.

Because the majority of individuals gaining coverage under this provision are likely to have been previously uninsured, we do not anticipate that the provisions of this final rule will impose new costs on providers. Medicaid generally reimburses providers at a lower rate than employer-sponsored health insurance or other forms of private health insurance. For the minority of individuals who become eligible for Medicaid under this provision who are currently covered by employer-sponsored health insurance, there is thus a possibility that their providers may experience lower payment rates. Conversely, Medicaid generally reimburses federally qualified health centers at a higher rate than employer-sponsored insurance and many new Medicaid enrollees may seek treatment in this setting, which will increase payment to these providers. At the same time, the increased federal financial support for Medicaid, the growth in Medicaid enrollment, and the potential that many plans will operate in both the Exchange and in Medicaid may result in states electing to increase Medicaid payment rates to providers.[11]

4. Anticipated Effects on Federal Budget

Table 6 presents estimates of the federal budget effect of this final rule beyond the impact provided in the March 23, 2012, Medicaid eligibility final rule RIA. The federal financial impact of proposed changes to CHIP will be small; as CHIP expenditures are capped under current law, any increases in spending could be expected to be offset by less available funding in the future. The costs provided below are primarily attributable to the impact of the eligibility groups for former foster care children and family planning on net federal spending for Medicaid benefits. The impact of other Affordable Care Act provisions was detailed in the prior Medicaid eligibility final rule RIA. As a result of the establishment of the eligibility group for former foster care children and the new eligibility group covering family planning, OACT estimates an increase in net federal spending on Medicaid benefits for the period FY 2016 and later, with the increase estimated to be about $135 million in 2016 and about $429 million over the 3-year period from FY 2016 through 2018. The family planning group generates cost savings to both state and federal government because the cost of providing Medicaid-covered,

[10] A. Finkelstein, et al., ''The Oregon Health Insurance Experiment: Evidence from the First Year,'' National Bureau of Economic Research Working Paper Series No. 17190(2011).

[11] D. Bachrach, et al., ''Medicaid's role in the Health Benefits Exchange: A road map for States,'' A Maximizing Enrollment Report, National Academy for State Health Policy and Robert Wood Johnson Foundation (March 2011). Available online at *http://www.nashp.org/sites/default/files/maxenroll%20Bachrach%20033011.pdf.*

pregnancy-related care is much larger than the cost of providing contraceptive services.

TABLE 6—ESTIMATED NET INCREASE IN FEDERAL MEDICAID BENEFIT SPENDING, FY 2016–2018

[In millions of dollars]

| Net effect on Medicaid benefit spending | 2016 | 2017 | 2018 | 2016–2018 |
|---|---|---|---|---|
| Former Foster Care Group | 144 | 155 | 166 | 465 |
| Family Planning Group | −9 | −12 | −15 | −36 |
| Total | 135 | 143 | 151 | 429 |

Source: CMS Office of the Actuary.

*C. Alternatives Considered*

The majority of Medicaid and CHIP eligibility provisions proposed in this rule serve to implement the Affordable Care Act. All of the provisions in this final rule are a result of the passage of the Affordable Care Act and are largely self-implementing. Therefore, alternatives considered for this final rule were constrained due to the statutory provisions.

In developing this final rule, we considered alternatives to some of the simplified eligibility policies proposed here, as well as to the streamlined, coordinated process and eligibility policies this rule established between Medicaid, the Exchange, and other insurance affordability programs. One alternative was to allow Medicaid agencies to provide notices to individuals independently of the notices provided by other insurance affordability programs. This option would allow states to maintain current Medicaid notice practices, but could result in multiple communications from different entities regarding each individual's eligibility determination process. This could create significant confusion for applicants and beneficiaries. Another alternative was to consolidate all notice responsibilities within the Exchanges and require one clear line of communication between applicants and the entities determining eligibility for insurance affordability programs. However, this would reduce state flexibility relative to the flexibility already offered in the prior Medicaid eligibility rule and would mandate significant coordination among insurance affordability programs that could stretch beyond just the provision of notices.

We considered several alternatives related to appeals. For example, we initially proposed an ''auto-appeal'' provision such that a request for a fair hearing related to eligibility for premium tax credits would trigger a Medicaid appeal. However, we determined that this policy would likely result in a substantial increase in the volume of Medicaid fair hearing requests heard by state agencies, including for many individuals not interested in appealing their Medicaid determinations. In establishing requirements for an expedited review process, we considered several different timeframes including 3, 5, and 7 days, which would ensure adequate consumer protections for applicants and beneficiaries with urgent health care needs. Balancing the needs of the consumer with the operational challenges in implementing an expedited review process, we are finalizing a timeframe of 7 working days (with a delayed effective date) for eligibility appeals under § 431.244(f)(3)(i) of this final rule, while having a 3 working day timeframe for benefits and services appeals. However, in the notice of proposed rule making published concurrently with this final rule, we are requesting comment on the 3 and 5 day timeframes for eligibility appeals.

*D. Limitations of the Analysis*

A number of challenges face estimators in projecting Medicaid and CHIP benefits and costs under the Affordable Care Act and the final rule. Health care cost growth is difficult to project, especially for people who are currently not in the health care system—the population targeted for the Medicaid eligibility changes. Such individuals could have pent-up demand and thus have costs that may be initially higher than other Medicaid enrollees, while they might also have better health status than those who have found a way (for example, ''spent down'') to enroll in Medicaid.

There is also considerable uncertainty about behavioral responses to the Medicaid and CHIP changes. Individuals' participation rates are particularly uncertain. Medicaid participation rates for people already eligible tend to be relatively low (estimates range from 75 to 86 percent), despite the fact that there are typically no premiums and low to no cost sharing for comprehensive services. It is not clear how the proposed changes will affect those already eligible, or the interest in participating for those newly eligible, as previously described.

*E. Accounting Statement*

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars_a004_a-4/*), in Table 7 we have prepared an accounting statement table showing the classification of the impacts associated with implementation of this final rule. Consistent with standard practice, we show all direct effects as transfer payments.

TABLE 7—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED NET COSTS, FROM FY 2016 TO FY 2018

[In millions]

| Category | Estimate | Year dollar | Discount rate (%) | Period covered |
|---|---|---|---|---|
| Annualized Monetized Transfers from Federal Government to States on Behalf of Beneficiaries | 143 | 2016 | 7 | 2016–2018 |
| | 143 | 2016 | 3 | 2016–2018 |
| Annualized Monetized Transfers from States on Behalf of Beneficiaries | 54 | 2016 | 7 | 2016–2018 |
| | 54 | 2016 | 3 | 2016–2018 |

*F. Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires agencies to prepare an initial regulatory flexibility analysis to describe the impact of the final rule on small entities, unless the head of the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. The Act generally defines a ''small entity'' as: (1) A proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a not-for-profit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of ''small entity.'' HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

For the purposes of the regulatory flexibility analysis, we do not expect small entities to be directly affected by this final rule. The additional options for Medicaid eligibility and streamlined eligibility and enrollment processes finalized in this rule are expected to improve access to coverage, which would be likely to have a positive indirect impact on small entities.

Additionally, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a final rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this final rule will not have a direct economic impact on the operations of a substantial number of small rural hospitals.

*G. Unfunded Mandates*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation, by state, local, or tribal governments, in the aggregate, or by the private sector. In 2016, the threshold level is approximately $146 million. This final rule does not mandate expenditures by state governments, local governments, tribal governments, in the aggregate, or the private sector, of $146 million. The majority of state, local, and private sector costs related to implementation of the Affordable Care Act were described in the RIA accompanying the March 23, 2012 Medicaid eligibility final rule.

*H. Federalism*

Executive Order 13132 establishes certain requirements that an agency must meet when it issues a final rule that imposes substantial direct effects on states, preempts state law, or otherwise has federalism implications. We wish to note again that the impact of changes related to implementation of the Affordable Care Act were described in the RIA of the March 23, 2012, Medicaid eligibility final rule. As discussed in the March 23, 2012 RIA, we have consulted with states to receive input on how the various Affordable Care Act provisions codified in this final rule will affect states. We continue to engage in ongoing consultations with Medicaid and CHIP Technical Advisory Groups (TAGs), which have been in place for many years and serve as a staff level policy and technical exchange of information between CMS and the states. Through consultations with these TAGs, we have been able to get input from states specific to issues surrounding the changes in eligibility groups and rules that became effective in 2014.

In accordance to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department certifies that CMS has complied with the requirements of Executive Order 13132 for the attached proposed regulation in a meaningful and timely manner.

*I. Congressional Review Act*

This final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), which specifies that before a rule can take effect, the federal agency issuing the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information, and has been transmitted to Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects**

*42 CFR Part 407*

Supplemental medical insurance (SMI) enrollment and entitlement.

*42 CFR Part 430*

Administrative practice and procedure, Grant programs—health, Medicaid Reporting and recordkeeping requirements.

*42 CFR Part 431*

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

*42 CFR Part 433*

Administrative practice and procedure, Child support claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

*42 CFR Part 435*

Aid to Families with Dependent Children, Grant programs—health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

*42 CFR Part 457*

Administrative practice and procedure, Grant programs—health, Health insurance, 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 407—SUPPLEMENTAL MEDICAL INSURANCE (SMI) ENROLLMENT AND ENTITLEMENT

■ 1. The authority citation for part 407 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 407.42 is amended by revising paragraph (a)(5) to read as follows:

### § 407.42 Buy-in groups available to the 50 States, the District of Columbia, and the Northern Mariana Islands.

(a) * * *

(5) *Category E:* Individuals who, in accordance with § 435.134 of this chapter, are covered under the State's Medicaid plan despite the increase in social security benefits provided by Public Law 92–336.

* * * * *

## PART 430—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

■ 3. The authority citation for part 430 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 4. Section 430.12 is amended by revising paragraph (a) to read as follows:

**§ 430.12 Submittal of State plans and plan amendments.**

(a) *Format.* A State plan for Medicaid consists of a standardized template, issued and updated by CMS, that includes both basic requirements and individualized content that reflects the characteristics of the State's program. The Secretary will periodically update the template and format specifications for State plans and plan amendments through a process consistent with the requirements of the Paperwork Reduction Act.

* * * * *

## PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

■ 5. The authority citation for part 431 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act, (42 U.S.C. 1302).

■ 6. Section 431.200 is amended by adding paragraph (d) to read as follows:

**§ 431.200 Basis and scope.**

* * * * *

(d) Implements section 1943(b)(3) of the Act and section 1413 of the Affordable Care Act to permit coordinated hearings and appeals among insurance affordability programs.

■ 7. Section 431.201 is amended by—

■ a. Revising the definition of ''Action''; and

■ b. Adding the definitions of ''Joint fair hearing request'' and ''Local evidentiary hearing'' in alphabetical order.

The revision and additions to read as follows:

**§ 431.201 Definitions.**

* * * * *

*Action* means a termination, suspension of, or reduction in covered benefits or services, or a termination, suspension of, or reduction in Medicaid eligibility or an increase in beneficiary liability, including a determination that a beneficiary must incur a greater amount of medical expenses in order to establish income eligibility in accordance with § 435.121(e)(4) or § 435.831 of this chapter or is subject to an increase in premiums or cost-sharing charges under subpart A of part 447 of this chapter. It also means a determination by a skilled nursing facility or nursing facility to transfer or discharge a resident and an adverse determination by a State with regard to the preadmission screening and resident review requirements of section 1919(e)(7) of the Act.

* * * * *

*Joint fair hearing request* means a request for a Medicaid fair hearing which is included in an appeal request submitted to an Exchange or Exchange appeals entity under 45 CFR 155.520 or other insurance affordability program or appeals entity, in accordance with the signed agreement between the agency and an Exchange or Exchange appeals entity or other program or appeals entity described in § 435.1200(b)(3) of this chapter .

*Local evidentiary hearing* means a hearing held on the local or county level serving a specified portion of the State.

* * * * *

■ 8. Section 431.205 is amended by adding paragraphs (e) and (f) to read as follows:

**§ 431.205 Provision of hearing system.**

* * * * *

(e) The hearing system must be accessible to persons who are limited English proficient and persons who have disabilities, consistent with § 435.905(b) of this chapter.

(f) The hearing system must comply with the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, and section 1557 of the Affordable Care Act and implementing regulations.

■ 9. Section 431.206 is amended by—

■ a. Revising paragraphs (b)(1), (c)(2), and (e).

■ b. Adding paragraph (b)(4).

■ c. Removing ''and'' at the end of paragraph (b)(2) and removing the period at the end of paragraph (b)(3) and adding in its place ''; and''.

The revisions and addition read as follows:

**§ 431.206 Informing applicants and beneficiaries.**

* * * * *

(b) * * *

(1) Of his or her right to a fair hearing and right to request an expedited fair hearing;

* * * * *

(4) Of the time frames in which the agency must take final administrative action, in accordance with § 431.244(f).

(c) * * *

(2) At the time the agency denies an individual's claim for eligibility, benefits or services; or denies a request for exemption from mandatory enrollment in an Alternative Benefit Plan; or takes other action, as defined at § 431.201; or whenever a hearing is otherwise required in accordance with § 431.220(a);

* * * * *

(e) The information required under this subpart must be accessible to individuals who are limited English proficient and to individuals with disabilities, consistent with § 435.905(b) of this chapter, and may be provided in electronic format in accordance with § 435.918 of this chapter.

■ 10. Section 431.210 is amended by revising paragraphs (a), (b), and (d)(1) to read as follows:

**§ 431.210 Content of notice.**

* * * * *

(a) A statement of what action the agency, skilled nursing facility, or nursing facility intends to take and the effective date of such action;

(b) A clear statement of the specific reasons supporting the intended action;

* * * * *

(d) * * *

(1) The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing; or

* * * * *

■ 11. Section 431.220 is amended by—

■ a. Revising paragraph (a)(1).

■ b. Removing paragraph (a)(2).

■ c. Redesignating paragraphs (a)(3) through (7), as paragraphs (a)(2) through (6) respectively.

The revision reads as follows:

**§ 431.220 When a hearing is required.**

(a) * * *

(1) Any individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility or for covered benefits or services, or issued a determination of an individual's liability, or has not acted upon the claim with reasonable promptness including, if applicable—

(i) An initial or subsequent decision regarding eligibility;

(ii) A determination of the amount of medical expenses that an individual must incur in order to establish eligibility in accordance with § 435.121(e)(4) or § 435.831 of this chapter; or

(iii) A determination of the amount of premiums and cost sharing charges under subpart A of part 447 of this chapter;

(iv) A change in the amount or type of benefits or services; or

(v) A request for exemption from mandatory enrollment in an Alternative Benefit Plan.

* * * * *

■ 12. Section 431.221 is amended by revising paragraph (a) to read as follows:

**§ 431.221 Request for hearing.**

(a)(1) The agency must establish procedures that permit an individual, or an authorized representative as defined at § 435.923 of this chapter, to—

(i) Submit a hearing request via any of the modalities described in § 435.907(a) of this chapter, except that the requirement to establish procedures for submission of a fair hearing request described in § 435.907(a)(1), (2) and (5) of this chapter (relating to submissions via Internet Web site, telephone and other electronic means) is effective no later than the date described in § 435.1200(i) of this chapter; and

(ii) Include in a hearing request submitted under paragraph (a)(1)(i) of this section, a request for an expedited fair hearing.

(2) [Reserved]

■ 13. Section 431.223 is amended by revising paragraph (a) to read as follows:

**§ 431.223 Denial or dismissal of request for a hearing.**

* * * * *

(a) The applicant or beneficiary withdraws the request. The agency must accept withdrawal of a fair hearing request via any of the modalities available per § 431.221(a)(1)(i). For telephonic hearing withdrawals, the agency must record the individual's statement and telephonic signature. For telephonic, online and other electronic withdrawals, the agency must send the affected individual written confirmation, via regular mail or electronic notification in accordance with the individual's election under § 435.918(a) of this chapter.

* * * * *

■ 14. Section 431.224 is added to read as follows:

**§ 431.224 Expedited appeals.**

(a) *General rule.* (1) The agency must establish and maintain an expedited fair hearing process for individuals to request an expedited fair hearing, if the agency determines that the time otherwise permitted for a hearing under § 431.244(f)(1) could jeopardize the individual's life, health or ability to attain, maintain, or regain maximum function.

(2) The agency must take final administrative action within the period of time permitted under § 431.244(f)(3) if the agency determines that the individual meets the criteria for an expedited fair hearing in paragraph (a)(1) of this section.

(b) *Notice.* The agency must notify the individual whether the request is granted or denied as expeditiously as possible. Such notice must be provided orally or through electronic means in accordance with § 435.918 of this chapter, if consistent with the individual's election under such section; if oral notice is provided, the agency must follow up with written notice, which may be through electronic means if consistent with the individual's election under § 435.918.

■ 15. Section 431.232 is amended by revising paragraph (b) to read as follows:

**§ 431.232 Adverse decision of local evidentiary hearing.**

* * * * *

(b) Inform the applicant or beneficiary in writing that he or she has a right to appeal the decision to the State agency within 10 days after the individual receives the notice of the adverse decision. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she did not receive the notice within the 5-day period; and

* * * * *

■ 16. Section 431.241 is amended by—

■ a. Revising paragraph (a);

■ b. Removing paragraph (b); and

■ c. Redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

The revision reads as follows:

**§ 431.241 Matters to be considered at the hearing.**

* * * * *

(a) Any matter described in § 431.220(a)(1) for which an individual requests a fair hearing.

* * * * *

■ 17. Section 431.242 is amended by revising paragraph (a)(1) and adding paragraph (f) to read as follows:

**§ 431.242 Procedural rights of the applicant or beneficiary.**

* * * * *

(a) * * *

(1) The content of the applicant's or beneficiary's case file and electronic account, as defined in § 435.4 of this chapter; and

* * * * *

(f) Request an expedited fair hearing.

■ 18. Section 431.244 is amended by revising paragraph (f)(1) and adding paragraphs (f)(3) and (4) to read as follows:

**§ 431.244 Hearing decisions.**

* * * * *

(f) * * *

(1) Ordinarily, within 90 days from:

(i) The date the enrollee filed an MCO, PIHP, or PAHP appeal, not including the number of days the enrollee took to subsequently file for a State fair hearing; or

(ii) For all other fair hearings, the date the agency receives a request for a fair hearing in accordance with § 431.221(a)(1).

* * * * *

(3) In the case of individuals granted an expedited fair hearing in accordance with § 431.224(a)—

(i) For a claim related to eligibility described in § 431.220(a)(1), or any claim described in § 431.220(a)(2) (relating to a nursing facility) or § 431.220(a)(3) (related to preadmission and annual resident review), as expeditiously as possible and, effective no later than the date described in § 435.1200(i) of this chapter, no later than 7 working days after the agency receives a request for expedited fair hearing; or

(ii) For a claim related to services or benefits described in § 431.220(a)(1) as expeditiously as possible and, effective no later than the date described in § 435.1200(i) of this chapter, within the time frame in paragraph (f)(2) of this section.

(iii) For a claim related to services or benefits described in § 431.220(a)(4), (5) or (6), in accordance with the time frame in paragraph (f)(2) of this section.

(4)(i) The agency must take final administrative action on a fair hearing request within the time limits set forth in this paragraph except in unusual circumstances when—

(A) The agency cannot reach a decision because the appellant requests a delay or fails to take a required action; or

(B) There is an administrative or other emergency beyond the agency's control.

(ii) The agency must document the reasons for any delay in the appellant's record.

* * * * *

## PART 433—STATE FISCAL ADMINISTRATION

■ 19. The authority citation for part 433 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 20. Section 433.138 is amended by revising paragraphs (d)(1) introductory text, (d)(3), (f), and (g)(1)(i) to read as follows:

**§ 433.138 Identifying liable third parties.**

* * * * *

(d) * * *

(1) Except as specified in paragraph (d)(2) of this section, as part of the data exchange requirements under § 435.945 of this chapter, from the State wage information collection agency (SWICA) defined in § 435.4 of this chapter and from the SSA wage and earnings files data as specified in § 435.948(a)(1) of this chapter, the agency must—

* * * * *

(3) The agency must request, as required under § 435.948(a)(2) of this

chapter, from the State title IV–A agency, information not previously reported that identifies those Medicaid beneficiaries who are employed and their employer(s).

* * * * *

(f) *Data exchanges and trauma code edits: Frequency.* Except as provided in paragraph (l) of this section, the agency must conduct the data exchanges required in paragraphs (d)(1) and (3) of this section, and diagnosis and trauma edits required in paragraphs (d)(4) and (e) of this section on a routine and timely basis. The State plan must specify the frequency of these activities.

(g) * * *

(1) * * *

(i) Within 45 days, the agency must follow up (if appropriate) on such information to identify legally liable third party resources and incorporate such information into the eligibility case file and into its third party data base and third party recovery unit so the agency may process claims under the third party liability payment procedures specified in § 433.139 (b) through (f); and

* * * * *

■ 21. Section 433.145 is amended by revising paragraph (a)(2) to read as follows:

**§ 433.145 Assignment of rights to benefits—State plan requirements.**

(a) * * *

(2) Cooperate with the agency in establishing the identity of a child's parents and in obtaining medical support and payments, unless the individual establishes good cause for not cooperating, and except for individuals described in § 435.116 of this chapter (pregnant women), who are exempt from cooperating in establishing the identity of a child's parents and obtaining medical support and payments from, or derived from, the non-custodial parent of a child; and

* * * * *

■ 22. Section 433.147 is amended by revising the section heading and paragraphs (a)(1) and (c)(1) and by removing paragraph (d).

The revisions read as follows:

**§ 433.147 Cooperation in establishing the identity of a child's parents and in obtaining medical support and payments and in identifying and providing information to assist in pursuing third parties who may be liable to pay.**

(a) * * *

(1) Except as exempt under § 433.145(a)(2), establishing the identity of a child's parents and obtaining medical support and payments for himself or herself and any other person for whom the individual can legally assign rights; and

* * * * *

(c) * * *

(1) For establishing the identity of a child's parents or obtaining medical care support and payments, or identifying or providing information to assist the State in pursuing any liable third party for a child for whom the individual can legally assign rights, the agency must find that cooperation is against the best interests of the child.

* * * * *

■ 23. Section 433.148 is amended by revising paragraph (a)(2) to read as follows:

**§ 433.148 Denial or termination of eligibility.**

* * * * *

(a) * * *

(2) In the case of an applicant, does not attest to willingness to cooperate, and in the case of a beneficiary, refuses to cooperate in establishing the identity of a child's parents, obtaining medical child support and pursuing liable third parties, as required under § 433.147(a) unless cooperation has been waived;

* * * * *

■ 24. Section 433.152 is amended by revising paragraph (b) to read as follows:

**§ 433.152 Requirements for cooperative agreements for third party collections.**

* * * * *

(b) Agreements with title IV–D agencies must specify that the Medicaid agency will provide reimbursement to the IV–D agency only for those child support services performed that are not reimbursable by the Office of Child Support Enforcement under title IV–D of the Act and that are necessary for the collection of amounts for the Medicaid program.

## PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

■ 25. The authority citation for part 435 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 26. Section 435.3(a) is amended by—

■ a. Adding entries for ''1902(a)(46)(B),'' ''1902(ee),'' and ''1905(a)'' in numerical order; and

■ b. Revising 1903(v).

The revisions and additions read as follows:

**§ 435.3 Basis.**

(a) * * *

1902(a)(46)(B) Requirement to verify citizenship.

* * * * *

1902(ee) Option to verify citizenship through electronic data sharing with the Social Security Administration.

* * * * *

1903(v) Payment for emergency services under Medicaid provided to non-citizens.

* * * * *

1905(a) Definition of medical assistance.

* * * * *

■ 27. Section 435.4 is amended by—

■ a. Adding the definitions of ''Citizenship'', ''Combined eligibility notice'', and ''Coordinated content'' in alphabetical order;

■ b. Revising the definition of ''Electronic account''; and

■ c. Adding the definitions of ''Non-citizen'', and ''Qualified non-citizen'' in alphabetical order.

The revision and additions read as follows:

**§ 435.4 Definitions and use of terms.**

* * * * *

*Citizenship* includes status as a ''national of the United States,'' and includes both citizens of the United States and non-citizen nationals of the United States described in 8 U.S.C. 1101(a)(22).

*Combined eligibility notice* means an eligibility notice that informs an individual or multiple family members of a household of eligibility for each of the insurance affordability programs and enrollment in a qualified health plan through the Exchange, for which a determination or denial of eligibility was made, as well as any right to request a fair hearing or appeal related to the determination made for each program. A combined notice must meet the requirements of § 435.917(a) and contain the content described in § 435.917(b) and (c), except that information described in § 435.917(b)(1)(iii) and (iv) may be included in a combined notice issued by another insurance affordability program or in a supplemental notice provided by the agency. A combined eligibility notice must be issued in accordance with the agreement(s) consummated by the agency in accordance with § 435.1200(b)(3).

*Coordinated content* means information included in an eligibility notice regarding, if applicable –

(1) The transfer of an individual's or household's electronic account to another insurance affordability program;

(2) Any notice sent by the agency to another insurance affordability program

regarding an individual's eligibility for Medicaid;

(3) The potential impact, if any, of—

(i) The agency's determination of eligibility or ineligibility for Medicaid on eligibility for another insurance affordability program; or

(ii) A determination of eligibility for, or enrollment in, another insurance affordability program on an individual's eligibility for Medicaid; and

(4) The status of household members on the same application or renewal form whose eligibility is not yet determined.

* * * * *

*Electronic account* means an electronic file that includes all information collected and generated by the agency regarding each individual's Medicaid eligibility and enrollment, including all documentation required under § 435.914 and including any information collected or generated as part of a fair hearing process conducted under subpart E of this part, the Exchange appeals process conducted under 45 CFR part 155, subpart F or other insurance affordability program appeals process.

* * * * *

*Non-citizen* has the same meaning as the term ''alien,'' as defined at 8 U.S.C. 1101(a)(3) and includes any individual who is not a citizen or national of the United States, defined at 8 U.S.C. 1101(a)(22).

* * * * *

*Qualified non-citizen* includes the term ''qualified alien'' as defined at 8 U.S.C. 1641(b) and (c).

* * * * *

**§ 435.113 [Removed]**

■ 28. Section 435.113 is removed.

**§ 435.114 [Removed]**

■ 29. Section 435.114 is removed.

■ 30. Section 435.115 is revised to read as follows:

**§ 435.115 Families with Medicaid eligibility extended because of increased collection of spousal support.**

(a) *Basis.* This section implements sections 408(a)(11)(B) and 1931(c)(1) of the Act.

(b) *Eligibility.* (1) The extended eligibility period is for 4 months.

(2) The agency must provide coverage during an extended eligibility period to a parent or other caretaker relative who was eligible and enrolled for Medicaid under § 435.110, and any dependent child of such parent or other caretaker relative who was eligible and enrolled under § 435.118, in at least 3 out of the 6 months immediately preceding the month that eligibility for the parent or other caretaker relative under § 435.110 is lost due to increased collection of spousal support under title IV–D of the Act.

■ 31. Section 435.117 is amended by—

■ a. Revising the section heading;

■ b. Revising paragraphs (a), (b), and (c); and

■ c. Amending paragraph (d) to add a paragraph heading.

The revisions and additions read as follows:

**§ 435.117 Deemed newborn children.**

(a) *Basis.* This section implements sections 1902(e)(4) and 2112(e) of the Act.

(b) *Eligibility.* (1) The agency must provide Medicaid to children from birth until the child's first birthday without application if, for the date of the child's birth, the child's mother was eligible for and received covered services under—

(i) The Medicaid State plan (including during a period of retroactive eligibility under § 435.915) regardless of whether payment for services for the mother is limited to services necessary to treat an emergency medical condition, as defined in section 1903(v)(3) of the Act; or

(ii) The CHIP State plan as a targeted low-income pregnant woman in accordance with section 2112 of the Act, with household income at or below the income standard established by the agency under § 435.118 for infants under age 1.

(2) The agency may provide coverage under this section to children from birth until the child's first birthday without application who are not described in (b)(1) of this section if, for the date of the child's birth, the child's mother was eligible for and received covered services under—

(i) The Medicaid State plan of any State (including during a period of retroactive eligibility under § 435.915); or

(ii) Any of the following, provided that household income of the child's mother at the time of the child's birth is at or below the income standard established by the agency under § 435.118 for infants under age 1:

(A) The State's separate CHIP State plan as a targeted low-income child;

(B) The CHIP State plan of any State as a targeted low-income pregnant woman or child; or

(C) A Medicaid or CHIP demonstration project authorized under section 1115 of the Act.

(3) The child is deemed to have applied and been determined eligible under the Medicaid State plan effective as of the date of birth, and remains eligible regardless of changes in circumstances until the child's first birthday, unless the child dies or ceases to be a resident of the State or the child's representative requests a voluntary termination of eligibility.

(c) *Medicaid identification number.* (1) The Medicaid identification number of the mother serves as the child's identification number, and all claims for covered services provided to the child may be submitted and paid under such number, unless and until the State issues the child a separate identification number.

(2) The State must issue a separate Medicaid identification number for the child prior to the effective date of any termination of the mother's eligibility or prior to the date of the child's first birthday, whichever is sooner, except that the State must issue a separate Medicaid identification number in the case of a child born to a mother:

(i) Whose coverage is limited to services necessary for the treatment of an emergency medical condition, consistent with § 435.139 or § 435.350;

(ii) Covered under the State's separate CHIP; or

(iii) Who received Medicaid in another State on the date of birth.

(d) *Renewal of eligibility.*

* * * * *

■ 32. Section 435.145 is revised to read as follows:

**§ 435.145 Children with adoption assistance, foster care, or guardianship care under title IV–E.**

(a) *Basis.* This section implements sections 1902(a)(10)(A)(i)(I) and 473(b)(3) of the Act.

(b) *Eligibility.* The agency must provide Medicaid to individuals for whom—

(1) An adoption assistance agreement is in effect with a State or Tribe under title IV–E of the Act, regardless of whether adoption assistance is being provided or an interlocutory or other judicial decree of adoption has been issued; or

(2) Foster care or kinship guardianship assistance maintenance payments are being made by a State or Tribe under title IV–E of the Act.

■ 33. Section 435.150 is added to read as follows:

**§ 435.150 Former foster care children.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(i)(IX) of the Act.

(b) *Eligibility.* The agency must provide Medicaid to individuals who:

(1) Are under age 26;

(2) Are not eligible and enrolled for mandatory coverage under §§ 435.110 through 435.118 or §§ 435.120 through 435.145; and

(3) Were in foster care under the responsibility of the State or a Tribe within the State and enrolled in Medicaid under the State's Medicaid State plan or under a section 1115 demonstration project upon attaining:

(i) Age 18; or

(ii) A higher age at which the State's or such Tribe's foster care assistance ends under title IV–E of the Act.

(c) *Options.* At the State option, the agency may provide Medicaid to individuals who meet the requirements at paragraphs (b)(1) and (2) of this section, were in foster care under the responsibility of the State or Tribe within the State upon attaining either age described in paragraph (b)(3)(i) or (ii) of this section, and were:

(1) Enrolled in Medicaid under the State's Medicaid State plan or under a section 1115 demonstration project at some time during the period in foster care during which the individual attained such age; or

(2) Placed by the State or Tribe in another State and, while in such placement, were enrolled in the other State's Medicaid State plan or under a section 1115 demonstration project:

(i) Upon attaining either age described in paragraph (b)(3)(i) or (ii) of this section; or

(ii) At state option, at some time during the period in foster care during which the individual attained such age.

■ 34. Section 435.170 is revised to read as follows:

**§ 435.170 Pregnant women eligible for extended or continuous eligibility.**

(a) *Basis.* This section implements sections 1902(e)(5) and 1902(e)(6) of the Act.

(b) *Extended eligibility for pregnant women.* For a pregnant woman who was eligible and enrolled under subpart B, C, or D of this part on the date her pregnancy ends, the agency must provide coverage described in paragraph (d) of this section through the last day of the month in which the 60-day postpartum period ends.

(c) *Continuous eligibility for pregnant women.* For a pregnant woman who was eligible and enrolled under subpart B, C, or D of this part and who, because of a change in household income, will not otherwise remain eligible, the agency must provide coverage described in paragraph (d) of this section through the last day of the month in which the 60-day post-partum period ends.

(d) *Covered Services.* The coverage described in this paragraph (d) consists of—

(1) Full Medicaid coverage, as described in § 435.116(d)(2); or

(2) Pregnancy-related services described in § 435.116(d)(3), if the agency has elected to establish an income limit under § 435.116(d)(4), above which pregnant women enrolled for coverage under § 435.116 receive pregnancy-related services described in § 435.116(d)(3).

(e) *Presumptive Eligibility.* This section does not apply to pregnant women covered during a presumptive eligibility period under section 1920 of the Act.

■ 35. Section 435.172 is added to subpart B to read as follows:

**§ 435.172 Continuous eligibility for hospitalized children.**

(a) *Basis.* This section implements section 1902(e)(7) of the Act.

(b) *Requirement.* The agency must provide Medicaid to an individual eligible and enrolled under § 435.118 until the end of an inpatient stay for which inpatient services are furnished, if the individual:

(1) Was receiving inpatient services covered by Medicaid on the date the individual is no longer eligible under § 435.118 based on the child's age; and

(2) Would remain eligible but for attaining such age.

■ 36. Section 435.201 is amended by—

■ a. Amending paragraph (a)(4) by removing ''; '' and adding in its place ''; and'';

■ b. Revising paragraph (a)(5); and

■ c. Removing paragraph (a)(6).

The revisions read as follows:

**§ 435.201 Individuals included in optional groups.**

(a) * * *

* * * * *

(5) Parents and other caretaker relatives (as defined in § 435.4).

* * * * *

■ 37. Section 435.210 is revised to read as follows:

**§ 435.210 Optional eligibility for individuals who meet the income and resource requirements of the cash assistance programs.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(I) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to any group or groups of individuals specified in § 435.201(a)(1) through (3) who meet the income and resource requirements of SSI or an optional State supplement program in States that provide Medicaid to optional State supplement recipients.

■ 38. Section 435.211 is revised to read as follows:

**§ 435.211 Optional eligibility for individuals who would be eligible for cash assistance if they were not in medical institutions.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(IV) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to any group or groups of individuals specified in § 435.201(a)(1) through (3) who are institutionalized in a title XIX reimbursable medical institution and who:

(1) Are ineligible for the SSI or an optional State supplement program in States that provide Medicaid to optional State supplement recipients, because of lower income standards used under the program to determine eligibility for institutionalized individuals; but

(2) Would be eligible for aid or assistance under SSI or an optional State supplement program (as specified in § 435.232 or § 435.234) if they were not institutionalized.

■ 39. Section 435.213 is added to read as follows:

**§ 435.213 Optional eligibility for individuals needing treatment for breast or cervical cancer.**

(a) *Basis.* This section implements sections 1902(a)(10)(A)(ii)(XVIII) and 1902(aa) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals who—

(1) Are under age 65;

(2) Are not eligible and enrolled for mandatory coverage under the State's Medicaid State plan in accordance with subpart B of this part;

(3) Have been screened under the Centers for Disease Control and Prevention (CDC) breast and cervical cancer early detection program (BCCEDP), established in accordance with the requirements of section 1504 of the Public Health Service Act, and found to need treatment for breast or cervical cancer; and

(4) Do not otherwise have creditable coverage, as defined in section 2704(c) of the Public Health Service Act, for treatment of the individual's breast or cervical cancer. An individual is not considered to have creditable coverage just because the individual may:

(i) Receive medical services provided by the Indian Health Service, a tribal organization, or an Urban Indian organization; or

(ii) Obtain health insurance coverage after a waiting period of uninsurance.

(c) *Need for treatment.* An individual is considered to need treatment for breast or cervical cancer if the initial screen under BCCEDP or, subsequent to the initial period of eligibility, the individual's treating health professional determines that:

(1) Definitive treatment for breast or cervical cancer is needed, including treatment of a precancerous condition or early stage cancer, and including diagnostic services as necessary to determine the extent and proper course of treatment; and

(2) More than routine diagnostic services or monitoring services for a precancerous breast or cervical condition are needed.

■ 40. Section 435.214 is added to read as follows:

**§ 435.214 Eligibility for Medicaid limited to family planning and related services.**

(a) *Basis.* This section implements sections 1902(a)(10)(A)(ii)(XXI) and 1902(ii) and clause (XVI) in the matter following section 1902(a)(10)(G) of the Act.

(b) *Eligibility.* (1) The agency may provide Medicaid limited to the services described in paragraph (d) of this section to individuals (of any gender) who—

(i) Are not pregnant; and

(ii) Meet the income eligibility requirements at paragraph (c) of this section.

(2) [Reserved]

(c) *Income standard.* (1) The income standard established in the State plan may not exceed the higher of the income standard for pregnant women in effect under—

(i) The Medicaid State plan in accordance with § 435.116.

(ii) A Medicaid demonstration under section 1115 of the Act.

(iii) The CHIP State plan under section 2112 of the Act.

(iv) A CHIP demonstration under section 1115 of the Act.

(2) The individual's household income is determined in accordance with § 435.603. The agency must indicate in its State plan the options selected by it under § 435.603(k).

(d) *Covered services.* Individuals eligible under this section are covered for family planning and family planning-related benefits as described in clause (XVI) of the matter following section 1902(a)(10)(G) of the Act.

■ 41. Section 435.215 is added to read as follows:

**§ 435.215 Individuals infected with tuberculosis.**

(a) *Basis.* This section implements sections 1902(a)(10)(A)(ii)(XII) and 1902(z)(1) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals who—

(1) Are infected with tuberculosis;

(2) Are not eligible for full coverage under the State's Medicaid State plan (that is, all services which the State is required to cover under § 440.210(a)(1) of this chapter and all services which it has opted to cover under § 440.225 of this chapter, or which the State covers under an approved alternative benefits plan under § 440.325 of this chapter), including coverage for tuberculosis treatment as elected by the State for this group; and

(3) Have household income that does not exceed the income standard established by the State in its State plan, which standard must not exceed the higher of—

(i) The maximum income standard applicable to disabled individuals for mandatory coverage under subpart B of this part; or

(ii) The effective income level for coverage of individuals infected with tuberculosis under the State plan in effect as of March 23, 2010, or December 31, 2013, if higher, converted, at State option, to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

(c) *Covered Services.* Individuals eligible under this section are covered for the following services related to the treatment of infection with tuberculosis:

(1) Prescribed drugs, described in § 440.120 of this chapter;

(2) Physician's services, described in § 440.50 of this chapter;

(3) Outpatient hospital and rural health clinic described in § 440.20 of this chapter, and Federally-qualified health center services;

(4) Laboratory and x-ray services (including services to confirm the presence of the infection), described in § 440.30 of this chapter;

(5) Clinic services, described in § 440.90 of this chapter;

(6) Case management services defined in § 440.169 of this chapter; and

(7) Services other than room and board designated to encourage completion of regimens of prescribed drugs by outpatients including services to observe directly the intake of prescription drugs.

■ 42. Section 435.220 is revised to read as follows:

**§ 435.220 Optional eligibility for parents and other caretaker relatives.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(I) of the Act for optional eligibility of parents and other caretaker relatives as defined at § 435.4.

(b) *Eligibility.* The agency may provide Medicaid to parents and other caretaker relatives defined in § 435.4 and, if living with such parent or other caretaker relative, his or her spouse, whose household income is at or below the income standard established by the agency in its State plan, in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard under this section—

(1) Must exceed the income standard established by the agency under § 435.110(c); and

(2) May not exceed the higher of the State's AFDC payment standard in effect as of July 16, 1996, or the State's highest effective income level for eligibility of parents and other caretaker relatives in effect under the Medicaid State plan or demonstration program under section 1115 of the Act as of March 23, 2010, or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

■ 43. Section 435.222 is revised to read as follows:

**§ 435.222 Optional eligibility for reasonable classifications of individuals under age 21.**

(a) *Basis.* This section implements sections 1902(a)(10)(A)(ii)(I) and (IV) of the Act for optional eligibility of individuals under age 21.

(b) *Eligibility.* The agency may provide Medicaid to all—or to one or more reasonable classifications, as defined in the State plan, of—individuals under age 21 (or, at State option, under age 20, 19 or 18) who have household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the higher of the State's AFDC payment standard in effect as of July 16, 1996, or the State's highest effective income level, if any, for such individuals under the Medicaid State plan or a demonstration program under section 1115 of the Act as of March 23, 2010, or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

**§ 435.223 [Removed]**

■ 44. Section 435.223 is removed.

■ 45. Section 435.226 is added to read as follows:

**§ 435.226 Optional eligibility for independent foster care adolescents.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(XVII) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals under age 21 (or, at State option, under age 20

or 19) who were in foster care under the responsibility of a State or Tribe (or, at State or Tribe option, only to such individuals for whom Federal foster care assistance under title IV–E of the Act was being provided) on the individual's 18th birthday and have household income at or below the income standard, if any, established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* (1) The income standard established under this section may not be lower than the State's income standard established under § 435.110.

(2) The State may elect to have no income standard for eligibility under this section.

■ 46. Section 435.227 is revised to read as follows:

**§ 435.227 Optional eligibility for individuals under age 21 who are under State adoption assistance agreements.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(VIII) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals under age 21 (or, at State option, under age 20, 19, or 18):

(1) For whom an adoption assistance agreement (other than an agreement under title IV–E of the Act) between a State and the adoptive parent(s) is in effect;

(2) Who the State agency which entered into the adoption agreement determined could not be placed for adoption without Medicaid coverage because the child has special needs for medical or rehabilitative care; and

(3) Who, prior to the adoption agreement being entered into—

(i) Were eligible under the Medicaid State plan of the State with the adoption assistance agreement; or

(ii) Had household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the effective income level (converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act) under the State plan or under a demonstration program under section 1115 of the Act as of March 23, 2010 or December 31, 2013, whichever is higher, that was applied by the State to the household income of a child prior to the execution of an adoption assistance agreement for purposes of determining eligibility of children described in paragraphs (b)(1) and (2) of this section.

(d) *Limit Eligibility* The agency may limit eligibility under this section to children for whom the State, or another State identified in the State plan, has entered into an adoption assistance agreement.

■ 47. Section 435.229 is revised to read as follows:

**§ 435.229 Optional targeted low-income children.**

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(XIV) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals under age 19, or at State option within a range of ages under age 19 established in the State plan, who meet the definition of an optional targeted low-income child in § 435.4 and have household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the higher of—

(1) 200 percent of the Federal poverty level (FPL);

(2) A percentage of the FPL which exceeds the State's Medicaid applicable income level, defined at § 457.10 of this chapter, by no more than 50 percentage points (converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act); and

(3) The highest effective income level for coverage of such individuals under the Medicaid State plan or demonstration program under section 1115 of the Act or for coverage of targeted low-income children, defined in § 457.10 of this chapter, under the CHIP State plan or demonstration program under section 1115 of the Act, as of March 23, 2010, or December 31, 2013, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

■ 48. Section 435.301 is amended by—

■ a. Removing paragraph (b)(1)(iii).

■ b. Redesignating paragraph (b)(1)(iv) as paragraph (b)(1)(iii); and

■ c. Revising paragraph (b)(2)(ii).

The revisions read as follows:

**§ 435.301 General rules.**

* * * * *

(b) * * *

(2) * * *

(ii) Parents and other caretaker relatives (§ 435.310).

* * * * *

■ 49. Section 435.310 is revised to read as follows:

**§ 435.310 Medically needy coverage of parents and other caretaker relatives.**

If the agency provides Medicaid for the medically needy, it may provide Medicaid to parents and other caretaker relatives who meet:

(a) The definition of ''caretaker relative'' at § 435.4, or are the spouse of a parent or caretaker relative; and

(b) The medically needy income and resource requirements at subpart I of this part.

**§ 435.401 [Amended]**

■ 50. Section 435.401 is amended by removing and reserving paragraph (c)(1).

■ 51. Section 435.406 is amended by—

■ a. Revising the section heading;

■ b. Revising paragraphs (a) introductory text, (a)(1) introductory text, (a)(1)(i) and (a)(1)(ii);

■ c. Removing paragraphs (a)(1)(iii) and (a)(1)(iv);

■ d. Redesignating paragraph (a)(1)(v) as paragraph (a)(1)(iii);

■ e. Revising newly redesignated paragraph (a)(1)(iii) introductory text;

■ f. Adding paragraph (a)(1)(iii)(E);

■ g. In paragraph (a)(2)(i) and (ii), removing the terms ''alien'' and ''aliens'' each time they appear and adding in their place the terms ''non-citizen'' or ''non-citizens,'' as appropriate;

■ h. In paragraph (a)(2)(i), removing the phrase ''Qualified Alien status'' and adding in its place the phrase ''Qualified Non-Citizen status'';

■ i. Adding paragraphs (a)(3) and (c); and

■ j. In paragraph (b), removing the terms ''aliens,'' ''qualified aliens'' and ''non-qualified aliens'' and adding in their place ''non-citizen,'' ''qualified non-citizen'' and ''non-qualified non-citizen,'' respectively.

The additions and revisions read as follows:

**§ 435.406 Citizenship and non-citizen eligibility.**

(a) The agency must provide Medicaid to otherwise eligible individuals who are—

(1) Citizens and nationals of the United States, provided that—

(i) The individual has made a declaration of United States citizenship, as defined in § 435.4, or an individual described in paragraph (a)(3) of this section has made such declaration on the individual's behalf, and such status is verified in accordance with paragraph (c) of this section; and

(ii) For purposes of the declaration and citizenship verification requirements discussed in paragraphs

(a)(1)(i) of this section, an individual includes applicants under a section 1115 demonstration (including a family planning demonstration project) for which a State receives Federal financial participation in its expenditures.

(iii) The following groups of individuals are exempt from the requirement to provide documentation to verify citizenship in paragraph (c) of this section:

* * * * *

(E)(*1*) Individuals who are or were deemed eligible for Medicaid in the State under § 435.117 or § 457.360 of this chapter on or after July 1, 2006, based on being born to a pregnant woman eligible under the State's Medicaid or CHIP state plan or waiver of such plan;

(*2*) At State option, individuals who were deemed eligible for coverage under § 435.117 or § 457.360 of this chapter in another State on or after July 1, 2006, provided that the agency verifies such deemed eligibility.

* * * * *

(3) For purposes of paragraphs (a)(1) and (2), of this section, a declaration of citizenship or satisfactory immigration status may be provided, in writing and under penalty of perjury, by an adult member of the individual's household, an authorized representative, as defined in § 435.923, or if the applicant is a minor or incapacitated, someone acting responsibly for the applicant provided that such individual attests to having knowledge of the individual's status.

* * * * *

(c) The agency must verify the declaration of citizenship or satisfactory immigration status under paragraph (a)(1) or (2) of this section in accordance with § 435.956.

■ 52. Section 435.407 is revised to read as follows:

**§ 435.407 Types of acceptable documentary evidence of citizenship.**

(a) *Stand-alone evidence of citizenship.* The following must be accepted as sufficient documentary evidence of citizenship:

(1) A U.S. passport, including a U.S. Passport Card issued by the Department of State, without regard to any expiration date as long as such passport or Card was issued without limitation.

(2) A Certificate of Naturalization.

(3) A Certificate of U.S. Citizenship.

(4) A valid State-issued driver's license if the State issuing the license requires proof of U.S. citizenship, or obtains and verifies a SSN from the applicant who is a citizen before issuing such license.

(5)(i) Documentary evidence issued by a Federally recognized Indian Tribe identified in the **Federal Register** by the Bureau of Indian Affairs within the U.S. Department of the Interior, and including Tribes located in a State that has an international border, which—

(A) Identifies the Federally recognized Indian Tribe that issued the document;

(B) Identifies the individual by name; and

(C) Confirms the individual's membership, enrollment, or affiliation with the Tribe.

(ii) Documents described in paragraph (a)(5)(i) of this section include, but are not limited to:

(A) A Tribal enrollment card;

(B) A Certificate of Degree of Indian Blood;

(C) A Tribal census document;

(D) Documents on Tribal letterhead, issued under the signature of the appropriate Tribal official, that meet the requirements of paragraph (a)(5)(i) of this section.

(6) A data match with the Social Security Administration.

(b) *Evidence of citizenship.* If an applicant does not provide documentary evidence from the list in paragraph (a) of this section, the following must be accepted as satisfactory evidence to establish citizenship if also accompanied by an identity document listed in paragraph (c) of this section—

(1) A U.S. public birth certificate showing birth in one of the 50 States, the District of Columbia, Guam, American Samoa, Swain's Island, Puerto Rico (if born on or after January 13, 1941), the Virgin Islands of the U.S. or the CNMI (if born after November 4, 1986, (CNMI local time)). The birth record document may be issued by a State, Commonwealth, Territory, or local jurisdiction. If the document shows the individual was born in Puerto Rico or the Northern Mariana Islands before the applicable date referenced in this paragraph, the individual may be a collectively naturalized citizen. The following will establish U.S. citizenship for collectively naturalized individuals:

(i) *Puerto Rico:* Evidence of birth in Puerto Rico and the applicant's statement that he or she was residing in the U.S., a U.S. possession, or Puerto Rico on January 13, 1941.

(ii) *Northern Mariana Islands (NMI) (formerly part of the Trust Territory of the Pacific Islands (TTPI)):*

(A) Evidence of birth in the NMI, TTPI citizenship and residence in the NMI, the U.S., or a U.S. Territory or possession on November 3, 1986, (NMI local time) and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time);

(B) Evidence of TTPI citizenship, continuous residence in the NMI since before November 3, 1981 (NMI local time), voter registration before January 1, 1975, and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time);

(C) Evidence of continuous domicile in the NMI since before January 1, 1974, and the applicant's statement that he or she did not owe allegiance to a foreign State on November 4, 1986 (NMI local time). Note: If a person entered the NMI as a nonimmigrant and lived in the NMI since January 1, 1974, this does not constitute continuous domicile and the individual is not a U.S. citizen.

(2) At State option, a cross match with a State vital statistics agency documenting a record of birth.

(3) A Certification of Report of Birth, issued to U.S. citizens who were born outside the U.S.

(4) A Report of Birth Abroad of a U.S. Citizen.

(5) A Certification of birth in the United States.

(6) A U.S. Citizen I.D. card.

(7) A Northern Marianas Identification Card issued by the U.S. Department of Homeland Security (or predecessor agency).

(8) A final adoption decree showing the child's name and U.S. place of birth, or if an adoption is not final, a Statement from a State-approved adoption agency that shows the child's name and U.S. place of birth.

(9) Evidence of U.S. Civil Service employment before June 1, 1976.

(10) U.S. Military Record showing a U.S. place of birth.

(11) A data match with the SAVE Program or any other process established by DHS to verify that an individual is a citizen.

(12) Documentation that a child meets the requirements of section 101 of the Child Citizenship Act of 2000 as amended (8 U.S.C. 1431).

(13) Medical records, including, but not limited to, hospital, clinic, or doctor records or admission papers from a nursing facility, skilled care facility, or other institution that indicate a U.S. place of birth.

(14) Life, health, or other insurance record that indicates a U.S. place of birth.

(15) Official religious record recorded in the U.S. showing that the birth occurred in the U.S.

(16) School records, including pre-school, Head Start and daycare, showing the child's name and U.S. place of birth.

(17) Federal or State census record showing U.S. citizenship or a U.S. place of birth.

(18) If the applicant does not have one of the documents listed in paragraphs (a) or (b)(1) through (17) of this section, he or she may submit an affidavit signed by another individual under penalty of perjury who can reasonably attest to the applicant's citizenship, and that contains the applicant's name, date of birth, and place of U.S. birth. The affidavit does not have to be notarized.

(c) *Evidence of identity.* (1) The agency must accept the following as proof of identity, provided such document has a photograph or other identifying information sufficient to establish identity, including, but not limited to, name, age, sex, race, height, weight, eye color, or address:

(i) Identity documents listed at 8 CFR 274a.2 (b)(1)(v)(B)(1), except a driver's license issued by a Canadian government authority.

(ii) Driver's license issued by a State or Territory.

(iii) School identification card.

(iv) U.S. military card or draft record.

(v) Identification card issued by the Federal, State, or local government.

(vi) Military dependent's identification card.

(vii) U.S. Coast Guard Merchant Mariner card.

(viii) For children under age 19, a clinic, doctor, hospital, or school record, including preschool or day care records.

(ix) A finding of identity from an Express Lane agency, as defined in section 1902(e)(13)(F) of the Act.

(x) Two other documents containing consistent information that corroborates an applicant's identity. Such documents include, but are not limited to, employer identification cards; high school, high school equivalency and college diplomas; marriage certificates; divorce decrees; and property deeds or titles.

(2) Finding of identity from a Federal or State governmental agency. The agency may accept as proof of identity a finding of identity from a Federal agency or another State agency (not described in paragraph (c)(1)(ix) of this section), including but not limited to a public assistance, law enforcement, internal revenue or tax bureau, or corrections agency, if the agency has verified and certified the identity of the individual.

(3) If the applicant does not have any document specified in paragraph (c)(1) of this section and identity is not verified under paragraph (c)(2) of this section, the agency must accept an affidavit signed, under penalty of perjury, by a person other than the applicant who can reasonably attest to the applicant's identity. Such affidavit must contain the applicant's name and other identifying information establishing identity, as described in paragraph (c)(1) of this section. The affidavit does not have to be notarized.

(d) *Verification of citizenship by a Federal agency or another State.* The agency may rely, without further documentation of citizenship or identity, on a verification of citizenship made by a Federal agency or another State agency, if such verification was done on or after July 1, 2006.

(e) *Assistance with obtaining documentation.* States must provide assistance to individuals who need assistance in securing satisfactory documentary evidence of citizenship in a timely manner.

(f) *Documentary evidence.* A photocopy, facsimile, scanned or other copy of a document must be accepted to the same extent as an original document under this section, unless information on the copy submitted is inconsistent with other information available to the agency or the agency otherwise has reason to question the validity of, or the information in, the document.

**§ 435.510 [Removed]**

■ 53. Section 435.510 and the undesignated center heading of ''Dependency'' are removed.

**§ 435.522 [Removed]**

■ 54. Section 435.522 is removed.

■ 55. Section 435.601 is amended by—

■ a. Revising paragraph (b) and (d)(1) introductory text.

■ b. Removing paragraphs (d)(1)(i) and(ii); and

■ c. Redesignating paragraphs (d)(1)(iii) through (vi) as paragraphs (d)(1)(i) through (iv), respectively.

The revisions read as follows:

**§ 435.601 Application of financial eligibility methodologies.**

* * * * *

(b) *Basic rule for use of non-MAGI financial methodologies.* (1) This section only applies to individuals excepted from application of MAGI-based methods in accordance with § 435.603(j).

(2) Except as specified in paragraphs (c) and (d) of this section or in § 435.121 or as permitted under § 435.831(b)(1), in determining financial eligibility of individuals as categorically or medically needy, the agency must apply the financial methodologies and requirements of the cash assistance program that is most closely categorically related to the individual's status.

* * * * *

(d) * * *

(1) At State option, and subject to the conditions of paragraphs (d)(2) through (5) of this section, the agency may apply income and resource methodologies that are less restrictive than the cash assistance methodologies or methodologies permitted under § 435.831(b)(1) in determining eligibility for the following groups:

* * * * *

■ 56. Section 435.602 is amended by—

■ a. Redesignating paragraph (a)(1) through (4) as paragraphs (a)(2)(i) through (iv) respectively and redesignating paragraph (a) introductory text as new paragraph (a)(2) introductory text.

■ b. Adding a new paragraph (a)(1).

■ c. Revising newly redesignated paragraph (a)(2)(ii).

The revisions and addition read as follows:

**§ 435.602 Financial responsibility of relatives and other individuals.**

(a) * * *

(1) This section only applies to individuals excepted from application of MAGI-based methods in accordance with § 435.603(j).

(2) * * *

(ii) In relation to individuals under age 21 (as described in section 1905(a)(i) of the Act), the financial responsibility requirements and methodologies that apply include considering the income and resources of parents or spouses whose income and resources will be considered if the individual under age 21 were dependent under the State's approved State plan under title IV–A of the Act in effect as of July 16, 1996, whether or not they are actually contributed, except as specified under paragraph (c) of this section. These requirements and methodologies must be applied in accordance with the provisions of the State's approved title IV–A State plan as of July 16, 1996.

* * * * *

■ 57. Section 435.603 is amended by revising paragraphs (f)(2)(i), (f)(3)(ii) and (iii), and (j)(4) and adding paragraph (k) to read as follows:

**§ 435.603 Application of modified adjusted gross income (MAGI)**

* * * * *

(f) * * *

(2) * * *

(i) Individuals other than a spouse or child who expect to be claimed as a tax dependent by another taxpayer; and

* * * * *

(3) * * *

(ii) The individual's children under the age specified in paragraph (f)(3)(iv) of this section; and

(iii) In the case of individuals under the age specified in paragraph (f)(3)(iv)

of this section, the individual's parents and siblings under the age specified in paragraph (f)(3)(iv) of this section.

* * * * *

(j) * * *

(4) Individuals who request coverage for long-term care services and supports for the purpose of being evaluated for an eligibility group under which long-term care services and supports not covered for individuals determined eligible using MAGI-based financial methods are covered, or for individuals being evaluated for an eligibility group for which being institutionalized, meeting an institutional level of care or satisfying needs-based criteria for home and community based services is a condition of eligibility. For purposes of this paragraph, ''long-term care services and supports'' include nursing facility services, a level of care in any institution equivalent to nursing facility services; and home and community-based services furnished under a waiver or State plan under sections 1915 or 1115 of the Act; home health services as described in sections 1905(a)(7) of the Act and personal care services described in sections 1905(a)(24) of the Act.

* * * * *

(k) *Eligibility.* In the case of an individual whose eligibility is being determined under § 435.214, the agency may—

(1) Consider the household to consist of only the individual for purposes of paragraph (f) of this section;

(2) Count only the MAGI-based income of the individual for purposes of paragraph (d) of this section.

(3) Increase the family size of the individual, as defined in paragraph (b) of the section, by one.

■ 58. Section 435.610 is amended revising paragraphs (a) introductory text and (a)(2) and removing paragraph (c) to read as follows:

**§ 435.610 Assignment of rights to benefits.**

(a) Consistent with §§ 433.145 through 433.148 of this chapter, as a condition of eligibility, the agency must require legally able applicants and beneficiaries to:

* * * * *

(2) In the case of applicants, attest that they will cooperate, and, in the case of beneficiaries, cooperate with the agency in—

(i) Establishing the identity of a child's parents and in obtaining medical support and payments, unless the individual establishes good cause for not cooperating or is a pregnant woman described in § 435.116; and

(ii) Identifying and providing information to assist the Medicaid agency in pursuing third parties who may be liable to pay for care and services under the plan, unless the individual establishes good cause for not cooperating.

* * * * *

■ 59. Section 435.831 is amended by revising paragraph (b) introductory text, (b)(1), and (c) to read as follows:

**§ 435.831 Income eligibility.**

* * * * *

(b) *Determining countable income.* For purposes of determining medically needy eligibility under this part, the agency must determine an individual's countable income as follows:

(1) For individuals under age 21, pregnant women, and parents and other caretaker relatives, the agency may apply—

(i) The AFDC methodologies in effect in the State as of August 16, 1996, consistent with § 435.601 (relating to financial methodologies for non-MAGI eligibility determinations) and § 435.602 (relating to financial responsibility of relatives and other individuals for non-MAGI eligibility determinations); or

(ii) The MAGI-based methodologies defined in § 435.603(b) through (f). If the agency applies the MAGI-based methodologies defined in § 435.603(b) through (f), the agency must comply with the terms of § 435.602, except that in applying § 435.602(a)(2)(ii) to individuals under age 21, the agency may, at State option, include all parents as defined in § 435.603(b) (including stepparents) who are living with the individual in the individual's household for purposes of determining household income and family size, without regard to whether the parent's income and resources would be counted under the State's approved State plan under title IV–A of the Act in effect as of July 16, 1996, if the individual were a dependent child under such State plan.

* * * * *

(c) *Eligibility based on countable income.* If countable income determined under paragraph (b) of this section is equal to or less than that applicable income standard under § 435.814, the individual is eligible for Medicaid.

* * * * *

■ 60. Section § 435.901 is revised to read as follows:

**§ 435.901 Consistency with objectives and statutes.**

The Medicaid agency's standards and methods for providing information to applicants and beneficiaries and for determining eligibility must be consistent with the objectives of the program and with the rights of individuals under the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, section 1557 of the Affordable Care Act, and all other relevant provisions of Federal and State laws and their respective implementing regulations.

■ 61. Section 435.905 is amended by—

■ a. Revising the section heading and paragraph (b)(1);

■ b. Amending paragraph (b)(2) by removing the period at the end of the paragraph and adding ''; and'' in its place ''; and

■ c. Adding paragraph (b)(3)

The revision and addition read as follows:

**§ 435.905 Availability and accessibility of program information.**

* * * * *

(b) * * *

(1) Individuals who are limited English proficient through the provision of language services at no cost to the individual including, oral interpretation and written translations;

* * * * *

(3) Individuals must be informed of the availability of the accessible information and language services described in this paragraph and how to access such information and services, at a minimum through providing taglines in non-English languages indicating the availability of language services.

* * * * *

**§ 435.909 [Amended]**

■ 62. Section 435.909 is amended by removing and reserving paragraph (a).

■ 63. Section 435.910 is amended by revising paragraph (g) to read as follows:

**§ 435.910 Use of social security number.**

* * * * *

(g) The agency must verify the SSN furnished by an applicant or beneficiary with SSA to ensure the SSN was issued to that individual, and to determine whether any other SSNs were issued to that individual.

* * * * *

■ 64. Section 435.911 is amended by—

■ a. Revising paragraphs (b)(1) introductory text, and (b)(1)(i);

■ b. Adding paragraph (b)(2); and

■ c. Revising paragraphs (c) introductory text, and (c)(1).

The revisions and additions read as follows:

**§ 435.911 Determination of eligibility.**

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, applicable modified adjusted gross income standard means 133 percent of the Federal poverty level or, if higher –

(i) In the case of parents and other caretaker relatives described in § 435.110(b), the income standard established in accordance with § 435.110(c) or § 435.220(c);

* * * * *

(2) In the case of individuals who have attained at least age 65 and individuals who have attained at least age 19 and who are entitled to or enrolled for Medicare benefits under part A or B or title XVIII of the Act, there is no applicable modified adjusted gross income standard, except that in the case of such individuals—

(i) Who are also pregnant, the applicable modified adjusted gross income standard is the standard established under paragraph (b)(1) of this section; or

(ii) Who are also a parent or caretaker relative, as described in § 435.4, the applicable modified adjusted gross income standard is the higher of the income standard established in accordance with § 435.110(c) or § 435.220(c).

(c) For each individual who has submitted an application described in § 435.907 or whose eligibility is being renewed in accordance with § 435.916 and who meets the non-financial requirements for eligibility (or for whom the agency is providing a reasonable opportunity to verify citizenship or immigration status in accordance with § 435.956(b)) of this chapter, the State Medicaid agency must comply with the following—

(1) The agency must, promptly and without undue delay consistent with timeliness standards established under § 435.912, furnish Medicaid to each such individual whose household income is at or below the applicable modified adjusted gross income standard.

(2) For each individual described in paragraph (d) of this section, the agency must collect such additional information as may be needed consistent with § 435.907(c), to determine, consistent with the timeliness standards in § 435.912, whether such individual is eligible for Medicaid on any basis other than the applicable modified adjusted gross income standard, and furnish Medicaid on such basis.

* * * * *

**§ 435.913 [Removed]**

■ 65. Section 435.913 is removed.

■ 66. Section 435.917 is added to read as follows:

**§ 435.917 Notice of agency's decision concerning eligibility, benefits, or services.**

(a) *Notice of eligibility determinations.* Consistent with §§ 431.206 through 431.214 of this chapter, the agency must provide all applicants and beneficiaries with timely and adequate written notice of any decision affecting their eligibility, including an approval, denial, termination or suspension of eligibility, or a denial or change in benefits and services. Such notice must—

(1) Be written in plain language;

(2) Be accessible to persons who are limited English proficient and individuals with disabilities, consistent with § 435.905(b), and

(3) If provided in electronic format, comply with § 435.918(b).

(b) *Content of eligibility notice.* (1) *Notice of approved eligibility.* Any notice of an approval of Medicaid eligibility must include, but is not limited to, clear statements containing the following information—

(i) The basis and effective date of eligibility;

(ii) The circumstances under which the individual must report, and procedures for reporting, any changes that may affect the individual's eligibility;

(iii) If applicable, the amount of medical expenses which must be incurred to establish eligibility in accordance with § 435.121 or § 435.831.

(iv) Basic information on the level of benefits and services available based on the individual's eligibility, including, if applicable—

(A) The differences in coverage available to individuals enrolled in benchmark or benchmark-equivalent coverage or in an Alternative Benefits Plan and coverage available to individuals described in § 440.315 of this chapter (relating to exemptions from mandatory enrollment in benchmark or benchmark-equivalent coverage);

(B) A description of any premiums and cost sharing required under Part 447 Subpart A of this chapter;

(C) An explanation of how to receive additional detailed information on benefits and financial responsibilities; and

(D) An explanation of any right to appeal the eligibility status or level of benefits and services approved.

(2) Notice of adverse action including denial, termination or suspension of eligibility or change in benefits or services. Any notice of denial, termination or suspension of Medicaid eligibility or change in benefits or services must be consistent with § 431.210 of this chapter.

(c) *Eligibility.* Whenever an approval, denial, or termination of eligibility is based on an applicant's or beneficiary's having household income at or below the applicable modified adjusted gross income standard in accordance with § 435.911, the eligibility notice must contain—

(1) Information regarding bases of eligibility other than the applicable modified adjusted gross income standard and the benefits and services afforded to individuals eligible on such other bases, sufficient to enable the individual to make an informed choice as to whether to request a determination on such other bases; and

(2) Information on how to request a determination on such other bases;

(d) *Combined Eligibility Notice.* The agency's responsibility to provide notice under this section is satisfied by a combined eligibility notice, as defined in § 435.4, provided by the Exchange or other insurance affordability program in accordance with an agreement between the agency and such program consummated in accordance with § 435.1200(b)(3), except that, if the information described in paragraph (b)(1)(iii) and (iv) of this section is not included in such combined eligibility notice, the agency must provide the individual with a supplemental notice of such information, consistent with this section.

**§ 435.919 [Removed]**

■ 67. Section 435.919 is removed.

■ 68. Section 435.926 is added to read as follows:

**§ 435.926 Continuous eligibility for children.**

(a) *Basis.* This section implements section 1902(e)(12) of the Act.

(b) *Eligibility.* The agency may provide continuous eligibility for the period specified in paragraph (c) of this section for an individual who is:

(1) Under age 19 or under a younger age specified by the agency in its State plan; and

(2) Eligible and enrolled for mandatory or optional coverage under the State plan in accordance with subpart B or C of this part.

(c) *Continuous eligibility period.* (1) The agency must specify in the State plan the length of the continuous eligibility period, not to exceed 12 months.

(2) A continuous eligibility period begins on the effective date of the individual's eligibility under § 435.915 or most recent redetermination or renewal of eligibility under § 435.916

and ends after the period specified by the agency under paragraph (c)(1) of this section.

(d) *Applicability.* A child's eligibility may not be terminated during a continuous eligibility period, regardless of any changes in circumstances, unless:

(1) The child attains the maximum age specified in accordance with paragraph (b)(1) of this section;

(2) The child or child's representative requests a voluntary termination of eligibility;

(3) The child ceases to be a resident of the State;

(4) The agency determines that eligibility was erroneously granted at the most recent determination, redetermination or renewal of eligibility because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative; or

(5) The child dies.

■ 69. Section 435.940 is amended by revising the first sentence to read as follows:

**§ 435.940 Basis and scope.**

The income and eligibility verification requirements set forth at §§ 435.940 through 435.960 are based on sections 1137, 1902(a)(4), 1902(a)(19), 1902(a)(46)(B), 1902(ee), 1903(r)(3), 1903(x), and 1943(b)(3) of the Act, and section 1413 of the Affordable Care Act. * * *

**§ 435.945 [Amended]**

■ 70. Section 435.945(g) is amended by removing the reference ''§ 435.910, § 435.913, and § 435.940 through § 435.965 of this subpart'' and adding in its place the reference ''§ 435.910 and § 435.940 through § 435.965''.

■ 71. Section 435.952 is amended by adding paragraph (c)(3) to read as follows:

**§ 435.952 Use of information and requests of additional information from individuals.**

* * * * *

(c) * * *

(3) *Exception for special circumstances.* The agency must establish an exception to permit, on a case-by-case basis, self-attestation of individuals for all eligibility criteria when documentation does not exist at the time of application or renewal, or is not reasonably available, such as in the case of individuals who are homeless or have experienced domestic violence or a natural disaster. This exception does not apply if documentation is specifically required under title XI or XIX, such as requirements for verifying citizenship and immigration status, as implemented at § 435.956(a).

* * * * *

■ 72. Section 435.956 is amended by adding paragraphs (a) and (b) to read as follows:

**§ 435.956 Verification of other non-financial information.**

(a) *Citizenship and immigration status.* (1)(i) The agency must—

(A) Verify citizenship status through the electronic service established in accordance with § 435.949 or alternative mechanism authorized in accordance with § 435.945(k), if available; and

(B) Promptly attempt to resolve any inconsistencies, including typographical or other clerical errors, between information provided by the individual and information from an electronic data source, and resubmit corrected information through such electronic service or alternative mechanism.

(ii) If the agency is unable to verify citizenship status in accordance with paragraph (a)(1)(i) of this section, the agency must verify citizenship either—

(A) Through a data match with the Social Security Administration; or

(B) In accordance with § 435.407.

(2) The agency must—

(i) Verify immigration status through the electronic service established in accordance with § 435.949, or alternative mechanism authorized in accordance with § 435.945(k);

(ii) Promptly attempt to resolve any inconsistencies, including typographical or other clerical errors, between information provided by the individual and information from an electronic data source, and resubmit corrected information through such electronic service or alternative mechanism.

(3) For purposes of the exemption from the five-year waiting period described in 8 U.S.C. 1613, the agency must verify that an individual is an honorably discharged veteran or in active military duty status, or the spouse or unmarried dependent child of such person, as described in 8 U.S.C. 1612(b)(2) through the electronic service described in § 435.949 or alternative mechanism authorized in accordance with § 435.945(k). If the agency is unable to verify such status through such service the agency may accept self-attestation of such status.

(4)(i) The agency must maintain a record of having verified citizenship or immigration status for each individual, in a case record or electronic database in accordance with the State's record retention policies in accordance with § 431.17(c) of this chapter.

(ii) Unless the individual reports a change in citizenship or the agency has received information indicating a potential change in the individual's citizenship, the agency may not re-verify or require an individual to re-verify citizenship at a renewal of eligibility under § 435.916 of this subpart, or upon a subsequent application following a break in coverage.

(5) If the agency cannot promptly verify the citizenship or satisfactory immigration status of an individual in accordance with paragraph (a)(1) or (2) of this section, the agency—

(i) Must provide a reasonable opportunity in accordance with paragraph (b) of this section; and

(ii) May not delay, deny, reduce or terminate benefits for an individual whom the agency determines to be otherwise eligible for Medicaid during such reasonable opportunity period, in accordance with § 435.911(c).

(iii) If a reasonable opportunity period is provided, the agency may begin to furnish benefits to otherwise eligible individuals, effective the date of application, or the first day of the month of application, consistent with the agency's election under § 435.915(b).

(b) *Reasonable opportunity period.* (1) The agency must provide a reasonable opportunity period to individuals who have made a declaration of citizenship or satisfactory immigration status in accordance with § 435.406(a), and for whom the agency is unable to verify citizenship or satisfactory immigration status in accordance with paragraph (a) of this section. During the reasonable opportunity period, the agency must continue efforts to complete verification of the individual's citizenship or satisfactory immigration status, or request documentation if necessary. The agency must provide notice of such opportunity that is accessible to persons who have limited English proficiency and individuals with disabilities, consistent with § 435.905(b). During such reasonable opportunity period, the agency must, if relevant to verification of the individual's citizenship or satisfactory immigration status—

(i) In the case of individuals declaring citizenship who do not have an SSN at the time of such declaration, assist the individual in obtaining an SSN in accordance with § 435.910, and attempt to verify the individual's citizenship in accordance with paragraph (a)(1) of this section once an SSN has been obtained and verified;

(ii) Promptly provide the individual with information on how to contact the electronic data source described in paragraph (a) of this section so that he or she can attempt to resolve any inconsistencies defeating electronic verification directly with such source, and pursue verification of the

individual's citizenship or satisfactory immigration status if the individual or source informs the agency that the inconsistencies have been resolved; and

(iii) Provide the individual with an opportunity to provide other documentation of citizenship or satisfactory immigration status, in accordance with section 1137(d) of the Act and § 435.406 or § 435.407.

(2) The reasonable opportunity period—

(i) Begins on the date on which the notice described in paragraph (b)(1) of this section is received by the individual. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she did not receive the notice within the 5-day period.

(ii)(A) Ends on the earlier of the date the agency verifies the individual's citizenship or satisfactory immigration status or determines that the individual did not verify his or her citizenship or satisfactory immigration status in accordance with paragraph (a)(2) of this section, or 90 days after the date described in paragraph (b)(2)(i) of this section, except that,

(B) The agency may extend the reasonable opportunity period beyond 90 days for individuals declaring to be in a satisfactory immigration status if the agency determines that the individual is making a good faith effort to obtain any necessary documentation or the agency needs more time to verify the individual's status through other available electronic data sources or to assist the individual in obtaining documents needed to verify his or her status.

(3) If, by the end of the reasonable opportunity period, the individual's citizenship or satisfactory immigration status has not been verified in accordance with paragraph (a) of this section, the agency must take action within 30 days to terminate eligibility in accordance with part 431 subpart E (relating to notice and appeal rights) of this chapter, except that § 431.230 and § 431.231 of this chapter (relating to maintaining and reinstating services) may be applied at State option.

(4)(i) The agency may establish in its State plan reasonable limits on the number of reasonable opportunity periods during which medical assistance is furnished which a given individual may receive once denied eligibility for Medicaid due to failure to verify citizenship or satisfactory immigration status, provided that the conditions in paragraph (b)(4)(ii) of this section are met.

(ii) Prior to implementing any limits under paragraph (b)(4)(i) of this section, the agency must—

(A) Demonstrate that the lack of limits jeopardizes program integrity; and

(B) Receive approval of a State plan amendment prior to implementing limits.

* * * * *

■ 73. Section 435.1001 is amended by revising paragraph (a)(2) to read as follows:

**§ 435.1001 FFP for administration.**

(a) * * *

(2) Administering presumptive eligibility.

* * * * *

■ 74. Section 435.1002 is amended by revising paragraphs (c)(1) and (4) to read as follows:

**§ 435.1002 FFP for services.**

* * * * *

(c) * * *

(1) During a presumptive eligibility period to individuals who are determined to be presumptively eligible for Medicaid in accordance with subpart L of this part;

* * * * *

(4) Regardless of whether such individuals file an application for a full eligibility determination or are determined eligible for Medicaid following the period of presumptive eligibility.

■ 75. Section 435.1004 is amended by revising paragraph (b) to read as follows:

**§ 435.1004 Beneficiaries overcoming certain conditions of eligibility.**

* * * * *

(b) FFP is available for a period not to exceed—

(1) The period during which a recipient of SSI or an optional State supplement continues to receive cash payments while these conditions are being overcome; or

(2) For beneficiaries, eligible for Medicaid only and recipients of SSI or an optional State supplement who do not continue to receive cash payments, the second month following the month in which the beneficiary's Medicaid coverage will have been terminated.

■ 76. Section 435.1008 is revised to read as follows:

**§ 435.1008 FFP in expenditures for medical assistance for individuals who have declared citizenship or nationality or satisfactory immigration status.**

(a) This section implements sections 1137 and 1902(a)(46)(B) of the Act.

(b) Except as provided in paragraph (c) of this section, FFP is not available to a State for expenditures for medical assistance furnished to individuals unless the State has verified citizenship or immigration status in accordance with § 435.956.

(c) FFP is available to States for otherwise eligible individuals whose declaration of U.S. citizenship or satisfactory immigration status in accordance with section 1137(d) of the Act and § 435.406(c) has been verified in accordance with § 435.956, who are exempt from the requirements to verify citizenship under § 435.406(a)(1)(iii), or for whom benefits are provided during a reasonable opportunity period to verify citizenship, nationality, or satisfactory immigration status in accordance with section § 435.956(b), including the time period during which an appeal is pending if the State has elected the option under § 435.956(b)(3).

■ 77. Section 435.1100 is revised to read as follows:

**§ 435.1100 Basis for presumptive eligibility.**

This subpart implements sections 1920, 1920A, 1920B, 1920C, and 1902(a)(47)(B) of the Act.

■ 78. Remove the undesignated center heading ''Presumptive Eligibility for Children'' that immediately precedes § 435.1101.

■ 79. Section 435.1101 is amended by—

■ a. Revising the section heading;

■ b. Adding introductory text for the section;

■ c. Adding the definition of ''Application'';

■ d. Removing the definition of ''Application form'';

■ e. Amending the definition of ''Qualified entity'' by amending paragraph (9)(iii) by removing ''; and'' and adding in its place '';'', redesignating paragraph (10) as paragraph (11), and adding a new paragraph (10).

The revision and additions read as follows:

**§ 435.1101 Definitions related to presumptive eligibility.**

For the purposes of this subpart, the following definitions apply:

*Application* means, consistent with the definition at § 435.4, the single streamlined application adopted by the agency under § 435.907(a); and

* * * * *

*Qualified entity* * * *

(10) Is a health facility operated by the Indian Health Service, a Tribe or Tribal organization under the Indian Self Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*), or an Urban Indian Organization under title V of the Indian Health Care

Improvement Act (25 U.S.C. 1651 *et seq.*).

* * * * *

■ 80. Section 435.1200 is amended by—

■ a. Revising the section heading and paragraphs (a), (b), (c) introductory text, (d), and (e)(1);

■ b. Amending paragraph (e)(2) introductory text by removing the comma after ''electronic interface'';

■ c. Revising paragraph (e)(3); and

■ d. Adding paragraphs (g) through (i).

The additions and revisions to read as follows:

**§ 435.1200 Medicaid agency responsibilities for a coordinated eligibility and enrollment process with other insurance affordability programs.**

(a) *Statutory basis, purpose, and definitions.*

(1) *Statutory basis and purpose.* This section implements section 1943(b)(3) of the Act as added by section 2201 of the Affordable Care Act to ensure coordinated eligibility and enrollment among insurance affordability programs.

(2) *Definitions.* (i) *Combined eligibility notice* has the meaning as provided in § 435.4.

(ii) *Coordinated content* has the meaning as provided in § 435.4.

(iii) *Joint fair hearing request* has the meaning provided in § 431.201 of this chapter.

(b) *General requirements and definitions.* The State Medicaid agency must—

(1) Fulfill the responsibilities set forth in paragraphs (d) through (h) of this section and, if applicable, paragraph (c) of this section.

(2) Certify for the Exchange and other insurance affordability programs the criteria applied in determining Medicaid eligibility.

(3) Enter into and, upon request, provide to the Secretary one or more agreements with the Exchange, Exchange appeals entity and the agencies administering other insurance affordability programs as are necessary to fulfill the requirements of this section, including a clear delineation of the responsibilities of each program to—

(i) Minimize burden on individuals seeking to obtain or renew eligibility or to appeal a determination of eligibility for enrollment in a QHP or for one or more insurance affordability program;

(ii) Ensure compliance with paragraphs (d) through (h) of this section and, if applicable, paragraph (c) of this section;

(iii) Ensure prompt determinations of eligibility and enrollment in the appropriate program without undue delay, consistent with timeliness standards established under § 435.912, based on the date the application is submitted to any insurance affordability program;

(iv) Provide for a combined eligibility notice and opportunity to submit a joint fair hearing request, consistent with paragraphs (g) and (h) of this section; and

(v) If the agency has delegated authority to conduct fair hearings to the Exchange or Exchange appeals entity under § 431.10(c)(1)(ii) of this chapter, provide for a combined appeals decision by the Exchange or Exchange appeals entity for individuals who requested an appeal of an Exchange-related determination in accordance with 45 CFR part155 subpart F and a fair hearing of a denial of Medicaid eligibility which is conducted by the Exchange or Exchange appeals entity.

(c) *Provision of Medicaid for individuals found eligible for Medicaid by another insurance affordability program.* If the agency has entered into an agreement in accordance with § 431.10(d) of this chapter under which the Exchange or other insurance affordability program makes final determinations of Medicaid eligibility, for each individual determined so eligible by the Exchange (including as a result of a decision made by the Exchange or Exchange appeals entity in accordance with paragraph (g)(6) or (7)(i)(A) of this section) or other program, the agency must—

* * * * *

(d) *Transfer from other insurance affordability programs to the State Medicaid agency.* For individuals for whom another insurance affordability program has not made a determination of Medicaid eligibility, but who have been assessed by such program (including as a result of a decision made by the Exchange appeals entity) as potentially Medicaid eligible, and for individuals not so assessed, but who otherwise request a full determination by the Medicaid agency, the agency must—

(1) Accept, via secure electronic interface, the electronic account for the individual and notify such program of the receipt of the electronic account;

(2) Not request information or documentation from the individual in the individual's electronic account, or provided to the agency by another insurance affordability program or appeals entity;

(3) Promptly and without undue delay, consistent with timeliness standards established under § 435.912, determine the Medicaid eligibility of the individual, in accordance with § 435.911, without requiring submission of another application and, for individuals determined not eligible for Medicaid, comply with paragraph (e) of this section as if the individual had submitted an application to the agency;

(4) Accept any finding relating to a criterion of eligibility made by such program or appeals entity, without further verification, if such finding was made in accordance with policies and procedures which are the same as those applied by the agency or approved by it in the agreement described in paragraph (b)(3) of this section; and

(5) Notify such program of the final determination of the individual's eligibility or ineligibility for Medicaid.

(e) * * *

(1) *Individuals determined not eligible for Medicaid.* For each individual who submits an application or renewal to the agency which includes sufficient information to determine Medicaid eligibility, or whose eligibility is being renewed in accordance to a change in circumstance in accordance with § 435.916(d), and whom the agency determines is not eligible for Medicaid, and for each individual determined ineligible for Medicaid in accordance with a fair hearing under subpart E of part 431 of this chapter, the agency must promptly and without undue delay, consistent with timeliness standards established under § 435.912, determine potential eligibility for, and, as appropriate, transfer via a secure electronic interface the individual's electronic account to, other insurance affordability programs.

* * * * *

(3) The agency may enter into an agreement with the Exchange to make determinations of eligibility for enrollment in a QHP through the Exchange, advance payments of the premium tax credit and cost-sharing reductions, consistent with 45 CFR 155.110(a)(2).

* * * * *

(g) *Coordination involving appeals entities.* The agency must—

(1) Include in the agreement into which the agency has entered under paragraph (b)(3) of this section that, if the Exchange or other insurance affordability program provides an applicant or beneficiary with a combined eligibility notice including a determination that the individual is not eligible for Medicaid, the Exchange or Exchange appeals entity (or other insurance affordability program or other program's appeals entity) will—

(i) Provide the applicant or beneficiary with an opportunity to submit a joint fair hearing request, including an opportunity to a request

expedited review of his or her fair hearing request consistent with § 431.221(a)(1)(ii) of this chapter; and

(ii) Notify the Medicaid agency of any joint fair hearing request and transmit to the agency the electronic account of the individual who made such request, unless the fair hearing will be conducted by the Exchange or Exchange appeals entity in accordance to a delegation of authority under § 431.10(c)(1)(ii) of this chapter; and

(2) Beginning on the applicability date described in paragraph (i) of this section, establish a secure electronic interface the through which—

(i) The Exchange or Exchange appeals entity (or other insurance affordability program or appeals entity) can notify the agency that an individual has submitted a joint fair hearing request in accordance with paragraph (g)(1)(ii) of this section;

(ii) The individual's electronic account, including any information provided by the individual as part of an appeal to either the agency or Exchange appeals entity (or other insurance affordability program or appeals entity), can be transferred from one program or appeals entity to the other; and

(iii) The agency can notify the Exchange, Exchange appeals entity (or other insurance affordability program or appeals entity) of the information described in paragraphs (g)(5)(i)(A), (B) and (C) of this section.

(3) Accept and act on a joint fair hearing request submitted to the Exchange or Exchange appeals entity and transferred to the agency as if the request for fair hearing had been submitted directly to the agency in accordance with § 431.221 of this chapter;

(4) In conducting a fair hearing in accordance with subpart E or part 431 of this chapter, minimize to the maximum extent possible, consistent with guidance issued by the Secretary, any requests for information or documentation from the individual included in the individual's electronic account or provided to the agency by the Exchange or Exchange appeals entity.

(5)(i) In the case of individuals described in paragraph (g)(5)(ii) of this section who submit a request a fair hearing under subpart E of part 431 of this chapter to the agency or who submit a joint fair hearing request to the Exchange or Exchange appeals entity (or other insurance affordability program or appeals entity), if the fair hearing is conducted by the Medicaid agency, transmit, through the electronic interface established under paragraph (g)(1) of this section, to the Exchange, Exchange appeals entity (or other insurance affordability program or appeals entity), as appropriate and necessary to enable such other entity to fulfill its responsibilities under 45 CFR part 155, 42 CFR part 457 or 42 CFR part 600—

(A) Notice that the individual has requested a fair hearing;

(B) Whether Medicaid benefits will be furnished pending final administrative action on such fair hearing request in accordance with § 431.230 or § 431.231 of this chapter; and

(C) The hearing decision made by the agency.

(ii) Individuals described in this paragraph include individuals determined ineligible for Medicaid—

(A) By the Exchange; or

(B) By the agency and transferred to the Exchange or other insurance affordability program in accordance with paragraph (e)(1) or (2) of this section.

(6)(i) In the case of individuals described in paragraph (g)(6)(ii) of this section, if the agency has delegated authority under § 431.10(c)(1)(i) to the Exchange to make Medicaid eligibility determinations, the agency must accept a determination of Medicaid eligibility made by the Exchange appeals entity and comply with paragraph (c) of this section in the same manner as if the determination of Medicaid eligibility had been made by the Exchange.

(ii) Individuals described in this paragraph are individuals who were determined ineligible for Medicaid by the Exchange in accordance with 45 CFR 155.305(c), who did not request a fair hearing of such determination, and whom the Exchange appeals entity determines are eligible for Medicaid in deciding an appeal requested by the individual in accordance with 45 CFR part 155 subpart F.

(7)(i) In the case of individuals described in paragraph (g)(7)(ii) of this section, the agency must either—

(A) Accept a determination of Medicaid eligibility made by the Exchange appeals entity and comply with paragraph (c) of this section in the same manner as if the determination of Medicaid eligibility had been made by the Exchange; or

(B) Accept a determination of Medicaid eligibility made by the Exchange appeals entity as an assessment of Medicaid eligibility made by the Exchange and make a determination of eligibility in accordance with paragraph (d) of this section, taking into account any additional information provided to or obtained by the Exchange appeals entity in conducting the Exchange-related appeal.

(ii) Individuals described in this paragraph are individuals who were determined ineligible for Medicaid by the Medicaid agency in accordance with paragraph (e) of the section, who did not request a fair hearing of such determination of Medicaid ineligibility, and whom the Exchange appeals entity determines are eligible for Medicaid in deciding an appeal requested by the individual in accordance with 45 CFR part 155 subpart F.

(h) *Coordination of eligibility notices.* The agency must—

(1) Include in the agreement into which the agency has entered under paragraph (b)(3) of this section that, to the maximum extent feasible, the agency, Exchange or other insurance affordability program will provide a combined eligibility notice, as defined in § 435.4, to individuals, as well as to multiple members of the same household included on the same application or renewal form.

(2) For individuals and other household members who will not receive a combined eligibility notice, include appropriate coordinated content, as defined in § 435.4, in any notice provided by the agency in accordance with § 435.917.

(3) For individuals determined ineligible for Medicaid based on having household income above the applicable MAGI standard, but who are undergoing a Medicaid eligibility determination on a basis other than MAGI in accordance with (e)(2) of this section, the agency must—

(i) Provide notice to the individual, consistent with § 435.917—

(A) That the agency—

(*1*) Has determined the individual ineligible for Medicaid due to household income over the applicable MAGI standard; and

(*2*) Is continuing to evaluate Medicaid eligibility on other bases, including a plain language explanation of the other bases being considered.

(B) Include in such notice coordinated content that the agency has transferred the individual's electronic account to the other insurance affordability program (as required under paragraph (e)(2) of this section) and an explanation that eligibility for or enrollment in such other program will not affect the determination of Medicaid eligibility on a non-MAGI basis; and

(i) Provide the individual with notice, consistent with § 435.917, of the final determination of eligibility on all bases, including coordinated content regarding, as applicable—

(A) The notice being provided to the Exchange or other program in accordance with paragraph (e)(2)(ii) of this section;

(B) Any impact that approval of Medicaid eligibility may have on the individual's eligibility for such other program; and

(C) The transfer of the individual's electronic account to the Exchange in accordance with paragraph (e)(1) of this section.

(i) *Notice of applicability date.* The date described in this paragraph is 6 months from the date of a published **Federal Register** document alerting States of the requirement to comply with paragraphs (g)(2) of this section and §§ 431.221(a)(1)(i), 431.244(f)(3)(i) and (ii) of this chapter. The earliest we will publish such notice will be May 30, 2017, which would result in an earliest effective date of November 30, 2017.

## PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 81. The authority citation for part 457 continues to read as follows:

**Authority:** Section 1102 of the Social Security Act (42 U.S.C. 1302).

■ 82. Section 457.10 is amended by—

■ a. Adding the definitions of ''Combined eligibility notice'', and ''Coordinated content'';

■ b. Revising the definition of ''Electronic account''; and

■ c. Adding the definition of ''Joint review request'' in alphabetical order.

The additions and revision read as follows:

### § 457.10 Definitions and use of terms.

* * * * *

*Combined eligibility notice* means an eligibility notice that informs an individual, or multiple family members of a household of eligibility for each of the insurance affordability programs and enrollment in a qualified health plan through the Exchange, for which a determination or denial of eligibility was made, as well as any right to request a review, fair hearing or appeal related to the determination made for each program. A combined notice must meet the requirements of § 457.340(e) and contain the content described in § 457.340(e)(1), except that information described in § 457.340(e)(1)(i)(C) may be provided in a combined notice issued by another insurance affordability program or in a supplemental notice provided by the State. A combined eligibility notice must be issued in accordance with the agreement(s) consummated by the State in accordance with § 457.348(a).

* * * * *

*Coordinated content* means information included in an eligibility notice regarding, if applicable—

(1) The transfer of an individual's or household's electronic account to another insurance affordability program;

(2) Any notice sent by the State to another insurance affordability program regarding an individual's eligibility for CHIP;

(3) The potential impact, if any, of—

(i) The State's determination of eligibility or ineligibility for CHIP on eligibility for another insurance affordability program; or

(ii) A determination of eligibility for, or enrollment in, another insurance affordability program on an individual's eligibility for CHIP; and

(iii) [Reserved]

(4) The status of household members on the same application or renewal form whose eligibility is not yet determined.

* * * * *

*Electronic account* means an electronic file that includes all information collected and generated by the State regarding each individual's CHIP eligibility and enrollment, including all documentation required under § 457.380 and including any information collected or generated as part of a review process conducted in accordance with subpart K of this part, the Exchange appeals process conducted under 45 CFR part 155, subpart F or other insurance affordability program appeals process.

* * * * *

*Joint review request* means a request for a review under subpart K of this part which is included in an appeal request submitted to an Exchange or Exchange appeals entity or other insurance affordability program or appeals entity, in accordance with the signed agreement between the State and an Exchange or Exchange appeals entity or other program or appeals entity in accordance with § 457.348(b).

* * * * *

■ 83. Section 457.50 is revised to read as follows:

### § 457.50 State plan.

The State plan is a comprehensive written statement, submitted by the State to CMS for approval, that describes the purpose, nature, and scope of the State's CHIP and gives an assurance that the program is administered in conformity with the specific requirements of title XXI, title XIX (as appropriate), and the regulations in this chapter. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program. The Secretary will periodically specify updated requirements on the format of State plan through a process consistent with the requirements of the Paperwork Reduction Act.

■ 84. Section 457.60 is amended by revising the first sentence and adding a new second sentence in the introductory text to read as follows:

### § 457.60 Amendments.

A State may seek to amend its approved State plan in whole or in part at any time through the submission of an amendment to CMS. The Secretary will periodically specify updated requirements on the format of State plan amendments through a process consistent with the requirements of the Paperwork Reduction Act. * * *

* * * * *

■ 85. Section 457.110 is amended by revising paragraph (a) to read as follows:

### § 457.110 Enrollment assistance and information requirements.

(a) *Information disclosure.* The State must make accurate, easily understood, information available to families of potential applicants, applicants and enrollees, and provide assistance to these families in making informed decisions about their health plans, professionals, and facilities. This information must be provided in plain language and is accessible to individuals with disabilities and persons who are limited English proficient, consistent with § 435.905(b) of this chapter.

(1) The State must provide individuals with a choice to receive notices and information required under this subpart and subpart K of this part, in electronic format or by regular mail, provided that the State establish safeguards in accordance with § 435.918 of this chapter.

(2) [Reserved]

* * * * *

■ 86. Section 457.310 is amended by revising paragraph (b)(2)(i) to read as follows:

### § 457.310 Targeted low-income child.

* * * * *

(b) * * *

(2) * * *

(i) Found eligible or potentially eligible for Medicaid under policies of the State plan (determined through either the Medicaid application process or the screening process described at § 457.350), except for eligibility under § 435.214 of this chapter (related to coverage for family planning services);

* * * * *

■ 87. Section 457.320 is amended by—

■ a. Redesignating paragraphs (c) (d), and (e) as paragraphs (d), (e), and (f), respectively.
■ b. Reserving paragraph (c); and
■ c. Revising newly redesignated paragraph (d).

The addition and revisions read as follows:

**§ 457.320 Other eligibility standards.**

* * * * *

(c) [Reserved]

(d) *Citizenship and immigration status.* All individuals seeking coverage under a separate child health plan must make a declaration of United States citizenship or satisfactory immigration status. Such declaration may be made by an adult member of the individual's household, an authorized representative, as defined in § 435.923 of this chapter (referenced at § 457.340), or if the individual is a minor or incapacitated, someone acting responsibly for the individual provided that such individual attests to having knowledge of the individual's status.

* * * * *

■ 88. Section 457.340 is amended by—
■ a. Revising paragraph (a);
■ b. Revising paragraph (e);
■ c. Redesignating paragraph (f) as paragraph (g); and
■ d. Adding a new paragraph (f).

The revisions and addition read as follow:

**§ 457.340 Application for and enrollment in CHIP.**

(a) *Application and renewal assistance, availability of program information, and Web site.* The terms of §§ 435.905, 435.906, 435.908, and 435.1200(f) of this chapter apply equally to the State in administering a separate CHIP.

* * * * *

(e) *Notice of eligibility determinations.* The State must provide each applicant or enrollee with timely and adequate written notice of any decision affecting his or her eligibility, including an approval, denial or termination, or suspension of eligibility, consistent with §§ 457.315, 457.348, and 457.350. The notice must be written in plain language; and accessible to persons who are limited English proficient and individuals with disabilities, consistent with § 435.905(b) of this chapter and § 457.110.

(1) *Content of eligibility notice.*

(i) Any notice of an approval of CHIP eligibility must include, but is not limited to, the following—

(A) The basis and effective date of eligibility;

(B) The circumstances under which the individual must report and procedures for reporting, any changes that may affect the individual's eligibility;

(C) Basic information on benefits and services and if applicable, any premiums, enrollment fees, and cost sharing required, and an explanation of how to receive additional detailed information on benefits and financial responsibilities; and

(D) Information on the enrollees' right and responsibilities, including the opportunity to request a review of matters described in § 457.1130.

(ii) Any notice of denial, termination, or suspension of CHIP eligibility must include, but is not limited to the following—

(A) The basis supporting the action and the effective date,

(B) Information on the individual's right to a review process, in accordance with § 457.1180;

(iii) In the case of a suspension or termination of eligibility, the State must provide sufficient notice to enable the child's parent or other caretaker to take any appropriate actions that may be required to allow coverage to continue without interruption.

(2) The State's responsibility to provide notice under this paragraph is satisfied by a combined eligibility notice, as defined in § 457.10, provided by an Exchange or other insurance affordability program in accordance with paragraph (f) of this section, except that, if the information described in paragraph (e)(1)(i)(C) of this section is not included in such combined eligibility notice, the State must provide the individual with a supplemental notice of such information, consistent with this section.

(f) *Coordination of notices with other programs.* The State must—

(1) Include in the agreement into which the State has entered under § 457.348(a) that for individuals who are transferred between the State and another insurance affordability program in accordance with § 457.348 or § 457.350, the State, Exchange or other insurance affordability program will provide, to the maximum extent feasible, a combined eligibility notice to individuals, as well as to multiple members of the same household included on the same application or renewal form.

(2) For individuals and other household members who will not receive a combined eligibility notice, include appropriate coordinated content, as defined in § 457.10, in any notice provided by the State in accordance with paragraph (e)(1) of this section.

* * * * *

■ 89. Section 457.342 is added to read as follows:

**§ 457.342 Continuous eligibility for children.**

(a) A State may provide continuous eligibility for children under a separate CHIP in accordance with the terms of § 435.926 of this chapter, and subject to a child remaining ineligible for Medicaid, as required by section 2110(b)(1) of the Act and § 457.310 (related to the definition and standards for being a targeted low-income child) and the requirements of section 2102(b)(3) of the Act and § 457.350 (related to eligibility screening and enrollment).

(b) In addition to the reasons provided at § 435.926(d) of this chapter, a child may be terminated during the continuous eligibility period for failure to pay required premiums or enrollment fees required under the State plan, subject to the disenrollment protections afforded under section 2103(e)(3)(C) of the Act (related to premium grace periods) and § 457.570 (related to disenrollment protections).

■ 90. Section 457.348 is amended by revising paragraphs (a), (b), and (c) to read as follows:

**§ 457.348 Determinations of Children's Health Insurance Program eligibility by other insurance affordability programs.**

(a) *Agreements with other insurance affordability programs.* The State must enter into and, upon request, provide to the Secretary one or more agreements with an Exchange and the agencies administering other insurance affordability programs as are necessary to fulfill the requirements of this section, including a clear delineation of the responsibilities of each program to—

(1) Minimize burden on individuals seeking to obtain or renew eligibility or to appeal a determination of eligibility for one or more insurance affordability program;

(2) Ensure compliance with paragraphs (b) and (c) of this section and § 457.350;

(3) Ensure prompt determination of eligibility and enrollment in the appropriate program without undue delay, consistent with the timeliness standards established under § 457.340(d), based on the date the application is submitted to any insurance affordability program, and

(4) Provide for coordination of notices with other insurance affordability programs, consistent with § 457.340(f), and an opportunity for individuals to submit a joint review request, as defined in § 457.10, consistent with § 457.351.

(5) Provide for a combined appeals decision by an Exchange or Exchange

appeals entity (or other insurance affordability program or appeals entity) for individuals who requested an appeal of an Exchange-related determination in accordance with 45 CFR part 155 subpart F (or of a determination related to another program) and an appeal of a denial of CHIP eligibility which is conducted by an Exchange or Exchange appeals entity (or other program or appeals entity) in accordance with the State plan.

(b) *Provision of CHIP for individuals found eligible for CHIP by another insurance affordability program.* If a State accepts final determinations of CHIP eligibility made by another insurance affordability program, for each individual determined so eligible by the other insurance affordability program (including as a result of a decision made by an Exchange appeals entity authorized by the State to adjudicate reviews of CHIP eligibility determinations), the State must—

(1) Establish procedures to receive, via secure electronic interface, the electronic account containing the determination of CHIP eligibility and notify such program of the receipt of the electronic account;

(2) Comply with the provisions of § 457.340 to the same extent as if the application had been submitted to the State; and

(3) Maintain proper oversight of the eligibility determinations made by the other program.

(c) *Transfer from other insurance affordability programs to CHIP.* For individuals for whom another insurance affordability program has not made a determination of CHIP eligibility, but who have been screened as potentially CHIP eligible by such program (including as a result of a decision made by an Exchange or other program appeals entity), the State must—

(1) Accept, via secure electronic interface, the electronic account for the individual and notify such program of the receipt of the electronic account;

(2) Not request information or documentation from the individual in the individual's electronic account, or provided to the State by another insurance affordability program or appeals entity;

(3) Promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d), determine the CHIP eligibility of the individual, in accordance with § 457.340, without requiring submission of another application and, for individuals determined not eligible for CHIP, comply with § 457.350(i) of this section;

(4) Accept any finding relating to a criterion of eligibility made by such program or appeals entity, without further verification, if such finding was made in accordance with policies and procedures which are the same as those applied by the State in accordance with § 457.380 or approved by it in the agreement described in paragraph (a) of this section; and

(5) Notify such program of the final determination of the individual's eligibility or ineligibility for CHIP.

* * * * *

■ 91. Section 457.350 is amended by—

■ a. Revising paragraphs (b) introductory text;

■ b. Amending paragraph (h)(1) by removing ''; and'' and adding in its place '';'';

■ c. Revising paragraph (h)(2);

■ d. Adding paragraph (h)(3);

■ e. Revising paragraph (i) introductory text;

■ f. Adding paragraph (i)(2);

■ g. Revising paragraph (j)(2) and (3); and

■ h. Adding paragraph (j)(4).

The additions and revisions read as follows:

**§ 457.350 Eligibility screening and enrollment in other insurance affordability programs.**

* * * * *

(b) *Screening objectives.* A State must, promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d), identify potential eligibility for other insurance affordability programs of any applicant, enrollee, or other individual who submits an application or renewal form to the State which includes sufficient information to determine CHIP eligibility, or whose eligibility is being renewed due to a change in circumstance in accordance with § 457.343 or who is determined not eligible for CHIP in accordance to a review conducted in accordance with subpart K of this part, as follows:

* * * * *

(h) * * *

(2) Children placed on a waiting list or for whom action on their application is otherwise deferred are transferred to other insurance affordability programs in accordance with paragraph (i) of this section; and

(3) Families are informed that a child may be eligible for other insurance affordability programs, while the child is on a waiting list for a separate child health program or if circumstances change, for Medicaid.

(i) *Individuals found potentially eligible for other insurance affordability programs.* For individuals identified in paragraph (b)(3) of this section, including during a period of uninsurance imposed by the State under § 457.805, the State must—

* * * * *

(2) In the case of individuals subject to a period of uninsurance under § 457.805 and transferred to another insurance affordability program in accordance with paragraph (i)(1) of this section, the State must—

(i) Notify such program of the date on which such period ends and the individual is eligible to enroll in CHIP; and

(ii) Consistent with § 457.340(e), provide the individual with—

(A) An initial notice that the individual is not currently eligible to enroll in the State's separate child health plan and the reasons therefor; the date on which the individual will be eligible to enroll in the State's separate child health plan; and that the individual's account has been transferred to another insurance affordability program for a determination of eligibility to enroll in such program during the period of underinsurance. Such notice also must contain coordinated content informing the individual of the notice being provided to the other insurance affordability program per paragraph (i)(3)(i) of this section and the impact that the individual's eligibility to enroll in the State's separate child health plan will have on the individual's eligibility for such other program.

(B) Prior to the end of the individual's period of uninsurance (sufficient to enable the individual to disenroll from the insurance affordability program to which the individual's account was transferred per paragraph (i)(1) of this section), notice reminding the individual of the information described in paragraph (i)(2)(A) of this section, as appropriate.

(j) * * *

(2) Complete the determination of eligibility for CHIP in accordance with § 457.340 or evaluation for potential eligibility for other insurance affordability programs in accordance with paragraph (b) of this section.

(3) Include in the notice of CHIP eligibility or ineligibility provided under § 457.340(e), as appropriate, coordinated content relating to—

(i) The transfer of the individual's electronic account to the Medicaid agency per paragraph (j)(1) of this section;

(ii) The transfer of the individual's account to another insurance affordability program in accordance with paragraph (i)(1) of this section, if applicable; and

(iii) The impact that an approval of Medicaid eligibility will have on the individual's eligibility for CHIP or another insurance affordability program, as appropriate.

(4) Dis-enroll the enrollee from CHIP if the State is notified in accordance with § 435.1200(d)(5) of this chapter that the applicant has been determined eligible for Medicaid.

* * * * *

■ 92. Section 457.351 is added to read as follows:

**§ 457.351 Coordination involving appeals entities for different insurance affordability programs.**

(a) The terms of § 435.1200(g) of this chapter apply equally to the State in administering a separate CHIP. References to a ''fair hearing'' and ''joint fair hearing request'' in § 435.1200(g) of this chapter are treated as references to a ''review'' under subpart K of this part and to a ''joint appeal request'' as defined in § 457.10. Reference to ''expedited review of a fair hearing request consistent with § 431.221(a)(1)(ii) of this chapter'' is considered a reference to ''expedited review of an eligibility or enrollment matter under § 457.1160(a)''. Reference to § 435.1200(b)(3), (c), (d) and (e) are treated as a reference to § 457.348(b), (c) and (d) and § 457.350(c), respectively.

(b) [Reserved.]

■ 93. Section 457.355 is revised to read as follows:

**§ 457.355 Presumptive eligibility for children.**

The State may provide coverage under a separate child health program for children determined by a qualified entity to be presumptively eligible for the State's separate CHIP in the same manner and to the same extent as permitted under Medicaid under § 435.1101 and § 435.1102 of this chapter.

■ 94. Section 457.360 is added to read as follows:

**§ 457.360 Deemed newborn children.**

(a) *Basis.* This section implements section 2112(e) of the Act.

(b) *Eligibility.* (1) The State must provide CHIP to children from birth until the child's first birthday without application if—

(i) The child's mother was eligible for and received covered services for the date of the child's birth under the State plan as a targeted low-income pregnant woman in accordance with section 2112 of the Act; and

(ii) The child is not eligible for Medicaid under § 435.117 of this chapter.

(2)(i) The State may provide coverage under this section to children who are not eligible for Medicaid under § 435.117 from birth until the child's first birthday without application if the requirement in paragraph (b)(2)(ii) of this section is met and if, for the date of the child's birth, the child's mother was eligible for and received covered services under—

(A) The State plan as a targeted low-income child;

(B) CHIP coverage in another State; or

(C) Coverage under the State's demonstration under section 1115 of the Act as a Medicaid or CHIP population.

(ii) For purposes of paragraph (b)(2)(i) of this section, the State may only elect the optional populations described if it elects to cover the corresponding optional populations in Medicaid under § 435.117(b)(2)(ii) of this chapter.

(3) The child is deemed to have applied and been determined eligible under the State's separate CHIP State plan effective as of the date of birth, and remains eligible regardless of changes in circumstances (except if the child dies or ceases to be a resident of the State or the child's representative requests a voluntary termination of the child's eligibility) until the child's first birthday.

(c) *CHIP identification number.* (1) The CHIP identification number of the mother serves as the child's identification number, and all claims for covered services provided to the child may be submitted and paid under such number, unless and until the State issues a separate identification number for the child.

(2) The State must issue a separate CHIP identification number for the child prior to the effective date of any termination of the mother's eligibility or prior to the date of the child's first birthday, whichever is sooner, except that the State must issue a separate CHIP identification number for the child if the mother was covered in another State at the time of birth.

■ 95. Section 457.380 is amended by adding paragraph (b) to read as follows:

**§ 457.380 Eligibility verification.**

* * * * *

(b) *Status as a citizen, national or a non-citizen.* (1) Except for newborns identified in § 435.406(a)(1)(iii)(E) of this chapter, who are exempt from any requirement to verify citizenship, the agency must—

(i) Verify citizenship or immigration status in accordance with § 435.956(a) of this chapter, except that the reference to § 435.945(k) is read as a reference to paragraph (i) of this section; and

(ii) Provide a reasonable opportunity period to verify such status in accordance with § 435.956(a)(5) and (b) of this chapter and provide benefits during such reasonable opportunity period to individuals determined to be otherwise eligible for CHIP.

(2) [Reserved]

* * * * *

**§ 457.616 [Amended]**

■ 96. Section 457.616 is amended by removing and reserving paragraph (a)(3).

**§ 457.805 [Amended].**

■ 97. Section 457.805(b)(3)(vi) is amended by removing the word ''and'' and by adding in its place the word ''or''.

Dated: October 24, 2016.

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: November 8, 2016.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2016–27844 Filed 11–21–16; 4:15 pm]

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Parts 431, 435, and 457**

**[CMS–2334–P2]**

**RIN 0938–AS55**

# Medicaid and Children's Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule proposes to implement provisions of the Medicaid statute pertaining to Medicaid eligibility and appeals. This proposed rule continues our efforts to assist states in implementing Medicaid and CHIP eligibility, appeals, and enrollment changes required by the Affordable Care Act.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 23, 2017.

**ADDRESSES:** In commenting, please refer to file code CMS–2334–P2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2334–P2, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2334–P2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Sarah deLone, (410) 786–0615.

**SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 410–786–7195.

## Executive Summary

This proposed rule proposes to implement provisions of the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act). This proposed rule proposes changes to promote modernization and coordination of Medicaid appeals processes with other health coverage programs authorized under the Affordable Care Act, as well as technical and minor proposed modifications to delegations of eligibility determinations and appeals.

## Table of Contents

To assist readers in referencing sections contained in this document, we are providing the following table of contents.



## Acronyms and Terms

Because of the many organizations and terms to which we refer by acronym in this final rule, we are listing these acronyms and their corresponding terms in alphabetical order below:

ABP Alternative Benefit Plans
[the] Act The Social Security Act
Affordable Care Act The Affordable Care Act of 2010, which is the collective term for the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) as amended by the Health Care and Education Reconciliation act of 2010 (Pub. L. 111–152)
APTC Advanced Payment of the Premium Tax Credit
CHIP Children's Health Insurance Program
CMS Centers for Medicare & Medicaid Services
COI Collection of Information
CSR Cost-sharing reductions
FFE Federally-Facilitated Exchange
FFP Federal financial participation
HHS Department of Health and Human Services
ICA Intergovernmental Cooperation Act of 1968
ICR Information Collection Requirements
MAGI Modified Adjusted Gross Income
MCO Managed Care Organization
OMB Office of Management and Budget
PRA Paperwork Reduction Act of 1995
QHP Qualified Health Plan
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
SBE State-Based Exchange
SSA Social Security Administration
SSI Supplemental Security Income

## I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), was amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010). These laws are collectively referred to as the Affordable Care Act. The Affordable Care Act extends and simplifies Medicaid eligibility and, in the March 23, 2012 **Federal Register**, we issued a final rule entitled ''Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010'' addressing certain key Medicaid eligibility issues.

In the January 22, 2013 **Federal Register**, we published a proposed rule entitled ''Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing'' (78 FR 4594) (''January 22, 2013 Eligibility and Appeals Proposed Rule'') that proposed changes to provide states more flexibility to coordinate Medicaid and the Children's Health Insurance Program (CHIP) procedures related to eligibility notices, appeals, and other related administrative actions with similar procedures used by other health coverage programs authorized under the Affordable Care Act. In the July 15, 2013 **Federal Register**, we issued the ''Medicaid and Children's Health Insurance Programs: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes, and Premiums and Cost Sharing; Exchanges: Eligibility and Enrollment; final rule'' that finalized certain provisions included in the January 22, 2013 Eligibility and Appeals proposed rule (78 FR 42160) (''July 15, 2013, Eligibility and Appeals final rule''). In the final rule published elsewhere in this **Federal Register**, ''Medicaid and Children's Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP'' (''Medicaid Eligibility and Appeals final rule''), we finalized most of the remaining provisions included in the January 22, 2013, proposed rule.

We received a number of comments on the January 22, 2013, Eligibility and Appeals proposed rule suggesting alternatives that we had not originally considered and did not propose. To give the public the opportunity to comment on those options, we are now proposing certain revisions to the regulations in 42 CFR part 431, subpart E, part 435, subpart M, and part 457, subpart K, that are related to those comments. In addition, we propose to make other corrections and modifications related to delegations of eligibility determinations and appeals, and appeals procedures. We have developed these proposals through our experiences working with states and Exchanges, and Exchange appeals entities operationalizing fair hearings.

## II. Provisions of the Proposed Rule

### *A. Appeals Coordination With Exchanges and CHIP*

Section 431.221(a)(1) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** requires states to establish procedures that permit applicants and beneficiaries, or their authorized representative, to submit a Medicaid fair hearing request through the same modalities as must be available to submit an application (that is, online, by phone and through other commonly available electronic means, as well as by mail, or in person under § 435.907(a)). States will be required to make all modalities available effective 6 months from the date of a **Federal Register** notice alerting them to the effectiveness of the requirement.

We believe it is important that, to the extent possible, consumer protections and procedures should be aligned across all insurance affordability programs. Therefore, in this proposed rule, we propose to add a new § 457.1185(a)(1)(i), which would require that states make the same modalities available for individuals to request a review of CHIP determinations that are subject to review under § 457.1130. Under proposed § 457.1185(a)(1)(ii), states would be required to provide applicants and beneficiaries (or an authorized representative) with the ability to include a request for expedited completion of their review as part of their request for review under § 457.1160. We intend the requirement to make available the opportunity for applicants and beneficiaries to request review of CHIP determinations either online, by phone, or through other commonly-available electronic means to be effective at the same time as these other modalities are required for Medicaid fair hearing requests under § 431.221(a)(1) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**.

As consumers may increasingly rely on telephonic and electronic appeal requests, we believe it is important for individuals to receive confirmation that their request has been received. Therefore, we also propose to add a new § 431.221(a)(2) to require that the agency provide individuals and their authorized representatives with written confirmation within 5 business days of receiving a Medicaid fair hearing request. Under the proposed regulations, this written confirmation would be provided by mail or electronic communication, in accordance with the election made by the individual under § 435.918. We also propose a definition of ''business days'' in § 431.201 to clarify that it has the same meaning as ''working days'' and occurs Monday through Friday, excluding all federal holidays as well as other holidays recognized by the state. We propose a similar written confirmation requirement for CHIP review requests at § 457.1185(a)(2). Written confirmation of Exchange-related appeals similarly is required under the Exchange regulations at 45 CFR 155.520(d); however, no time frame is specified in the Exchange regulations for an Exchange or Exchange appeals entity to provide such written confirmation.

Current § 431.221(d) requires that the Medicaid agency establish an ''appeals period'' (that is, the period of time individuals are provided to request a fair hearing) not to exceed 90 days. Current regulations do not provide for a minimum appeals period for Medicaid fair hearing requests or provide any limitation on the length of the appeals period under CHIP. Under 45 CFR 155.520(b), which specifies the requirements for Exchange appeal requests submitted to an Exchange or Exchange appeals entity, individuals are given 90 days to appeal an Exchange-related determination, except that an Exchange and Exchange appeals entity may provide for a shorter appeals period for Exchange-related appeal requests in order to achieve alignment with Medicaid, as long as such shorter period is not less than 30 days. In the January 22, 2013, Eligibility and Appeals proposed rule, we proposed providing applicants who receive a combined eligibility notice with the opportunity to make a joint fair hearing request. Some commenters were concerned that individuals could be confused if different Medicaid and Exchange appeals periods applied, and that this could result in procedural denials if fair hearing requests were filed timely under the Exchange regulations (generally 90 days), but not by the state's filing deadline for Medicaid (which could be less than 90 days). For example, an

Exchange appeals entity's appeal period could be 90 days, where a state Medicaid agency's appeal period is 45 days for an individual to request a fair hearing.

Fully aligning the Exchange appeals and Medicaid appeals periods would require states to provide Medicaid applicants and beneficiaries with a 90-day appeals period. Currently, only two states allow 90 days for individuals to request fair hearings; most states permit only 30 days. We believe that requiring that all states provide a 90-day appeals period would be challenging to many state agencies, given the significant operational changes required. On the other hand, because eligible individuals can enroll in Medicaid throughout the year, individuals whose appeal period has expired can always submit a new application or claim for the agency's consideration. Therefore, we propose instead to maximize the extent of alignment and to minimize the potential for consumer confusion resulting from different appeals periods for the different programs by revising § 431.221(d) to require that Medicaid agencies accept as timely filed a Medicaid appeal filed using a joint fair hearing request that is timely submitted to an Exchange or Exchange appeals entity within the appeals period allowed by the Exchange.

As discussed in the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**, we are finalizing regulations at §§ 435.1200(g)(1)(i) and 457.351 enabling individuals who receive a combined eligibility notice from an Exchange which includes a Medicaid or CHIP denial to submit a joint request (referred to as a ''joint fair hearing request'' in the case of a Medicaid denial and a ''joint review request'' in the case of a CHIP denial) to an Exchange or Exchange appeals entity. Building on the joint fair hearing and joint review request process finalized in the Medicaid Eligibility and Appeals final rule, proposed § 431.221(d)(2) in this proposed rule, would require states to treat a request for a Medicaid fair hearing as timely filed if filed with an Exchange or Exchange appeals entity as part of a joint fair hearing request within the time permitted for requesting an Exchange-related appeal under the Exchange regulations. At § 457.1185(a)(3)(ii), we propose that states similarly must accept as timely joint review requests in CHIP filed at an Exchange or Exchange appeals entity within the time permitted under the Exchange regulation.

To promote, although not require, alignment of the Medicaid and Exchange-related appeals periods, we are also proposing revisions at § 431.221(d)(1) under which the Medicaid agency would be required to provide individuals with no less than 30 days nor more than 90 days to request a fair hearing—the same minimum and maximum appeals period permitted under the Exchange regulations at 45 CFR 155.520(b); a similar requirement for CHIP is proposed at new § 457.1185(a)(3)(i).

In order to account for delays in mailing, we are also extending the date on which the notice for appeals in Medicaid and CHIP would be considered to be received. Under proposed §§ 431.221(d)(1) and 457.1185(a)(3)(i), the date on which a notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she received the notice at a later date. This 5-day rule is consistent with the date notices are considered received under § 431.231(c)(2), as well as §§ 431.232(b) and 435.956(g)(2)(i) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**.

Section 431.223(a) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** provides that states must offer individuals who have requested a Medicaid fair hearing the ability to withdraw their request via any of the modalities available for requesting a fair hearing. Telephonic hearing withdrawals must be recorded, including the appellant's statement and telephonic signature. This provision also provides that, for telephonic, online and other electronic withdrawals, the agency must send the appellant a written confirmation of such withdrawal, via regular mail or electronic notification, in accordance with the individual's election under § 435.918(a).

In this rule, we propose at § 431.223(a) that the agency must send such written confirmation within 5 business days of the agency's receipt of the withdrawal request. We propose to adopt the same policy for withdrawals of a CHIP review request at new § 457.1185(b). Under § 431.223(a) of the Medicaid Eligibility and Appeals final rule, through cross-reference to § 431.221(a)(1)(i), and under proposed § 457.1185(b), the requirement to accept telephonic, online or other electronic withdrawals is effective at the same time as the requirement to make those modalities available to individuals to make a fair hearing request. As noted above, the earliest that states will be required to accept submission of Medicaid fair hearing or CHIP review requests online, by phone or other commonly-available electronic means is 6 months from the date of publication of a **Federal Register** notice regarding implementation of this requirement. Individuals always retain the right to request a withdrawal in writing, regardless of other modalities available.

In addition, we are proposing to revise § 457.1180 to specify that the information provided to enrollees and applicants regarding the matters subject to review under § 457.1130 be accessible to individuals who are limited English proficient and to individuals with disabilities, consistent with § 435.905(b). Section 457.340(a) (related to availability of program information) applies the terms of § 435.905 equally to CHIP. The proposed revisions to § 457.1180 are intended, in response to comments received on the January 22, 2013 Eligibility and Appeals proposed rule, to clarify the accessibility standards for review notices in CHIP and that these standards are the same as those required for Medicaid, including the modifications to the requirements added in the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**. We also propose revisions to § 457.1180 to specify that these accessibility standards are applicable to both paper and electronic formats, according to the individual's choice, as provided in § 457.110.

We are also proposing conforming revisions at § 457.1120(a)(1) to add a cross-reference to proposed § 457.1185 in the list of regulations with which the states' CHIP review processes must comply.

*B. Expedited Appeals Processes*

1. Expedited Medicaid Fair Hearings, Timeliness and Performance Standards (§§ 431.224, 431.244 and 431.247)

Section 431.224(a) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** requires that states establish and maintain an expedited fair hearing process if the standard time frame for final administrative action could jeopardize the individual's life, health or ability to attain, maintain, or regain maximum function. Under § 431.244(f)(3)(i) of that final rule, requests for an expedited fair hearing of an eligibility-related matter that meet this standard must be adjudicated within 7 working days from the date the agency receives the request. Under § 431.244(f)(3)(ii) of the final rule published elsewhere in this **Federal Register**, requests for an expedited fair

hearing of a fee-for-service coverage-related matter must be adjudicated within 3 working days from the date the agency receives the request, which we believe affords comparable treatment with individuals requesting an expedited appeal of a decision by a managed care plan under § 438.410. Sections 431.206, 431.221, and 431.242 of the final rule provide that individuals must be informed of the ability to request an expedited fair hearing. For a discussion of the final regulations related to expedited fair hearing processes, see section II.A.2 of the preamble to the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**.

In this rule, we propose additional parameters governing the timeframe for adjudicating both standard and expedited fair hearings, while maintaining flexibility for each state to establish policies and procedures best tailored to its own situation. In developing proposed policies relating to expedited fair hearings, we looked at the existing expedited appeals processes we have established for Medicaid managed care, Exchange-related and Medicare appeals to learn from and maximize coordination with other programs, as well as to achieve comparable treatment across programs.

First, we are proposing to amend § 431.244(f)(3)(i) of the final rule published elsewhere in this **Federal Register**, to reduce the amount of time that the agency has to adjudicate expedited fair hearings of an eligibility-related matter from 7 working days to 5 working days. This would more closely align the timeframe for eligibility-related expedited fair hearings with the 3-day time frame provided for service-related appeals under § 431.244(f)(2) and (f)(3)(ii), and thus result in more equitable treatment of applicants and beneficiaries who have urgent health needs. We are considering two other options related to the timeframe for states to take final administrative action on an expedited eligibility appeal: (1) Reducing the proposed time frame to 3 working days, which would align completely with the standard for service-related expedited fair hearings; or (2) not making any change to § 431.244(f)(3)(i) which would leave the 7 day timeframe in place.

We note that we had initially proposed a 3-day timeframe for all expedited fair hearing decisions in the January 2013 proposed eligibility and appeals regulation, provisions of which are being published in the final rule published elsewhere in this **Federal Register**. Many commenters, particularly those representing consumers, supported this expedited timeframe; however, perhaps not anticipating that we might finalize a longer timeframe, the commenters did not provide specific rationale for their support, or address their view on whether a somewhat longer timeframe for issuing a decision in expedited fair hearings is acceptable. Therefore, while we are providing for a 7 working-day timeframe for eligibility-related expedited fair hearings in § 431.244(f)(3)(i) of the final rule published elsewhere in this **Federal Register**, we are proposing in this proposed rule a shorter timeframe to ensure that all stakeholders are provided an opportunity to provide specific input on the appropriate time frame for the agency to take final administrative action in an expedited fair hearing when an urgent health need is present, and we encourage all stakeholders to submit comments on all three options.

We also propose to revise § 431.224(b) to require that the notice provided to individuals who are denied an expedited fair hearing in any context must include: (1) The reason for the denial; (2) an explanation that the appeal request will be handled in accordance with the standard fair hearing process under part 431 subpart E, including the individual's rights under such process, and that a decision will be rendered in accordance with the time frame permitted under § 431.244(f)(1) and proposed § 431.247 (discussed below). Similar notice in the event of a denial of a request for an expedited appeal is required under Exchange regulations at 45 CFR 155.540(b)(2), as well as Medicare Advantage rules at § 422.584. We note that enrollees of Medicaid managed care plans may file a ''grievance'' if the plan denies a request to expedite an appeal related to services under § 438.406(a)(3)(ii)(B). Medicare Advantage plans are also required to inform beneficiaries of the right to file a ''grievance'' if a beneficiary disagrees with the plan's decision not to expedite the appeal request per the requirement set forth under § 422.584(d)(2). However, we are not proposing to include a grievance process at § 431.224, as there is no similar grievance process under part 431, subpart E, and we believe it would be unnecessarily burdensome to establish a grievance process for this purpose only. Additionally, we do not believe that a separate grievance process will provide meaningful assistance to beneficiaries in addressing their underlying appeal. Furthermore, individuals whose grievance involves a claim that they have been discriminated against in the appeals and hearings process can use the grievance process that each Medicaid or CHIP agency must establish under section 1557 of the Affordable Care Act and its implementing regulations, at 45 CFR 92.7. These individuals may also file complaints of discrimination directly with the HHS Office for Civil Rights at *www.HHS.gov/OCR.*

Instead of establishing a new grievance process, we have proposed requirements in paragraph (b) of § 431.224 related to the contents of the notice of a denial of an expedited fair hearing to ensure transparency to the individual about why such a denial was issued, as well as requiring information related to the standard appeals process. We seek comments on this approach and whether and why, if an expedited fair hearing request related to a fee-for-service eligibility matter is denied, a grievance process should be created as part of the expedited fair hearings process at § 431.224.

Section 431.224(b) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** provides that a state must notify an individual if his or her request for an expedited fair hearing was granted or denied ''as expeditiously as possible.'' We are proposing to modify paragraph (b) to provide for a more specific timeframe under which the state must notify an individual of whether his or her request for an expedited fair hearing is denied or granted. We are considering the following: (1) The state must notify an individual no later than 5 days from the date of the request for an expedited fair hearing (the same as the time frame in proposed §§ 431.221(a)(2) and § 431.223(a) for receipt of telephonic and online fair hearing requests and withdrawals in general); (2) another specific timeframe less than or greater than 5 days; (3) a time frame to be established by the Secretary in sub-regulatory guidance, consistent with Exchange Appeals regulations at 45 CFR 155.540(b)(2) (related to confirmation of denial of an expedited appeal where notification was oral); or (4) leaving the current policy that a state should inform an individual as ''expeditiously as possible.'' We seek comments on these proposals.

We propose to add a new paragraph (c) to § 431.224 under which each state would be required to develop, and update as appropriate, an expedited fair hearing plan, to be provided to the Secretary upon request. The expedited fair hearing plan must describe the

expedited fair hearing policies and procedures adopted by the agency to ensure access to an expedited fair hearing request in accordance with § 431.224, including the circumstances in which the agency will require documentation to substantiate the need for an expedited fair hearing under § 431.224(a)(1). Medical documentation requirements that are so burdensome as to create a procedural barrier to reasonable access to the expedited appeal process would not be permitted under proposed § 431.224(c). We will be available to provide states with technical assistance in developing their expedited fair hearing plans.

We note that Medicare Advantage and Part D expedited appeals processes at § 422.584 and § 423.584 require the Medicare Advantage or Part D plan to grant an expedited appeal if the request is made or supported by a physician and the physician indicates that applying the standard time frame for conducting an appeal may seriously jeopardize the life or health of the enrollee or the enrollee's ability to regain maximum function. For requests made by the enrollee, the plan must provide an expedited appeal if it determines that applying the standard time frame could seriously jeopardize the life or health of the enrollee or the enrollee's ability to regain maximum function. Although the enrollee may submit further medical documentation to support his or her claims, none is required. This is similar, but not identical to the standard we are finalizing at § 431.224 of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**. We seek comment on the extent to which states may require, or may be prohibited from requiring, appellants to submit documentation of the urgency of their medical need, including whether we should adopt any of the above-described approaches.

We propose adding a new section, § 431.247, in subpart E to provide that states must establish timeliness and performance standards for taking final administrative action for applicants and beneficiaries requesting a fair hearing (whether or not an expedited hearing is requested), consistent with guidance issued by the Secretary, similar to the standards which states must establish for eligibility determinations under § 435.912. In proposed § 431.247(a)(1), we define ''appellant.'' In proposed paragraph (a)(2), we define ''timeliness standards.'' In proposed paragraph (a)(3), we define ''performance standards.'' Proposed § 431.247(b)(1) provides that, consistent with guidance to be issued by the Secretary, states must establish, and submit to the Secretary upon request, timeliness and performance standards for (1) taking final administrative action on fair hearing requests for which an expedited hearing was not requested or was not granted under § 431.224; and (2) taking final administrative action on fair hearing requests for which the agency has approved a request for an expedited fair hearing under § 431.224, in accordance with the timeframes established in § 431.244(f). Proposed paragraph (b)(2) provides that states may establish different performance standards for individuals who submit their request for a fair hearing directly to the agency under § 431.221 and those whose fair hearing request is submitted to, and transferred to the agency from, an Exchange or Exchange appeals entity in accordance with § 435.1200(g)(1)(iii) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**.

In § 431.247(b)(3), we propose that the timeliness and performance standards must account for the following factors: (1) The capabilities and resources generally available to the Medicaid agency or other governmental agency conducting fair hearings in accordance with § 431.10(c) or other delegation; (2) the demonstrated performance and processes established by other state Medicaid and CHIP agencies, Exchanges and Exchange appeals entities, as reflected in data reported by the Secretary or otherwise available to the state; (3) the medical needs of the individuals who request fair hearings; and (4) the relative complexity of adjudicating fair hearing requests, taking into account such factors as the complexity of the eligibility criteria or services or benefits criteria which must be evaluated, the volume and complexity of evidence submitted by individual or the agency, and whether witnesses are called to testify at the hearing. Under proposed paragraph (c), states would be required to inform individuals of the timeliness standards adopted under this section, consistent with § 431.206(b)(4).

Proposed § 431.247(d) would require that the agency generally take final administrative action on all fair hearing requests in accordance with the outer time limits set forth in § 431.244(f) (90 days for standard fair hearings generally and shorter timeframes for expedited fair hearings), except when the agency cannot reach a decision due to delay on the part of the appellant or there is an emergency beyond the agency's control. We propose to move the regulation text codified at § 431.244(f)(4) in the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** (relating to an exception to the timeliness requirements in unusual circumstances, as well as the need to record the reason for any such delay) to § 431.247(d). We also propose at § 431.247(d) to provide that the agency may delay taking final action for up to 14 calendar days in such unusual circumstances, similar to the delay permitted under the CHIP and Medicaid managed care regulations at §§ 457.1160(b)(2) and 438.408(c), respectively. In § 431.247(e), we propose that the agency cannot use the time standards either (1) as a waiting period before taking final administrative action or (2) as a reason to dismiss a fair hearing request (because it has not taken final administrative action within the time standards). We note paragraphs (c) through (e) are similar to the requirements in § 435.912 related to timeliness and performance standards for eligibility determinations.

We also propose a technical revision to the introductory text of § 431.244(f) of the final eligibility rule published elsewhere in this **Federal Register** to add a cross-reference to proposed § 431.247 to clarify that final administrative action on all fair hearings (both standard and expedited) must be taken in accordance with the timeliness and performance standards established under § 431.247.

2. Expedited CHIP Reviews and Timeliness and Performance Standards (§ 457.1160)

We also are proposing to revise § 457.1160 to require that States establish timeliness and performance standards for completing reviews of eligibility or enrollment matters in CHIP, similar to the requirements proposed for Medicaid. For states that have elected a review process that is specific to CHIP, as provided in § 457.1120(a)(1) (as opposed to a review process that complies with requirements in effect for all health insurance issuers in the state, as permitted under § 457.1120(a)(2)), § 457.1160(a) would require the state to complete reviews of eligibility, enrollment and health services matters within a reasonable amount of time, and to consider the need for expedited review when there is an immediate need for health services. Existing regulations at § 457.1160(b) further specify that the standard time frame for completion of reviews of health services matters is 90 days, unless the medical needs of the individual require a shorter time frame. If the life or health of the individual would be seriously jeopardized (as determined by the physician or health plan) by operating under the standard

time frame, then the state must complete the review within 72 hours, with a permissible extension of this 72-hour time frame by up to 14 calendar days at the request of the applicant or enrollee.

The current provisions relating to time frames for standard and expedited reviews of health services matters have well served the needs of CHIP beneficiaries, and we are not aware of any concerns with their implementation, from beneficiaries or states. Accordingly, we are not proposing any revisions in this proposed rule related to reviews of health services matters in CHIP. With regard to eligibility or enrollment matters, we are proposing a new paragraph (c) in § 457.1160 to require that states establish timeliness and performance standards for completing reviews of eligibility or enrollment matters, similar to the standards that we are proposing for Medicaid at § 431.247. Proposed revisions at § 457.1160(a) cross-reference proposed paragraph (c) to provide that states complete the review of an eligibility or enrollment matter consistent with the performance and timeliness standards established.

At proposed § 457.1160(c)(1), we define ''appellant,'' ''timeliness standards,'' and ''performance standards'' for the purpose of completing reviews of eligibility or enrollment matters. Proposed paragraph (c)(2) provides that, consistent with guidance issued by the Secretary, states must establish timeliness and performance standards for completing reviews of eligibility or enrollment matters when the matter is subject to expedited review (in accordance with the standard for granting expedited review in § 457.1160(a)), as well as for eligibility or enrollment matters that are not subject to expedited review. At paragraph (c)(3), we propose that states may be permitted to establish different timeliness and performance standards for reviews in which the review request is submitted directly to the state in accordance with the proposed § 457.1185, and for those in which the review is transferred to the state in accordance with § 457.351. Proposed paragraph (c)(4) requires states to complete reviews within the standards the state has established unless there are circumstances beyond its control that prevent it from meeting these standards.

We had considered proposing the adoption of the Medicaid requirements for expedited reviews, including: The requirement at § 431.244(f)(1) that the state complete a review within 90 days of the date that the individual requests a review; the standard for granting an expedited fair hearing at § 431.224(a)(1); the requirements at §§ 431.224(a)(2) and 431.244(f)(3) of the Medicaid Eligibility and Appeals final rule, published elsewhere in this **Federal Register**, providing for completion of expedited fair hearing requests within 7 working days; and the requirements at proposed § 431.224(b) and (c), relating to notification of individuals as to whether their request for expedited fair hearing has been granted and the development of an expedited fair hearing plan. Similarly, we had considered proposing specific criteria which must be considered by states in developing timeliness and performance standards for CHIP, as are proposed for states in developing such standards for Medicaid at § 431.247(b)(3) in this proposed rule. However, we do not believe these Medicaid policies are consistent with the broader flexibility generally granted to states in administering their separate CHIPs under title XXI of Social Security Act (the Act). Rather, we believe that the changes we are proposing for CHIP provide states with the flexibility to develop timeliness and performance standards for eligibility or enrollment matters best suited to a state's situation and consistent with the historic flexibility granted to states in administering their CHIP programs. However, we are considering and seek comment on whether further alignment of CHIP and Medicaid policies related to timeliness and performance standards, including adoption of one or more of the above-listed provisions proposed for Medicaid, would result in improvements in care or comparability of treatment between programs, increased administrative efficiency or improved coordination between insurance affordability programs.

*C. Single State Agency—Medicaid Delegations of Eligibility and Fair Hearings*

Under § 431.10(c)(1)(i), as revised in the July 2013 Eligibility final rule, the agency may delegate authority to determine Medicaid eligibility to the single state agency for the financial assistance program under Title IV–A (in the 50 states and the District of Columbia), the single state agency for the financial assistance programs under Title I or XIV (in Guam, Puerto Rico and the Virgin Islands), the federal agency administering the supplemental security income program under title XVI of the Act (SSI), and an Exchange.

Under § 431.10(c)(1)(ii), the agency may delegate fair hearing authority to an Exchange or Exchange appeals entity, subject to certain limitations and consumer protections. In this rule, we are proposing a limited expansion of the entities to which states may delegate eligibility determination and fair hearing authority to include other state and local agencies and tribes, to the extent the agency determines them capable of making eligibility determinations. We note that the state agency's requirements to provide oversight and monitoring described in existing regulations at § 431.10(c)(3) continue to apply to these proposed delegations. We also propose to remove §§ 431.205(b)(2), 431.232 and 431.233, relating to review of local evidentiary hearings, as hearings by local agencies will be handled instead under the rules relating to delegation of fair hearing authority at § 431.10(c). We have proposed to address the option to delegate the authority to conduct fair hearings at a local agency, instead at § 431.205(b)(1). Additional discussion of the changes in proposed § 431.205(b) is below.

Finally, we propose a number of revisions to the regulations to further strengthen beneficiary protections and the Medicaid agency's authority in delegated situations, to more clearly reflect current policy relating to delegation of eligibility determination and fair hearing authority to other governmental entities and to align policy and oversight in situations in which the Medicaid agency is supervising another state or local agency in administering certain state plan functions with current requirements for oversight over agencies to which authority has been formally delegated under § 431.10. These proposed revisions are discussed in more detail below.

Section 1902(a)(4) of the Act provides for such methods of administration as are found by the Secretary to be necessary for the proper and efficient operation of the state plan. Section 1902(a)(4) of the Act also permits local administration of state plan functions if performed under the supervision of the state Medicaid agency. Anticipating delegation of administrative functions to other governmental entities, section 1902(a)(5) of the Act similarly provides that states designate a single state agency to administer or to supervise the administration of the state plan. Delegation of authority to conduct eligibility determinations and/or adjudicate fair hearings—such as to the Exchange or other public benefit program agencies, as is currently permitted under § 431.10(c)—as well as to perform other administrative functions, may further the goals of efficient and effective operation of the Medicaid program consistent with

section 1902(a)(4) of the Act. Thus, current § 431.10(c) permits delegation of eligibility determination authority to the Exchange, the Social Security Administration (SSA) and the title IV–A agency.

In some instances, delegation to a local agency or tribal entity also may support the best interests of beneficiaries, consistent with section 1902(a)(19) of the Act as well as section 1902(a)(4) of the Act, where cultural sensitivity possessed by local entities and the establishment of community relationships is important to best serving the local population. Consistent with these statutory provisions, we propose to add (1) new paragraph (c)(1)(i)(A)(*4*) to § 431.10, permitting states to delegate authority to determine eligibility to other state and local governmental agencies and to Alaska Native or American Indian tribal entities and (2) new paragraph (c)(1)(ii)(A) permitting states to delegate authority to conduct fair hearings to local agencies or tribal entities that were involved in the initial eligibility determination in the state, provided that individuals have the opportunity to have their fair hearing conducted instead at the Medicaid agency, consistent with current requirements when a state delegates the authority to conduct a fair hearing at § 431.10(c)(1)(ii). In § 431.10(a)(2), we propose to define ''tribal entities'' as a tribal or Alaskan Native governmental entity designated by the Department of the Interior, Bureau of Indian Affairs, which publishes a Notice recognizing such tribal entities annually in the **Federal Register**. For the most recent Notice, see *January 29, 2016, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs* at *www.bia.gov/cs/groups/xraca/documents/text/idc1-033010.pdf.* We have historically approved delegation of authority to conduct eligibility determinations to a tribal entity when that entity is also a designated title IV–A agency. Under § 431.10(c)(1)(i)(A)(*4*), we propose to provide that states may delegate authority to determine eligibility to tribal entities, regardless of whether the tribal entity is a IV–A agency. We see no policy reason to limit delegation of authority to a tribal entity to determine eligibility only if the entity is a IV–A agency.

We note that the expansion of delegation authority to include other state and local agencies and tribal entities under the proposed rule aligns with current practice in a number of states, including states in which counties determine eligibility. While the proposed revisions of § 431.10(c)(1)(i) provide for delegation of eligibility determinations to other state agencies, the proposed revisions of § 431.10(c)(1)(ii) do not provide for a delegation of fair hearing authority to other state agencies. States seeking to delegate fair hearing authority to another state agency must request a waiver under the Intergovernmental Cooperation Act of 1968 (ICA), codified at 31 U.S.C. 5604.

We do not believe that delegation of fair hearing authority to a local agency or tribal entity in another state, or to an entity not otherwise involved in making the underlying decision that is the subject of a fair hearing makes sense because it could involve local agencies or tribal entities conducting fair hearings about eligibility determinations conducted outside their jurisdiction. It is also important that the tribe or local agency to which the eligibility determination function is delegated is geographically located in the state and that the Medicaid agency has determined that the tribe or local agency is capable of making eligibility determinations. The new delegation authority provided at proposed § 431.10(c)(1)(i)(A)(*4*) and (c)(1)(ii)(A) therefore is limited to state and local agencies and tribal entities located in the state; in the case of fair hearing authority, the local agency or tribal entity also must have made the underlying determination at issue in the fair hearing. However, the hearing officer must be an impartial official, who was not involved in the initial determination or action, in accordance with requirement of the delegation to adhere to Medicaid policies reflected at § 431.10(c)(3)(A) and, more generally, in part 431, subpart E.

Consistent with limitations on delegations under current regulations, any delegation under proposed § 431.10(c)(1)(i)(A)(*4*), (c)(1)(ii)(A) or (c)(1)(ii)(C) must be reflected in an approved state plan amendment per § 431.10(c)(1)(i)(A) and must meet the requirements set forth at § 431.10(c)(2) (limiting delegations to government agencies which maintain personnel standards on a merit basis); § 431.10(c)(3) (relating to agency oversight responsibilities and conditions of delegations); § 431.10(d) (relating to agreements between the state Medicaid agency and the delegated entity); and § 431.10(c)(1)(ii) (relating to every applicant's and beneficiary's right to request a fair hearing before the single state agency rather than a delegated entity). Conforming revisions also are proposed at § 431.10(c)(3)(iii) and (d)(4) to ensure that the terms of those provisions apply to delegations of fair hearing authority to any authorized entity; § 431.10(c)(1) (introductory text) to specify that all delegations authorized under that paragraph must be conducted in accordance with the requirements of paragraphs (c)(2), (3) and (4); § 431.10(d) (introductory text) to include local agencies and tribal entities in the list of entities with which the state must have a written agreement in order to delegate authority; § 431.10(c)(2) to require that any tribal entity to which authority under the regulations is delegated maintains personnel standards on a merit basis; and § 431.205(b) and (c) to provide for the permissibility of fair hearings before a local agency or tribal entity, as well as before the Medicaid agency or Exchange or Exchange appeals entity.

Section 431.205(b)(2) of the regulations currently provides that the Medicaid agency may provide for a local evidentiary hearing, with a right of appeal to the Medicaid agency. Section 431.232 provides individuals the right to request that such appeal involve a *de novo* hearing before the Medicaid agency; otherwise, per § 431.233, an appeal to the Medicaid agency may be limited to a review of the record developed by the local hearing officer. Because states would be permitted to delegate fair hearing authority to local agencies under the proposed rule, we are proposing to revise § 431.205(b)(2) to include local agencies and tribal entities in the list of entities that may conduct fair hearings in a given state and to remove §§ 431.232 and 431.233. Under the proposed revisions, the single state agency no longer could use local evidentiary hearings, with individuals retaining the right of appeal, including a *de novo* hearing, to the Medicaid agency. Instead, fair hearing authority could be delegated to a local agency in the same manner and subject to the same limitations as apply to delegations to an Exchange or Exchange appeals entity or other agency under § 431.10(c)(1)(ii) of the regulations. We are aware of only one state that currently uses a local evidentiary hearing under existing regulations. We seek comment on whether the current regulatory authority for states to use a local evidentiary hearing with a right of appeal to the Medicaid agency, including the right to a *de novo* hearing should be retained in lieu of or in addition to the proposed regulation to permit states to delegate authority to local agencies to adjudicate fair hearings. We also seek comment on whether there are any differences in objectivity of the various types of

entities that may conduct fair hearings, or other factors that might justify differences in the policies relating to delegations of fair hearing authority to such entities. Unless the agency has made a formal delegation of fair hearing authority, subject to the limitations and protections set forth in the regulations, we believe it is important that applicants and beneficiaries always receive a full evidentiary hearing before the state agency. Therefore, if we were to retain §§ 431.205(b), 431.232 and 431.233, we seek comment on whether to revise the regulations to provide that if an individual appeals the decision of a local evidentiary hearing, the Medicaid agency must always conduct a ''*de novo* hearing,'' rather than doing so only at the request of the individual; this would mean that the Medicaid agency would never render a final decision based only on a review of the record established by the local evidentiary hearing, as currently permitted under § 431.233(a).

Section 431.10(c)(3)(iii) permits states the option to establish a review process of hearing decisions issued by an Exchange or Exchange appeal entity that has been delegated authority to conduct fair hearings under § 431.10(c)(1)(ii), but such review is limited to the proper application of federal and state Medicaid law, regulations and policies. In this proposed rule, we propose:

- To extend the option for states to review fair hearing decisions that were issued by another state agency or local agency or tribal entity under a delegation of authority; under the proposed rule, such review also would be limited to the proper application of federal and state Medicaid law, regulations and policies at § 431.246(a) (see discussion below); and
- To provide at §§ 431.10(c)(1)(ii) (introductory text) and 431.246(a)(2)(i) that individuals have the right to have the Medicaid agency review the hearing decision issued by a delegated entity for errors in the application of law, clearly erroneous factual findings or abuse of discretion within 30 days of the date the individual receives the hearing decision. In § 431.246(b)(2)(iii), we propose that the date the individual receives the hearing decision, is considered to be 5 days after the date of the decision, unless the individual shows that he or she received the decision at a later date. This proposed timeframe would provide consistency across states while also supporting timely final decisions. The addition of 5 days for mail is consistent with § 431.231, and aligns with our proposal in this rule regarding timeframe to request a fair hearing at § 431.221(d)(1).

To limit the delay in final administrative action on the fair hearing that this additional layer of review could necessitate, we propose at § 431.246(a)(2)(ii) that states have 45 days to issue a decision, measured from the date the individual requests that the agency review a fair hearing decision rendered by a delegated entity. Unlike the fair hearing conducted by the delegated agency, this review would not be *de novo,* but would be based on the record developed during the fair hearing. In implementing this review process, the Medicaid agency would be limited to applying the standards described in § 431.246(a)(2)(i).

Review of a hearing decision issued by a delegated entity for error in the application of law would focus on whether the applicable federal and state law, regulations and policy were correctly interpreted and applied in the specific circumstances of a case. In reviewing factual findings in a hearing decision, the agency must give deference to the hearing officer and could not set aside a hearing officer's finding unless it were clearly erroneous, even if the agency would have made a different finding. Similarly, an abuse of discretion standard would require that the agency find that the hearing officer acted in an arbitrary manner, or without evidence in the record to support his or her decision. We believe the proposed standard for limited agency review would achieve the appropriate balance of deference to the hearing officer, whose role is to weigh and evaluate the credibility of the evidence in the record, in determining the facts; protecting the rights of beneficiaries; and retaining the authority for the agency to exercise its oversight responsibilities. The regulation text at proposed § 431.246 (discussed in more detail below in this proposed rule) also applies the right to request a review of a fair hearing decision made pursuant to a delegation of fair hearing authority under an ICA waiver. We seek comment on potential alternatives, specifically including whether the right to request a review of a delegated hearing decision should be applied to all delegations of fair hearing authority, including both delegations under § 431.10(c)(1)(ii) as well as delegations under an ICA waiver, or whether the right to request review should be available only in the case of fair hearing decisions rendered pursuant to a delegation of authority in certain situations or to certain types of entities.

We also note that if, in the regular course of its monitoring and oversight activities under § 431.10(c)(3)(ii), a Medicaid agency finds that a hearing decision issued by a delegated entity contains an erroneous application of law or policy, or clearly erroneous factual findings, or otherwise represents an abuse of discretion, existing regulations at § 431.10(c)(3)(ii) permit a state to ''institute corrective action, as needed.'' Instituting corrective action could include modifying or reversing the hearing decisions to correct the error, as well as taking more systemic action such as providing training for the hearing officers, issuing clarifications of policy, and rescinding the delegation, if necessary.

We also propose a number of minor revisions to provide additional guidance related to our current delegation policy, as follows:

- Consistent with our current policy, we believe it is important that applicants always retain the right to submit an application to, and have their eligibility determined by, a state or local entity (which could be a state-based exchange), and we propose revisions to expressly reflect this policy into the regulation text. Thus, under proposed § 431.10(c)(1)(i)(A)(*3*), if eligibility determination authority is delegated to an Exchange, individuals must have the opportunity to file their application with, and have their eligibility determined by, the Medicaid agency or other state, local or tribal agency or entity in the state to which authority to determine eligibility has been delegated.

We also propose minor modifications to specify that the Web site required at § 435.1200(f) must be established and maintained by the state Medicaid agency. The proposed revision is intended to clarify the current regulation text to align more precisely with our current policy that, while the Medicaid agency can enter into an agreement with, or otherwise engage, another entity (such as another state agency) over which it exercises supervisory control or oversight consistent with section 1902(a)(4) of the Act, to build and maintain the Web site which must be made available to consumers under current § 435.1200(f), it cannot rely on the Web site established and operated by another agency or entity over which it has no contractual or other supervisory arrangement to fulfill this responsibility. We note that we have added a definition of ''Federally-facilitated Exchange'' to § 431.10(a)(2), utilizing the definition established in Exchange regulations at § 155.20.

- We propose at § 431.10(c)(2)(ii) to include a general standard which must be met for an agency to delegate authority to determine eligibility or conduct fair hearings. Specifically, we propose that the agency must find that

the delegation of authority will be at least as effective and efficient as maintaining direct responsibility for the delegated function, and that the delegation will not jeopardize the interests of applicants or beneficiaries or undermine the objectives of the Medicaid program. This proposed standard is similar to the standard which must be met under the ICA, codified at 31 U.S.C. 6504, when a state is requesting a waiver of single state agency requirements to delegate certain functions to another state agency.

- Section 431.220(a)(1) of the Eligibility final rule published elsewhere in this **Federal Register** re-codifies current policy (also reflected in § 431.241(a)) that individuals can request a fair hearing of the agency's failure to act with reasonable promptness. We propose conforming revisions at §§ 431.10(c)(1)(ii)(B) and 431.205(b)(1)(ii), redesignated at § 431.205(b)(3) in this proposed rule, to clarify that a delegation of fair hearing authority to an Exchange or Exchange appeals entity includes authority to hear claims regarding a failure on the part of an Exchange to make an eligibility determination with reasonable promptness. Thus, if a state has delegated authority to make eligibility determinations to an Exchange, which fails to make a timely determination on a given application, the applicant would be able to request a fair hearing to address such failure. If fair hearing authority also has been delegated, an Exchange or Exchange appeals entity would be responsible under the scope of delegation to conduct such a fair hearing, unless the individual has requested that the Medicaid agency do so.
- We propose technical revisions at § 431.10(c)(1)(ii) (introductory text) to provide that any delegation of fair hearing authority must be included in an approved state plan, and add a paragraph (c)(1)(ii)(C) to § 431.10 to provide that any delegation of fair hearing authority must specify the agency or tribal entity to which authority is delegated, as well as the type of applicants and beneficiaries affected by the delegation. These are similar to the requirements relating to delegations of eligibility determinations at § 431.10(c)(1)(i) (introductory text) and § 431.10(c)(1)(i)(B).
- Section 431.10(c) permits states to delegate authority to conduct eligibility determinations and fair hearings to designated federal agencies; however, we inadvertently omitted inclusion of federal agencies from the list of agencies in § 431.10(d) with which the state must have a written agreement to effectuate such delegation. We propose a technical correction at § 431.10(d) to correct this omission.
- We received questions about whether functions that are delegated at § 431.10(c)(1) can be redelegated by the delegated entity to a third party. The answer is no. Section 431.10(c)(1)(i) and (ii) specify the entities to which a state may delegate determinations of eligibility or conducting of fair hearings, subject to the requirements in paragraph (c)(2) (limiting delegations of eligibility determinations or fair hearing authority to governmental agencies with personnel merit protections, limiting delegations of eligibility determinations or fair hearing authority to entities that the agency determines capable of making the eligibility determinations, or conducting the hearings, and, as revised in this proposed rule, requiring that any delegation meet certain administrative efficiency standards) and paragraph (c)(3) (related to agency oversight and monitoring responsibilities). In addition, per § 431.10(d) to delegate a function to another entity, the Medicaid agency must also have an agreement in place with the delegated entity to effectuate the delegation.

We do not believe it is appropriate, or consistent with current policy or section 1902(a)(3), (4) or (5) of the Act, for any entity which has received a delegation of eligibility determination or fair hearing authority to re-delegate any aspect of the delegation to another entity. However, our regulations do not explicitly address this issue. To ensure no ambiguity in the policy, we propose a new paragraph at § 431.10(c)(4) to be clear that the Medicaid agency may not permit a delegated entity to re-delegate any function that the Medicaid agency delegated under paragraph (c)(1) of the section and has a responsibility to ensure that no such re-delegation occurs. We also propose a new paragraph (d)(5), to require the agreement between the agencies include assurance that the functions being delegated will not be re-delegated.

- In § 431.205(b)(3) redesignated from § 431.205(b)(1)(ii), we are proposing to remove the regulation text describing the condition that any delegation of fair hearing authority must provide for an opportunity for individuals to request a fair hearing at the Medicaid agency instead, as this already is required under § 431.10(c)(1)(ii), and thus the language at § 431.205(b)(1)(ii) is redundant. Proposed introductory text at § 431.205(b) also incorporates this requirement by cross-referencing § 431.10(c)(1)(ii).

Finally, the single state agency also may supervise the administration of the state plan by another state or local agency, as permitted under section 1902(a)(5) of the Act. For example, county offices process applications and/or renewal forms and determine initial and ongoing eligibility. Such arrangements are permitted under section 1902(a)(5) of the Act, which requires that the single state agency administer or supervise the administration of the state plan in a manner consistent with the statute, and § 431.10(b)(1). However, under section 1902(a)(5) of the Act, the single state agency ultimately is responsible for ensuring that the administration of the state's Medicaid program complies with all relevant federal and state law, regulations and policies, and therefore the single state agency must remain accountable for exercising the same type of oversight when supervising other governmental entities in administering the state plan as it must exercise over an agency or other governmental entity to which it has delegated authority to conduct eligibility determinations or fair hearings under § 431.10(c).

Because the specific oversight responsibilities set forth in the regulations apply only to entities performing administrative functions under a formal delegation of authority per § 431.10(c)(1)(i) or (ii), we propose a new paragraph (e) to provide that, in supervising the administration of the state plan in accordance with paragraph (b)(1), the Medicaid agency must ensure compliance with the requirements of § 431.10(c)(2), (3) and (4) and enter into agreements with entities it is supervising which satisfy the requirements of § 431.10(d). We propose to redesignate current § 431.10(e) as § 431.10(f), accordingly.

*D. Modernization of Fair Hearing Processes*

Recent work with states and consumer advocates on Medicaid fair hearings has revealed a number of areas in which federal policy is unclear or outdated. To address these areas, we are proposing additional revisions to regulations in part 431 subpart E to clarify policies and further modernize the regulations governing fair hearings processes.

Section 1902(a)(3) of the Act requires that the Medicaid agency provide the opportunity for a fair hearing to individuals who believe their claim for medical assistance has been denied or not acted upon with reasonable promptness. Implementing section 1902(a)(3) of the Act, our regulations at § 431.205(d) require states to provide for a hearing system that meets constitutional due process standards;

specifically, § 431.242(c) and (d) require that individuals be able to establish all pertinent facts and circumstances and to present their arguments without undue interference at a fair hearing. Despite these longstanding provisions, we have received complaints about unreasonable limitations on the presentation of evidence, such as requiring that evidence be submitted prior to a hearing in order to be admissible or not considering all relevant evidence submitted, as well as situations in which hearing officers are not considering particular claims or evidence:

- Hearing officers are not considering evidence not already reviewed by the agency (sometimes remanding the case to the agency to do so). For example, an applicant whose residency status was not evaluated by the agency because the agency denied eligibility on the basis of income is not permitted to establish state residence during the fair hearing consistent with the state's standards, such as accepting self-attestation. The result is that, if the hearing officer concludes that the agency's denial based on income was wrong, instead of making a final determination, the case is remanded to the agency to determine residency, causing further delay in a final determination.
- Hearing officers are not considering an individual's eligibility back to the date of application or renewal or during the 3-month retroactive eligibility period prior to the month of application; or, in the case of an individual found not eligible for the month of application, not considering eligibility during the months between the date of application and the date of the fair hearing. For example, a hearing officer, after considering all the evidence in the record, may find the agency properly denied Medicaid based on the individual's income in the month of the application in January, but if the applicant experienced a reduction in hours of work (and therefore income) in a subsequent month prior to the hearing date, some hearing officers may not consider the applicant's eligibility as of such subsequent month. Or, in June, a hearing officer finds that an applicant denied eligibility in March based on an application submitted in January is eligible effective in June, but does not consider eligibility back to the date or month of application.

Such practices would constitute a barrier to reaching a correct eligibility decision, are contrary to the purpose of section 1902(a)(3) of the Act, do not result in effective administration of the state plan, and are inconsistent with the best interests of beneficiaries, especially those who are not represented by counsel. Therefore, in accordance with sections 1902(a)(3), 1902(a)(4) and 1902(a)(19) of the Act, we propose to redesignate the regulations which are finalized in the Medicaid Eligibility and Appeals final rule published elsewhere in the **Federal Register** from § 431.241(a)(1) through (4) to § 431.241(a)(1)(i) through (iv), and to add new paragraph (a)(2) to specify that, in fair hearings related to eligibility, the hearing must cover the individual's eligibility as of the date of application (including during the retroactive period described in § 435.915) or renewal, as well as during the months between such date and the date of the fair hearing. Proposed § 431.241(a)(2) relates specifically to eligibility-related fair hearings. We seek comment on whether the proposed regulation also should be applied to services and benefits-related fair hearings.

Section 431.242(c) requires that individuals have an opportunity to ''establish all pertinent facts and circumstances.'' We propose to revise § 431.242(c), re-designated at proposed § 431.242(b)(2), to provide more clearly that individuals have the right at their fair hearing to submit evidence related to any relevant fact, factor or basis of eligibility or otherwise related to their claim, and that they have the right to do so before, during and, in appropriate circumstances, after the hearing—for example, to support testimony provided during the hearing which is relevant to the disposition of the appeal. Section 431.242(b), (d) and (e) provide appellants with the right to bring witnesses and make arguments related to their claim without undue interference, and to question or refute evidence or testimony presented against their claim. These provisions are retained at re-designated § 431.242(b)(1), (3) and (4). If a hearing officer determines that particular evidence or testimony offered, or a particular argument made, is not relevant, proposed § 431.244(d)(3) requires that the fair hearing decision must explain why.

Section 431.205 requires the Medicaid agency to maintain a system for providing a fair hearing before the Medicaid agency and provide for a system where the state delegates authority to conduct fair hearings to another government entity. We note that current regulations setting forth requirements regarding Medicaid fair hearing procedures provide that Medicaid fair hearings should be conducted *de novo*, defined at § 431.201 as a hearing that ''starts over from the beginning.'' See § 431.240 (requiring hearings to be conducted by impartial officials); § 431.242 (requiring the state to provide individuals the opportunity to submit evidence and arguments without interference); and § 431.244(a) (requiring that hearing decisions are issued based only on evidence introduced at the hearing). However, we have received reports that hearing officers in some states are deferring to the findings and decisions made by Managed Care Organizations (MCO) and other first-tier arbiters attempting to reach an informal resolution of an appeal, which would obviate the need for a full hearing. This is not permitted under current regulations at § 431.244(a), which provide that fair hearing decisions must be based exclusively on evidence presented at the fair hearing.

To further clarify this policy in the regulations, we propose to revise the introductory text to § 431.205(b) to state that the fair hearing system established by the state must provide the opportunity for a *de novo* hearing before the Medicaid agency and to be clear that if the state elects to delegate the authority to conduct fair hearings under § 431.10(c)(1)(ii) to a governmental entity, the fair hearing provided through a delegation must be a *de novo* hearing. Even if a state delegates the authority to conduct fair hearings to another governmental entity, an individual would still have the opportunity under § 431.10(c)(1)(ii) to have their *de novo* hearing conducted instead at the Medicaid agency. Under § 431.220(b), a fair hearing is not required if the sole issue is a federal or state law requiring an automatic change adversely affecting some or all beneficiaries. In contrast, § 431.210(d)(2) (regarding content of notices) requires individuals to be informed in cases of an action based on a change in law, the circumstances under which a hearing will be granted. This has resulted in uncertainty as to when a hearing is required when a change in state or federal law or policy results in an adverse action. We propose revisions at § 431.220(b) that would provide that, while a hearing does not need to be granted if the sole issue is related to a change in federal or state law, a hearing must be granted if an individual asserts facts or a legal argument that could result in a reversal of the adverse action taken, despite the change in law, that is, asserting continued eligibility or the right to continued coverage on a basis unrelated to the change in law.

For example, if the state eliminates an optional category of eligibility and an individual requests a fair hearing after receiving a termination notice, the

individual would not have a right to a hearing challenging termination of eligibility based solely on the elimination of the category. However, the state would be required to conduct a hearing if the individual indicates that he or she may be eligible for Medicaid under a different category, consistent with the requirement at § 435.916(f)(1) (providing that the agency consider all potential bases of eligibility before terminating coverage). We also propose revisions at § 431.210(d)(2) to require that a notice of adverse action resulting from a change in statute explain the method by which the affected individual can inform the agency that he or she has information to be considered by the agency described at §431.220(b). This minor modification is consistent with § 431.206(b)(2), which requires states to inform individuals of the method by which to request a fair hearing.

Sections 1902(a)(3) and 1902(a)(4) of the Act require that the state plan provide for fair hearings before the state agency and be administered by staff protected by personnel standards on a merit basis. Neither states nor a delegated entity may use hearing officers employed by private contractors or not-for-profit agencies. Consistent with these statutory requirements and the limitation on the delegation of fair hearing authority at § 431.10(c)(2), we propose to add § 431.240(a)(3)(ii) providing that officials who conduct fair hearings must be employees of a government agency or tribal entity that maintains personnel standards on a merit basis.

We also have received concerns relating to insufficient national standards of conduct required of Medicaid fair hearing officers, for example, of hearing officers who are not impartial, and officers who consider evidence that is not contained in the record, but is obtained through an ex parte communication. Engagement of impartial officials who adhere to established ethical standards and codes of conduct is critical to ensuring basic due process protections, as required under § 431.205(d). Therefore, we propose to add a requirement at paragraph (a)(3)(iii) that hearing officials must have been trained in nationally-recognized standards of conduct or in state-based standards that conform to nationally-recognized standards. Acceptable nationally-recognized ethics standards include (but are not necessarily limited to) the *National Association of Hearing Officials' Model Code of Ethics* or the *Model Code of Judicial Conduct for State Administrative Law Judges.* We understand that many states already use administrative law judges or require training that may meet this standard. The single state agency would be responsible for ensuring that this training requirement is met as part of its oversight responsibilities in § 431.10(c)(3)(ii).

Public access to fair hearing decisions is critical to transparency and equitable administration of the state plan, and we understand that some states may charge significant sums to redact or copy information prior to release, in some cases even for applicants and beneficiaries to receive their own records and hearing decisions, while other states provide such information free of charge, including to the public at large. Sections 431.242(a) and 431.244(g) require that fair hearing decisions be made available to the public (subject to protection of confidential individually-identifiable health information under § 431.301) and that individuals have access to examine their case file at a reasonable time and prior to a fair hearing. Because charging sums of money may pose a barrier to obtaining information needed to ensure due process, we propose to add paragraph (c) at § 431.242 that states must provide reasonable access to such information before and during the hearing in a manner consistent with commonly-available electronic technology to individuals and their representatives free of charge. We also propose minor revisions to the introductory text of § 431.242, as well as to paragraph (a) and introductory text to paragraph (b) that would clarify that states must provide such reasonable access to relevant information to individuals and their representatives.

Further, because we believe that restricting public access to hearing decisions by imposing fees is contrary to the public interest, we propose revisions at § 431.244(g) that would require states to provide the public with access to fair hearing decisions free of charge, provided that the state adheres to necessary privacy and confidentiality protocols required under part 431, subpart F and to other federal and state laws safeguarding privacy. States do not have to provide free paper copies of hearing decisions. Posting redacted decisions online in an indexed and searchable format, which would be cost-effective for the state while increasing public access and transparency, would satisfy this requirement. We understand a number of states currently post redacted hearing decisions online. This requirement would include hearing decisions issued by the single state agency and by any delegated governmental entities that issue Medicaid hearing decisions. Note that any program information must be provided accessibly to individuals who are limited English proficient and individuals with disabilities in accordance with § 435.905.

We considered whether a reasonable fee could be charged by a state either related to review of a case file information or hearing decisions considering that states do have some costs associated with providing this information. Although we understand that the state may incur some administrative costs in providing access to case files and hearing decisions, we do not believe such costs should be passed onto the applicants/beneficiaries or the public at large. Because of the importance of this provision to the fairness and transparency of the hearing process, we believe this cost should be considered as part of the general administrative costs associated with providing Medicaid fair hearings, for which Federal financial participation (FFP) at the state's administrative matching rate is available.

We are aware that in some states, another state agency may make a recommended or preliminary hearing decision for the Medicaid agency, which issues the final decision, after reviewing the preliminary decision, including findings of fact and application of federal and state law and policy. Such arrangements have been permitted without a formal delegation of fair hearing authority in the past, on the grounds that the agency's review satisfies the individual's right to have a fair hearing before the state Medicaid agency. While we believe that review by a Medicaid agency to ensure proper application of federal and state law and policy is an appropriate exercise of oversight and can be an important tool to meeting the agency's obligation and individuals' rights under the statute, we do not believe that a process in which the Medicaid agency reviews findings of facts made by a hearing officer in another agency is consistent with principles of impartiality required under § 431.240(a)(3) of our regulations. (For more discussion on this policy, which also applies to the scope of the agency's review of hearing decisions delegated to an Exchange or Exchange Appeals Entity, *see* appeals preamble related to § 431.10(c)(3)(iii) in our July 15, 2013, Eligibility Final rule (78 FR 42167)). Therefore, we propose to re-designate § 431.246 as § 431.248, make conforming changes at § 431.202, and to add § 431.246(a) to provide that the Medicaid agency may establish a review process whereby the agency reviews

preliminary, recommended or final decisions made by another state, local or tribal agency to which the Medicaid agency has authorized such entity conduct its fair hearings as described in § 431.205(b), under an ICA waiver or otherwise. However, we propose at § 431.246(a)(1)(i) to specify that the permissible scope of the Medicaid agency's review of a fair hearing decision made by such entity is limited to the proper application of federal and state Medicaid law and regulations, sub-regulatory guidance and written interpretive policies. Proposed § 431.246(a)(1)(ii) specifies that should a state elect to establish such a review process, the review process may not result in final administrative action beyond the period provided under § 431.244(f) (*i.e.*, 90 days). We note that this proposal in § 431.246(a)(1)(ii) already applies to states that establish a review process of a hearing decision issued by an Exchange or Exchange appeals entity delegated in accordance with § 431.10(c)(1)(ii) under the option provided to states in § 431.10(c)(3)(iii). States that have elected the option to delegate the authority to conduct fair hearings under § 431.10(c)(1)(ii), must have agreements in place between the agencies that describe the relationships and responsibilities between the parties including adherence to Medicaid fair hearings regulations at part 431, subpart E.

Proposed § 431.246(a)(2) provides that applicants and beneficiaries must be given the opportunity to request that the Medicaid agency review the hearing decision issued by another such agency for errors in applications of law, clearly erroneous findings of fact, or abuse of discretion, similar to the proposed revisions to § 431.10(c)(1)(ii) discussed above in this section. Under proposed paragraph (b) of § 431.246, any review conducted by the agency under either paragraph (a)(1) or (2) must be conducted by an impartial official not involved in the initial agency determination. Under proposed § 431.246, the Medicaid agency would not be permitted to conduct a *de novo* review of the hearing officer's decision or otherwise modify or reverse a hearing officer's findings of fact, unless under a request by an appellant to review such findings for an error in the application of law, clearly erroneous findings of fact, or abuse of discretion. We note that proposed § 431.246 would apply regardless of whether the other agency's or tribal entity's hearing decision is characterized as a recommendation, a preliminary, or final decision, and regardless of whether or not there is a formal delegation of fair hearing authority under § 431.10(c)(1)(ii), an ICA waiver or otherwise.

While this proposed regulation may result in changes in the appeals process for some states, all states will continue to have flexibility in structuring their appeals process. Under the regulations, as revised in this proposed rule, a state may: (1) Conduct fair hearings within the Medicaid agency; (2) delegate authority to conduct certain fair hearings to an Exchange or Exchange appeals entity, in accordance with § 431.10(c)(1)(ii); or (3) delegate authority to conduct fair hearings to a state agency or local agency or tribal entity, in accordance with proposed revisions at § 431.10(c)(1)(ii), discussed in section II.C of the preamble.

In addition, states may delegate authority to conduct fair hearings to another state agency through requesting a waiver of single state agency requirements under the ICA. Regardless of the arrangement a state establishes (and whether regulatory or waiver authority is employed in delegating fair hearing authority), the Medicaid agency may establish review processes as a part of its oversight responsibilities, provided that it is consistent with the scope of review permitted under § 431.10(c)(3)(iii) and proposed § 431.246(a).

Under proposed § 431.246 and proposed removal of §§ 431.232 and 431.233, we understand that some states may need to change their policies regarding the scope of their review if the Medicaid agency uses a process where it may conduct a *de novo* review of another state or local agency's preliminary, recommended, or final hearing decision. The practical effect of specifying the scope of review a Medicaid agency may conduct of another entity's hearing decision (limited generally to review of the application of federal and state law and which would not permit a *de novo* review of another agency's decision), is that states that only have informal arrangements in place may need to formally delegate the authority to conduct fair hearings either under § 431.10(c)(1)(ii) or through an ICA waiver, as appropriate to the arrangement. We note that proposed § 431.246(a)(2) provides an exception to permit review by the Medicaid agency, if requested by the applicant or beneficiary claiming the hearing decision issued by another agency contains errors in the application of law, clearly erroneous factual findings, or an abuse of discretion.

We propose at § 431.246(b) that any review process established by the state under § 431.246(a)(1) or (2) must be conducted by an impartial official not involved in the initial determination by the agency, consistent with longstanding policy of having a neutral decision-maker of a fair hearing decision and existing regulations at §§ 431.240(a)(3) and 431.10(c)(3)(iii).

Finally, § 431.244(d) and (e) provide different requirements for hearing decision content for an evidentiary hearing and a *de novo* hearing. Because we are proposing to remove §§ 431.232 and 431.233 (relating to a separate process for local evidentiary hearings) and all state Medicaid hearings must be provided *de novo* (see additional discussion below in section D), we propose to eliminate the different requirements for content of hearing decisions at § 431.244(d). Thus, we propose revisions to § 431.244(d) to combine paragraphs (d) and (e) and reserve paragraph (e). In so doing, we modify paragraph (d)(2) (eliminating duplicative language with (e)(2) and adding supporting evidence that must be identified), and add paragraph (d)(3), which is in paragraph (e)(1) (to specify the reason for the decision). To ensure careful consideration of all evidence by hearing officers, we propose a new paragraph (d)(4) that requires the hearing officer to clearly explain why evidence that is introduced by an applicant or beneficiary was not accepted or does not support a decision in favor of the applicant and beneficiary.

## III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), we are required to publish a 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval.

To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the 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 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 are soliciting public comment on each of the section 3506(c)(2)(A)-

required issues for the following information collection requirements and burden estimates.

*A. Wage Estimates*

To derive average costs, we used data from the U.S. Bureau of Labor Statistics' May 2015 National Occupational Employment and Wage Estimates for all salary estimates (*http://www.bls.gov/oes/current/oes_nat.htm*). In this regard, the Table 1 presents the mean hourly wage, the cost of fringe benefits (calculated at 100 percent of salary), and the adjusted hourly wage.

TABLE 1—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

| Occupation title | Occupation code | Mean hourly wage ($/hr) | Fringe benefit ($/hr) | Adjusted hourly wage ($/hr) |
|---|---|---|---|---|
| Business Operations Specialist | 13–1000 | 34.09 | 34.09 | 68.18 |
| Computer Programmer | 15–1131 | 40.56 | 40.56 | 81.12 |
| General and Operations Managers | 11–1021 | 57.44 | 57.44 | 114.88 |
| Management Analyst | 13–1111 | 44.12 | 44.12 | 88.24 |

*B. Proposed Information Collection Requirements (ICRs)*

1. ICRs Regarding Single State Agency (§ 431.10)

Any delegation under proposed § 431.10(c)(1)(i)(A)(*4*), (c)(1)(ii)(A) or (C) will need to be reflected in an approved state plan amendment per § 431.10(c)(1)(i)(A) and must meet the requirements set forth at § 431.10(c)(2). Delegations are currently described in the single state agency section of the Medicaid state plan at A1–A3, which is approved under control number 0938–1148 (CMS–10398). The single state agency state plan templates are planned for inclusion in the electronic state plan being developed by CMS as part of the MACPro system. When the MACPro system is available, these Medicaid templates will be updated to include all of the options described in § 431.10 and will be submitted to OMB for approval with the revised MACPro PRA package under control number 0928–1188 (CMS–10434).

For the purpose of the cost burden related to this regulation, we anticipate 15 state Medicaid agencies will submit changes to the single state agency section of their state plan to establish new delegations. We estimate it would take a management analyst 1 hour at $88.24 an hour and a general and operations manager 0.5 hours at $114.88 an hour to complete, submit, and respond to questions regarding the state plan amendment. The estimated cost burden for each agency is $145.68. The total estimated cost burden is $2,185.20, while the total time is 22.5 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 7.5 hours (22.5 hours/3 years) at a cost of $728.40 ($2,185.20/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. Because the currently approved state plan templates are not changing at this time, the preceding requirements and burden estimates will be submitted to OMB for approval under control number 0938–New (CMS–10579).

2. ICRs Regarding Request for a Hearing (§§ 431.221 and 457.1185)

Section 431.221(a)(1) of the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** requires states to establish and implement procedures that permit applicants and beneficiaries, or their authorized representative, to submit a Medicaid fair hearing request through the same modalities that must be made available to submit an application (that is, online, by phone and through other commonly available electronic means, as well as by mail, or in person under § 435.907(a)). Section 457.1185(a)(1) of this proposed rule would apply the requirement to CHIP.

In applying the § 431.221(a)(1) fair hearing requirements to CHIP, and assuming that all 42 separate CHIP agencies would need to upgrade their systems to accept CHIP fair hearing requests, we estimate that it would take each agency 62 hours to develop the procedures and systems necessary to permit individuals to submit hearing requests using all of the required methods and to record telephonic signatures. We estimate it would take a business operations specialist 44 hours at $68.18/hr, a general and operations manager 8 hours at $114.88/hr, and a computer programmer 10 hours at $81.12/hr to develop the procedures. In aggregate, we estimate a one-time burden of 2,604 hours (62 hr × 42 CHIP agencies) at a cost of $206,199.84[42 agencies × ((44 hr × $68.18/hr) + (8 hr × $114.88/hr) + (10 hr × $81.12/hr))].

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 868 hr (2,604 hours/3 years) at a cost of $68,733.28 ($206,199.84/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires.

For fair hearing requests that are submitted online, by phone, or by other electronic means, §§ 431.221(a)(2) and 457.1185(a)(2) would require that the agency provide individuals (and their authorized representative) with written confirmation within 5 business days of receiving such request. The written confirmation would be provided by mail or electronic communication, in accordance with the election made by the individual under § 435.918.

Since many states already provide such notices, we estimate that up to 20 states may need to take action to comply with this provision. We estimate a one-time burden of 20 hr at $68.18/hr for a business operations specialist to create the initial notification. In aggregate, we estimate 400 hours (20 hr × 20 states) and $27,272.00 (400 hr × $68.18/hr).

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 133.3 hr (400 hours/3 years) at a cost of $9,090.67 ($27,272.00/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires.

Issuance of the written confirmation is an information collection requirement that is associated with an administrative action against specific individuals or entities (5 CFR 1320.4(a)(2) and (c)). Consequently, the burden for forwarding the confirmation notifications is exempt from the requirements of the PRA.

We will submit the preceding burden estimates to OMB for approval under control number 0938–New (CMS–10579).

3. ICRs Regarding Withdrawal of Request for a Hearing (§§ 431.223 and 457.1285)

Sections 431.223(a) and 457.1285(b) would require that states record appellant's statement and telephonic signature during a telephonic withdrawal. For telephonic, online and other electronic withdrawals, within 5 business days the agency must send the affected individual written confirmation of such withdrawal, via regular mail or electronic notification in accordance with the individual's election.

We estimate that 56 state Medicaid agencies (the 50 states, the District of Columbia, and the 5 Territories) and 42 separate CHIP agencies will be subject to the preceding requirements. We estimate that it would take each agency 62 hours to develop the procedures and systems necessary to permit individuals to submit hearing requests using all of the required methods and to record telephonic signatures. We estimate it would take a business operations specialist 44 hours at $68.18/hr, a general and operations manager 8 hours at $114.88/hr, and a computer programmer 10 hours at $81.12/hr to develop the procedures. In aggregate, we estimate a one-time burden of 6,076 hours and $463,555.68.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 2,025 hr (6,076 hours/3 years) at a cost of $154,518.56 ($463,555.68/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires.

We will submit the preceding burden estimates to OMB for approval under control number 0938–New (CMS–10579).

Issuance of the written confirmation is an information collection requirement that is associated with an administrative action against specific individuals or entities (5 CFR 1320.4(a)(2) and (c)). Consequently, the burden for forwarding the confirmation notifications is exempt from the requirements of the PRA.

4. ICRs Regarding Expedited Appeals (§ 431.224)

In § 431.224(b) the Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register**, the state is required to clearly inform an individuals whether a request for an expedited review will be granted as expeditiously as possible either orally or through electronic means, and must then follow up with written notice. Section 431.224(b) would be revised under this proposed rule to require that this notice is provided orally whenever possible, as well as in writing via U.S. mail or electronic communication. If a request for expedited review is denied, the written notice under proposed § 431.224(b) must include the reason for the denial and an explanation that the appeal request will be handled in accordance with the standard fair hearing processes and timeframes.

Providing the notification in § 435.224(b) is an information collection requirement that is associated with an administrative action (5 CFR 1320.4(a)(2) and (c)) pertaining to specific individuals. Consequently, the burden for providing the notifications is exempt from the requirements of the PRA.

Proposed § 431.224(c) would require that states develop an expedited fair hearing plan describing the expedited fair hearing policies and procedures adopted to achieve compliance with the regulation, and submit such plan to the Secretary upon request.

We estimate that 56 Medicaid agencies will be subject to the requirement to develop the expedited fair hearing plan in § 435.224(c) and that it would take each Medicaid agency 20 hours to develop, review, and submit the expedited fair hearing plan. For the purpose of the cost burden, we estimate it would take a business operations specialist 17 hours at $68.18/hr, and a general and operations manager 3 hours at $114.88/hr, to complete the verification plan. In aggregate, we estimate a one-time burden of 1,120 hours and $84,207.20.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 373.3 hr (1,120 hours/3 years) at a cost of $28,069.07 ($84,207.20/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires.

We will submit the preceding burden estimates to OMB for approval under control number 0938–New (CMS–10579).

5. ICRs Regarding the Timely Adjudication of Fair Hearings (§§ 431.247 and 457.1160)

In §§ 431.247 and 457.1160, states would be required to establish timeliness and performance standards for taking final administrative action specific to applicants and beneficiaries requesting a fair hearing. This would be similar to the standards which states must establish for eligibility determinations under § 435.912. Specifically, consistent with guidance to be issued by the Secretary, states would be required to establish and submit to the Secretary upon request, timeliness and performance standards for: (1) Taking final administrative action on fair hearing requests which are not subject to expedited fair hearing request under § 431.224 or expedited review request under § 457.1160(a); and (2) taking final administrative action on fair hearing requests for which the agency has approved a request for an expedited fair hearing under § 431.224 or expedited review under § 457.1160(a).

In §§ 431.247(b)(2) and 457.1160(c)(3), states may establish different performance standards for individuals who submit their request for a fair hearing or review directly to the agency under § 431.221 or § 457.1185 and those whose fair hearing or review request is submitted to, and transferred to the agency from, the Exchange or Exchange appeals entity in accordance with §§ 435.1200 or 457.351.

Section 431.247(b)(3) would provide that the timeliness and performance standards must account for the following four factors: (1) The capabilities and resources generally available to the agency and any agency conducting the state's fair hearings in accordance with § 431.10(c) necessary to conduct fair hearing and expedited review processes; (2) the demonstrated performance and processes established by state Medicaid and CHIP agencies, Exchanges and Exchange Appeals Entities, as reflected in data by the Secretary, or otherwise available to the state; (3) the needs of the individuals who request fair hearings and the relative complexity of adjudicating fair hearing requests, taking into account such factors as the complexity of the eligibility criteria which must be evaluated, the volume and complexity of evidence submitted by individual or the agency, and whether witnesses are called to testify at the hearing; and (4) the needs of individuals who request expedited fair hearing, including the relative complexity of determining whether the standard for an expedited fair hearing under § 431.224(a) is met.

In § 431.247(c), states would be required to inform individuals of the timeliness standards that the state adopted under this section. This information would be included in the notice described at § 431.206, which is required to inform each beneficiary of his or her right to a fair hearing.

Section 431.247(d) would provide two exceptions for unusual circumstances under which states may extend the timeframe for taking final administrative action: (1) When the agency cannot reach a decision because the appellant

requests a delay or postponement of the fair hearing or fails to take a required action; or (2) when there is an administrative or other emergency beyond the agency's control. As with any other change to an appellant's case, the state agency would need to document any reason for delay in the appellant's record.

We believe the burden associated with § 431.247(c) and (d) is exempt from the PRA as a usual and customary business practice in accordance with 5 CFR 1320.3(b)(2). The burden is exempt since the time, effort, and financial resources necessary to comply with the notice and documentation requirements would occur in the absence of federal regulation and would be incurred by persons during the normal course of their activities. We seek comment on any additional burden with respect to the requirements of § 431.247(c) and (d) that has not been contemplated here. We estimate that 56 Medicaid agencies and 42 CHIP agencies will be subject to the requirement to develop timeliness and performance standards as described in § 431.247 and that it would take each Medicaid and CHIP agency 30 hours to develop, review, and submit the standards. For the purpose of the cost burden, we estimate it would take a business operations specialist 24 hours at $68.18/hr, and a general and operations manager 6 hours at $114.88/hr, to complete development of the standards. In aggregate, we estimate a one-time burden of 2,940 hours and $227,908.80.

Amendments to the Medicaid and CHIP state plans will be needed to reflect a state's timeliness and performance standards, consistent with the guidance issued by the Secretary. This information will be included in the single state agency section of the state plan, which is planned for inclusion in the electronic state plan being developed by us as part of the MACPro system. When the MACPro system is available, these Medicaid and CHIP templates would be updated to include a section on the timely adjudication of fair hearings and all of the options described in §§ 431.247 and 457.1160. The new templates would be submitted to OMB for approval with the revised MACPro PRA package under control number 0928–1188 (CMS–10434).

For the purpose of the cost burden related to this regulation, we estimate it would take a management analyst 4 hours at $88.24 an hour and a general and operations manager 1.5 hours at $114.88 an hour to complete, submit, and respond to questions regarding the state plan amendment. The estimated cost burden for each agency is $525.28. We estimate 56 state Medicaid agencies (the 50 states, the District of Columbia, and 5 Territories) and 42 CHIP agencies (in states that have a separate or combined CHIP), totaling 98 agencies would be required to submit an amendment to the single state agency section of their state plan to respond to this requirement. The total estimated cost burden is $51,477.44, while the total time is 539 hours.

Over the course of OMB's anticipated 3-year approval period, we estimate an annual burden of 1,159 hours (2,940 hours/3 years) at a cost of $93,128.75 ($279,386.24/3 years). We are annualizing the one-time estimate since we do not anticipate any additional burden after the 3-year approval period expires. The preceding requirements and burden estimates would be submitted to OMB for approval under control number 0938–1188 (CMS–10434). However, we are seeking comment on the burden at this time.

*C. Summary of Proposed Annual Burden Estimates*

TABLE 2—PROPOSED ANNUAL RECORDKEEPING AND REPORTING REQUIREMENTS

| Regulation section(s) | OMB Control No. | Respondents | Total responses | Burden per response (hours) | Total annual burden (hours) | Hourly labor cost of reporting ($/hr) | Total labor cost of reporting ($) | Total capital/ maintenance costs ($) | Total cost ($) |
|---|---|---|---|---|---|---|---|---|---|
| 431.10 | 0938–New | 15 | 15 | 1.5 | [1] 7.5 | varies [7] | 728.40 | 0 | 728.40 |
| 431.221 and 457.1185. | 0938–New | 42 | 42 | 62 | [2] 868 | varies [7] | 68,733.28 | 0 | 68,733.28 |
| 431.221 and 457.1185. | 0938–New | 20 | 20 | 20 | [3] 133 | 68.18 | 9,090.67 | 0 | 9,091 |
| 431.223(a) and 457.1285(b). | 0938–New | 98 | 98 | 62 | [4] 2,025 | varies [7] | 154,518.68 | 0 | 154,519 |
| 431.224(c) | 0938–New | 56 | 56 | 20 | [5] 373 | varies [7] | 28,069.07 | 0 | 28,069.07 |
| 431.247 and 457.1160. | 0938–1188 | 98 | 98 | 12 | [6] 1159 | varies [7] | 93,128.75 | 0 | 93,128.75 |
| Total | | 98 | 329 | n/a | 3,586 | n/a | 278,299.25 | 0 | 278,299.25 |

[1] Annualized. Nonannualized, 22.5 hr at a cost of $2,185.
[2] Annualized. Nonannualized, 2,604 hr at a cost of $206,199.84.
[3] Annualized. Nonannualized, 400 hr at a cost of $27,272.00.
[4] Annualized. Nonannualized, 6,076 hr at a cost of $463,555.68.
[5] Annualized. Nonannualized, 1,120 hr at a cost of $84,207.20.
[6] Annualized. Nonannualized, 2,940 hr at a cost of $279,386.24.
[7] See text for details.

*D. Submission of PRA-Related Comments*

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by the OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections discussed above, please visit CMS' Web site at *www.cms.hhs.gov/PaperworkReductionActof1995,* or call the Reports Clearance Office at 410–786–1326.

We invite public comments on these potential information collection requirements. If you wish to comment, please submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule and identify the rule (CMS–2334–P2), the ICR's CFR citation, and the CMS ID and OMB control numbers.

PRA-related comments are due by 5:00 p.m. on January 23, 2017.

## IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and

time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

## V. Summary of Preliminary Regulatory Impact Analysis

### *A. Overall Impact*

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (September 19, 1980, 96), 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) and the Congressional Review Act (5 U.S.C. 804(2).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). Table 2 shows the annualized quantified impact for this proposed rule is approximately $0.26 million ($0.78 million over 3 year period). Thus, this rule does not reach the economic threshold of $100 million and thus is not considered a major rule.

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues less than $7.5 million to $38.5 million in any 1 year. Individuals and states are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this proposed rule would not have any economic impact on small entities.

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 603 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 for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would 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 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately $146 million. This proposed rule would not impose costs on State, local, or tribal governments or on the private sector, more than $146 million in any one year.

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 proposed rule will not impose substantial direct requirement costs on state or local governments.

To the extent that this proposed rule will have tribal implications, and in accordance with E.O. 13175 and the HHS Tribal Consultation Policy (December 2010), will consult with Tribal officials prior to the formal promulgation of this regulation.

### *B. Anticipated Effects*

#### 1. Effects on State Medicaid Programs

While states will likely incur short-term increases in administrative costs, we do not anticipate that this proposed rule would have significant financial effects on state Medicaid programs. The extent of these initial costs will depend on current state policy and practices, as many states have already adopted the administrative simplifications addressed in the rule. In addition, the administrative simplifications proposed in this rule may lead to savings as states streamline their fair hearing processes, consistent with the processes used by the Marketplace, and implement timeliness and performance standards.

This proposed rule would require states to provide written confirmation of receipt of a request for a fair hearing and the withdrawal of a fair hearing request. This proposed rule would also establish specific notice requirements for individuals whose request for an expedited fair hearing is denied. Such communications would result in new administrative costs for printing and mailing notices to beneficiaries who request notification by mail. For states that do not currently provide such written communications some modifications to state systems may be needed. Federal support is available to help states finance these system modifications. Systems used for eligibility determination, enrollment, and eligibility reporting activities by Medicaid are eligible for enhanced funding with a federal matching rate of 90 percent if they meet certain standards and conditions.

To ensure adequate public access to hearing decisions, this proposed rule would require states to post redacted hearing decisions online or make them otherwise accessible free of charge. While a number of states currently post redacted hearing decisions online, other states would incur additional administrative costs for the staff time needed to make the decisions available, including adherence to privacy and confidentiality protocols and making the decisions available in a format accessible to individuals who are limited English proficient and individuals with disabilities. We have not quantified this burden and request specific information from states on the burden this requirement might impose that could be used to quantify these impacts.

States that elect new options proposed in this rule with respect to delegation of eligibility determinations and fair hearings would need to submit a state plan amendment (SPA) to formalize those elections. States would also need to submit a new SPA to describe the timeliness and performance standards developed in accordance with requirements proposed in this rule. Submission of a new SPA would result in administrative costs for personnel to prepare the SPA submission and respond to questions. As described in section IV. of this rule, we estimate an annual cost of approximately $18,000 per year for 3 years for states to complete the SPA submissions necessary to comply with the requirements proposed in this rule. However, election of these new options may also result in administrative simplifications with associated cost savings that are not included in the estimated SPA submission costs. We request comments on the burden, if any, associated with these requirements.

The Medicaid Eligibility and Appeals final rule published elsewhere in this **Federal Register** establishes new requirements for states to develop and maintain an expedited fair hearing

process. This proposed rule would require states to create a plan describing the policies and procedures adopted by the agency to ensure access to an expedited fair hearing request and to establish timeliness and performance standards for the expedited fair hearings process. While the plan and the performance standards may require additional administrative costs upfront, they should lead to greater efficiencies for states as these processes are implemented.

Finally, this proposed rule would require that states generally take final administrative action on fair hearing requests within the timeframes set forth in their state plans. In unusual circumstances, a delay in the timeframe would be acceptable and as with any other change to an appellants case, the state would need to document the reasons for delay in the individual's case record. Such delays would be rare, but the corresponding documentation would require additional staff time to complete. We request comments on the burden, if any, associated with these requirements.

2. Effects on Providers

This proposed rule would not have any direct impact on providers. However, there may be indirect effects resulting from streamlined processes for fair hearings. The timelier an applicant or beneficiary's fair hearing is resolved, the more timely a provider may receive payment for covered services.

*C. Alternatives Considered*

In developing this rule the following alternatives were considered. We considered not including a timeframe for states to provide written confirmation that a fair hearing request has been received or including a different timeframe, such as 10 days. However, comments received on the January 22, 2013, Eligibility and Appeals Proposed Rule supported the need for a 5-day timeframe to provide written notice.

An alternative approach that we considered when developing this rule was to establish a grievance process, similar to those used by Medicare Advantage plans and Medicaid managed care for individuals who believe they have been inappropriately denied an expedited fair hearing. Because we did not want to create a new administrative burden for states by setting up a grievance process, and because we did not want to establish a cumbersome and lengthy process for individuals who may have an urgent health need, we did not propose a new requirement that states establish a grievance process. Instead, we proposed transparent notice requirements for such denials.

Individuals who believe that they have been discriminated against in the appeals and hearings process can use the grievance process that each state agency operating a Medicaid program or CHIP must have under section 1557 of the Affordable Care Act and its implementing regulation, among other existing federal civil rights authorities. These individuals may also file complaints of discrimination directly with the HHS Office for Civil Rights at *www.HHS.gov/OCR.*

*D. Conclusion*

For the reasons discussed above, we are not preparing analysis for either the RFA or section 1102(b) of the Act because we have determined that this regulation would not have a direct significant economic impact on a substantial number of small entities or a direct significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, the Office of Management and Budget has reviewed this regulation.

**List of Subjects**

*42 CFR Part 431*

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

*42 CFR Part 435*

Aid to families with dependent children, Grant programs—health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

*42 CFR Part 457*

Children's Health Insurance Program—allotments and grants to states.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to further amend 42 CFR chapter IV, as amended by the Medicaid and Children's Health Insurance Programs: Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Other Provisions Related to Eligibility and Enrollment for Medicaid and CHIP final rule published elsewhere in this issue of the **Federal Register** as set forth below:

## PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

■ 1. The authority citation for part 431 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act, (42 U.S.C. 1302).

■ 2. Section 431.10 is amended by—
■ a. In paragraph (a)(2), adding the definitions of ''Federally-facilitated Exchange'' and ''Tribal entity'' in alphabetical order;
■ b. Revising paragraph (c)(1) introductory text;
■ c. In paragraph (c)(1)(i)(A)(*2*), removing ''or'' at the end of the paragraph;
■ d. Revising paragraph (c)(1)(i)(A)(*3*);
■ e. Adding paragraph (c)(1)(i)(A)(*4*);
■ f. Revising paragraphs (c)(1)(ii), (c)(2), and (c)(3)(iii);
■ g. Adding paragraph (c)(4);
■ h. Revising paragraphs (d) introductory text and (d)(4);
■ i. Adding paragraph (d)(5);
■ j. Redesignating paragraph (e) as paragraph (f); and
■ k. Adding new paragraph (e).

The additions and revisions read as follows:

**§ 431.10 Single State agency.**

(a) * * *

(2) * * *

*Federally-facilitated Exchange* have the meaning given in 45 CFR 155.20.

* * * * *

*Tribal entity* means a tribal or Alaska Native governmental entity designated by the Department of Interior, Bureau of Indian Affairs.

* * * * *

(c) * * *

(1) Subject to the requirements of paragraphs (c)(2), (3) and (4) of this section, the Medicaid agency—

(i)(A) * * *

(*3*) An Exchange, provided that individuals also are able to file an application through all modalities described in § 435.907(a) of this chapter with, and have their eligibility determined by, the Medicaid agency or another State, local or tribal agency or entity within the State to which the agency has delegated authority to determine eligibility under this section; or

(*4*) Another State or local agency or tribal entity.

* * * * *

(ii) May, in the approved State plan, delegate authority to conduct fair hearings under subpart E of this part to the following entities, provided that individuals requesting a fair hearing are given a choice to have their fair hearing instead conducted by the Medicaid agency and that individuals are provided the opportunity to have the Medicaid agency review the hearing decision issued by the delegated entity for reasons described in § 431.246(a)(2):

(A) A local agency or tribal entity, only if:

(*1*) The subject of the fair hearing request is a claim related to an eligibility determination or other action taken by a local agency or tribal entity under a delegation of authority under paragraph (c)(1)(i) of this section or other agreement with the Medicaid agency; and

(*2*) The local agency or tribal entity is located within the State;

(B) In the case of denials of eligibility or failure to make an eligibility determination with reasonable promptness, for individuals whose income eligibility is determined based on the applicable modified adjusted gross income standard described in § 435.911(c) of this chapter, an Exchange or Exchange appeals entity.

(C) Any election to delegate fair hearing authority made under this paragraph (c)(1)(ii) must specify to which agency the delegation applies in an approved State plan, and specify the individuals for whom authority to conduct fair hearings is delegated.

(2) The Medicaid agency may delegate authority under this paragraph (c) to make eligibility determinations or to conduct fair hearings under this section only—

(i) To a government agency or tribal entity that maintains personnel standards on a merit basis;

(ii) If the agency has determined that such entity is capable of making the eligibility determinations, or conducting the hearings, in accordance with all applicable requirements; and

(iii) If the agency finds that delegating such authority is at least as effective and efficient as maintaining direct responsibility for the delegated function and will not jeopardize the interests of applicants or beneficiaries or the objectives of the Medicaid program; and

(3) * * *

(iii) If authority to conduct fair hearings is delegated to another entity under paragraph (c)(1)(ii) of this section, the agency may establish a review process whereby the agency reviews fair hearing decisions made under the delegation, but such review must be limited to the proper application of Federal and State Medicaid law and regulations, including sub-regulatory guidance and written interpretive policies, and must be conducted by an impartial official not directly involved in the initial agency determination.

(4) The Medicaid agency must ensure that an entity to which authority to determine eligibility or conduct fair hearings is delegated under paragraph (c)(1) of this section does not re-delegate any administrative function or authority associated with such delegation.

(d) *Agreement with Federal, State, tribal, or local entities making eligibility determinations or fair hearing decisions.* The plan must provide for written agreements between the Medicaid agency and the Exchange or any other Federal, State, local agency, or tribal entity that has been delegated authority under paragraph (c)(1)(i) of this section to determine Medicaid eligibility and for written agreements between the agency and the Exchange or Exchange appeals entity, any local agency or tribal entity that has been delegated authority to conduct Medicaid fair hearings under paragraph (c)(1)(ii) of this section. Such agreements must be available to the Secretary upon request and must include provisions for:

* * * * *

(4) For fair hearings, procedures to ensure that individuals have notice and a full opportunity to have their fair hearing conducted by either the entity to which fair hearing authority has been delegated or the Medicaid agency based on the individual's election.

(5) Assurance that the delegated entity will not re-delegate any function or authority that the Medicaid agency has delegated to it under paragraph (c)(1) of this section, consistent with paragraph (c)(4) of this section.

(e) *Supervision of administration of State plan.* When supervising the administration of the State plan in accordance with paragraph (b)(1) of this section, the Medicaid agency must:

(1) Ensure compliance with the requirements of paragraphs (c)(2) and (3) of this section; and

(2) Enter into agreements which satisfy the requirements of paragraph (d) of this section with the entities it is supervising.

* * * * *

■ 3. Section 431.201 is amended by adding the definition of ''Working days and business days'' in alphabetical order to read as follows:

**§ 431.201 Definitions.**

* * * * *

*Working days* and *business days* have the same meaning. Both terms mean Monday through Friday, excluding all State and Federal holidays recognized by the State.

■ 4. Section 431.202 is revised to read as follows:

**§ 431.202 State plan requirements.**

A State plan must provide that the requirements of §§ 431.205 through 431.248 are met.

■ 5. Section 431.205 is amended by revising paragraphs (b) and (c) to read as follows:

**§ 431.205 Provision of hearing system.**

* * * * *

(b) The State's hearing system must provide for an opportunity for a *de novo* hearing before the Medicaid agency. In accordance with a delegation of authority under § 431.10(c)(1)(ii) the State may provide the opportunity for a hearing at—

(1) A local agency;

(2) A tribal entity; or

(3) For the denial of eligibility or failure to make an eligibility determination with reasonable promptness for individuals whose income eligibility is determined based on the applicable modified adjusted gross income standard described in § 435.911(c) of this chapter, an Exchange or Exchange appeals entity.

(c) The agency may offer local or tribal hearings in some political subdivisions and not in others.

* * * * *

■ 6. Section 431.210 is amended by revising paragraphs (d)(1) and (2) to read as follows:

**§ 431.210 Content of notice.**

* * * * *

(d) * * *

(1) The individual's right to request a hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted and the method by which an individual may inform the State that he or she has information to be considered by the agency described at § 431.220(b)(2); and

* * * * *

■ 7. Section 431.220 is amended by revising paragraph (b) to read as follows:

**§ 431.220 When a hearing is required.**

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, the agency need not grant a hearing if the sole issue is related to a Federal or State law requiring an automatic change adversely affecting some or all applicants or beneficiaries.

(2) The agency must grant a hearing for individuals who assert facts or legal arguments that could result in a reversal of the adverse action taken irrespective of the change in law.

■ 8. Section 431.221 is amended by adding paragraph (a)(2) and revising paragraph (d) to read as follows:

**§ 431.221 Request for hearing.**

(a) * * *

(2) Within 5 business days of receiving a hearing request, the agency must confirm receipt of such request, through mailed or electronic communication to the individual or

authorized representative, in accordance with the election made by the individual under § 435.918 of this chapter.

* * * * *

(d)(1) Except as provided in paragraph (d)(2) of this section, the agency must allow the applicant or beneficiary a reasonable time, which may not be less than 30 days nor exceed 90 days from the date the notice of denial or action is received, to request a hearing. The date on which a notice is received is considered to be 5 days after the date of the notice, unless the individual shows that he or she received the notice at a later date.

(2) A request for a Medicaid hearing must be considered timely if filed with an Exchange or Exchange appeals entity (or with another insurance affordability program or appeals entity) as part of a joint fair hearing request, as defined in § 431.201, within the time permitted for requesting an appeal of a determination related to eligibility for enrollment in a qualified health plan or for advanced payments of the premium tax credit or cost sharing reductions under 45 CFR 155.520(b) or within the time permitted by such other program, as appropriate.

■ 9. Section 431.223 is amended by revising paragraph (a) to read as follows:

**§ 431.223 Denial or dismissal of request for a hearing.**

* * * * *

(a) The applicant or beneficiary withdraws the request. The agency must accept withdrawal of a fair hearing request via any of the modalities available per § 431.221(a)(1)(i). For telephonic hearing withdrawals, the agency must record the individual's statement and telephonic signature. For telephonic, online, and other electronic withdrawals, the agency must send the affected individual written confirmation, via regular mail or electronic notification in accordance with the individual's election under § 435.918(a) of this chapter, within 5 business days of the agency's receipt of the withdrawal.

* * * * *

■ 10. Section 431.224 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 431.224 Expedited appeals.**

* * * * *

(b) *Notification.* The agency must notify individuals whether their request for an expedited fair hearing is granted or denied as expeditiously as possible. Such notice must be provided orally whenever possible, as well as in writing via U.S. mail or electronic communication, in accordance with the individual's election under § 435.918 of this chapter. Written notice of the denial must include the following:

(1) The reason for the denial; and

(2) An explanation that the appeal request will be handled in accordance with the standard fair hearing process under this subpart, including the individual's rights under such process, and that a decision will be rendered in accordance with the time frame permitted under §§ 431.244(f)(1) and 431.247.

(c) *Expedited fair hearing plan.* The agency must develop, update as appropriate, and submit to the Secretary upon request, an expedited fair hearing plan describing the expedited fair hearing policies and procedures adopted by the agency to ensure access to an expedited fair hearing and decision in accordance with this section, including the extent to which documentation will be required to substantiate whether the standard for an expedited fair hearing described in paragraph (a)(1) of this section is met. The policies and procedures adopted by the agency must be reasonable and must not impede access to an expedited fair hearing for individuals with urgent health care needs.

**§ 431.232 [Removed]**

■ 11. Section 431.232 is removed.

**§ 431.233 [Removed]**

■ 12. Section 431.233 is removed.

■ 13. Section 431.240 is amended by revising paragraph (a)(3) to read as follows:

**§ 431.240 Conducting the hearing.**

(a) * * *

(3) By one or more impartial officials who—

(i) Have not been directly involved in the initial determination of the denial, delay, or action in question;

(ii) Are employees of a government agency or tribal entity that maintains personnel standards on a merit basis; and

(iii) Have been trained in nationally recognized or State ethics codes articulating standards of conduct for hearing officials which conform to nationally recognized standards.

* * * * *

■ 14. Section 431.241 is amended by revising paragraph (a) to read as follows:

**§ 431.241 Matters to be considered at the hearing.**

* * * * *

(a)(1) Any matter described in § 431.220(a)(1) for which an individual requests a fair hearing.

(2) In the case of fair hearings related to eligibility, the individual's eligibility as of the date of application (including during the retroactive period described in § 435.915 of this chapter) or renewal as well as between such date and the date of the fair hearing.

* * * * *

■ 15. Section 431.242 is amended by—

■ a. Revising introductory text;

■ b. Revising paragraph (a) introductory text;

■ c. Redesignating paragraphs (b), (c), (d), (e), and (f) as paragraphs (b)(1), (2), (3), (4), and (5), respectively;

■ d. Adding paragraph (b) introductory text;

■ e. Revising newly redesignated paragraph (b)(2); and

■ f. Adding a new paragraph (c).

The additions and revisions read as follows:

**§ 431.242 Procedural rights of the applicant or beneficiary.**

The agency must provide the applicant or beneficiary, or his representative with—

(a) Reasonable access, before the date of the hearing and during the hearing and consistent with commonly-available technology, to—

* * * * *

(b) An opportunity to—

* * * * *

(2) Present all evidence and testimony relevant to his or her claim, including evidence and testimony related to any relevant fact, factor or basis of eligibility or otherwise related to their claim, without undue interference before, at (or, in appropriate circumstances, after) the hearing;

* * * * *

(c) The information described in paragraph (a) of this section must be made available to the applicant, beneficiary, or representative free of charge.

■ 16. Section 431.244 is amended by—

■ a. Revising paragraph (d);

■ b. Removing and reserving paragraph (e);

■ c. Revising paragraph (f) introductory text;

■ d. Revising paragraph (f)(3)(i);

■ e. Removing paragraph (f)(4); and

■ f. Revising paragraph (g).

The revisions and additions read as follows:

**§ 431.244 Hearing decisions.**

* * * * *

(d) In any hearing, the decision must be a written one that—

(1) Summarizes the facts;

(2) Identifies the evidence and regulations supporting the decision;

(3) Specifies the reasons for the decision; and

(4) Must explain why evidence introduced or argument advanced by an applicant or beneficiary or his or her representative was not accepted or does not support a decision in favor of the applicant or beneficiary, if applicable.

(e) [Reserved]

(f) The agency must take final administrative action in accordance with the timeliness standards established under § 431.247, subject to the following maximum time periods:

* * * * *

(3) * * *

(i) For an eligibility-related claim described in § 431.220(a)(1), or any claim described in § 431.220(a)(2) or (3), as expeditiously as possible and, no later than 5 working days after the agency receives a request for expedited fair hearing; or

* * * * *

(g) The agency must provide public access to all agency hearing decisions free of charge, subject to the requirements of subpart F of this part for safeguarding of information.

**§ 431.246 [Redesignated as § 431.248]**

■ 17. Section 431.246 is redesignated as § 431.248.

■ 18. Section 431.246 is added to read as follows:

**§ 431.246 Review by the State Medicaid agency.**

(a) If fair hearings are conducted by a governmental entity described in § 431.205(b) or by another State agency, under a delegation of authority under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6504, or otherwise, the agency—

(1) May establish a review process whereby the agency reviews preliminary, recommended or final decisions made by such other entity, provided that such review—

(i) Is limited to the proper application of law, including Federal and State law and regulations, subregulatory guidance and written interpretive policies; and

(ii) Does not result in final administrative action beyond the period provided under § 431.244(f).

(2)(i) Must provide applicants and beneficiaries the opportunity to request that the Medicaid agency review the hearing decision issued by such entity within 30 days after the individual receives the fair hearing decision for—

(A) Errors in the application of law;

(B) Clearly erroneous factual findings; or

(C) Abuse of discretion.

(ii) In the case of a request for agency review of a fair hearing decision under paragraph (a)(2)(i) of this section, the agency must issue a written decision upholding, modifying or reversing the hearing officer's decision within 45 days from the date of the individual's request.

(iii) The date on which the decision is received is considered to be 5 days after the date of the decision, unless the individual shows that he or she received the decision at a later date.

(b) If the State conducts any review of hearing decisions in accordance with paragraph (a)(1) or (2) of this section, such reviews must be conducted by an impartial official not involved in the initial determination by the agency.

■ 19. Section 431.247 is added to read as follows:

**§ 431.247 Timely adjudication of fair hearings.**

(a) For purposes of this section:

(1) *Appellant* means an individual who has requested a fair hearing in accordance with § 431.221.

(2) *Timeliness standards* means the maximum period of time in which the agency is required to take final administrative action on the fair hearing request of every appellant.

(3) *Performance standards* are overall standards for taking final administrative action on fair hearing requests in an efficient and timely manner across a pool of individuals, but do not include standards for taking final administrative action on a particular appellant's request.

(b)(1) Consistent with guidance issued by the Secretary, the agency must establish, and submit to the Secretary upon request, timeliness and performance standards for—

(i) Taking final administrative action on fair hearing requests which are not subject to expedited review under § 431.224; and

(ii) Taking final administrative action on fair hearing requests with respect to which the agency has approved a request for expedited review under § 431.224;

(2) The agency may establish different timeliness and performance standards for fair hearings in which the fair hearing request is submitted to the agency in accordance with § 431.221 and for those in which the fair hearing request is transferred to the agency in accordance with § 435.1200(g)(1)(ii) of this chapter; and

(3) Timeliness and performance standards established under this section must take into consideration—

(i) The capabilities and resources generally available to the agency or other agency conducting fair hearings in accordance with § 431.10(c) or other delegation;

(ii) The demonstrated performance and processes established by other State Medicaid and CHIP agencies, Exchanges and Exchange appeals entities, as reflected in data reported by the Secretary or otherwise available to the State;

(iii) The medical needs of the individuals who request fair hearings; and

(iv) The relative complexity of adjudicating fair hearing requests, taking into account such factors as the complexity of the eligibility criteria or services or benefits criteria which must be evaluated, the volume and complexity of evidence submitted by individual or the agency, and whether witnesses are called to testify at the hearing.

(c) The agency must inform individuals of the timeliness standards adopted in accordance with this section and consistent with § 431.206(b)(4).

(d)(1) The agency must take final administrative action on a fair hearing request within the timeframes set forth at § 431.244(f), except that the agency may extend the timeframe set forth in § 431.244(f)(3) for taking final administrative action on expedited fair hearing requests up to 14 calendar days in unusual circumstances when—

(i) The agency cannot reach a decision because the appellant requests a delay or fails to take a required action; or

(ii) There is an administrative or other emergency beyond the agency's control.

(2) The agency must document the reasons for any delay in the appellant's record.

(e) The agency must not use the time standards—

(1) As a waiting period before taking final administrative action; or

(2) As a reason for dismissing a fair hearing request (because it has not taken final administrative action within the time standards).

## PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

■ 20. The authority citation for part 435 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 21. Section 435.1200 is amended by revising paragraph (f)(1) introductory text to read as follows:

**§ 435.1200 Medicaid agency responsibilities.**

* * * * *

(f) * * *

(1) The State Medicaid agency must establish, maintain, and make available to current and prospective Medicaid

applicants and beneficiaries a State Web site that—

* * * * *

## PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 22. The authority citation for part 457 continues to read as follows:

**Authority:** Section 1102 of the Social Security Act (42 U.S.C. 1302).

■ 23. Section 457.1120 is amended by revising paragraph (a)(1) to read as follows:

### § 457.1120 State plan requirement: Description of review process.

(a) * * *

(1) *Program specific review.* A process that meets the requirements of §§ 457.1130, 457.1140, 457.1150, 457.1160, 457.1170, 457.1180, and 457.1185; or

* * * * *

■ 24. Section 457.1160 is amended by revising paragraph (a) and adding paragraph (c) to read as follows:

### § 457.1160 Program specific review process: Time frames.

(a) *Eligibility or enrollment matter.* A State must complete the review of a matter described in § 457.1130(a) within a reasonable amount of time, consistent with the standards established in accordance with paragraph (c) of this section. In setting time frames, the State must consider the need for expedited review when there is an immediate need for health services.

* * * * *

(c) *Timeliness and performance standards for eligibility or enrollment matters*—(1) *Definitions.* For purposes of this section—

*Appellant* means an individual who has requested a review in accordance with §§ 457.1130 and 457.1185;

*Performance standards* are overall standards for completing reviews in an efficient and timely manner across a pool of individuals, but do not include standards for completing a particular appellant's review;

*Timeliness standards* mean the maximum period of time in which the State is required to complete the review request of every appellant; and

*Performance standards* are overall standards for completing reviews in an efficient and timely manner across a pool of individuals, but do not include standards for completing a particular appellant's review.

(2) *Timeliness and performance standards for regular and expedited review.* Consistent with guidance issued by the Secretary, the State must establish timeliness and performance standards for completing reviews of eligibility or enrollment matters described in § 457.1130(a). The State must establish standards both for matters subject to expedited review under paragraph (a) of this section, as well as for eligibility or enrollment matters that are not subject to expedited review.

(3) *Option for different timeliness and performance standards.* The State may establish different timeliness and performance standards for reviews of eligibility or enrollment matters in which the review request is submitted to the State in accordance with § 457.1185, and for those in which the review is transferred to the State in accordance with § 457.351.

(4) *Exception to timeliness and performance standards.* The State must complete reviews within the standards it has established unless there are circumstances beyond its control that prevent the State from meeting these standards, or the individual requests a delay.

■ 25. Section 457.1180 is revised to read as follows:

### § 457.1180 Program specific review process: Notice.

A State must provide enrollees and applicants timely written notice of any determinations required to be subject to review under § 457.1130 that includes the reasons for the determination, an explanation of the applicable rights to review of that determination, the standard and expedited time frames for review, the manner in which a review can be requested, and the circumstances under which enrollment may continue pending review. As provided in § 457.340(a) (related to availability of program information), the information required under this subpart must be accessible to individuals who are limited English proficient and to individuals with disabilities, consistent with the accessibility standards in § 435.905(b) of this chapter, and whether provided in paper or electronic format in accordance with § 457.110.

■ 26. Section 457.1185 is added to read as follows:

### § 457.1185 Review requests and withdrawals.

(a) *Requests for review.* (1) The State must establish procedures that permit an individual or an authorized representative, as defined at § 435.923 of this chapter (referenced at § 457.340), to—

(i) Submit a request for review via all the modalities described in § 435.907(a) of this chapter (referenced at § 457.330), except that the requirement to accept a request for review via the modalities described in § 435.907(a)(1), (2) and (5) of this chapter (relating to submissions via Internet Web site, telephone and other electronic means) is effective no later than the date described in § 435.1200(g)(i) of this chapter; and

(ii) Include in a request for review submitted under paragraph (a)(1)(i) of this section, a request for expedited completion of the review under § 457.1160.

(2) Within 5 business days of receiving a request for review, the State must confirm receipt of such request, through mailed or electronic communication to the individual or authorized representative, in accordance with the election made by the individual under § 457.110.

(3)(i) Except as provided in paragraph (a)(3)(ii) of this section, the State must allow applicants and beneficiaries a reasonable time to submit a request for review, which may not be less than 30 days nor exceed 90 days from the date a notice described in § 457.1180 is received. The date on which a notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she received the notice at a later date.

(ii) A request for a review must be considered timely if filed with the Exchange or Exchange appeals entity (or with another insurance affordability program or appeals entity) as part of a joint review request, as defined in § 457.10, within the time permitted for requesting an appeal of a determination related to eligibility for enrollment in a qualified health plan or for advanced payments of the premium tax credit or cost sharing reductions under 45 CFR 155.520(b) or within the time permitted by such other program, as appropriate.

(b) *Withdrawal of requests for review.* The State must accept withdrawal of a request for review via any of the modalities available under paragraph (a)(1)(i) of this section. For telephonic hearing withdrawals, the State must record the individual's statement and telephonic signature. For telephonic, online and other electronic withdrawals, the agency must send the affected individual written confirmation, via regular mail or electronic notification, in accordance with the individual's election under § 457.110, within 5 business days of the State's receipt of the withdrawal request.

Dated: October 24, 2016.

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Dated: November 8, 2016.

**Sylvia M. Burwell,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2016–27848 Filed 11–21–16; 4:15 pm]

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Part III

## Environmental Protection Agency

40 CFR Part 98
Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 98**

**[EPA–HQ–OAR–2015–0764; FRL–9955–12–OAR]**

**RIN 2060–AS73**

## Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency is finalizing revisions and confidentiality determinations for the petroleum and natural gas systems source category of the Greenhouse Gas Reporting Program. In particular, this action adds new monitoring methods for detecting leaks from oil and gas equipment in the petroleum and natural gas systems source category consistent with the fugitive emissions monitoring methods in the recently finalized new source performance standards for the oil and gas industry. This action also adds emission factors for leaking equipment to be used in conjunction with these monitoring methods to calculate and report greenhouse gas emissions resulting from equipment leaks. Finally, this action finalizes reporting requirements and confidentiality determinations for nine new or substantially revised data elements contained in these amendments.

**DATES:** This final rule is effective on January 1, 2017.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2015–0764. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9334; fax number: (202) 343–2342; email address: *GHGReporting@epa.gov.* For technical information, please go to the Greenhouse Gas Reporting Rule Web site, *http://www.epa.gov/ghgreporting/.* To submit a question, select Help Center, followed by ''Contact Us.''

*Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of this final rule will also be available through the WWW. Following the Administrator's signature, a copy of this action will be posted on the EPA's Greenhouse Gas Reporting Rule Web site at *http://www.epa.gov/ghgreporting/index.html.*

**SUPPLEMENTARY INFORMATION:**

*Regulated Entities.* These revisions affect entities that must submit annual greenhouse gas (GHG) reports under the Greenhouse Gas Reporting Program (GHGRP), codified in the Code of Federal Regulations (CFR) at 40 CFR part 98. This rule applies to all petroleum and natural gas systems facilities that are subject to 40 CFR part 98, regardless of the facility's location, and ensures that all these facilities across the United States (U.S.) report GHG data consistently, and therefore is ''nationally applicable'' within the meaning of section 307(b)(1) of the Clean Air Act (CAA). Further, the Administrator has determined that rules codified in 40 CFR part 98 are subject to the provisions of CAA section 307(d). (See CAA section 307(d)(1)(V) (the provisions of section 307(d) apply to ''such other actions as the Administrator may determine'').) These are amendments to existing regulations. These amended regulations affect owners or operators of petroleum and natural gas systems that directly emit GHGs. Regulated categories and entities include, but are not limited to, those listed in Table 1 of this preamble:

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

| Category | NAICS [a] | Examples of affected facilities |
|---|---|---|
| Petroleum and Natural Gas Systems | 486210 | Pipeline transportation of natural gas. |
| | 221210 | Natural gas distribution. |
| | 211111 | Crude petroleum and natural gas extraction. |
| | 211112 | Natural gas liquid extraction. |

[a] North American Industry Classification System.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Other types of facilities than those listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A and 40 CFR part 98, subpart W. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

What is the effective date? The final rule is effective on January 1, 2017. Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. The EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: ''The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.'' Thus, section 553(d) of the APA does not apply to this rule. The EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making the first set of amendments to this rule effective on January 1, 2017. Section 553(d) allows an effective date less than 30 days after publication for a rule that ''grants or recognizes an exemption or relieves a restriction'' or ''as otherwise provided by the agency for good cause found and published with the rule.'' As explained below, the EPA finds that there is good cause for the first set of amendments to this rule to become effective on January 1, 2017, even though this may result in an effective date fewer than 30 days from date of publication in the **Federal Register**.

While this action is being signed prior to December 1, 2016, there is likely to

be a significant delay in the publication of this rule as it contains complex equations and tables and is relatively long. As an example, the EPA Administrator signed the Greenhouse Gas Reporting Rule: 2015 Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems final rule on October 1, 2015, but the rule was not published in the **Federal Register** until October 22, 2015 (80 FR 64262). The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. To employ the APA section 553(d)(3) ''good cause'' exemption, an agency must balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.[1] Where, as here, the final rule will be signed and made available on the EPA Web site more than 30 days before the effective date, but where the publication is likely to be delayed due to the complexity and length of the rule, the regulated entities are afforded this reasonable amount of time. We balance these circumstances with the need for the amendments to be effective by January 1, 2017; a delayed effective date would result in regulatory uncertainty, program disruption, and an inability to have the amendments effective for the 2017 reporting year. Accordingly, we find good cause exists to make this rule effective on January 1, 2017, consistent with the purposes of APA section 553(d)(3).

Judicial Review. Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) by January 30, 2017 Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Section 307(d)(7)(B) of the CAA also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, William Jefferson Clinton Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20004. Note that under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements.

*Acronyms and Abbreviations.* The following acronyms and abbreviations are used in this document.

APA Administrative Procedure Act
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
CH4 methane
$CO_2$ carbon dioxide
CRA Congressional Review Act
DOT Department of Transportation
EPA U.S. Environmental Protection Agency
FR Federal Register
GHG greenhouse gas
GHGRP Greenhouse Gas Reporting Program
GRI Gas Research Institute
ICR Information Collection Request
LNG liquefied natural gas
NAICS North American Industry Classification System
NSPS New Source Performance Standards
NTTAA National Technology Transfer and Advancement Act
OGI optical gas imaging
OMB Office of Management and Budget
ppmv parts per million by volume
PRA Paperwork Reduction Act
RFA Regulatory Flexibility Act
U.S. United States
UMRA Unfunded Mandates Reform Act
VOC volatile organic compounds
WWW Worldwide Web

*Organization of This Document.* The following outline is provided to aid in locating information in this preamble.



## I. Background

### *A. Organization of This Preamble*

Section I of this preamble provides background information regarding the origin of the final amendments. This section also discusses the EPA's legal authority under the CAA to promulgate and amend 40 CFR part 98 of the Greenhouse Gas Reporting Rule (hereafter referred to as ''part 98'') as well as the legal authority for making confidentiality determinations for the data to be reported. Section II of this preamble contains information on the final amendments to part 98, subpart W (Petroleum and Natural Gas Systems) (hereafter referred to as ''subpart W''), including a summary of the major comments that the EPA considered in the development of this final rule. Section III of this preamble discusses the final confidentiality determinations for new or substantially revised data

[1] *Omnipoint Corp.* v. *FCC*, 78 F3d 620, 630 (D.C. Cir. 1996), quoting *U.S.* v. *Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977).

reporting elements. Section IV of this preamble discusses the impacts of the final amendments to subpart W. Finally, section V of this preamble describes the statutory and executive order requirements applicable to this action.

*B. Background on This Action*

The EPA's GHGRP requires annual reporting of GHG data and other relevant information from large sources and suppliers in the United States. On October 30, 2009, the EPA published part 98 in the **Federal Register** (FR) for collecting information regarding GHG emissions from a broad range of industry sectors (74 FR 56260). Although reporting requirements for petroleum and natural gas systems were originally proposed to be part of part 98 (74 FR 16448, April 10, 2009), the final October 2009 rulemaking did not include the petroleum and natural gas systems source category as one of the 29 source categories for which reporting requirements were finalized. The EPA re-proposed subpart W in 2010 (75 FR 18608; April 12, 2010), and a subsequent final rulemaking was published on November 30, 2010, with the requirements for the petroleum and natural gas systems source category at 40 CFR part 98, subpart W (75 FR 74458). Following promulgation, the EPA finalized several actions revising subpart W (76 FR 22825, April 25, 2011; 76 FR 53057, August 25, 2011; 76 FR 59533, September 27, 2011; 76 FR 80554, December 23, 2011; 77 FR 51477, August 24, 2012; 78 FR 25392, May 1, 2013; 78 FR 71904, November 29, 2013; 79 FR 70352, November 25, 2014; 80 FR 64262, October 22, 2015).[2]

The Strategy to Reduce Methane Emissions in the President's Climate Action Plan summarizes the sources of $CH_4$ emissions, commits to new steps to cut emissions of this potent GHG, and outlines the Administration's efforts to improve the measurement of these emissions. The strategy builds on progress to date and takes steps to further cut $CH_4$ emissions from several sectors, including the oil and natural gas sector. In the strategy, the EPA was specifically tasked with continuing to review GHGRP regulatory requirements to address potential gaps in coverage, improve methods, and ensure high quality data reporting.[3] On January 14, 2015, the Obama administration provided additional direction to the EPA to ''explore potential regulatory opportunities for applying remote sensing technologies and other innovations in measurement and monitoring technology to further improve the identification and quantification of emissions'' in the oil and natural gas sector, such as the emissions submitted as part of GHGRP annual reporting.[4]

Under subpart W, GHGs that must be reported by each industry segment and applicable source types are specified in 40 CFR 98.232, including equipment leaks from listed component types. In order to fulfill these equipment leak emissions reporting requirements, reporters must utilize one of two calculation methodologies [5] to calculate GHG emissions from equipment leaks as specified in 40 CFR 98.233: (1) Calculation methodology based on equipment leak surveys (40 CFR 98.233(q)), or (2) calculation methodology based on population counts (40 CFR 98.233(r).[6] For example, facilities in the Onshore Natural Gas Processing and Onshore Natural Gas Transmission Compression industry segments use the calculation methodology based on equipment leak surveys for most components at their facilities. If 40 CFR 98.233(q) specifies that an equipment leak survey is required for the subsection of listed component types in 40 CFR 98.232, reporters must use one of the monitoring methods specified in 40 CFR 98.234 when conducting those equipment leak surveys to detect leaking components at the facility. The calculation methodology based on equipment leak surveys requires that the reporter then determine the total amount of time each component was assumed to be leaking and multiply that by the concentration of the methane ($CH_4$) and carbon dioxide ($CO_2$) in the gas and the applicable emission factor (referred to as a ''leaker emission factor''), listed in Table W–1E and Table W–2 through Table W–7, to calculate emissions. Finally, 40 CFR 98.236 specifies the data elements that must be reported to the EPA.

On January 29, 2016, the EPA proposed ''Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' (81 FR 4987) to add new monitoring methods for detecting leaks from oil and gas equipment, to revise which industry segments and sources use the calculation methodology based on equipment leak surveys or the calculation methodology based on population counts, to clarify how the definition of fugitive emission components in the new source performance standards (NSPS) for the oil and natural gas sector (40 CFR part 60, subpart OOOOa, at 81 FR 35824) (hereafter referred to as the ''NSPS subpart OOOOa'') aligns with the equipment components subject to subpart W, to add leaker emission factors for multiple industry segments, and to add reporting requirements and confidentiality determinations for new or substantially revised data elements. Under those proposed amendments, facilities with fugitive emissions components at a well site or compressor station subject to the NSPS subpart OOOOa would use data derived from the NSPS subpart OOOOa fugitive emissions requirements (*i.e.*, which components were determined to have fugitive emissions) along with the subpart W leaker emission factors to calculate and report GHG emissions to the GHGRP. The proposed revisions provided the opportunity for owners and operators of sources not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions standards (*e.g.,* sources participating in a voluntarily implemented program) and not already required to conduct leak surveys under subpart W to optionally use the calculation methodology at 40 CFR 98.233(q) to calculate and report their GHG emissions to the GHGRP. The EPA also proposed that facilities that are already required to conduct leak surveys under subpart W would be able to use the newly proposed monitoring method(s) in 40 CFR 98.234. In addition, the EPA proposed new reporting requirements for all reporters using the calculation methodology

[2] See Greenhouse Gas Reporting Program, Historical Rulemakings. Available at *https://www.epa.gov/ghgreporting/rulemaking-notices-ghg-reporting.*

[3] Climate Action Plan—Strategy to Reduce Methane Emissions. The White House, Washington, DC, March 2014. Available at *http://www.whitehouse.gov/sites/default/files/strategy_to_reduce_methane_emissions_2014-03-28_final.pdf.*

[4] FACT SHEET: Administration Takes Steps Forward on Climate Action Plan by Announcing Actions to Cut Methane Emissions. The White House, Office of the Press Secretary, January 14, 2015. Available at *https://www.whitehouse.gov/the-press-office/2015/01/14/fact-sheet-administration-takes-steps-forward-climate-action-plan-anno-1.*

[5] Throughout this preamble, the term ''calculation methodology'' refers to the procedures used to calculate emissions (*e.g.,* ''calculation methodology based on equipment leak surveys'' refers to the methodology described in 40 CFR 98.233(q)) and ''monitoring method'' refers to the technology, test method, or other method of determining whether an individual component is leaking (see 40 CFR 98.234(a)). The term ''leak detection method'' that is used in the 40 CFR part 98 subpart W regulatory text has the same meaning as ''monitoring method'' used in this preamble.

[6] Reporters using the calculation methodology based on population counts determine the total number of all components in the facility and multiply that count by the average estimated time of operation, the concentration of the $CH_4$ and $CO_2$ in the gas, and the applicable emission factor (referred to as a ''population emission factor'') to calculate emissions.

based on equipment leak surveys and proposed to require reporters using the calculation methodology for the first time to begin reporting the information associated with that methodology. Finally, the EPA proposed confidentiality determinations for nine new or substantially revised data elements. The public comment period for these proposed rule amendments ended on March 15, 2016, following a 15-day extension of the original comment period end date (81 FR 9797; February 26, 2016). On June 3, 2016, the EPA published the final NSPS subpart OOOOa requirements (81 FR 35824).

In this action, the EPA is finalizing revisions to subpart W largely as proposed, with some changes made after consideration of public comments. Summaries of significant comments submitted on the proposed amendments and the EPA's responses to those comments can be found in sections II, III, and IV of this preamble. All comments submitted on the proposed amendments and the EPA's additional responses to the comments can be found in ''Response to Public Comments on Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764.

As further detailed in the preamble to the proposed amendments, these revisions advance the EPA's goal of maximizing rule effectiveness by providing a mechanism for facilities to use the NSPS subpart OOOOa monitoring results for purposes of GHGRP subpart W reporting. This alignment reduces burden for entities subject to the fugitive emissions/equipment leak detection method requirements in both programs, and, when combined with the other amendments being finalized in this revision, provides clear monitoring methods, equipment leak survey and calculation methodologies and emission factors, and reporting requirements in subpart W, thus enabling government, regulated entities, and the public to easily identify and understand regulatory requirements. These amendments also further advance the ability of the GHGRP to provide access to high quality data on GHG emissions by adding the ability for reporters to use data collected during equipment leak surveys and to perform site-specific equipment leak calculations.

### *C. Legal Authority*

The EPA is finalizing these rule amendments under its existing CAA authority provided in CAA section 114. As stated in the preamble to the 2009 final GHG reporting rule (74 FR 56260; October 30, 2009), CAA section 114(a)(1) provides the EPA broad authority to require the information to be gathered by this rule because such data will inform and are relevant to the EPA's carrying out a wide variety of CAA provisions. See the preambles to the proposed (74 FR 16448; April 10, 2009) and final GHG reporting rule (74 FR 56260; October 30, 2009) for further information.

In addition, pursuant to sections 114, 301, and 307 of the CAA, the EPA is publishing final confidentiality determinations for the new or substantially revised data elements required by these amendments. Section 114(c) requires that the EPA make information obtained under section 114 available to the public, except for information (excluding emission data) that qualifies for confidential treatment. The Administrator has determined that this action is subject to the provisions of section 307(d) of the CAA. Section 307(d) contains a set of procedures relating to the issuance and review of certain CAA rules.

### *D. How do these amendments apply to 2016 and 2017 reports?*

These amendments are effective on January 1, 2017. Starting with the 2017 reporting year, facilities must follow the revised methods to detect equipment leaks (if applicable) and to calculate and report their annual equipment leak emissions. The first annual reports of emissions calculated using the amended requirements will be those submitted by April 2, 2018, covering reporting year 2017. For reporting year 2016, reporters will calculate emissions according to the requirements in part 98 that are applicable to reporting year 2016 (*i.e.,* the requirements in place until the effective date of this final rule).

## II. Summary of Final Revisions and Other Amendments to Subpart W and Responses to Public Comment

Sections II.A through II.F of this preamble describe the revisions that we are finalizing in this rulemaking. Section II.A provides a general summary of the final amendments to subpart W. Section II.B describes the final amendments to the requirement to use the calculation methodology based on equipment leak surveys. Section II.C describes the final amendments to the subpart W monitoring methods. Section II.D describes the final amendments for component types to be surveyed. Section II.E describes the final amendments to the subpart W leaker emission factors. Finally, section II.F provides a summary of the final amendments to the subpart W reporting requirements. The amendments described in each section are followed by a summary of the major comments on those amendments and the EPA's responses. See ''Response to Public Comments on Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764 for a complete listing of all comments and the EPA's responses.

### *A. Summary of Final Amendments—General*

#### 1. Summary of Final Amendments

In this action, the EPA is amending subpart W to add new monitoring methods for detecting leaks from oil and gas equipment in the petroleum and natural gas systems source category consistent with the NSPS subpart OOOOa. The EPA is also specifying that facilities with a collection of fugitive emissions components at a well site or compressor station subject to the NSPS subpart OOOOa (40 CFR 60.5397a) would be required to survey those components, except as otherwise specified in this subpart W final rule, for the subpart W calculation methodology based on equipment leak surveys using one of the new monitoring methods being added to subpart W. In practice, this means that facilities can use the results of the NSPS subpart OOOOa-required fugitive emissions monitoring survey to fulfill these subpart W requirements. The EPA is adding leaker emission factors to be used in conjunction with the calculation methodology based on equipment leak surveys to calculate and report GHG emissions. The revisions provide the opportunity for owners and operators of sources not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions standards (*e.g.,* sources participating in a voluntarily implemented program) and not already required to conduct leak surveys under subpart W to optionally use the calculation methodology at 40 CFR 98.233(q) to calculate and report their GHG emissions, and to use the new monitoring methods in 40 CFR 98.234 to do so.

Facilities in certain subpart W industry segments [7] that are already required to conduct leak surveys will be able to use the new monitoring methods

[7] These segments are Onshore Natural Gas Transmission Compression, Underground Natural Gas Storage, LNG Storage, and LNG Import and Export Equipment.

in 40 CFR 98.234. If they use either of the two new monitoring methods in 40 CFR 98.234(a)(6) or (7) that are consistent with the NSPS subpart OOOOa, then in addition to surveying the components currently subject to the survey requirements in subpart W, they must also survey all other components that are fugitive emissions components in the NSPS subpart OOOOa, with limited exceptions, as specified in 40 CFR 98.232 (see sections II.C and II.D of this preamble). If they use any of the monitoring methods currently in 40 CFR 98.234(a)(1) through (5), then in addition to surveying the components currently subject to the survey requirements in subpart W, they may elect to survey the other components specified in 40 CFR 98.232.

The comments received on this rule generally do not dispute the merit of allowing the use of new monitoring methods in subpart W, but they do include issues related to the adequacy of the notice and comment process, the calculation methodology based on equipment leak surveys, reporting, and applicability.

*2. Summary of Comments and Responses*

*Comment:* Numerous commenters stated that the EPA's reference to the proposed NSPS subpart OOOOa included in the subpart W proposal was premature, and substantively and procedurally flawed. According to these commenters, by relying on a proposed action, the EPA did not provide the opportunity for notice or comment on how the rule would ultimately affect stakeholders. These commenters stated that at the very least the EPA made it difficult and increased burden for stakeholders to evaluate scope and impacts and to provide comment. Commenters stated that they could only comment on the effect of the incorporation of the NSPS subpart OOOOa proposed requirements, as they could not review and comment on the effect of the finalized NSPS subpart OOOOa requirements on subpart W prior to closure of the comment period for the subpart W proposal. Specifically, the commenters expressed concern that because the EPA received so many comments on the proposed NSPS subpart OOOOa, the final NSPS subpart OOOOa provisions would likely be significantly different in certain aspects and that those details were unknowable at the time of comment. Noting that the EPA expressed intent in the preamble to the subpart W proposed amendments to incorporate the final NSPS subpart OOOOa provisions in the final subpart W rule, the commenters stated they inherently would have no formal opportunity to meaningfully comment on the effect those final NSPS subpart OOOOa provisions would have on subpart W reporters. Several commenters stated that this created substantive and procedural flaws in the proposed rule, as the EPA provided neither the ''terms or substance'' nor a ''description of the subjects and issues involved'' of the proposed rule as required for notice and comment rulemaking under the Administrative Procedure Act, 5 U.S.C. 553(b), nor did the EPA meet the more stringent notice and comment requirements of CAA section 307. Several commenters stated that EPA similarly did not consider changes that might be made to the final NSPS subpart OOOOa through the judicial review process.

Several commenters requested that the EPA either finalize, or re-propose or re-open the public comment period for, the proposed alignment of subpart W with the NSPS subpart OOOOa only after the NSPS subpart OOOOa is finalized. Other commenters requested that the EPA withdraw the proposal to amend subpart W and reconsider whether any revisions are necessary once the NSPS subpart OOOOa is in effect.

*Response:* The EPA disagrees that the proposed rule for this subpart W revision was premature, or substantively and procedurally flawed. This action is focused on aligning the subpart W requirements, to the extent possible, with the finalized NSPS subpart OOOOa fugitive emission requirements so that facilities may use the results of the NSPS subpart OOOOa-required fugitive emissions monitoring surveys to fulfill subpart W requirements, and does so through revisions that incorporate final NSPS subpart OOOOa monitoring methods into subpart W and make their use mandatory in subpart W surveys for most components subject to NSPS subpart OOOOa. The proposed rule for subpart W clearly specified that only a monitoring method finalized in the NSPS subpart OOOOa rule would be finalized for subpart W, which ensured that no requirement would reference any monitoring method that was merely at proposal stage. The proposed rule provided adequate notice and opportunity to comment on how the rule will affect stakeholders, and thus this final rule is in compliance with the relevant requirements of CAA section 307(d). Multiple commenters cited the Administrative Procedure Act (APA), including 5 U.S.C. 553(b)(3), which requires that a notice of proposed rulemaking shall include ''either the terms or substance of the proposed rule or a description of the subjects and issues involved.'' The EPA notes that our process is also consistent with the notice and comment requirements of the APA, 5 U.S.C. 551–559. In the preamble to the proposed and final rule, as well as in ''Response to Public Comments on Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764, the EPA describes at length the statement and purpose of the revisions, provides explanations for any changes in the rule, and responds to all comments submitted.

Specifically, in regards to the proposed rule referencing the then proposed NSPS subpart OOOOa monitoring method(s) and fugitive emissions component definition,[8] the EPA disagrees that the proposed rule did not give adequate notice and therefore the EPA did not re-propose or re-open the comment period for this action. The proposed rule clearly laid out the EPA's proposal and requested comment regarding alternatives, as well as the detailed reasoning behind and goals of the proposal. The EPA provided this detailed explanation to ensure that commenters had ample notice of the revisions under consideration, and provided 45 days for the public comment period. This process accords with proper notice and comment procedure. Commenters posit that referencing the then proposed NSPS subpart OOOOa standard in the proposed rule renders this notice premature and inadequate, and the EPA respectfully disagrees. First, in proposing to add the NSPS subpart OOOOa equipment leak detection methods as approved monitoring methods for subpart W surveys, the EPA was not proposing to require any new collection of data under subpart W, as the data on fugitive emissions components would already be collected to meet the requirements of NSPS subpart OOOOa. Instead, the EPA proposed to add these new monitoring methods under subpart W so that reporters would be able to use, for the purpose of compliance with the proposed mandatory subpart W equipment leak survey, calculation, and reporting requirements, whatever data would already be collected as a result of complying with the monitoring method(s) that would be finalized in the NSPS subpart OOOOa. Similarly, while the EPA proposed to include all fugitive emissions components subject to the

[8] The NSPS subpart OOOOa rule has since been finalized. 81 FR 35824 (June 3, 2016).

final NSPS subpart OOOOa monitoring methods within subpart W emissions reporting requirements, with some exceptions, which would mean that additional components would fall within the scope of subpart W applicability, these data would already be collected under the NSPS subpart OOOOa, meaning that no new data would need to be collected for subpart W that was not already required by another CAA program. As such, the substance of the monitoring method(s) and fugitive emission component definition was not at issue for purposes of subpart W within these revisions, as that process took place within the NSPS subpart OOOOa rulemaking. Rather, the EPA ensured that reporters were provided notice of the proposal to add the monitoring methods and scope of components that would be finalized under the NSPS OOOOa as additional monitoring methods and applicable components for subpart W, provided notice of the proposed additional subpart W equipment leak survey, calculation, and reporting requirements for equipment components subject to the NSPS subpart OOOOa, and made clear that the intent of these revisions was to align the programs so that reporters would use the data gathered in complying with the finalized NSPS subpart OOOOa to comply with their subpart W requirements. The proposed rule further explained the purpose behind this proposed revision, as detailed in the proposed rule (81 FR 4987; January 29, 2016), including reducing burden on reporters by minimizing the potential equipment leak surveys required at a given facility across CAA programs. As noted earlier, the proposed rule for subpart W clearly specified that only a monitoring method finalized in the NSPS subpart OOOOa rule would be finalized for subpart W, which ensured that no requirement would reference any monitoring method that was merely at proposal stage. In fact, the proposed rule for subpart W clearly detailed the NSPS subpart OOOOa proposed monitoring method, and identified that the NSPS subpart OOOOa proposal included a potential alternative monitoring method, and furthermore explained that any method(s) added in this final subpart W action would be the method(s) that were finalized in the NSPS subpart OOOOa.

Furthermore, Subpart W currently includes an optical gas imaging (OGI) method (see 40 CFR 98.234(a)(1)) and Method 21 (40 CFR 98.234(a)(2)) in the subpart W list of monitoring methods. While there are differences in the application of the methods between the current subpart W and the final NSPS subpart OOOOa,[9] necessitating this revision, current use of OGI and Method 21 for purposes of subpart W provides support that the methods at issue provide reliable data for use in subpart W emissions reporting.

This final rule incorporates the monitoring methods finalized in the NSPS subpart OOOOa with some changes from proposal. To the extent the specifics of how this final subpart W rule is adding method(s) in accordance with the NSPS subpart OOOOa differ from the specifics in the subpart W proposal, as explained further in section II.C of this preamble, these changes are consistent with the purpose detailed in the proposed rule and were made to ensure only those portions of the final NSPS subpart OOOOa that are essential to the integrity of the methods are referenced within the requirements of subpart W. This final rule revises applicable components subject to subpart W to include all components subject to the final NSPS subpart OOOOa, except for the finalized as proposed exclusion of certain components, as further detailed in section II.D of this preamble. The EPA notes that while we finalized the reference to the NSPS subpart OOOOa with certain exceptions regarding applicable components as proposed, the final NSPS subpart OOOOa definition of fugitive emission components was narrower in scope than that rule's proposal. This final rule also includes revisions, with some changes from proposal as detailed in Sections II.B, II.D, II.E, and II.F of this preamble, to how reporters must use the data obtained in accordance with the methods finalized in the NSPS subpart OOOOa for subpart W reporting.

Although the EPA's own reasoned consideration and its assessment of public comment have resulted in some modifications to the final rule, as explained further in sections II.B through II.F of this preamble, such changes reflect the goals and alternatives in the EPA's original proposal, and the proposed rule ensured that interested parties were ''fairly apprised'' of the elements ultimately included in this final rulemaking. See, *e.g.,* United Steelworkers of America v. Schuylkill Metals, 828 F.2d 314 (5th Cir. 1987).

While some changes occurred to the NSPS subpart OOOOa requirements from proposal to final in that rulemaking, including changes to the substance of the monitoring methods and the fugitive emission component definition, those substantive changes are out of scope of this subpart W rulemaking that is intended to align with the final NSPS subpart OOOOa requirements; however, commenters were provided full notice and opportunity to comment within that NSPS subpart OOOOa rulemaking, as fully explained within those proposed and final preambles, the EPA's response to comments, and the docket of that action.[10]

The commenter is correct that the EPA did not consider changes that may be made to the final NSPS subpart OOOOa through the judicial review process. Any such potential, future changes are premature to consider at this time.

*B. Summary of Final Amendments to the Requirement To Use the Calculation Methodology Based on Equipment Leak Surveys*

1. Summary of Final Amendments

As noted in section I.B of this preamble, subpart W presently requires reporters with sources in certain industry segments to use the calculation methodology based on population counts according to 40 CFR 98.233(r). For example, reporters in the Onshore Petroleum and Natural Gas Production and the Onshore Petroleum and Natural Gas Gathering and Boosting industry segments are required either to count the number of equipment components of each type (*e.g.,* valve, connector, open-ended line, or pressure relief valve) or to count the number of major equipment at the facility and then calculate the number of equipment components of each type using default average component counts for each piece of major equipment in Tables W–1B and W–1C to subpart W (40 CFR 98.233(r)(2)). The resulting equipment component counts are then multiplied by default ''population emission factors'' in Table W–1A to subpart W to calculate emissions from equipment leaks.

Other reporters are required to use the calculation methodology based on equipment leak surveys according to 40 CFR 98.233(q) using one of the monitoring methods in 40 CFR 98.234(a). For example, reporters in the Onshore Natural Gas Transmission Compression industry segment must conduct at least one equipment leak survey in a calendar year for the compressor and non-compressor components in gas service listed in Table W–3A to subpart W. These reporters then use the number of leaking

[9] See section II.C of this preamble.

[10] Docket ID No. EPA–HQ–OAR–2010–0505.

components in the calendar year, the average amount of time each component was leaking, and the default ''leaker emission factors'' in Table W–3A to subpart W to calculate emissions according to Equation W–30.

The EPA is finalizing the proposal to apply the calculation methodology based on equipment leak surveys in 40 CFR 98.233(q) to additional reporters in subpart W. Specifically, reporters in any subpart W industry segment with a well site(s) and/or compressor station(s) required to conduct fugitive emissions monitoring to comply with the NSPS subpart OOOOa will be required to use the calculation methodology based on equipment leak surveys for those components [11] under subpart W using the new monitoring methods consistent with the NSPS subpart OOOOa (see section II.C of this preamble). While these are new calculation methodology and equipment leak survey requirements for the subpart W reporting of these components, reporters may meet the survey requirements by counting the actual number of components with fugitive emissions identified through implementation of the NSPS subpart OOOOa as leaks for purposes of subpart W and use those counts with the calculation methodologies specified in 40 CFR 98.233(q) to determine equipment leak emissions for those components.

We received extensive comment regarding the proposed revisions to require facilities in the Onshore Natural Gas Processing industry segment to use the results of the leak surveys conducted to comply with the NSPS subpart OOOOa equipment leak requirements for reporting under subpart W. We are still reviewing those comments and are not taking final action on those revisions at this time.

For other sources of equipment leaks (*i.e.,* those not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions standards),[12] the amended subpart W requirements depend on whether the component types are currently required to be reported using the calculation methodology based on equipment leak surveys (40 CFR 98.233(q)) or the calculation methodology based on population counts (40 CFR 98.233(r)). For components at facilities in industry segments that are currently required to use the calculation methodology based on equipment leak surveys to comply with subpart W, the EPA is finalizing as proposed that reporters must continue to conduct equipment leak surveys as required by subpart W but may use any monitoring method in 40 CFR 98.234(a). If they use either of the two new monitoring methods in 40 CFR 98.234(a)(6) or (7) that are consistent with the NSPS subpart OOOOa, then in addition to surveying the components currently subject to the survey requirements in subpart W, they must also survey all other components that are fugitive emissions components in the NSPS subpart OOOOa, with limited exceptions, as specified in 40 CFR 98.232 (see sections II.C and II.D of this preamble). If they use any of the monitoring methods currently in 40 CFR 98.234(a)(1) through (5), then in addition to surveying the components currently subject to the survey requirements in subpart W, they may elect to survey the other components specified in 40 CFR 98.232.

For components at facilities in industry segments that are currently required to use the calculation methodology based on population counts, the reporter may continue to use that methodology. Alternatively, the EPA is finalizing as proposed the option that the reporter may elect to use the calculation methodology based on equipment leak surveys (40 CFR 98.233(q)(1)(iv)) in lieu of the calculation methodology based on population counts (40 CFR 98.233(r)). If this option is selected, then the reporter must use any of the monitoring methods in 40 CFR 98.234(a). If they use a monitoring method in 40 CFR 98.234(a)(6) or (7), then they must survey all components that would otherwise be subject to the calculation methodology based on population counts, and they must also survey all other components that are fugitive emissions components in the NSPS subpart OOOOa, with limited exceptions, as specified in 40 CFR 98.232. If they use any of the monitoring methods currently in 40 CFR 98.234(a)(1) through (5), then in addition to surveying the components that would otherwise be subject to the calculation methodology based on population counts, they may elect to survey the other specified in 40 CFR 98.232. The intent of the new provision in 40 CFR 98.233(q)(1)(iv) is to allow flexibility for reporters currently required to use the calculation methodology based on population counts for components that are not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions standards.

The burden of using the calculation methodology based on equipment leak surveys will be similar to using the existing subpart W calculation methodology based on population counts, and the results will be more representative of the number of leaks at the facility than the calculation methodology based on population counts. Table 2 of this preamble provides a summary of the equipment leak calculation methodologies and monitoring methods that will be available to each industry segment covered by subpart W under these amendments.

TABLE 2—FINAL EQUIPMENT LEAK REQUIREMENTS FOR SUBPART W

| Subpart W industry segments [a] | Components subject to 40 CFR 60.5397a of the NSPS subpart OOOOa | | Components not subject to 40 CFR 60.5397a of the NSPS subpart OOOOa | |
|---|---|---|---|---|
| | Subpart W calculation methodology [b] | Subpart W monitoring method for leak detection [c] | Subpart W calculation methodology | Subpart W monitoring method for leak detection [d] |
| Onshore Petroleum and Natural Gas Production. | Leak survey (40 CFR 98.233(q)). | OGI or Method 21 as specified in the NSPS subpart OOOOa. | Leak survey (40 CFR 98.233(q)); OR<br>Population count (40 CFR 98.233(r)). | Any method in 40 CFR 98.234(a).<br>N/A. |
| Onshore Natural Gas Transmission Compression; Underground Natural Gas Storage: Storage stations, gas service. | Leak survey (40 CFR 98.233(q)). | OGI or Method 21 as specified in the NSPS subpart OOOOa. | Leak survey (40 CFR 98.233(q)) [e]. | Any method in 40 CFR 98.234(a). |

[11] See section II.D of this preamble.

[12] Except for onshore natural gas processing and natural gas distribution.

TABLE 2—FINAL EQUIPMENT LEAK REQUIREMENTS FOR SUBPART W—Continued

| Subpart W industry segments [a] | Components subject to 40 CFR 60.5397a of the NSPS subpart OOOOa | | Components not subject to 40 CFR 60.5397a of the NSPS subpart OOOOa | |
|---|---|---|---|---|
| | Subpart W calculation methodology [b] | Subpart W monitoring method for leak detection [c] | Subpart W calculation methodology | Subpart W monitoring method for leak detection [d] |
| Underground Natural Gas Storage: Storage wellheads, gas service. | Leak survey (40 CFR 98.233(q)). | OGI or Method 21 as specified in the NSPS subpart OOOOa. | Leak survey (40 CFR 98.233(q)); OR<br>Population count (40 CFR 98.233(r)). | Any method in 40 CFR 98.234(a).<br>N/A. |
| LNG [f] Storage: LNG Service; LNG Import and Export Equipment: LNG Service. | Leak survey (40 CFR 98.233(q)). | OGI or Method 21 as specified in the NSPS subpart OOOOa. | Leak survey (40 CFR 98.233(q)). | Any method in 40 CFR 98.234(a). |
| LNG Storage: Gas Service; LNG Import and Export Equipment: Gas Service. | Leak survey (40 CFR 98.233(q)). | OGI or Method 21 as specified in the NSPS subpart OOOOa. | Leak survey (40 CFR 98.233(q)); OR<br>Population count (40 CFR 98.233(r)) [g]. | Any method in 40 CFR 98.234(a).<br>N/A. |

[a] Onshore Natural Gas Processing and Natural Gas Distribution are not included in this table because we are not revising the calculation methodology and monitoring method for leak detection for these industry segments in this action. The current requirements are still applicable to components in these industry segments.

[b] The term ''calculation methodology'' refers to the procedures used to calculate emissions (*e.g.,* ''calculation methodology based on equipment leak surveys'' refers to the methodology described in 40 CFR 98.233(q)) and ''monitoring method'' refers to the technology, test method, or other method of determining whether an individual component is leaking (see 40 CFR 98.234(a)).

[c] OGI as specified in the NSPS subpart OOOOa is codified in subpart W at 40 CFR 98.234(a)(6) and Method 21 as specified in the NSPS subpart OOOOa is codified in subpart W at 40 CFR 98.234(a)(7).

[d] ''Any method in 40 CFR 98.234(a)'' means any of the following methods: OGI as specified in 40 CFR 60.18 (40 CFR 98.234(a)(1)), Method 21 with a leak definition of 10,000 parts per million by volume (ppmv)(40 CFR 98.234(a)(2)), Infrared laser beam illuminated instrument (40 CFR 98.234(a)(3)), Acoustic leak detection device (40 CFR 98.234(a)(5)), OGI as specified in the NSPS subpart OOOOa (40 CFR 98.234(a)(6)) or Method 21 with a leak definition of 500 ppmv (40 CFR 98.234(a)(7)).

[e] Reporting is required for emissions from valves, connectors, open-ended lines, pressure relief valves, and meters but is optional for instruments and other components unless the reporter elects to use either OGI or Method 21 as specified in the NSPS subpart OOOOa (40 CFR 98.234(a)(6) or (7)), in which case reporting is also required for instruments and other fugitive emissions components.[13]

[f] LNG = liquefied natural gas.

[g] Reporting is only required for emissions from vapor recovery compressors if this option is chosen.

*2. Summary of Comments and Responses*

*Comment:* Several commenters stated that facilities in the Onshore Petroleum and Natural Gas Production and Onshore Petroleum and Natural Gas Gathering and Boosting industry segments should not be required to use the NSPS subpart OOOOa results to calculate GHG emissions to comply with subpart W. They stated that the proposed NSPS subpart OOOOa leak detection program was limited to one monitoring method, which is inconsistent with the current flexibility for reporters conducting equipment leak surveys for subpart W to choose any monitoring method within 40 CFR 98.234(a). The commenters asserted that this requirement will result in some subpart W reporters having to manage multiple equipment leak survey programs within one facility, especially if the facility is located within a state with a different leak detection program, and this result is overly burdensome. In addition, the commenters stated that the equipment leak survey results will be internally inconsistent if they use different methods, and a facility's emissions could appear to increase one year simply because the number of sites subject to the NSPS subpart OOOOa increases, requiring the reporter to use the OGI method in the NSPS subpart OOOOa for an increased number of components. Instead, the reporters suggested, use of the calculation methodology based on equipment leak surveys, including the selection of monitoring method within 40 CFR 98.234(a), should be voluntary for all facilities not currently required to conduct leak surveys under subpart W.

In contrast, another commenter requested that the EPA require all subpart W reporters to detect leaks using direct equipment leak detection technologies such as OGI. The commenter stated that leak detection using OGI can produce more accurate data than current subpart W methods and that the EPA's approach is consistent with the EPA's stated goals to enhance the rigor and transparency of subpart W data. In addition, the commenter stated that applying OGI detection uniformly across subpart W sources will produce data that is readily comparable across facilities and will allow the EPA to assess the performance of facilities over time.

*Response:* For facilities that have affected sources required to conduct fugitive emissions monitoring to comply with the NSPS subpart OOOOa well site or compressor station fugitive emissions standards, the EPA is finalizing as proposed that these components must meet the subpart W calculation methodology based on equipment leak survey requirements. In practice, this means reporters can meet these requirements by counting the actual number of components with fugitive emissions identified through implementation of the NSPS subpart OOOOa as leaks for purposes of subpart W. This requirement will achieve the EPA's stated goal of alignment with the NSPS subpart OOOOa and will assist in providing the EPA with a greater understanding of emission reductions.

At this time, we are not requiring all subpart W facilities to perform a leak detection survey using direct equipment leak detection technologies such as OGI. Rather this action is focused on aligning the subpart W requirements, to the extent possible, with the NSPS subpart OOOOa fugitive emission requirements so that facilities may use the results of the NSPS subpart OOOOa-required

[13] See section II.D.1 of this preamble for the EPA's decision on the final subpart W requirements for components not subject to 40 CFR 60.5397a of the NSPS Subpart OOOOa from affected facilities in the Onshore Natural Gas Transmission Compression industry segment, and storage stations in gas service within the Underground Natural Gas Storage industry segment.

fugitive emissions monitoring surveys to fulfill subpart W requirements.

The EPA does not agree that a subpart W requirement to use the results of a previously completed leak survey within the subpart W calculation methodology based on equipment leak surveys will result in an undue burden to these reporters. For components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions standards, there is little to no burden associated with using the number of components found to have fugitive emissions as the number of leaking components in the subpart W calculation methodology based on equipment leak surveys. The only additional piece of information these reporters need to calculate emissions is the amount of time each component was leaking, and this is a straightforward determination based on the dates of the equipment leak surveys. See section IV.B of this preamble for information and responses to comments related to the EPA's burden estimates for these amendments.

*C. Summary of Final Amendments to Monitoring Methods*

1. Summary of Final Amendments

The EPA is finalizing the proposal to add OGI, as specified in the NSPS subpart OOOOa, to the list of monitoring methods in 40 CFR 98.234(a). The addition of this specific OGI method to subpart W at 40 CFR 98.234(a)(6) aligns the methods in the two rulemakings and allows subpart W facilities to directly use information derived from the implementation of the fugitive emissions monitoring conducted under the NSPS subpart OOOOa to calculate and report equipment leak emissions to the GHGRP.

The EPA has made changes to the proposed subpart W amendments after consideration of public comment and/or to be consistent with the final revisions made to the corresponding proposed NSPS subpart OOOOa specifications. The proposed subpart W amendments cross-referenced the proposed 40 CFR 60.5397a(b) through (e) and (g) through (i), which included the requirements to: (1) Develop a corporate-wide fugitive emissions monitoring plan; (2) develop a site-specific monitoring plan; (3) observe each fugitive emissions component for fugitive emissions; (4) conduct monitoring surveys semiannually; and (5) adjust the frequency of monitoring surveys based on the percent of the fugitive emissions components detected to have fugitive emissions. For the reasons described below, the final amendments to subpart W for the OGI method cross-reference a portion of the NSPS subpart OOOOa requirements to develop the fugitive emissions monitoring plan and the NSPS subpart OOOOa requirements to observe each fugitive emissions component for fugitive emissions.

The final NSPS subpart OOOOa requires an emissions monitoring plan that covers the affected sources within each company-defined area. This monitoring plan includes information about the survey frequency, monitoring method and instrument selected, repair procedures and timeframes, recordkeeping, and procedures for calibrating the monitoring instrument and verifying that it can detect fugitive emissions at the required levels.

For the final subpart W amendments, the EPA evaluated the NSPS subpart OOOOa requirements for the monitoring plan along with the level of detail in the existing monitoring methods in 40 CFR 98.234(a). The EPA determined that information about the monitoring instrument selected and procedures for calibrating the monitoring instrument and verifying that it can detect fugitive emissions at the required levels is necessary to ensure the OGI monitoring is performed correctly. Therefore, the new OGI detection method in subpart W does include the NSPS subpart OOOOa requirement to develop a monitoring plan that describes the OGI instrument (40 CFR 60.5397a(c)(3)) and how the OGI survey will be conducted to ensure that fugitive emissions can be imaged effectively (40 CFR 60.5397a(c)(7)). The EPA determined that the NSPS subpart OOOOa survey frequency should not be cross-referenced in subpart W because cross-referencing these frequencies would override the current annual survey requirement in subpart W regardless of whether the use of the new monitoring methods is voluntary or mandatory. The EPA determined that the repair procedures and timeframes should not be cross-referenced because subpart W is part of a reporting program and does not require repair of detected leaks. The EPA also determined that the NSPS subpart OOOOa recordkeeping requirements should not be cross-referenced because they include provisions that are not applicable to greenhouse gas reporting, such as records related to repairs. Applicable recordkeeping requirements for all leak detection methods in subpart W are specified at 40 CFR 98.237.

The final site-specific monitoring plan in the NSPS subpart OOOOa includes three items specific to the OGI method: (1) A sitemap; (2) a defined observation path for the operator that ensures that all fugitive emissions components are within sight of the path; and (3) a monitoring plan for difficult-to-monitor and unsafe-to-monitor fugitive emissions components. The EPA has reviewed these elements as well and determined not to cross-reference these three elements in subpart W. The observation path and the sitemap ensure that the OGI operator visualizes all of the components that must be surveyed, analogous to requirements in some rules to identify all of the equipment that must be monitored using Method 21 (*e.g.,* 40 CFR 60.486a(e)(1) and 40 CFR 63.162(c)). Subpart W does not include these identification requirements as part of the Method 21 requirements in 40 CFR 98.234(a)(2), so it would be inconsistent to require the observation path as part of the new OGI method. However, while we are not finalizing the explicit requirement to define the observation path the operator will follow during their survey, we do note that 40 CFR part 98, subpart A requires a written GHG monitoring plan for all facilities subject to the GHGRP (see 40 CFR 98.4(g)(5)). Defining an observation path is one item that could be included in the GHG monitoring plan to meet the requirement to describe ''procedures and methods that are used for quality assurance . . . of all . . . other instrumentation'' used to collect data to comply with the GHGRP (40 CFR 98.3(g)(5)(i)(C)).

The EPA is finalizing the proposed requirement to observe each fugitive emissions component for fugitive emissions (40 CFR 60.5397a(e)).[14] The EPA considers surveying all fugitive emissions components (instead of just the current list of equipment in subpart W for a particular industry segment) to be an inherent part of the NSPS subpart OOOOa OGI method.

The EPA is not cross-referencing the semi-annual (well sites) and quarterly (compressor stations) monitoring frequencies of the final NSPS subpart OOOOa. As noted above, cross-referencing these monitoring frequencies would override the current annual survey requirement in subpart W regardless of whether the use of the new monitoring methods is voluntary or mandatory. The EPA is instead clarifying that for reporters with components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and for which surveys are required or elected, the results from each equipment leak

[14] See section II.D.1 of this preamble for details regarding the specific NSPS subpart OOOOa-defined fugitive emissions components that are not considered sources of ''equipment leaks'' in subpart W.

survey must be used to calculate GHG emissions for subpart W. The EPA is further clarifying that it is not our intent to require reporters that are not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements to conduct more than one equipment leak survey in a calendar year for purposes of GHGRP reporting, solely because they choose to use the OGI method. The EPA also notes that the proposed NSPS subpart OOOOa provisions for adjusting the frequency of equipment leak surveys based on the percent of the fugitive emissions components detected to have fugitive emissions were not included in the final NSPS subpart OOOOa and therefore are not cross-referenced in the final subpart W revisions.

Finally, consistent with the final NSPS subpart OOOOa, the EPA is finalizing the use of Method 21 as an alternative monitoring method to OGI (as specified in the NSPS subpart OOOOa) at 40 CFR 98.234(a)(7). As the EPA noted in the preamble for this proposed revision to subpart W (81 FR 4989; Jan. 29, 2016), the NSPS subpart OOOOa proposal identified EPA Method 21 as a monitoring method that may also be used to conduct resurveys of repaired components when fugitive emissions are detected (80 FR 56612 (well sites) and 80 FR 56612 (compressor stations)), and the EPA requested comment on including in the final rule the use of Method 21 for fugitive emissions monitoring as well (80 FR 56638 (well sites) and 80 FR 56643 (compressor stations)). The EPA also made clear in the preamble to these proposed revisions to subpart W that, consistent with the goal of aligning the methods in the two rulemakings (subpart W and the NSPS subpart OOOOa), the EPA expected that the final amendments to subpart W for monitoring methods would reference the final version of the method(s) in the NSPS subpart OOOOa, including any changes made to the NSPS subpart OOOOa in response to comments on the proposed monitoring method(s) (81 FR 4991). Accordingly, the EPA is finalizing the use of Method 21 as an alternative monitoring method to OGI (as specified in the NSPS subpart OOOOa) at 40 CFR 98.234(a)(7).

For reporters that elect to use Method 21 as specified in 40 CFR 98.234(a)(7), either for components that are subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements or voluntarily, a leak is detected if an instrument reading of 500 ppmv or greater is measured. As explained in this section regarding the NSPS subpart OOOOa OGI monitoring method, we determined that the requirements in 40 CFR 60.5397a(b) are consistent with the requirements of subpart W regarding the development of an emissions monitoring plan; this monitoring plan is required to include verification that the procedures of Method 21 are followed consistent with the requirements in 40 CFR 60.5397a(c)(8). Also, as with the NSPS subpart OOOOa OGI method, the EPA is requiring in subpart W observation of each fugitive emissions component for fugitive emissions consistent with the requirements in 40 CFR 60.5397a(e); the EPA considers surveying all fugitive emissions components to be an inherent part of the NSPS subpart OOOOa Method 21 alternative to the OGI method and is consistent with requirements in subpart W to conduct a complete equipment leak survey.

At this time, the EPA is not adding any other monitoring methods to subpart W. We will continue to evaluate equipment leak detection methods and technologies [15] and may amend subpart W to allow the use of additional methods in the future.

2. Summary of Comments and Responses

*Comment:* Many commenters disagreed with the EPA's proposal to add only the OGI method as specified in the NSPS subpart OOOOa to 40 CFR 98.234(a) of subpart W. They asserted that while OGI is an effective method for finding the majority of emissions more quickly than EPA Method 21, it is also a costly technology that cannot quantify emissions. The commenters stated that OGI has other limitations, especially in non-ideal weather conditions; one commenter also stated that use of the OGI camera requires a hot work permit in many instances.

*Response:* Due to similar comments on the proposed NSPS subpart OOOOa, the final NSPS subpart OOOOa provides owners and operators of new, modified, or reconstructed well sites or compressor stations with the option of using EPA Method 21 with a repair threshold of 500 ppmv if they elect not to use the OGI method (40 CFR 60.5397a). As discussed in section II.C.1 of this preamble, the final amendments to subpart W provide for the use of EPA Method 21 where a leak is detected for purposes of subpart W if an instrument reading of 500 ppmv or greater is measured. This amendment to subpart W maintains the alignment with the NSPS subpart OOOOa well site and compressor station fugitive emissions monitoring requirements, so that reporters can directly use the NSPS subpart OOOOa monitoring results to count the number of leaks under subpart W.

*Comment:* Many commenters stated that leak detection technology is a rapidly growing field and there are many alternative technologies and new technologies in development that may be more accurate and less costly than OGI. Some commenters noted that recent emphasis on $CH_4$ emissions has caused vendors to focus on $CH_4$ leak detection. Therefore, according to the commenters, some of those technologies may be better options for the purpose of reporting emissions under subpart W than other leak detection programs. The commenters stated that the EPA's proposal to limit leak surveys to a prescriptive list of methods could limit development of these new technologies.

Commenters provided a variety of suggestions for incorporation of new and emerging technologies into subpart W. Three commenters recommended that the EPA establish a clear process for industry, vendors, and/or the EPA to evaluate the efficacy and accuracy of alternative $CH_4$ monitoring technologies and approve the use of those technologies. One of these commenters noted that any technology evaluation process should be straightforward and more streamlined than the years-long process needed to approve emissions control devices or continuous emissions monitoring systems. Another of these commenters suggested that the EPA model a technology evaluation process after the vendor testing program for flares and combustors, in which the EPA sets testing protocols and vendors demonstrate that they can meet specific criteria. A fourth commenter suggested that the EPA develop a pilot program to incentivize the accelerated development and deployment of advanced monitoring and detection technologies and to compare the effectiveness of these approaches to periodic, OGI-based surveys.

*Response:* The EPA agrees with the commenters that emissions monitoring in the oil and gas sector is a field of emerging technology, and major advances are expected in the near future. We are seeing a rapidly growing push to develop and produce low-cost monitoring technologies to find fugitive $CH_4$ emissions sooner and at lower levels than current technology allows, thus enhancing the ability of operators to detect fugitive emissions. The EPA agrees that continued development of these cost-effective technologies is

[15] For example, the EPA has issued a voluntary request for information inviting all parties to provide information on innovative technologies to detect, measure, and mitigate emissions from the oil and gas industry. See 81 FR 46670 (July 18, 2016).

important. However, the EPA does not have enough information at this time to evaluate specific technologies to determine if they are equivalent to or better than the monitoring methods provided in and being added to 40 CFR 98.234(a). The EPA may evaluate new options as they become available and determine if they are equivalent to existing methods. For example, the final NSPS subpart OOOOa provides a process for the EPA to determine that a technology can be used as an ''alternative means of emission limitation.'' [16] As technologies are approved through this process, the EPA anticipates that it would contemporaneously incorporate these monitoring methods in subpart W to ensure continued alignment between the NSPS subpart OOOOa and subpart W through future notice and comment rulemaking.

*Comment:* Multiple commenters addressed the proposed requirement to consider any fugitive emissions observed using OGI during the NSPS subpart OOOOa fugitive emissions monitoring as a leak for purposes of subpart W. Most of these commenters objected to the proposal and stated that the definition of a leak for subpart W should be 10,000 ppmv, regardless of the monitoring method used. These commenters asserted that setting the leak definition consistent with the current methods in subpart W would ensure that the new methods result in new information being collected and reported consistently within a facility and consistent with the equipment leak data already in the GHGRP. One commenter noted that defining a leak as emissions at a set concentration is much less subjective than defining a leak as any emissions observed with OGI, and setting the leak definition at 10,000 ppmv rather than a lower concentration would allow operators to focus on finding (and fixing) large leaks instead of spending resources to identify many small leaks that do not contribute much to overall emissions. Another commenter noted that a leak definition of 10,000 ppmv is consistent with the leaker emission factors currently provided in subpart W as well as the proposed new leaker emission factors.

One commenter agreed with a subpart W leak being defined as any fugitive emissions observed using OGI during the NSPS subpart OOOOa fugitive emissions monitoring or emissions above 500 ppmv detected via EPA Method 21, but the commenter asserted that the leak definition for any new or emerging technologies used in a voluntary leak survey should be 5,000 ppmv. The commenter noted that these new technologies are likely to be more sensitive and detect emissions at lower concentrations than OGI, and companies that are employing more accurate instruments should not be ''penalized'' by having to report more leaks than if they used OGI.

*Response:* Subpart W already includes OGI and EPA Method 21 with a leak definition of 10,000 ppmv for use by reporters currently required to conduct leak surveys for subpart W. The final amendments also provide for use of these methods by reporters electing to conduct an equipment leak survey voluntarily (*i.e.,* for sources currently required to use the calculation methodology based on population counts that are not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements). The EPA is adding the methods used for fugitive emissions monitoring in the NSPS subpart OOOOa to 40 CFR 98.234(a), as approved monitoring methods for subpart W leak surveys. This addition facilitates alignment with the NSPS subpart OOOOa and will allow reporters to directly use the NSPS subpart OOOOa monitoring results to count the number of leaks under subpart W. Finally, as noted in section II.C.1 of this preamble, the EPA is not adding any other monitoring methods to subpart W at this time, so it is not necessary to consider a different leak definition for new or emerging technologies.

The EPA disagrees that using a leak definition other than 10,000 ppmv would undermine the quality of the data reported to the GHGRP. First, subpart W currently includes an OGI monitoring method in 40 CFR 98.234(a)(1). While this monitoring method allows facilities to screen the observed leaks using Method 21, it does not require it, and we do not expect that many reporters actively use dual monitoring methods in their leak surveys to screen all OGI-detected leaks using Method 21.

Second, we are also finalizing, consistent with the final NSPS subpart OOOOa rule, the ability to use Method 21 with a leak definition of 500 ppmv as an alternative to the OGI method. We agree with commenters that the average emissions rate of leaks identified using Method 21 with a leak definition of 500 ppmv would be less than the average emissions rate of leaks identified using Method 21 with a leak definition of 10,000 ppmv. To address this issue, we are also finalizing separate leaker factors that are appropriate for reporters using this alternative method (Method 21 with a leak definition of 500 ppmv). As described in further detail in section II.E.1 of this preamble and in the document ''Greenhouse Gas Reporting Rule: Technical Support for Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems Final Rule'' in Docket ID No. EPA–HQ–OAR–2015–0764, these additional emission factors were developed from the same data set that was used to develop the original population emission factors and the proposed leaker factors.[17] Therefore, this additional Method 21 monitoring method, which includes a different leak definition than the other Method 21-based method already available in subpart W at 40 CFR 98.234(a)(2), has been specifically considered and new emission factors are provided in the final rule to ensure that this new monitoring method's leak definition will not undermine the quality of the emissions reported under subpart W.

If the EPA did not provide the ability for reporters to use the monitoring methods required by the NSPS subpart OOOOa within subpart W, reporters would not be able to use the NSPS subpart OOOOa monitoring results directly; instead, they would have to measure each occurrence of fugitive emissions individually to determine if it is a leak for purposes of subpart W, which would increase the burden for those reporters.

### *D. Summary of Final Amendments for Components To Be Surveyed*

#### 1. Summary of Final Amendments

The EPA proposed to align the subpart W equipment components with the NSPS subpart OOOOa definition of ''fugitive emissions component,'' with certain exceptions.[18] After careful consideration of comments, the EPA is finalizing that provision consistent with the final NSPS subpart OOOOa definition of ''fugitive emissions component'' with certain exceptions consistent with the proposal, as described in further detail in this section below. A ''fugitive emissions component'' is defined in 40 CFR 60.5430a of the final NSPS subpart

[16] See 40 CFR 60.5398a titled ''What are the alternative means of emission limitations for GHG and volatile organic compounds from well completions, reciprocating compressors, the collection of fugitive emissions components at a well site and the collection of fugitive emissions components at a compressor station?''

[17] This data set was developed from monitoring conducted using Method 21 with a leak definition of 10,000 ppmv.

[18] See 81 FR 4994 for a discussion of the differences between the proposed definition of ''fugitive emissions component'' and the proposed components subject to equipment leak reporting in subpart W.

OOOOa to include any component that has the potential to emit fugitive emissions of CH4 or volatile organic compounds at a well site or compressor station, including but not limited to valves, connectors, pressure relief devices, open-ended lines, flanges, covers and closed vent systems not subject to 40 CFR 60.5411a, thief hatches or other openings on a controlled storage vessel not subject to 40 CFR 60.5395a, compressors, instruments, and meters. Devices that vent as part of normal operations, such as natural gas-driven pneumatic controllers or natural gas-driven pumps, are not fugitive emissions components, as the natural gas discharged from the device's vent is not considered a fugitive emission. Emissions originating from a location other than the vent are considered fugitive emissions.

As noted in the preamble to the proposed subpart W amendments, some of the components listed in the NSPS subpart OOOOa definition of fugitive emissions component are already included as part of the subpart W equipment leaks calculation methodologies (either based on equipment leak surveys or on population counts), while other fugitive emissions components are specifically addressed in other calculation methodologies in subpart W. As part of developing the proposed amendments for subpart W, we compared the list of components in the NSPS subpart OOOOa proposed definition of fugitive emissions component with the current methodologies in subpart W to identify which fugitive emissions components were already covered by an existing requirement in subpart W and which fugitive emissions components would be specifically covered in subpart W when using the OGI method as specified in the proposed NSPS subpart OOOOa.

Table 3 of this preamble provides a summary of the applicable subpart W calculation methodologies for components subject to the fugitive emissions standards in the final NSPS subpart OOOOa. The basis for excluding certain components that are subject to the fugitive emissions standards in the final NSPS subpart OOOOa from the final equipment leak survey requirements in 40 CFR 98.233(q) is discussed below.

TABLE 3—FINAL SUBPART W CALCULATION METHODOLOGY REQUIREMENTS FOR COMPONENTS SUBJECT TO THE FUGITIVE EMISSIONS STANDARDS IN NSPS SUBPART OOOOa

| Type of component in definition of fugitive emissions component and subject to the fugitive emissions standards in NSPS subpart OOOOa | Applicable GHG emissions calculation methodology in subpart W by industry segment for components that are also subject to the fugitive emissions standards for well sites or compressor stations in the NSPS subpart OOOOa[a] | | |
|---|---|---|---|
| | Onshore petroleum and natural gas production, onshore petroleum and natural gas gathering and boosting | Underground natural gas storage, LNG storage, LNG import and export equipment | Onshore natural gas transmission compression |
| Thief hatches or other openings on controlled storage vessels not subject to 40 CFR 60.5395a. | • 40 CFR 98.233(j) ..... | • 40 CFR 98.233(q) (use factor for "other" components in Tables W–4A, W–5A, and W–6A to subpart W)[b]. | • 40 CFR 98.233(k). |
| Compressors, excluding emissions from vents that are part of normal operations (*i.e.,* wet seal oil degassing vents). | • 40 CFR 98.233(q) for blowdown valve leakage and isolation valve leakage (use factor for "open-ended line" in Table W–1E to subpart W)[b].<br>• 40 CFR 98.233(q) for all other leaks from the housing (use factor for "other" components in Table W–1E to subpart W)[b].<br>• 40 CFR 98.233(p)(10) for rod packing venting from reciprocating compressors. | • 40 CFR 98.233(o) for blowdown valve leakage and isolation valve leakage from centrifugal compressors.<br>• 40 CFR 98.233(p) for blowdown valve leakage, isolation valve leakage, and rod packing venting from reciprocating compressors.<br>• 40 CFR 98.233(q) for all other leaks from the housing (use factor for "other" components in Table W–4A, W–5A, and W–6A to subpart W)[b]. | • 40 CFR 98.233(o) for blowdown valve leakage and isolation valve leakage from centrifugal compressors<br>• 40 CFR 98.233(p) for blowdown valve leakage, isolation valve leakage, and rod packing venting from reciprocating compressors<br>• 40 CFR 98.233(q) for all other leaks from the housing (use factor for "other" components in Tables W–3A, to subpart W)[b] |
| All other components ..... | • 40 CFR 98.233(q) (use factors for applicable component types in Table W–1E to subpart W)[b]. | • 40 CFR 98.233(q) (use factors for applicable component types in Tables W–4A, W–5A, and W–6A to subpart W)[c]. | • 40 CFR 98.233(q) (use factors for applicable component types in Table W–3A to subpart W)[c]. |

[a] Onshore Natural Gas Processing and Natural Gas Distribution are not included in this table because we are not revising the calculation methodology and monitoring method for leak detection for these industry segments in this action. The current requirements are still applicable to components in these industry segments.

[b] The leaker emission factors for "other" components are being finalized in this revision.

[c] The leaker emission factors include both factors in the current rule and factors that are being finalized in this action, depending on the specific component and the monitoring method used to conduct the survey, as discussed in section II.E.1 of this preamble.

At proposal, we determined that the subpart W calculation methodology for storage tanks in 40 CFR 98.233(j) already includes emissions from thief hatches or other openings on storage vessels in the Onshore Petroleum and Natural Gas Production and Onshore Petroleum and Natural Gas Gathering and Boosting industry segments. However, we requested comment on whether the agency should consider separate approaches for controlled storage tanks and uncontrolled storage tanks. The final definition of "fugitive emissions component" in the NSPS subpart OOOOa (40 CFR 60.5430a) includes only thief hatches or other openings on a controlled storage vessel; it does not specifically list openings on uncontrolled storage vessels. We reviewed the subpart W calculation methodology specifically for storage tanks with a vapor recovery system (40 CFR 98.233(j)(4)) and storage tanks with a flare (40 CFR 98.233(j)(5)). The procedure for determining emissions from a tank with a vapor recovery system instructs reporters to adjust the storage tank emissions downward by the magnitude of emissions recovered using

a vapor recovery system as determined by engineering estimate based on best available data (40 CFR 98.233(j)(4)(i)). The procedure for determining emissions from a tank with a flare references 40 CFR 98.233(n), which instructs reporters to use engineering calculations based on process knowledge, company records, and best available data to determine the flow to the flare if the flare does not have a continuous flow measurement device. If a reporter sees fugitive emissions from a thief hatch or other opening on a controlled storage vessel during an equipment leak survey conducted using OGI, the reporter should consider that information as part of the ''best available data'' used to calculate emissions from that storage tank. Therefore, we have concluded that emissions from thief hatches or other openings on storage vessels in the Onshore Petroleum and Natural Gas Production and Onshore Petroleum and Natural Gas Gathering and Boosting industry segments are already included in the subpart W storage tank emission calculations in 40 CFR 98.233(j) and are finalizing, consistent with the proposal, that they are not to be considered when determining emissions from equipment leaks for purposes of subpart W.

We are also finalizing as proposed the exclusion of thief hatches and other openings on transmission storage tanks from the equipment leak reporting requirements.[19] We note that, for purposes of subpart W reporting, a leaking thief hatch or other opening is functionally a secondary vent, and thus subject to annual screening on an uncontrolled tank according to 40 CFR 98.233(k)(1). If screening shows vapors from the thief hatch or opening are continuous for 5 minutes, then a method in 40 CFR 98.233(k)(2) must be used to quantify the leak rate, and this amount must be combined with any other vent leak rates for reporting.

We are also finalizing the proposed distinction between equipment leak emissions and compressor emissions. Specifically, for centrifugal compressors, emission sources include wet seal oil degassing vents (for centrifugal compressors with wet seals), blowdown valve leakage, and isolation valve leakage. For reciprocating compressors, emission sources include reciprocating compressor rod packing vents, blowdown valve leakage, and isolation valve leakage.

For compressors in the Onshore Petroleum and Natural Gas Production and the Onshore Petroleum and Natural Gas Gathering and Boosting industry segments under subpart W, the compressor methodologies only cover emissions from centrifugal compressor wet seal oil degassing vents and from reciprocating compressor rod packing vents. Thus, the EPA is finalizing as proposed, for these industry segments, that blowdown valve leakage and isolation valve leakage are considered equipment leaks (*i.e.,* open-ended lines), and finalizing as proposed that emissions from centrifugal compressor wet seal oil degassing vents and from reciprocating compressor rod packing vents are not considered equipment leaks when using the calculation methodology based on equipment leak surveys in 40 CFR 98.233(q).[20]

For the Onshore Natural Gas Transmission Compression, Underground Natural Gas Storage, LNG Storage, and LNG Import and Export Equipment segments, subpart W requires reporters to make ''as found'' or continuous measurements for compressor emission sources, so the reporters will have either direct measurement data or site-specific emission factors by which to calculate emissions from all of the compressor sources listed above (*i.e.,* wet seal oil degassing vents for centrifugal compressors with wet seals, rod packing vents for reciprocating compressors, and blowdown valve leakage and isolation valve leakage for both centrifugal and reciprocating compressors). Therefore, we are finalizing as proposed to exclude these compressor emission sources from the requirements in the calculation methodology based on equipment leak surveys so that reporters do not double-count emissions from these sources in their GHGRP reports.

Finally, as noted in section II.C.1 of this preamble, we are finalizing the proposed determination that for purposes of subpart W, all other fugitive emissions components as defined in the NSPS subpart OOOOa not specifically identified above (*e.g.,* thief hatches or other openings on a controlled storage vessel, compressor sources with explicit calculation methodologies in subpart W) will be considered equipment components when conducting an equipment leak survey using the OGI method as specified in the NSPS subpart OOOOa or EPA Method 21 with a leak definition of 500 ppmv. In other words, we consider the provision requiring monitoring of fugitive emissions components as defined in the NSPS subpart OOOOa in 40 CFR 60.5397a(e) to be an inherent part of the NSPS subpart OOOOa OGI method and EPA Method 21 with a leak definition of 500 ppmv. Therefore, if a reporter with components not subject to the NSPS subpart OOOOa well site or compressor station fugitive emission requirements elects to use the NSPS subpart OOOOa OGI method or EPA Method 21 with a leak definition of 500 ppmv for purposes of subpart W, they are also electing to survey these additional components.

2. Summary of Comments and Responses

*Comment:* Several commenters stated that the NSPS subpart OOOOa proposed definition of ''fugitive emissions component'' is too expansive. Because it includes many more emission sources than a more traditional definition of equipment, the commenters asserted that it is inconsistent with current subpart W requirements. The commenters stated that aligning subpart W with the NSPS subpart OOOOa in this respect will complicate the question of which components must be monitored at subpart W facilities and will result in facilities having higher numbers of leaks than they would have if they used any other equipment leak detection method in subpart W. Some commenters stated that even for well sites and compressor station sites subject to the NSPS subpart OOOOa, component types considered to be equipment under subpart W should be consistent with a more traditional definition of equipment. Other commenters requested that equipment under subpart W only include component types for which the EPA can provide specific population factors and leaker emission factors.

*Response:* As noted in section II.D.1 of this preamble, the final definition of ''fugitive emissions component'' in the NSPS subpart OOOOa (40 CFR 60.5430a) does not list as many explicit individual component types, as originally proposed. The EPA is finalizing, with the exceptions discussed in section II.D.1 of this preamble and consistent with the extent proposed, this alignment with the NSPS subpart OOOOa, so that reporters may directly use the NSPS subpart OOOOa monitoring results to count the number of leaks under subpart W. Reporters using the calculation methodology based on equipment leak surveys for

[19] The exceptions to equipment leak reporting requirements were included in Tables W–1E and W–3 through W–6 of the proposal. The final rule moves these exceptions to 40 CFR 98.232, to increase clarity and reduce confusion while achieving the same purpose and effect.

[20] 40 CFR 98.233(q) specifies which subsections in 40 CFR 98.232 (*i.e.,* which components) must follow the calculation methodology based on equipment leak surveys in 40 CFR 98.233(q), and 40 CFR 98.232 subsections identify exceptions from the list of components for which equipment leak reporting is required.

components not subject to the NSPS subpart OOOOa may choose which monitoring method to use. If a reporter chooses to use one of the monitoring methods listed in 40 CFR 98.234(a)(1) through (5), that reporter would use the current list of equipment components for the appropriate industry segment in 40 CFR 98.232 (*e.g.,* the list of equipment at 40 CFR 98.232(e)(7) for the Onshore Natural Gas Transmission Compression industry segment). If a reporter chooses to use the OGI method as specified in the NSPS subpart OOOOa or EPA Method 21 with a leak definition of 500 ppmv, the reporter would use both the current list and the newly added list of equipment components for the appropriate industry segment in 40 CFR 98.232, which in conjunction include the NSPS subpart OOOOa definition of ''fugitive emissions component'' in 40 CFR 60.5430a with the exceptions discussed in section II.D.1 of this preamble (*e.g.,* the list of equipment at 40 CFR 98.232(e)(7) and (8) for the Onshore Natural Gas Transmission Compression industry segment).

*E. Summary of Final Amendments to Leaker Emission Factors and the Calculation Methodology Based on Equipment Leak Surveys*

1. Summary of Final Amendments

To quantify emissions from leaking equipment components, subpart W includes leaker emission factors for each component type in each industry segment currently required to use the calculation methodology based on equipment leak surveys. In contrast to the population emission factors, which are multiplied by the total facility component counts, leaker emission factors are multiplied by the actual number of leaks for each component type, as identified by the equipment leak survey. These amendments increase the component types that are required or may elect to use the calculation methodology based on equipment leak surveys, including most of the component types currently using the subpart W calculation methodology based on population counts.[21] Therefore, new leaker emission factors are being added so that reporters can calculate their GHG emissions for these new component types.

Specifically, the EPA proposed to add new sets of leaker emission factors to subpart W for: (1) The Onshore Petroleum and Natural Gas Production industry segment; (2) the Onshore Petroleum and Natural Gas Gathering and Boosting industry segment; (3) storage wellheads in gas service in the Underground Natural Gas Storage industry segment; (4) LNG storage components in gas service in the LNG Storage industry segment; and (5) LNG terminals components in gas service for the LNG Import and Export Equipment industry segment. For industry segments that already include a set of leaker emission factors, the EPA also proposed to expand that set of leaker emission factors to include certain additional components to better align with the definition of fugitive emissions components in the NSPS subpart OOOOa. See the document ''Greenhouse Gas Reporting Rule: Technical Support for Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket Item No. EPA–HQ–OAR–2015–0764–0028, for more information on the development of the proposed leaker emission factors.

We are finalizing the leaker emission factors for the Onshore Petroleum and Natural Gas Production and the Onshore Petroleum and Natural Gas Gathering and Boosting industry segments as proposed, with clarifications for flanges and connectors noted below. We are also finalizing the following leaker emission factors as proposed: (1) The leaker emission factors for ''other'' components in Tables W–3A, W–4A, W–5A, and W–6A to subpart W; (2) the leaker emission factors for storage wellhead equipment in gas service within Table W–4A to subpart W; and (3) the leaker emission factors for equipment in gas service for LNG storage components within Table W–5A to subpart W and for LNG terminal components within Table W–6A to subpart W. We are also finalizing the proposal to expand the existing leaker emission factor for meters to also include instruments in Tables W–3A and W–4A to subpart W for the Onshore Natural Gas Transmission Compression and Underground Natural Gas Storage industry segments, respectively. All but one of the proposed leaker factors for flanges in Tables W–3 through W–6 to subpart W (Tables W–3A, W–4A, W–5A, and W–6A to subpart W in these final amendments) were the same as the leaker factors for connectors; the exception was for flanges in gas service associated with storage wellheads at Underground Natural Gas Storage facilities, which had a proposed leaker factor that differed from the proposed leaker factor for connectors in the same service. Flanges are a type of connector, which means the proposed flange factors that were identical to the existing connector factors were redundant. Therefore, we have not finalized the proposed separate factors for flanges where the factor was the same as the factor for connectors and are finalizing that flanges must use the final connector factor, meaning the effect of the final amendments is the same as the proposal. The separate factors for connectors and flanges for storage wellheads in gas service at Underground Natural Gas Storage facilities are finalized as proposed, but to clarify that the factor for connectors applies only to all types of connectors other than flanges, the component name has been changed from ''connector'' in the proposal to ''connector (other)'' in Table W–4A of the final amendments. This change also makes the terminology in Table W–4A consistent with the terminology in Tables W–1A and W–1E, which also specify factors for flanges that differ from the factors for other types of connectors.

We are not finalizing the proposed addition of pumps to the leaker factors in Table W–2 for the Onshore Natural Gas Processing industry segment. As described in section II.B.1 of this preamble, we are not taking final action on the Onshore Natural Gas Processing revisions at this time.

In addition to finalizing nearly all of the proposed leaker factors, we are also finalizing an additional set of emission factors corresponding to the average emissions rates of components identified using Method 21 with a leak definition of 500 ppmv. The proposed leaker factors were developed based on Method 21 monitoring using a leak definition of 10,000 ppmv and were to be applied by all reporters regardless of the leak survey monitoring method used. As noted in section II.C of this preamble, the final NSPS subpart OOOOa includes an additional alternative that allows reporters to use Method 21 with a leak definition of 500 ppmv. On average, the emissions from a leak identified with a Method 21 reading above 500 ppmv are less than the emissions from a leak identified with a Method 21 reading of 10,000 ppmv or higher. Consequently, the leaker factor (which is the average emissions rate) for leaks identified when using a leak definition of 500 ppmv is smaller than the leaker factor for leaks identified when using a leak definition of 10,000 ppmv. Therefore, in order to use the NSPS subpart OOOOa survey results directly to calculate equipment leak emissions for subpart W when Method 21 with a leak definition of 500

[21] The NSPS subpart OOOOa fugitive emission requirements do not apply to fugitive emissions components in the Natural Gas Distribution industry segment.

ppmv is used, leaker factors were developed consistent with the average emissions rate of a ''leak'' defined as a measurement reading of 500 ppmv or more using Method 21. We developed these new leaker factors using data from EPA's Protocol for Equipment Leak Emissions Estimates [22] consistent with the data used to develop the proposed leaker factors for Onshore Petroleum and Natural Gas Production and the Onshore Petroleum and Natural Gas Gathering and Boosting industry segments. See the document ''Greenhouse Gas Reporting Rule: Technical Support for Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems Final Rule'' in Docket ID No. EPA–HQ–OAR–2015–0764, which provides more information on the development of the final leaker emission factors. The inclusion of leaker factors specific to Method 21 with a leak definition of 500 ppmv is consistent with our proposal to align subpart W calculation methodologies with the monitoring requirements in the NSPS subpart OOOOa.

We are also finalizing the proposed amendments to the time variable $T_{p,z}$ in Equation W–30 to clarify the total time a surveyed component found leaking is assumed to be leaking and operational. The previous language for the definition of the time variable specifically considers a first leak survey and a last leak survey in the year but does not provide specific language with respect to the duration of any ''intermediate'' survey conducted between the first and last survey. Therefore, the EPA proposed to amend the definition of the time variable to clarify how to determine the duration of a leak if more than two leak surveys are conducted in a year and to instruct reporters to sum the individual durations to determine the total time the component was leaking during the year.

The EPA is finalizing this amendment as proposed. The amendments to the time variable $T_{p,z}$ define each equipment leak survey as covering a unique, non-overlapping time period and we are clarifying our intent that a leak detected in the first or any intermediate survey is not considered to continue leaking past the date of that specific equipment leak survey. For the last survey conducted in the calendar year, the leak is assumed to continue until the end of the year. For example, if a reporter conducts three equipment leak surveys in a calendar year and a particular component is found to be leaking in the first and second surveys but not the third, the total leak duration is the sum of the time from January 1 to the date of the second survey. If a reporter conducts three equipment leak surveys in a calendar year and a particular component is found to be leaking in the first and last surveys but not the second, then the total leak duration is the sum of the time from January 1 to the date of the first survey and the time from the date of the second survey to December 31.

See ''Response to Public Comments on Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764 for all comments and the EPA's responses to comments on other aspects of the time variable $T_{p,z}$ in Equation W–30.

Finally, 40 CFR 98.233(q) includes a provision requiring reporters to conduct one equipment leak survey in a calendar year (which must include ''all component types'' subject to 40 CFR 98.233(q)) or multiple ''complete'' equipment leak surveys in a calendar year. In response to comments as part of the 2010 subpart W final rule, the EPA noted that subsequent equipment leak surveys should be ''conducted for an entire facility.'' [23]

The EPA has reviewed how this interpretation could interact with these final amendments for components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and finds that additional clarification is necessary. For example, a facility in the Onshore Petroleum and Natural Gas Production industry segment or the Onshore Petroleum and Natural Gas Gathering and Boosting industry segment may have some components that are subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and some components that are not. In such a case, multiple equipment leak surveys would be conducted for the components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements, to fulfill the requirements of the NSPS subpart OOOOa for those components, that would be consistent with subpart W monitoring methods under these final revisions.

However, under the current interpretation of a ''complete'' survey, it would appear that these reporters would either: (1) Be unable to use the NSPS subpart OOOOa fugitive emissions monitoring results as directed, because they did not survey all components at the facility; or (2) be forced to monitor all components at the facility on the same frequency as the components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements to meet the subpart W requirement to use all additional leak surveys conducted in accordance with NSPS OOOOa. The first interpretation would render these final amendments useless, and the second interpretation would increase the burden beyond the EPA's intentions, and could also have unintended consequences for the components subject to the NSPS subpart OOOOa (*e.g.*, a subpart W facility with some components subject to the NSPS subpart OOOOa well site fugitive emissions requirements and others subject to the NSPS subpart OOOOa compressor station fugitive emissions requirements could end up being required to monitor the fugitive emissions components at a well site four times a year instead of twice). Therefore, the EPA is clarifying in 40 CFR 98.233(q)(2)(i) that any monitoring conducted pursuant to and in compliance with the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements constitutes a ''complete'' survey for purposes of subpart W and must be used for subpart W reporting. The EPA is further clarifying that, to meet the requirements of 40 CFR 98.233(q), at least one equipment leak survey must be conducted in a calendar year.

2. Summary of Comments and Responses

*Comment:* Several commenters addressed the EPA's proposed leaker emission factors. Some of the commenters indicated that the EPA/Gas Research Institute (GRI) data set upon which the proposed factors are based is an older data set and asserted that it may not be representative of operating practices and procedures that have changed significantly over the past 20 years. In addition, the commenters stated that the EPA/GRI data set includes a limited population of measurements, so the proposed leaker emission factors may not account for operational variability on a regional or national level. Some commenters requested that the EPA consider newer studies, including those cited in

[22] U.S. Environmental Protection Agency. *Protocol for Equipment Leak Emissions Estimates.* EPA–453/R–95–017. November 1995. Docket Item No. EPA–HQ–OAR–2009–0927–0043.

[23] U.S. Environmental Protection Agency. *Mandatory Greenhouse Gas Reporting Rule Subpart W—Petroleum and Natural Gas: EPA's Response to Public Comments.* November 2010. Docket Item No. EPA–HQ–OAR–2009–0923–3608. Response to Comment Number EPA–HQ–OAR–2009–0923–1014–9, pp. 1281–1282.

''Greenhouse Gas Reporting Rule: Technical Support for Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' (Docket Item No. EPA–HQ–OAR–2015–0764–0028) either instead of or in combination with the EPA/GRI data set.

Several commenters urged the EPA to work with the regulated community to improve the default leaker emission factors in subpart W. One commenter noted that the proposed leaker emission factors may be a viable interim solution but recommended that the EPA analyze more robust data sets consisting of the combined results of all studies for each industry segment and evaluate whether the subpart W leaker emission factors should be revised.

*Response:* As described in the preamble to the proposed rule and the document ''Greenhouse Gas Reporting Rule: Technical Support for Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems Final Rule'' (Docket ID No. EPA–HQ–OAR–2015–0764), the EPA has determined that the EPA/GRI data set is appropriate to base leaker emission factors in these subpart W amendments. We note that the EPA/GRI data set provides sufficient data to develop leaker emission factors and that using this data set for the leaker emission factors provides consistency with the population emission factors used by reporters that do not conduct equipment leak surveys.

The EPA agrees that there are numerous recent studies that could be used to either replace or supplement the EPA/GRI study data, and many of these are described in the technical support document. The EPA evaluated these other studies and found that the leaker emission factors determined from these data sets agreed reasonably well with the leaker emission factors developed from the EPA/GRI data set, suggesting that the EPA/GRI leaker emission factors are still valid. Commenters that supported a different basis for the leaker emission factors than the EPA/GRI data set did not provide specific information explaining why another study would be a better basis or address any of the specific considerations listed above, although the comments received suggest that stakeholders are interested in further involvement in the assessment of the available data. Therefore, for the reasons stated in the preamble to the proposed rule and the document ''Greenhouse Gas Reporting Rule: Technical Support for Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems Final Rule'' in Docket ID No. EPA–HQ–OAR–2015–0764, the EPA is finalizing the leaker emission factors as proposed.

The EPA appreciates the commenters' interest in providing a thorough review of the available study data to develop an accurate set of leaker emission factors. The EPA is committed to working with stakeholders to ensure that GHGRP requirements and calculation methods are based upon the most robust data available. If the EPA determines that revisions to the subpart W leaker emission factors are appropriate in the future based on additional information, we anticipate that we will propose to amend the rule accordingly.

*Comment:* Numerous commenters stated that reporters should be allowed to use site-specific leak quantification data if available, either directly for each individual leak (*i.e.,* direct measurement data) or to develop their own leaker emission factors on a facility-specific, company-specific, or product-specific basis. Most of these commenters supported the EPA's proposal to include default leaker emission factors, but stated that reporters should not be limited to using them if the facility has more accurate, site-specific information. Some commenters further noted that the site-specific data reported to the GHGRP could be used to improve the default leaker emission factors in the future. One commenter also requested that the EPA require quantification of any leak that a reporter elects not to repair.

*Response:* The EPA did not propose and, after review and consideration of comments, is not finalizing provisions allowing reporters to use site-specific information to calculate equipment leak emissions for subpart W. While we agree that direct measurement has the potential to provide more accurate emissions data than using emission factors, we would need to develop criteria and guidelines for using direct measurement data consistently across subpart W reporters for calculating equipment leak emissions. Similarly, we agree that using site-specific emission factors can provide more accurate emissions data than using default emission factors, but a robust set of requirements would be needed for reporters to use when developing their own emission factors to ensure that those factors are as unbiased and representative as possible. In addition, if reporters are using direct measurement or their own emission factors, we would most likely need to amend the reporting requirements (*e.g.*, to require reporters to provide site-specific emission factors), and we would need to consider whether any other amendments would be needed to enable us to review and verify reported data. In either of these cases, we would provide the opportunity for the public to comment on those amended requirements before finalizing them within subpart W.

*F. Summary of Final Amendments to Reporting Requirements*

1. Summary of Final Amendments

The EPA is finalizing largely as proposed the new reporting requirements for facilities conducting equipment leak surveys under subpart W. Reporters in the Onshore Petroleum and Natural Gas Production and the Onshore Petroleum and Natural Gas Gathering and Boosting industry segments, reporters with storage wellheads in the Underground Natural Gas Storage industry segment, and reporters with components in gas service in the LNG Storage and LNG Import and Export Equipment industry segments that begin using the calculation methodology based on equipment leak surveys must report the information currently listed in 40 CFR 98.236(q)(1) and (2), which includes the number of equipment leak surveys, component types, number of leaking components, average time the components were assumed to be leaking, and annual $CO_2$ and $CH_4$ emissions. Facilities that conduct surveys using the new monitoring methods in 40 CFR 98.234(a)(6) or (7) must also report the data elements in 40 CFR 98.236(q)(2) for additional component types specified in 40 CFR 98.232. Reporters may elect to report the data elements in 40 CFR 98.236(q)(2) for the additional component types if they conduct surveys using a monitoring method in 40 CFR 98.234(a)(1) through (5).

The data elements in 40 CFR 98.236(q)(1) and (2) are already required to be reported by facilities conducting equipment leak surveys in the Onshore Natural Gas Transmission Compression, Underground Natural Gas Storage (storage stations), and LNG Storage and LNG Import and Export Equipment (components in LNG service) industry segments. However, facilities in those segments conducting equipment leak surveys using the new OGI method or Method 21, as specified in the NSPS subpart OOOOa (finalized in subpart W as 40 CFR 98.234(a)(6) or (7)), must begin reporting the data elements in 40 CFR 98.236(q)(2) for component types with the new leaker emission factors, including component types that are not currently subject to reporting. Facilities conducting equipment leak surveys using a monitoring method in 40 CFR

98.234(a)(1) through (5) may elect to begin reporting the data elements in 40 CFR 98.236(q)(2) for other components that are not currently subject to reporting.

In addition, the EPA is finalizing as proposed three new reporting requirements for facilities conducting equipment leak surveys in all of the above segments as well as the Onshore Natural Gas Processing and Natural Gas Distribution segments. First, facilities in those segments will be required to report the monitoring method(s) in 40 CFR 98.234(a) used to conduct the survey(s). Second, facilities in the above segments except for Onshore Natural Gas Processing and Natural Gas Distribution will be required to indicate whether any of their component types are subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements. Finally, facilities with components for which the calculation methodology based on equipment leak surveys is optional (*e.g.,* facilities in the Onshore Petroleum and Natural Gas Production segment) will be required to indicate whether they elected to use the calculation methodology based on equipment leak surveys for any of their component types at the facility.

Additionally, in reviewing specific reporting requirements while responding to public comments, we recognized that the reporting requirements at 40 CFR 98.236(r)(3)(ii) were unclear, and could be misinterpreted with respect to how this reporting element relates to the calculated emissions. Therefore, we are revising 40 CFR 98.236(r)(3)(ii) by adding the phrase ''. . . for which equipment leak emissions are calculated using the methodology in § 98.233(r)'' to clarify our original intent that the major equipment counts reported under this requirement are specific to equipment for which emissions are calculated using the population count methodology.

2. Summary of Comments and Responses

*Comment:* Two commenters addressed the proposed requirement in 40 CFR 98.236(q)(1)(iii) to indicate whether any component types at a facility are subject to the NSPS subpart OOOOa. One commenter opposed the addition, stating that it is overly burdensome to require reporters to delineate reporting of emission sources subject to the NSPS subpart OOOOa, especially if this is intended to be a numeric response regarding the number of individual components subject to the NSPS subpart OOOOa. Another commenter asserted that it is not clear if the response to proposed 40 CFR 98.236(q)(1)(iii) is a single yes or no for each facility or if the EPA will be expecting a yes or no response for each component type.

Response: In the final rule, the EPA has revised the proposed requirement in 40 CFR 98.236(q)(1)(iii) (indicate whether any component types are subject to the NSPS subpart OOOOa) to be clear that the EPA expects only one yes or no response for an entire facility. While the EPA understands that the number of leaking components and equipment leak emissions may increase as the number of components subject to the NSPS subpart OOOOa increases, this response will allow the EPA to provide transparent data related to changes in emissions for facilities with components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements over time. This data element will also support verification that the appropriate GHGRP monitoring method was used by the facility.

## III. Confidentiality Determinations

### *A. Summary of Final Confidentiality Determinations for New Subpart W Data Elements*

As noted in the proposed rule, we are applying the same approach as previously used for making confidentiality determinations for data elements reported under the GHGRP. In the ''Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Amendments to Special Rules Governing Certain Information Obtained Under the Clean Air Act'' (hereafter referred to as ''2011 Final CBI Rulemaking'') (76 FR 30782, May 26, 2011), the EPA grouped part 98 data elements for which EPA was determining confidentiality status through that rulemaking into 22 data categories (11 direct emitter data categories and 11 supplier data categories) with each of the 22 data categories containing data elements that are similar in type or characteristics. The EPA then made categorical confidentiality determinations for eight direct emitter data categories and eight supplier data categories and applied the categorical confidentiality determination to all data elements assigned to the category. Of these data categories with categorical determinations, the EPA determined that four direct emitter data categories are comprised of those data elements that meet the definition of ''emission data,'' as defined at 40 CFR 2.301(a), and are, therefore, not entitled to confidential treatment under section 114(c) of the CAA.[24] The EPA determined that the other four direct emitter data categories and the eight supplier data categories do not meet the definition of ''emission data.'' For these data categories that are determined not to be emission data, the EPA determined categorically that data in three direct emitter data categories and five supplier data categories are eligible for confidential treatment as CBI, and that the data in one direct emitter data category and three supplier data categories are ineligible for confidential treatment as CBI. For two direct emitter data categories, ''Unit/Process 'Static' Characteristics that Are Not Inputs to Emission Equations'' and ''Unit/Process Operating Characteristics that Are Not Inputs to Emission Equations,'' and three supplier data categories, ''GHGs Reported,'' ''Production/Throughput Quantities and Composition,'' and ''Unit/Process Operating Characteristics,'' the EPA determined in the 2011 Final CBI Rulemaking that the data elements assigned to those categories are not emission data, but the EPA did not make categorical CBI determinations for them. Rather, the EPA made CBI determinations for each individual data element included in those categories on a case-by-case basis taking into consideration the criteria in 40 CFR 2.208. The EPA did not make a final confidentiality determination for data elements assigned to the inputs to emission equation data category (a direct emitter data category) in the 2011 Final CBI Rulemaking. However, the EPA has since proposed and finalized an approach for addressing disclosure concerns associated with inputs to emissions equations.[25]

In the proposed rule, we assigned the nine proposed new or substantially revised data elements to the appropriate direct emitter data categories created in the 2011 Final CBI Rulemaking based on the type and characteristics of each data element. For the seven data elements the EPA assigned to a direct emitter category with a categorical determination, the EPA proposed that the categorical determination for the category be applied to the proposed new or substantially revised data elements,

[24] Direct emitter data categories that meet the definition of ''emission data'' in 40 CFR 2.301(a) are ''Facility and Unit Identifier Information,'' ''Emissions,'' ''Calculation Methodology and Methodological Tier,'' and ''Data Elements Reported for Periods of Missing Data that are not Inputs to Emission Equations.''

[25] Revisions to Reporting and Recordkeeping Requirements, and Confidentiality Determinations Under the Greenhouse Gas Reporting Program; Final Rule. (79 FR 63750, October 24, 2014).

as shown in Table 4 of this preamble. For the two data elements assigned to the ''Unit/Process Operating Characteristics that Are Not Inputs to Emission Equations,'' we proposed confidentiality determinations on a case-by-case basis taking into consideration the criteria in 40 CFR 2.208, consistent with the approach used for data elements previously assigned to these two data categories, as shown in Table 5 of this preamble. Refer to the preamble to the proposed rule (81 FR 4987; January 29, 2016) for additional information regarding the proposed confidentiality determinations.

With consideration of the information provided by commenters, the EPA is finalizing the confidentiality determinations as proposed. Specifically, the EPA is finalizing the proposed determination for each of the nine new or substantially revised data elements to be designated as ''emission data'' or ''not CBI.''

TABLE 4—FINAL DATA CATEGORY ASSIGNMENTS AND CONFIDENTIALITY DETERMINATIONS FOR NEW DATA ELEMENTS ASSIGNED TO CATEGORIES WITH CATEGORICAL DETERMINATIONS

| Citation | Data element | Final category assignment | Categorical determination (as established in 2011)[26] |
|---|---|---|---|
| § 98.236(q)(1)(i) | The number of complete equipment leak surveys performed during the calendar year. | Test and Calibration Methods. | Not Emission Data and Not CBI. |
| § 98.236(q)(1)(iii) | Whether any component types were subject to 40 CFR part 60, subpart OOOOa. | Facility and Unit Identifier Information. | Emission Data. |
| § 98.236(q)(1)(iv) | Whether you elected to comply with § 98.233(q) per § 98.233(q)(1)(iii). | Facility and Unit Identifier Information. | Emission Data. |
| § 98.236(q)(1)(v) | Each type of method described in § 98.234(a) that was used to conduct leak surveys. | Test and Calibration Methods. | Not Emission Data and Not CBI. |
| § 98.236(q)(2)(i) | For each component type that is located at your facility, component type. | Facility and Unit Identifier Information. | Emission Data. |
| § 98.236(q)(2)(iv) | For each component type that is located at your facility, annual $CO_2$ emissions, in metric tons $CO_2$. | Emissions | Emission Data. |
| § 98.236(q)(2)(v) | For each component type that is located at your facility, annual $CH_4$ emissions, in metric tons $CH_4$. | Emissions | Emission Data. |

TABLE 5—FINAL CONFIDENTIALITY FOR DATA ELEMENTS ASSIGNED TO THE ''UNIT/PROCESS OPERATING CHARACTERISTICS THAT ARE NOT INPUTS TO EMISSION EQUATIONS'' DATA CATEGORY

| Citation | Data element | Final confidentiality determination and rationale |
|---|---|---|
| § 98.236(q)(2)(ii) | For each component type that is located at your facility, total number of the surveyed component type that were identified as leaking in the calendar year (''$x_p$'' in Equation W–30). | Not Emission Data (Categorical Determination as Established in 2011).<br>Not CBI. The term ''equipment leaks'' refers to those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening. Leaking components at a facility may have a correlation to the level of maintenance at a facility. However, there is no direct correlation between the level of maintenance and process efficiency, *i.e.,* a higher number of leaks in one facility do not indicate that the processes have been running longer or more frequently than those processes at another facility that has a lower number of leaks. Furthermore, Department of Transportation (DOT) regulations require natural gas distribution companies and transmission pipeline companies to conduct periodic leak detection and fix any leaking equipment. The number of leaks detected and fixed is reported to the DOT and is publicly available. Finally, 40 CFR part 60, subpart OOOOa requires reporting for each component with visible emissions at affected well sites and compressor station sites. The EPA is finalizing that this data element is not confidential; and that it will be considered ''not CBI.'' |
| § 98.236(q)(2)(iii) | For each component type that is located at your facility, average time the surveyed components are assumed to be leaking and operational, in hours (average of ''$T_p$,z'' from Equation W–30). | Not Emission Data (Categorical Determination as Established in 2011).<br>Not CBI. This data element will provide information on the amount of time operational components were found to be leaking. This information provides little insight into maintenance practices at a facility because it does not identify the cause of the leaks or the nature and cost of repairs. Therefore, this information would not be likely to cause substantial competitive harm to reporters. For this reason, we are finalizing the average time operational components were found leaking be designated as ''not CBI.'' |

*B. Summary of Comments and Responses*

This section summarizes the major comments and responses related to the proposed categorical assignments and confidentiality determinations. See ''Response to Public Comments on Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–

[26] The categorical confidentiality determinations for the data categories listed in this table were finalized on May 26, 2011 (see 76 FR 30782).

0764 for a complete listing of all comments and responses. See the memorandum ''Final Data Category Assignments and Confidentiality Determinations for Data Elements in the 'Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems; Final Rule' '' in Docket ID No. EPA–HQ–OAR–2015–0764 for a complete listing of final data category assignments and confidentiality determinations.

*Comment:* One commenter stated that the EPA should reconsider the proposed determination of ''not CBI'' for the number of components identified as leaking in a calendar year and the average time the surveyed components are assumed to be leaking. The commenter asserted that designating this information as CBI would encourage more reporters to voluntarily conduct leak surveys. The commenter also noted that this information is publically available for some sources and suggested that the rule provide an exception from classification as CBI for components subject to State programs or NSPS that already require public disclosure. Another commenter requested that the EPA protect the community's right to know and not allow companies to keep the public from finding out about leaks from hydrocarbon facilities.

*Response:* While it is possible that the requirement to report the number of leaking components and the average time those components were leaking could discourage some reporters from conducting voluntary equipment leak surveys, this is not a valid reason to allow reporters to claim these data elements as confidential. As noted in section III.C of the preamble to the proposed rule, the EPA proposed that disclosure of these data elements is unlikely to cause substantial harm to a business's competitive position, and the commenter did not indicate that the EPA's determination was incorrect. Therefore, the EPA is finalizing the confidentiality determinations for these data elements as ''not CBI.''

## IV. Impacts of the Final Amendments to Subpart W

### *A. Impacts of the Final Amendments*

The final amendments to subpart W revise costs associated with the use of the monitoring methods and the calculation methodology based on equipment leak surveys for reporters in the following industry segments: Onshore Petroleum and Natural Gas Production, Onshore Petroleum and Natural Gas Gathering and Boosting, Onshore Natural Gas Transmission Compression, Underground Natural Gas Storage, LNG Storage, and LNG Import and Export Equipment. Reporters in these industry segments are required to use the results of fugitive emissions component monitoring required for well sites and compressor stations under the NSPS subpart OOOOa. Reporters in these segments with components not subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and for which they are currently required to use the calculation methodology based on population counts under subpart W may voluntarily use the calculation methodology based on equipment leak surveys for those components if the equipment leak survey is conducted following a monitoring method listed in subpart W.

The EPA received comments from one commenter regarding the specific impacts of the proposed amendments. After evaluating these comments and reviewing other changes from proposal, the EPA revised the impacts assessment from proposal. The EPA estimates that the costs of the final amendments to subpart W are slightly more burdensome than we estimated at proposal, but they do not significantly change the overall burden to subpart W reporters. The EPA estimated that the additional costs to subpart W reporters in the Onshore Petroleum and Natural Gas Production and the Onshore Petroleum and Natural Gas Gathering and Boosting industry segments to transition their existing equipment leak recordkeeping, calculating, and reporting systems to use the calculation methodology based on equipment leak surveys and to determine which components are subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and which are not, will be approximately $110,000 per year, or about $410 per reporter. The EPA estimated that the additional costs for subpart W reporters in the other industry segments (*i.e.,* Onshore Natural Gas Transmission Compression, Underground Natural Gas Storage, Liquefied Natural Gas (LNG) Storage, and LNG Import and Export Equipment) to add a few new emission factors to their existing systems (rather than transitioning their recordkeeping, calculating, and reporting systems) and to determine which components are covered by the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and which are not, will be approximately $20,000 per year or about $110 per reporter. The total costs are approximately $128,400 per year for all reporters, or about $286 per reporter. See the memorandum, ''Assessment of Impacts of the Final Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764 for additional information.

### *B. Summary of Comments and Responses*

This section summarizes the major comments and responses related to the impacts of the proposed amendments to subpart W of part 98. We note that while several commenters asserted that the proposed rule would be burdensome for many operators and suggested revisions to the rule requirements that would reduce the burden, only one commenter provided comments on the EPA's impacts estimate and supporting statement, and that commenter's major comments are summarized in this section. See ''Response to Public Comments on Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764 for a complete listing of all comments and responses.

*Comment:* One commenter stated that the EPA's estimate of two hours of labor and $198 per reporter significantly underestimates and misrepresents the amount of time and effort that goes into implementing a new rule. The commenter provided a cost estimate that assumes more labor hours than in the EPA's memorandum ''Assessment of Impacts of the Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' (Docket Item No. EPA–HQ–OAR–2015–0764–0025). The commenter noted that as more sites become subject to the NSPS subpart OOOOa at a facility, the costs of managing the data and processing it into a usable format for the GHGRP will increase each year for that reporter. The commenter also noted that the EPA was incorrect in assuming that there would be no costs for facilities in the Onshore Natural Gas Processing segment.

*Response:* The EPA has evaluated the comments and has made changes to the estimate of burden in the supporting statement. The following paragraphs address each of the points in the commenter's detailed cost estimate included with the comment letter and explain how the points are being addressed in the final burden and cost estimate.

The commenter suggested adding burden of two hours in the first year related to the initial monitoring plan development and burden of 0.5 hours in subsequent years related to yearly monitoring plan revisions. The EPA did not include costs at proposal related to the monitoring plan because the subpart W amendments do not require the development of a separate monitoring plan. Instead, the subpart W amendments cross reference the monitoring plan that is already being developed according to the NSPS subpart OOOOa. The EPA recognizes that reporters that are not subject to the NSPS subpart OOOOa would not already be required to develop a monitoring plan under the NSPS subpart OOOOa; however, reporters that elect to use one of the new leak detection methods are also electing to incur the burden of developing a monitoring plan. Therefore, there is no monitoring plan burden associated with the subpart W amendments and the final burden and cost estimate has not changed from proposal as a result of this comment.

The commenter suggested changing the number of hours to revise the reporting system to five hours and to allow one hour for maintenance in each subsequent year. At proposal, the EPA estimated that revising the reporting system to use the calculation methodology based on equipment leak surveys would require two hours. The commenter did not provide the basis for their estimate of five hours to update the data management system. The overall reporting costs for compliance already include a burden of ten hours per year and the EPA disagrees that updating the data management system would encompass half of that allotment because EPA anticipates that reporters would only need to add a few emission factors for leaking components to their existing system, rather than something more time-intensive such as creating a new data management system. We reviewed the revisions expected to be needed in the data management system. While we maintain that two hours are sufficient to implement the calculation methodology based on equipment leak surveys into a reporter's existing system, we recognize that this process will also require quality assurance reviews and testing to ensure the data are stored properly and the calculations are performed correctly. Therefore, we increased the number of hours estimated to revise the reporting system from two hours to 3.5 hours to account for these additional quality reviews of the data management system. However, the EPA has made no changes to burden associated with maintenance of the revised reporting system because the EPA asserts that any reporting system maintenance related to subpart W is already reflected in the twenty hours per year allotted to each subpart W reporter for recordkeeping and reporting activities.

The commenter suggested that the EPA adjust the proposed burden and cost estimate by adding the following activities and burden estimates: (1) Time for staff to process the survey data resulting from the calculation methodology based on equipment leak surveys and to enter it into the GHGRP system at a burden of three hours per year; (2) time for staff training at a burden of two hours for initial training and one hour per year in subsequent years; and (3) time for staff to review the data for quality assurance, follow missing data requirements, report data to the EPA, and retain all records at a burden of four total hours per year.

At proposal, the EPA did not include burden related to these activities because they are covered by the twenty hours per year already accounted for in the overall subpart W reporter burden for recordkeeping and reporting activities. Therefore, the final burden and cost estimate has not changed from proposal as a result of these comments.

However, at proposal, the EPA did not account for the time associated with determining which components in the reporting system are covered by the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and which are not. As a result, the EPA has added 0.5 hours per reporter in the first year that the reporter has an affected collection of fugitive emissions components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements and 0.1 hours per reporter in subsequent years.

Finally, for the reasons described in section II.B.2 of this preamble, the final rule language specifies that the requirement to use the NSPS subpart OOOOa results as part of the calculation methodology based on equipment leak surveys only applies to components subject to the NSPS subpart OOOOa well site or compressor station fugitive emissions requirements. The subpart W equipment leak survey requirements for facilities in the Onshore Natural Gas Processing segment do not change as a result of these amendments. Therefore, the EPA is not including any burden estimate for Onshore Natural Gas Processing reporters (i.e., the revisions to the burden estimate described in this response do not apply to the Onshore Natural Gas Processing segment).

Overall, the burden and cost estimate has been revised as discussed above from 502 hours and $50,000 per year at proposal to approximately 1,295 hours and $128,400 per year for all reporters.

## V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-and-executive orders.*

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

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

### *B. Paperwork Reduction Act (PRA)*

The information collection activities in this rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2300.19. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

This action increases burden for industry segments that conduct equipment leak surveys. These revisions are expected to increase respondent burden for subpart W reporters that become subject to the NSPS subpart OOOOa well site or compressor station fugitive requirements. To accommodate the new methods and emission factors added by these final amendments, the EPA expects that each affected subpart W reporter will either revise their reporter-specific calculation mechanism (i.e., calculation spreadsheet, recordkeeping database, etc.) or add a few new emission factors to the reporter-specific calculation mechanism, when and if the reporter becomes subject to the NSPS subpart OOOOa well site or compressor station fugitive requirements. The recordkeeping and reporting requirements are being finalized as proposed. Impacts associated with the final revisions to the recordkeeping and reporting requirements are detailed in the memorandum ''Assessment of Impacts of the Final Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems''

(see Docket ID No. EPA–HQ–OAR–2015–0764).

Data collection provides a critical tool for communities to identify nearby sources of GHGs and provides information to state and local governments. The data can be used to complement atmospheric GHG studies and inform updates to emission inventories such as the *Inventory of U.S. Greenhouse Gas Emissions and Sinks* (Inventory). Various activity data are collected that can be used to improve understanding of the occurrence of emissions from a variety of sources.

Data collected must be made available to the public unless the data qualify for CBI treatment under the CAA and EPA regulations. All data determined by the EPA to be CBI are safeguarded in accordance with regulations in 40 CFR chapter 1, part 2, subpart B.

*Respondents/affected entities:* The respondents in this information collection include owners and operators of petroleum and natural gas systems facilities that report their GHG emissions from equipment leaks to the EPA to comply with subpart W.

*Respondent's obligation to respond:* The respondent's obligation to respond is mandatory under the authority provided in CAA section 114.

*Estimated number of respondents:* Approximately 899 respondents per year.

*Frequency of response:* Annual.

*Total estimated burden:* 1,295 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* $128,400 (per year), includes $0 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the EPA will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities directly regulated by this final rule include small businesses in the petroleum and natural gas industry. The EPA has determined that some small businesses will be affected because their production processes emit GHGs exceeding the reporting threshold. This action includes amendments that may result in a small burden increase on some subpart W reporters, but the EPA has determined that the increased cost of less than $286 per reporter is not a significant impact. Details of this analysis are presented in ''Assessment of Impacts of the Final Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems'' in Docket ID No. EPA–HQ–OAR–2015–0764.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. As shown in sections IV.A and V.B of this preamble, the annual cost of this action is $128,400, which is well under $100 million per year.

*E. Executive Order 13132: Federalism*

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

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This regulation will apply directly to petroleum and natural gas facilities that emit GHGs. Although few facilities that will be subject to the rule are likely to be owned by tribal governments, the EPA sought opportunities to provide information to tribal governments and representatives during the development of the proposed and final subpart W that was promulgated on November 30, 2010 (75 FR 74458).

The EPA consulted with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that consultation is provided in section IV.F of the preamble to the re-proposal of subpart W published on April 12, 2010 (75 FR 18608), and section IV.F of the preamble to the subpart W 2010 final rule published on November 30, 2010 (75 FR 74458).

*G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. Instead, this rule addresses information collection and reporting and verification procedures.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 98**

Environmental protection, Administrative practice and procedure, Greenhouse gases, Reporting and recordkeeping requirements.

Dated: November 10, 2016.

**Gina McCarthy,**

*Administrator.*

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

## PART 98—MANDATORY GREENHOUSE GAS REPORTING

■ 1. The authority citation for part 98 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

## Subpart W—Petroleum and Natural Gas Systems

■ 2. Section 98.232 is amended by:
■ a. Revising paragraph (c)(21);
■ b. Adding paragraph (e)(8);
■ c. Revising paragraph (f)(5);
■ d. Adding paragraphs (f)(6) through (8);
■ e. Revising paragraphs (g)(3) and (4);
■ f. Adding paragraphs (g)(5) through (7);
■ g. Revising paragraphs (h)(4) and (5);
■ h. Adding paragraphs (h)(6) through (8); and
■ i. Revising paragraph (j)(10).

The revisions and additions read as follows:

### § 98.232 GHGs to report.

* * * * *

(c) * * *

(21) Equipment leaks from valves, connectors, open ended lines, pressure relief valves, pumps, flanges, and other components (such as instruments, loading arms, stuffing boxes, compressor seals, dump lever arms, and breather caps, but does not include components listed in paragraph (c)(11) or (19) of this section, and it does not include thief hatches or other openings on a storage vessel).

* * * * *

(e) * * *

(8) Equipment leaks from all other components that are not listed in paragraph (e)(1), (2), or (7) of this section and are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter or you elect to survey using a leak detection method described in § 98.234(a)(6) or (7). The other components subject to this paragraph (e)(8) also do not include thief hatches or other openings on a storage vessel. If these other components are not subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you may also elect to report emissions from these other components if you elect to survey them using a leak detection method described in § 98.234(a)(1) through (5).

(f) * * *

(5) Equipment leaks from valves, connectors, open ended lines, pressure relief valves, and meters associated with storage stations.

(6) Equipment leaks from all other components that are associated with storage stations, are not listed in paragraph (f)(1), (2), or (5) of this section, and are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter or you elect to survey using a leak detection method described in § 98.234(a)(6) or (7). If these other components are not subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you may also elect to report emissions from these other components if you elect to survey them using a leak detection method described in § 98.234(a)(1) through (5).

(7) Equipment leaks from valves, connectors, open-ended lines, and pressure relief valves associated with storage wellheads.

(8) Equipment leaks from all other components that are associated with storage wellheads, are not listed in paragraph (f)(1), (2), or (7) of this section, and are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a, of this chapter or you elect to survey using a leak detection method described in § 98.234(a)(6) or (7). If these other components are not subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you may also elect to report emissions from these other components if you elect to survey them using a leak detection method described in § 98.234(a)(1) through (5).

(g) * * *

(3) Flare stack emissions.

(4) Equipment leaks from valves, pump seals, connectors, and other equipment leak sources in LNG service.

(5) Equipment leaks from vapor recovery compressors, if you do not survey components associated with vapor recovery compressors in accordance with paragraph (g)(6) of this section.

(6) Equipment leaks from all components in gas service that are associated with a vapor recovery compressor, are not listed in paragraph (g)(1) or (2) of this section, and that are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter or you elect to survey using a leak detection method described in § 98.234(a).

(7) Equipment leaks from all components in gas service that are not associated with a vapor recovery compressor, are not listed in paragraph (g)(1) or (2) of this section, and are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter or you elect to survey using a leak detection method described in § 98.234(a)(6) or (7). If these components are not subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you may also elect to report emissions from these components if you elect to survey them using a leak detection method described in § 98.234(a)(1) through (5).

(h) * * *

(4) Flare stack emissions.

(5) Equipment leaks from valves, pump seals, connectors, and other equipment leak sources in LNG service.

(6) Equipment leaks from vapor recovery compressors, if you do not survey components associated with vapor recovery compressors in accordance with paragraph (h)(7) of this section.

(7) Equipment leaks from all components in gas service that are associated with a vapor recovery compressor, are not listed in paragraph (h)(1) or (2) of this section, and that are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter or you elect to survey using a leak detection method described in § 98.234(a).

(8) Equipment leaks from all components in gas service that are not associated with a vapor recovery compressor, are not listed in paragraph (h)(1) or (2) of this section, and that are either subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter or you elect to survey using a leak detection method described in § 98.234(a)(6) or (7). If these components are not subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you may also elect to report emissions from these components if you elect to survey them using a leak detection method described in § 98.234(a)(1) through (5).

* * * * *

(j) * * *

(10) Equipment leaks from valves, connectors, open ended lines, pressure relief valves, pumps, flanges, and other components (such as instruments, loading arms, stuffing boxes, compressor seals, dump lever arms, and breather caps, but does not include components in paragraph (j)(8) or (9) of this section, and it does not include thief hatches or other openings on a storage vessel).

* * * * *

■ 3. Section 98.233 is amended by:
■ a. Revising the parameter $EF_t$ of Equation W–1 in paragraph (a) introductory text, and paragraph (q);

■ b. Removing the first two sentences of paragraph (r) introductory text and adding four sentences in their place; and

■ c. Revising the parameters $Count_e$ and $EF_{s,e}$ of Equation W–32A in paragraph (r) introductory text, and paragraphs (r)(3) through (5).

The revisions read as follows:

**§ 98.233 Calculating GHG emissions.**

* * * * *

(a) * * *

* * * * *

$EF_t$ = Population emission factors for natural gas pneumatic device vents (in standard cubic feet per hour per device) of each type ''t'' listed in Tables W–1A, W–3B, and W–4B to this subpart for onshore petroleum and natural gas production, onshore natural gas transmission compression, and underground natural gas storage facilities, respectively. Onshore petroleum and natural gas gathering and boosting facilities must use the population emission factors listed in Table W–1A to this subpart.

* * * * *

(q) *Equipment leak surveys.* For the components identified in paragraphs (q)(1)(i) through (iii) of this section, you must conduct equipment leak surveys using the leak detection methods specified in paragraphs (q)(1)(i) through (iii) of this section. For the components identified in paragraph (q)(1)(iv) of this section, you may elect to conduct equipment leak surveys, and if you elect to conduct surveys, you must use a leak detection method specified in paragraph (q)(1)(iv) of this section. This paragraph (q) applies to components in streams with gas content greater than 10 percent $CH_4$ plus $CO_2$ by weight. Components in streams with gas content less than or equal to 10 percent $CH_4$ plus $CO_2$ by weight are exempt from the requirements of this paragraph (q) and do not need to be reported. Tubing systems equal to or less than one half inch diameter are exempt from the requirements of this paragraph (q) and do not need to be reported.

(1) *Survey requirements.* (i) For the components listed in § 98.232(e)(7), (f)(5), (g)(4), and (h)(5), that are not subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you must conduct surveys using any of the leak detection methods listed in § 98.234(a) and calculate equipment leak emissions using the procedures specified in paragraph (q)(2) of this section.

(ii) For the components listed in § 98.232(d)(7) and (i)(1), you must conduct surveys using any of the leak detection methods listed in § 98.234(a)(1) through (5) and calculate equipment leak emissions using the procedures specified in paragraph (q)(2) of this section.

(iii) For the components listed in § 98.232(c)(21), (e)(7), (e)(8), (f)(5), (f)(6), (f)(7), (f)(8), (g)(4), (g)(6), (g)(7), (h)(5), (h)(7), (h)(8), and (j)(10) that are subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter, you must conduct surveys using any of the leak detection methods in § 98.234(a)(6) or (7) and calculate equipment leak emissions using the procedures specified in paragraph (q)(2) of this section.

(iv) For the components listed in § 98.232(c)(21), (e)(8), (f)(6), (f)(7), (f)(8), (g)(6), (g)(7), (h)(7), (h)(8), or (j)(10), that are not subject to fugitive emissions standards in § 60.5397a of this chapter, you may elect to conduct surveys according to this paragraph (q), and, if you elect to do so, then you must use one of the leak detection methods in § 98.234(a).

(A) If you elect to use a leak detection method in § 98.234(a)(1) through (5) for the surveyed component types in § 98.232(c)(21), (f)(7), (g)(6), (h)(7), or (j)(10) in lieu of the population count methodology specified in paragraph (r) of this section, then you must calculate emissions for the surveyed component types in § 98.232(c)(21), (f)(7), (g)(6), (h)(7), or (j)(10) using the procedures in paragraph (q)(2) of this section.

(B) If you elect to use a leak detection method in § 98.234(a)(1) through (5) for the surveyed component types in § 98.232(e)(8), (f)(6), (f)(8), (g)(7), and (h)(8), then you must use the procedures in paragraph (q)(2) of this section to calculate those emissions.

(C) If you elect to use a leak detection method in § 98.234(a)(6) or (7) for any elective survey under this subparagraph (q)(1)(iv), then you must survey the component types in § 98.232(c)(21), (e)(8), (f)(6), (f)(7), (f)(8), (g)(6), (g)(7), (h)(7), (h)(8), and (j)(10) that are not subject to fugitive emissions standards in § 60.5397a of this chapter, and you must calculate emissions from the surveyed component types in § 98.232(c)(21), (e)(8), (f)(6), (f)(7), (f)(8), (g)(6), (g)(7), (h)(7), (h)(8), and (j)(10) using the emission calculation requirements in paragraph (q)(2) of this section.

(2) *Emission calculation methodology.* For industry segments listed in § 98.230(a)(2) through (9), if equipment leaks are detected during surveys required or elected for components listed in paragraphs (q)(1)(i) through (iv) of this section, then you must calculate equipment leak emissions per component type per reporting facility using Equation W–30 of this section and the requirements specified in paragraphs (q)(2)(i) through (xi) of this section. For the industry segment listed in § 98.230(a)(8), the results from Equation W–30 are used to calculate population emission factors on a meter/regulator run basis using Equation W–31 of this section. If you chose to conduct equipment leak surveys at all above grade transmission-distribution transfer stations over multiple years, ''n,'' according to paragraph (q)(2)(x)(A) of this section, then you must calculate the emissions from all above grade transmission-distribution transfer stations as specified in paragraph (q)(2)(xi) of this section.

$$E_{s,p,i} = GHG_i * EF_{s,p} * \sum_{z=1}^{x_p} T_{p,z} \qquad \text{(Eq. W-30)}$$

Where:

$E_{s,p,i}$ = Annual total volumetric emissions of GHGi from specific component type ''p'' (in accordance with paragraphs (q)(1)(i) through (iv) of this section) in standard (''s'') cubic feet, as specified in paragraphs (q)(2)(ii) through (x) of this section.

$x_p$ = Total number of specific component type ''p'' detected as leaking in any leak survey during the year. A component found leaking in two or more surveys during the year is counted as one leaking component.

$EF_{s,p}$ = Leaker emission factor for specific component types listed in Tables W–1E, W–2, W–3A, W–4A, W–5A, W–6A, and W–7 to this subpart.

$GHG_i$ = For onshore petroleum and natural gas production facilities and onshore petroleum and natural gas gathering and boosting facilities, concentration of $GHG_i$, $CH_4$, or $CO_2$, in produced natural gas as defined in paragraph (u)(2) of this section; for onshore natural gas processing facilities, concentration of $GHG_i$, $CH_4$ or $CO_2$, in the total hydrocarbon of the feed natural gas; for onshore natural gas transmission compression and underground natural

gas storage, $GHG_i$ equals 0.975 for $CH_4$ and $1.1 \times 10^{-2}$ for $CO_2$; for LNG storage and LNG import and export equipment, $GHG_i$ equals 1 for $CH_4$ and 0 for $CO_2$; and for natural gas distribution, $GHG_i$ equals 1 for $CH_4$ and $1.1 \times 10^{-2}$ $CO_2$.

$T_{p,z}$ = The total time the surveyed component ''z,'' component type ''p,'' was assumed to be leaking and operational, in hours. If one leak detection survey is conducted in the calendar year, assume the component was leaking for the entire calendar year. If multiple leak detection surveys are conducted in the calendar year, assume a component found leaking in the first survey was leaking since the beginning of the year until the date of the survey; assume a component found leaking in the last survey of the year was leaking from the preceding survey through the end of the year; assume a component found leaking in a survey between the first and last surveys of the year was leaking since the preceding survey until the date of the survey; and sum times for all leaking periods. For each leaking component, account for time the component was not operational (*i.e.,* not operating under pressure) using an engineering estimate based on best available data.

(i) You must conduct at least one leak detection survey in a calendar year. The leak detection surveys selected must be conducted during the calendar year. If you conduct multiple complete leak detection surveys in a calendar year, you must use the results from each complete leak detection survey when calculating emissions using Equation W–30. For components subject to the well site and compressor station fugitive emissions standards in § 60.5397a of this chapter, each survey conducted in accordance with § 60.5397a of this chapter will be considered a complete leak detection survey for purposes of this section.

(ii) Calculate both $CO_2$ and $CH_4$ mass emissions using calculations in paragraph (v) of this section.

(iii) Onshore petroleum and natural gas production facilities must use the appropriate default whole gas leaker emission factors for components in gas service, light crude service, and heavy crude service listed in Table W–1E to this subpart.

(iv) Onshore petroleum and natural gas gathering and boosting facilities must use the appropriate default whole gas leaker factors for components in gas service listed in Table W–1E to this subpart.

(v) Onshore natural gas processing facilities must use the appropriate default total hydrocarbon leaker emission factors for compressor components in gas service and non-compressor components in gas service listed in Table W–2 to this subpart.

(vi) Onshore natural gas transmission compression facilities must use the appropriate default total hydrocarbon leaker emission factors for compressor components in gas service and non-compressor components in gas service listed in Table W–3A to this subpart.

(vii) Underground natural gas storage facilities must use the appropriate default total hydrocarbon leaker emission factors for storage stations or storage wellheads in gas service listed in Table W–4A to this subpart.

(viii) LNG storage facilities must use the appropriate default methane leaker emission factors for LNG storage components in LNG service or gas service listed in Table W–5A to this subpart.

(ix) LNG import and export facilities must use the appropriate default methane leaker emission factors for LNG terminals components in LNG service or gas service listed in Table W–6A to this subpart.

(x) Natural gas distribution facilities must use Equation W–30 of this section and the default methane leaker emission factors for transmission-distribution transfer station components in gas service listed in Table W–7 to this subpart to calculate component emissions from annual equipment leak surveys conducted at above grade transmission-distribution transfer stations. Natural gas distribution facilities are required to perform equipment leak surveys only at above grade stations that qualify as transmission-distribution transfer stations. Below grade transmission-distribution transfer stations and all metering-regulating stations that do not meet the definition of transmission-distribution transfer stations are not required to perform equipment leak surveys under this section.

(A) Natural gas distribution facilities may choose to conduct equipment leak surveys at all above grade transmission-distribution transfer stations over multiple years ''n,'' not exceeding a five year period to cover all above grade transmission-distribution transfer stations. If the facility chooses to use the multiple year option, then the number of transmission-distribution transfer stations that are monitored in each year should be approximately equal across all years in the cycle.

(B) Use Equation W–31 of this section to determine the meter/regulator run population emission factors for each $GHG_i$. As additional survey data become available, you must recalculate the meter/regulator run population emission factors for each $GHG_i$ annually according to paragraph (q)(2)(x)(C) of this section.

$$EF_{s,MR,i} = \frac{\sum_{y=1}^{n}\sum_{p=1}^{7} E_{s,p,i,y}}{\sum_{y=1}^{n}\sum_{w=1}^{Count_{MR,y}} T_{w,y}} \qquad \text{(Eq. W-31)}$$

Where:

$EF_{s,MR,i}$ = Meter/regulator run population emission factor for $GHG_i$ based on all surveyed above grade transmission-distribution transfer stations over ''n'' years, in standard cubic feet of $GHG_i$ per operational hour of all meter/regulator runs.

$E_{s,p,i,y}$ = Annual total volumetric emissions at standard conditions of $GHG_i$ from component type ''p'' during year ''y'' in standard (''s'') cubic feet, as calculated using Equation W–30 of this section.

p = Seven component types listed in Table W–7 to this subpart for transmission-distribution transfer stations.

$T_{w,y}$ = The total time the surveyed meter/regulator run ''w'' was operational, in hours during survey year ''y'' using an engineering estimate based on best available data.

$Count_{MR,y}$ = Count of meter/regulator runs surveyed at above grade transmission-distribution transfer stations in year ''y''.

y = Year of data included in emission factor ''$EF_{s,MR,i}$'' according to paragraph (q)(2)(x)(C) of this section.

n = Number of years of data, according to paragraph (q)(2)(x)(A) of this section, whose results are used to calculate emission factor ''$EF_{s,MR,i}$'' according to paragraph (q)(2)(x)(C) of this section.

(C) The emission factor ''$EFs_{,MR,i,}$'' based on annual equipment leak surveys at above grade transmission-distribution transfer stations, must be calculated

annually. If you chose to conduct equipment leak surveys at all above grade transmission-distribution transfer stations over multiple years, ''n,'' according to paragraph (q)(2)(x)(A) of this section and you have submitted a smaller number of annual reports than the duration of the selected cycle period of 5 years or less, then all available data from the current year and previous years must be used in the calculation of the emission factor ''$EF_{s,MR,i}$'' from Equation W–31 of this section. After the first survey cycle of ''n'' years is completed and beginning in calendar year (n+1), the survey will continue on a rolling basis by including the survey results from the current calendar year ''y'' and survey results from all previous (n − 1) calendar years, such that each annual calculation of the emission factor ''$EF_{s,MR,i}$'' from Equation W–31 is based on survey results from ''n'' years. Upon completion of a cycle, you may elect to change the number of years in the next cycle period (to be 5 years or less). If the number of years in the new cycle is greater than the number of years in the previous cycle, calculate ''$EF_{s,MR,i}$'' from Equation W–31 in each year of the new cycle using the survey results from the current calendar year and the survey results from the preceding number years that is equal to the number of years in the previous cycle period. If the number of years, ''$n_{new}$,'' in the new cycle is smaller than the number of years in the previous cycle, ''n,'' calculate ''$EF_{s,MR,i}$'' from Equation W–31 in each year of the new cycle using the survey results from the current calendar year and survey results from all previous ($n_{new}$ − 1) calendar years.

(xi) If you chose to conduct equipment leak surveys at all above grade transmission-distribution transfer stations over multiple years, ''n,'' according to paragraph (q)(2)(x)(A) of this section, you must use the meter/regulator run population emission factors calculated using Equation W–31 of this section and the total count of all meter/regulator runs at above grade transmission-distribution transfer stations to calculate emissions from all above grade transmission-distribution transfer stations using Equation W–32B in paragraph (r) of this section.

(r) * * * This paragraph (r) applies to emissions sources listed in § 98.232(c)(21), (f)(7), (g)(5), (h)(6), and (j)(10) if you are not required to comply with paragraph (q) of this section and if you do not elect to comply with paragraph (q) of this section for these components in lieu of this paragraph (r). This paragraph (r) also applies to emission sources listed in § 98.232(i)(2), (i)(3), (i)(4), (i)(5), (i)(6), and (j)(11). To be subject to the requirements of this paragraph (r), the listed emissions sources also must contact streams with gas content greater than 10 percent CH plus $CO_2$ by weight. Emissions sources that contact streams with gas content less than or equal to 10 percent $CH_4$ plus $CO_2$ by weight are exempt from the requirements of this paragraph (r) and do not need to be reported. * * *

* * * * *

$Count_e$ = Total number of the emission source type at the facility. For onshore petroleum and natural gas production facilities and onshore petroleum and natural gas gathering and boosting facilities, average component counts are provided by major equipment piece in Tables W–1B and Table W–1C to this subpart. Use average component counts as appropriate for operations in Eastern and Western U.S., according to Table W–1D to this subpart. Onshore petroleum and natural gas gathering and boosting facilities must also count the miles of gathering pipelines by material type (protected steel, unprotected steel, plastic, or cast iron). Underground natural gas storage facilities must count each component listed in Table W–4B to this subpart. LNG storage facilities must count the number of vapor recovery compressors. LNG import and export facilities must count the number of vapor recovery compressors. Natural gas distribution facilities must count: (1) The number of distribution services by material type; (2) miles of distribution mains by material type; and (3) number of below grade metering-regulating stations, by pressure type; as listed in Table W–7 to this subpart.

* * * * *

$EF_{s,e}$ = Population emission factor for the specific emission source type, as listed in Tables W–1A, W–4B, W–5B, W–6B, and W–7 to this subpart. Use appropriate population emission factor for operations in Eastern and Western U.S., according to Table W–1D to this subpart.

* * * * *

(3) Underground natural gas storage facilities must use the appropriate default total hydrocarbon population emission factors for storage wellheads in gas service listed in Table W–4B to this subpart.

(4) LNG storage facilities must use the appropriate default methane population emission factor for LNG storage compressors in gas service listed in Table W–5B to this subpart.

(5) LNG import and export facilities must use the appropriate default methane population emission factor for LNG terminal compressors in gas service listed in Table W–6B to this subpart.

* * * * *

■ 4. Section 98.234 is amended by:

■ a. Revising paragraph (a) introductory text, the paragraph (a)(1) heading, and the fourth sentence in paragraph (a)(2); and

■ b. Adding paragraphs (a)(6) and (7).

The revisions and additions read as follows:

* * * * *

**§ 98.234 Monitoring and QA/QC requirements.**

(a) You must use any of the methods described in paragraphs (a)(1) through (5) of this section to conduct leak detection(s) of through-valve leakage from all source types listed in § 98.233(k), (o), and (p) that occur during a calendar year. You must use any of the methods described in paragraphs (a)(1) through (7) of this section to conduct leak detection(s) of equipment leaks from components as specified in § 98.233(q)(1)(i) that occur during a calendar year. You must use any of the methods described in paragraphs (a)(1) through (5) of this section to conduct leak detection(s) of equipment leaks from components as specified in § 98.233(q)(1)(ii) that occur during a calendar year. You must use one of the methods described in paragraph (a)(6) or (7) of this section to conduct leak detection(s) of equipment leaks from components as specified in § 98.233(q)(1)(iii). If electing to comply with § 98.233(q) as specified in § 98.233(q)(1)(iv), you must use any of the methods described in paragraphs (a)(1) through (7) of this section to conduct leak detection(s) of equipment leaks from component types as specified in § 98.233(q)(1)(iv) that occur during a calendar year.

(1) Optical gas imaging instrument as specified in § 60.18 of this chapter. * * *

* * * * *

(2) * * * If the equipment leak detection methods in this paragraph cannot be used, you must use alternative leak detection devices as described in paragraph (a)(1) of this section to monitor inaccessible equipment leaks or vented emissions.

* * * * *

(6) Optical gas imaging instrument as specified in § 60.5397a of this chapter. Use an optical gas imaging instrument for equipment leak detection in accordance with § 60.5397a(b), (c)(3), (c)(7), and (e) of this chapter and paragraphs (a)(6)(i) through (iii) of this section. Unless using methods in paragraph (a)(7) of this section, an optical gas imaging instrument must be used for all source types that are inaccessible and cannot be monitored without elevating the monitoring

personnel more than 2 meters above a support surface.

(i) For the purposes of this subpart, any visible emissions from a component listed in § 98.232 observed by the optical gas imaging instrument is a leak.

(ii) For the purposes of this subpart, the term ''fugitive emissions component'' in § 60.5397a of this chapter means ''component.''

(iii) For the purpose of complying with § 98.233(q)(1)(iv), the phrase ''the collection of fugitive emissions components at well sites and compressor stations'' in § 60.5397a(b) of this chapter means ''the collection of components for which you elect to comply with § 98.233(q)(1)(iv).''

(7) Method 21 as specified in § 60.5397a of this chapter. Use the equipment leak detection methods in appendix A–7 to part 60 of this chapter, Method 21, in accordance with § 60.5397a(b), (c)(8), and (e) of this chapter and paragraphs (a)(7)(i) through (iii) of this section. Inaccessible emissions sources, as defined in part 60 of this chapter, are not exempt from this subpart. If the equipment leak detection methods in this paragraph cannot be used, you must use alternative leak detection devices as described in paragraph (a)(6) of this section to monitor inaccessible equipment leaks.

(i) For the purposes of this subpart, any instrument reading from a component listed in § 98.232 of this chapter of 500 ppm or greater using Method 21 is a leak.

(ii) For the purposes of this subpart, the term ''fugitive emissions component'' in § 60.5397a of this chapter means ''component.''

(iii) For the purpose of complying with § 98.233(q)(1)(iv), the phrase ''the collection of fugitive emissions components at well sites and compressor stations'' in § 60.5397a(b) of this chapter means ''the collection of components for which you elect to comply with § 98.233(q)(1)(iv).''

* * * * *

■ 5. Section 98.236 is amended by:

■ a. Redesignating paragraphs (a)(1)(xiv) through (xvii) as paragraphs (a)(1)(xv) through (xviii), respectively;

■ b. Adding new paragraph (a)(1)(xiv);

■ c. Redesignating paragraphs (a)(9)(x) and (xi) as paragraphs (a)(9)(xi) and (xii), respectively;

■ d. Adding new paragraph (a)(9)(x);

■ e. Revising paragraph (q) introductory text, paragraph (q)(1), paragraph (q)(2) introductory text, paragraph (r)(3)(ii) introductory text, and the second sentence of paragraph (z) introductory text.

The revisions and additions read as follows:

**§ 98.236 Data reporting requirements.**

* * * * *

(a) * * *

(1) * * *

(xiv) Equipment leak surveys. Report the information specified in paragraph (q) of this section.

* * * * *

(9) * * *

(x) Equipment leak surveys. Report the information specified in paragraph (q) of this section.

* * * * *

(q) Equipment leak surveys. For any components subject to or complying with the requirements of § 98.233(q), you must report the information specified in paragraphs (q)(1) and (2) of this section. Natural gas distribution facilities with emission sources listed in § 98.232(i)(1) must also report the information specified in paragraph (q)(3) of this section.

(1) You must report the information specified in paragraphs (q)(1)(i) through (v) of this section.

(i) Except as specified in paragraph (q)(1)(ii) of this section, the number of complete equipment leak surveys performed during the calendar year.

(ii) Natural gas distribution facilities performing equipment leak surveys across a multiple year leak survey cycle must report the number of years in the leak survey cycle.

(iii) Except for onshore natural gas processing facilities and natural gas distribution facilities, indicate whether any equipment components at your facility are subject to the well site or compressor station fugitive emissions standards in § 60.5397a of this chapter. Report the indication per facility, not per component type.

(iv) For facilities in onshore petroleum and natural gas production, onshore petroleum and natural gas gathering and boosting, onshore natural gas transmission compression, underground natural gas storage, LNG storage, and LNG import and export equipment, indicate whether you elected to comply with § 98.233(q) according to § 98.233(q)(1)(iv) for any equipment components at your facility.

(v) Report each type of method described in § 98.234(a) that was used to conduct leak surveys.

(2) You must indicate whether your facility contains any of the component types subject to or complying with § 98.233(q) that are listed in § 98.232(c)(21), (d)(7), (e)(7), (e)(8), (f)(5), (f)(6), (f)(7), (f)(8), (g)(4), (g)(6), (g)(7), (h)(5), (h)(7), (h)(8), (i)(1), or (j)(10) for your facility's industry segment. For each component type that is located at your facility, you must report the information specified in paragraphs (q)(2)(i) through (v) of this section. If a component type is located at your facility and no leaks were identified from that component, then you must report the information in paragraphs (q)(2)(i) through (v) of this section but report a zero (''0'') for the information required according to paragraphs (q)(2)(ii) through (v) of this section.

* * * * *

(r) * * *

(3) * * *

(ii) Onshore petroleum and natural gas production facilities and onshore petroleum and natural gas gathering and boosting facilities must report the information specified in paragraphs (r)(3)(ii)(A) and (B) of this section, for each major equipment type, production type (*i.e.,* natural gas or crude oil), and geographic location combination in Tables W–1B and W–1C to this subpart for which equipment leak emissions are calculated using the methodology in § 98.233(r).

* * * * *

(z) * * * If your facility contains any combustion units subject to reporting according to paragraph (a)(1)(xviii), (a)(8)(i), or (a)(9)(xii) of this section, then you must report the information specified in paragraphs (z)(1) and (2) of this section, as applicable.

* * * * *

■ 6. Add Table W–1E to subpart W of part 98 in numerical order to read as follows:

TABLE W–1E TO SUBPART W OF PART 98—DEFAULT WHOLE GAS LEAKER EMISSION FACTORS FOR ONSHORE PETROLEUM AND NATURAL GAS PRODUCTION AND ONSHORE PETROLEUM AND NATURAL GAS GATHERING AND BOOSTING

| Equipment components | Emission factor (scf/hour/component) | |
|---|---|---|
| | If you survey using any of the methods in § 98.234(a)(1) through (6) | If you survey using Method 21 as specified in § 98.234(a)(7) |
| **Leaker Emission Factors—All Components, Gas Service [1]** | | |
| Valve | 4.9 | 3.5 |
| Flange | 4.1 | 2.2 |
| Connector (other) | 1.3 | 0.8 |
| Open-Ended Line [2] | 2.8 | 1.9 |
| Pressure Relief Valve | 4.5 | 2.8 |
| Pump Seal | 3.7 | 1.4 |
| Other [3] | 4.5 | 2.8 |
| **Leaker Emission Factors—All Components, Light Crude Service [4]** | | |
| Valve | 3.2 | 2.2 |
| Flange | 2.7 | 1.4 |
| Connector (other) | 1.0 | 0.6 |
| Open-Ended Line | 1.6 | 1.1 |
| Pump | 3.7 | 2.6 |
| Agitator Seal | 3.7 | 2.6 |
| Other [3] | 3.1 | 2.0 |
| **Leaker Emission Factors—All Components, Heavy Crude Service [5]** | | |
| Valve | 3.2 | 2.2 |
| Flange | 2.7 | 1.4 |
| Connector (other) | 1.0 | 0.6 |
| Open-Ended Line | 1.6 | 1.1 |
| Pump | 3.7 | 2.6 |
| Agitator Seal | 3.7 | 2.6 |
| Other [3] | 3.1 | 2.0 |

[1] For multi-phase flow that includes gas, use the gas service emission factors.
[2] The open-ended lines component type includes blowdown valve and isolation valve leaks emitted through the blowdown vent stack for centrifugal and reciprocating compressors.
[3] "Others" category includes any equipment leak emission point not specifically listed in this table, as specified in § 98.232(c)(21) and (j)(10).
[4] Hydrocarbon liquids greater than or equal to 20°API are considered "light crude."
[5] Hydrocarbon liquids less than 20°API are considered "heavy crude."

■ 7. Remove Table W–3 to subpart W of part 98 and add Table W–3A and Table W–3B to subpart W of part 98 in numerical order to read as follows:

TABLE W–3A TO SUBPART W OF PART 98—DEFAULT TOTAL HYDROCARBON LEAKER EMISSION FACTORS FOR ONSHORE NATURAL GAS TRANSMISSION COMPRESSION

| Onshore natural gas transmission compression | Emission factor (scf/hour/component) | |
|---|---|---|
| | If you survey using any of the methods in § 98.234(a)(1) through (6) | If you survey using Method 21 as specified in § 98.234(a)(7) |
| **Leaker Emission Factors—Compressor Components, Gas Service** | | |
| Valve [1] | 14.84 | 9.51 |
| Connector | 5.59 | 3.58 |
| Open-Ended Line | 17.27 | 11.07 |
| Pressure Relief Valve | 39.66 | 25.42 |
| Meter or Instrument | 19.33 | 12.39 |
| Other [2] | 4.1 | 2.63 |
| **Leaker Emission Factors—Non-Compressor Components, Gas Service** | | |
| Valve [1] | 6.42 | 4.12 |
| Connector | 5.71 | 3.66 |
| Open-Ended Line | 11.27 | 7.22 |

TABLE W–3A TO SUBPART W OF PART 98—DEFAULT TOTAL HYDROCARBON LEAKER EMISSION FACTORS FOR ONSHORE NATURAL GAS TRANSMISSION COMPRESSION—Continued

| Onshore natural gas transmission compression | Emission factor (scf/hour/component) | |
|---|---|---|
| | If you survey using any of the methods in § 98.234(a)(1) through (6) | If you survey using Method 21 as specified in § 98.234(a)(7) |
| Pressure Relief Valve | 2.01 | 1.29 |
| Meter or Instrument | 2.93 | 1.88 |
| Other [2] | 4.1 | 2.63 |

[1] Valves include control valves, block valves and regulator valves.
[2] Other includes any potential equipment leak emission point in gas service that is not specifically listed in this table, as specified in § 98.232(e)(8).

TABLE W–3B TO SUBPART W OF PART 98—DEFAULT TOTAL HYDROCARBON POPULATION EMISSION FACTORS FOR ONSHORE NATURAL GAS TRANSMISSION COMPRESSION

| Population emission factors—gas service onshore natural gas transmission compression | Emission factor (scf/hour/component) |
|---|---|
| Low Continuous Bleed Pneumatic Device Vents [1] | 1.37 |
| High Continuous Bleed Pneumatic Device Vents [1] | 18.20 |
| Intermittent Bleed Pneumatic Device Vents [1] | 2.35 |

[1] Emission Factor is in units of ''scf/hour/device.''

■ 8. Remove Table W–4 to subpart W of part 98 and add Table W–4A and Table W–4B to subpart W of part 98 in numerical order to read as follows:

TABLE W–4A TO SUBPART W OF PART 98—DEFAULT TOTAL HYDROCARBON LEAKER EMISSION FACTORS FOR UNDERGROUND NATURAL GAS STORAGE

| Underground natural gas storage | Emission factor (scf/hour/component) | |
|---|---|---|
| | If you survey using any of the methods in § 98.234(a)(1) through (6) | If you survey using Method 21 as specified in § 98.234(a)(7) |
| **Leaker Emission Factors—Storage Station, Gas Service** | | |
| Valve [1] | 14.84 | 9.51 |
| Connector (other) | 5.59 | 3.58 |
| Open-Ended Line | 17.27 | 11.07 |
| Pressure Relief Valve | 39.66 | 25.42 |
| Meter and Instrument | 19.33 | 12.39 |
| Other [2] | 4.1 | 2.63 |
| **Leaker Emission Factors—Storage Wellheads, Gas Service** | | |
| Valve [1] | 4.5 | 3.2 |
| Connector (other than flanges) | 1.2 | 0.7 |
| Flange | 3.8 | 2.0 |
| Open-Ended Line | 2.5 | 1.7 |
| Pressure Relief Valve | 4.1 | 2.5 |
| Other [2] | 4.1 | 2.5 |

[1] Valves include control valves, block valves and regulator valves.
[2] Other includes any potential equipment leak emission point in gas service that is not specifically listed in this table, as specified in § 98.232(f)(6) and (8).

TABLE W–4B TO SUBPART W OF PART 98—DEFAULT TOTAL HYDROCARBON POPULATION EMISSION FACTORS FOR UNDERGROUND NATURAL GAS STORAGE

| Underground natural gas storage | Emission factor (scf/hour/component) |
|---|---|
| **Population Emission Factors—Storage Wellheads, Gas Service** | |
| Connector | 0.01 |

TABLE W–4B TO SUBPART W OF PART 98—DEFAULT TOTAL HYDROCARBON POPULATION EMISSION FACTORS FOR UNDERGROUND NATURAL GAS STORAGE—Continued

| Underground natural gas storage | Emission factor (scf/hour/component) |
|---|---|
| Valve | 0.1 |
| Pressure Relief Valve | 0.17 |
| Open-Ended Line | 0.03 |
| **Population Emission Factors—Other Components, Gas Service** | |
| Low Continuous Bleed Pneumatic Device Vents [1] | 1.37 |
| High Continuous Bleed Pneumatic Device Vents [1] | 18.20 |
| Intermittent Bleed Pneumatic Device Vents [1] | 2.35 |

[1] Emission Factor is in units of "scf/hour/device."

■ 9. Remove Table W–5 to subpart W of part 98 and add Table W–5A and Table W–5B to subpart W of part 98 in numerical order to read as follows:

TABLE W–5A TO SUBPART W OF PART 98—DEFAULT METHANE LEAKER EMISSION FACTORS FOR LIQUEFIED NATURAL GAS (LNG) STORAGE

| LNG storage | Emission factor (scf/hour/component) | |
|---|---|---|
| | If you survey using any of the methods in § 98.234(a)(1) through (6) | If you survey using Method 21 as specified in § 98.234(a)(7) |
| **Leaker Emission Factors—LNG Storage Components, LNG Service** | | |
| Valve | 1.19 | 0.23 |
| Pump Seal | 4.00 | 0.73 |
| Connector | 0.34 | 0.11 |
| Other [1] | 1.77 | 0.99 |
| **Leaker Emission Factors—LNG Storage Components, Gas Service** | | |
| Valve [2] | 14.84 | 9.51 |
| Connector | 5.59 | 3.58 |
| Open-Ended Line | 17.27 | 11.07 |
| Pressure Relief Valve | 39.66 | 25.42 |
| Meter and Instrument | 19.33 | 12.39 |
| Other [3] | 4.1 | 2.63 |

[1] "Other" equipment type for components in LNG service should be applied for any equipment type other than connectors, pumps, or valves.
[2] Valves include control valves, block valves and regulator valves.
[3] "Other" equipment type for components in gas service should be applied for any equipment type other than valves, connectors, flanges, open-ended lines, pressure relief valves, and meters and instruments, as specified in § 98.232(g)(6) and (7).

TABLE W–5B TO SUBPART W OF PART 98—DEFAULT METHANE POPULATION EMISSION FACTORS FOR LIQUEFIED NATURAL GAS (LNG) STORAGE

| LNG storage | Emission factor (scf/hour/component) |
|---|---|
| **Population Emission Factors—LNG Storage Compressor, Gas Service** | |
| Vapor Recovery Compressor [1] | 4.17 |

[1] Emission Factor is in units of "scf/hour/device."

■ 10. Remove Table W–6 to subpart W of part 98 and add Table W–6A and Table W–6B to subpart W of part 98 in numerical order to read as follows:

TABLE W–6A TO SUBPART W OF PART 98—DEFAULT METHANE LEAKER EMISSION FACTORS FOR LNG IMPORT AND EXPORT EQUIPMENT

| LNG import and export equipment | Emission factor (scf/hour/component) | |
|---|---|---|
| | If you survey using any of the methods in § 98.234(a)(1) through (6) | If you survey using Method 21 as specified in sect; 98.234(a)(7) |
| **Leaker Emission Factors—LNG Terminals Components, LNG Service** | | |
| Valve | 1.19 | 0.23 |
| Pump Seal | 4.00 | 0.73 |
| Connector | 0.34 | 0.11 |
| Other [1] | 1.77 | 0.99 |
| **Leaker Emission Factors—LNG Terminals Components, Gas Service** | | |
| Valve [2] | 14.84 | 9.51 |
| Connector | 5.59 | 3.58 |
| Open-Ended Line | 17.27 | 11.07 |
| Pressure Relief Valve | 39.66 | 25.42 |
| Meter and Instrument | 19.33 | 12.39 |
| Other [3] | 4.1 | 2.63 |

[1] "Other" equipment type for components in LNG service should be applied for any equipment type other than connectors, pumps, or valves.
[2] Valves include control valves, block valves and regulator valves.
[3] "Other" equipment type for components in gas service should be applied for any equipment type other than valves, connectors, flanges, open-ended lines, pressure relief valves, and meters and instruments, as specified in § 98.232(h)(7) and (8).

TABLE W–6B TO SUBPART W OF PART 98—DEFAULT METHANE POPULATION EMISSION FACTORS FOR LNG IMPORT AND EXPORT EQUIPMENT

| LNG import and export equipment | Emission factor (scf/hour/component) |
|---|---|
| **Population Emission Factors—LNG Terminals Compressor, Gas Service** | |
| Vapor Recovery Compressor [1] | 4.17 |

[1] Emission Factor is in units of "scf/hour/compressor."

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Part IV

## Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators; Proposed Rule

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**18 CFR Part 35**

**[Docket Nos. RM16–23–000; AD16–20–000]**

# Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators

**AGENCY:** Federal Energy Regulatory Commission, Department of Energy.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations under the Federal Power Act (FPA) to remove barriers to the participation of electric storage resources and distributed energy resource aggregations in the capacity, energy, and ancillary service markets operated by regional transmission organizations (RTO) and independent system operators (ISO) (organized wholesale electric markets).

**DATES:** Comments are due January 30, 2017.

**ADDRESSES:** Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov*. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

*Instructions:* For detailed instructions on submitting comments and additional information on this process, see the Comment Procedures Section of this document.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**Table of Contents**



## I. Introduction

1. In this Notice of Proposed Rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) is proposing reforms to remove barriers to the participation of electric storage resources [1] and distributed energy resource [2] aggregations in the organized wholesale electric markets.[3] Specifically, we propose to require each RTO and ISO to revise its tariff to (1) establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, accommodates their participation in the organized wholesale electric markets and (2) define distributed energy resource aggregators as a type of market participant that can participate in the organized wholesale electric markets under the participation model that best accommodates the physical and operational characteristics of its distributed energy resource aggregation. We are taking this action pursuant to our legal authority under section 206 of the FPA to ensure that the RTO/ISO tariffs are just and reasonable and not unduly discriminatory or preferential.[4]

2. Resource participation in the organized wholesale electric markets is currently governed by (1) participation models [5] consisting of market rules designed for different types of resources and (2) the technical requirements for

[1] We define an electric storage resource as a resource capable of receiving electric energy from the grid and storing it for later injection of electricity back to the grid regardless of where the resource is located on the electrical system. These resources include all types of electric storage technologies, regardless of their size, storage medium (*e.g.,* batteries, flywheels, compressed air, pumped-hydro, etc.), or whether located on the interstate grid or on a distribution system.

[2] We define distributed energy resources as a source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter. These resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment.

[3] We define, for present purposes, organized wholesale electric markets as the capacity, energy, and ancillary service markets operated by regional transmission organizations (RTO) and independent system operators (ISO).

[4] 16 U.S.C. 824e (2012).

[5] We define a participation model as a set of tariff provisions that accommodate the participation of resources with particular physical and operational characteristics in the organized wholesale electric markets of the RTOs and ISOs.

market services that those resources are eligible to provide. Each RTO/ISO establishes the participation models for different types of resources and the technical requirements for providing services in a slightly different way. Sometimes RTO/ISO participation models place limitations on the services that certain types of resources are eligible to provide. For example, Stored Energy Resources are only allowed to provide regulation service in the Midcontinent Independent System Operator, Inc. (MISO). In addition, sometimes the technical requirements for providing a service may limit the types of resources that are able to provide it, such as the requirement for a resource to be running and synchronized to the grid to provide spinning reserves. Many tariffs were originally developed in an era when traditional generation resources were the only resources participating in the organized wholesale electric markets. As new and innovative resources have reached commercial maturity, RTOs/ISOs have updated their tariffs to establish participation models for these resources and, to some degree, reviewed the technical requirements for each service or determined which service the new resource could provide. If an RTO/ISO is not able to update its market rules before a new resource becomes commercially able to sell into the organized wholesale electric markets, the new resource may need to participate under one of the existing participation models developed for some other type of resource. Doing so may limit the market opportunities for new resources and correspondingly limit the potential supply of some services. For instance, some electric storage resources have chosen to participate as demand response resources simply because, absent other participation models, that is the participation model that more closely resembles the manner in which electric storage resources might participate in the organized wholesale electric markets. Further, new resources may have difficulty creating momentum for the market rule changes necessary to facilitate their participation and may thus need to spend considerable time and effort to gain entry to the organized wholesale electric markets. Where rules designed for traditional generation resources are applied to new technologies, where new technologies are required to fit into existing participation models, and where participation models focus on the eligibility of resources to provide services more so than the technical ability of resources to provide services, barriers can emerge to the participation of new technologies in the organized wholesale electric markets. We are therefore issuing this NOPR to address these barriers to the participation of electric storage resources and distributed energy resource aggregations in the organized wholesale electric markets.

3. First, we propose to require each RTO/ISO to revise its tariff to establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, accommodates their participation in the organized wholesale electric markets. As noted above, in this NOPR, we define a participation model as a set of tariff provisions that accommodate the participation of resources with particular physical and operational characteristics in the organized wholesale electric markets of the RTOs and ISOs.[6] For example, the California Independent System Operator Corporation's (CAISO) tariff defines several participation models, including those for Participating Generators, Proxy Demand Resources, Reliability Demand Response Resources, and Non-Generator Resources. These participation models create unique rules for these different types of resources where they need to be distinguished from other types of market participants. For example, the CAISO Tariff defines Non-Generator Resources as ''[r]esources that operate as either Generation or Load and that can be dispatched to any operating level within their entire capacity range but are also constrained by a MWh limit to (1) generate Energy, (2) curtail the consumption of Energy in the case of demand response, or (3) consume Energy.'' [7] Since Non-Generator Resources are operationally unique, CAISO has created rules for them that include, but are not limited to, the requirement to enter into participating generator and participating load agreements to participate in the CAISO markets,[8] the ability to participate in the Regulation Energy Management program,[9] the conditions under which payments are rescinded due to MWh constraints,[10] and the relevant bidding parameters.[11] Given the unique attributes of electric storage resources, establishing a participation model consisting of market rules that acknowledge their unique attributes will enable them to effectively participate in the organized wholesale electric markets. This participation model could adapt existing market rules to incorporate the reforms proposed below and/or create a new set of rules to accommodate the participation of electric storage resources, depending on the existing market construct in each RTO/ISO.

4. The proposed participation model must (1) ensure that electric storage resources are eligible to provide all capacity, energy and ancillary services that they are technically capable of providing in the organized wholesale electric markets; (2) incorporate bidding parameters [12] that reflect and account for the physical and operational characteristics of electric storage resources; (3) ensure that electric storage resources can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with existing market rules that govern when a resource can set the wholesale price; (4) establish a minimum size requirement for participation in the organized wholesale electric markets that does not exceed 100 kW; and (5) specify that the sale of energy from the organized wholesale electric markets to an electric storage resource that the resource then resells back to those markets must be at the wholesale locational marginal price (LMP).

5. Second, we propose to require each RTO/ISO to revise its tariff to allow distributed energy resource aggregators,[13] including electric storage resources, to participate directly in the organized wholesale electric markets. Specifically, we propose to require each RTO/ISO to establish distributed energy resource aggregators as a type of market participant and allow the distributed energy resource aggregators to register distributed energy resource aggregations under the participation model in the

[6] *See supra* note 5.

[7] CAISO Response at 3 (citing CAISO Tariff, App. A).

[8] *See* CAISO Tariff, sections 4.6 and 4.7.

[9] *See* CAISO Tariff, section 8.4.1.2. Regulation Energy Management is a market feature for resources located within the CAISO Balancing Authority Area that require Energy from the Real-Time Market to offer their full capacity as Regulation. CAISO Tariff, App. A (Definitions).

[10] *See* CAISO Tariff, sections 8.10.8.4 and 8.10.8.6.

[11] *See* CAISO Tariff, section 30.5.6.

[12] We refer to bidding parameters as the physical and operational constraints that a resource would identify per RTO/ISO requirements when submitting offers to sell capacity, energy, or ancillary services or bids to buy energy in the organized wholesale electric markets. Commission Staff referred to these as ''bid parameters'' in the Data Requests and Request for Comments issued on April 11, 2016 in Docket No. AD16–20–000.

[13] We define distributed energy resource aggregator as an entity that aggregates one or more distributed energy resources for purposes of participation in the organized wholesale capacity, energy, and ancillary service markets of the RTOs and ISOs.

RTO/ISO tariff that best accommodates the physical and operational characteristics of the distributed energy resource aggregation. We also propose to require that each RTO/ISO, to accommodate the participation of distributed energy resource aggregations in the organized wholesale electric markets, establish market rules on: (1) Eligibility to participate in the organized wholesale electric markets through a distributed energy resource aggregator; (2) locational requirements for distributed energy resource aggregations; (3) distribution factors and bidding parameters for distributed energy resource aggregations; (4) information and data requirements for distributed energy resource aggregations; (5) modifications to the list of resources in a distributed energy resource aggregation; (6) metering and telemetry system requirements for distributed energy resource aggregations; (7) coordination between the RTO/ISO, distributed energy resource aggregator, and the distribution utility; and (8) market participation agreements for distributed energy resource aggregators.

## II. Background

### *A. Electric Storage Resource and Distributed Energy Resource Aggregation Participation in Organized Wholesale Electric Markets*

6. The Commission has an ongoing interest in removing barriers to resources that are technically capable of participating in the organized wholesale electric markets and has been monitoring electric storage resource participation in these markets for some time. In 2010, Commission Staff issued a Request for Comments Regarding Rates, Accounting and Financial Reporting for New Electric Storage Technologies related to alternatives for categorizing and compensating storage services and, in particular, ideas on how best to develop rate policies that accommodate the flexibility of storage, consistent with the FPA.[14] Following that request, the Commission issued several rulemakings that have helped alleviate some of the barriers to electric storage resource participation in organized wholesale electric markets.[15] In addition, the Commission has addressed electric storage-related issues on a case-by-case basis.[16]

7. As the capabilities of electric storage resources and distributed energy resources continue to improve and their costs continue to decline, the Commission has become concerned that these resources may face barriers that limit them from participating in organized wholesale electric markets. To further examine this issue, the Commission hosted a panel to discuss electric storage resources at the November 19, 2015 Commission meeting. Subsequently, on April 11, 2016, Commission Staff issued data requests to each of the six RTOs/ISOs, seeking information about the rules in the organized wholesale electric markets that affect the participation of electric storage resources (Data Requests).[17] Concurrently, Commission Staff issued a Request for Comments, seeking comments on whether barriers exist to the participation of electric storage resources in the organized wholesale electric markets that may potentially lead to unjust and unreasonable wholesale rates (Request for Comments). In addition to the responses from the RTOs/ISOs, Commission Staff received 44 sets of comments from the entities identified in Appendix A.

8. A number of RTOs/ISOs allow participation of distributed energy resources, including electric storage resources, in the organized wholesale electric markets through distributed energy resource aggregations. For example, CAISO's Distributed Energy Resource Provider model allows for the participation of aggregated distributed energy resources in the energy and ancillary service markets.[18] Other RTOs/ISOs, including PJM Interconnection, L.L.C. (PJM), MISO, New York Independent System Operator, Inc.'s (NYISO), and SPP, allow aggregation in limited circumstances, typically linked to the requirement that the demand-side, generation, and electric storage resources are located behind the same point of interconnection or pricing node.[19] ISO New England Inc. (ISO–NE) also allows limited aggregations of generators, Alternative Technology Regulation Resources, Asset Related Demands, and demand resources subject to certain parameters.[20]

### *B. The Need for Reform*

9. The Commission must ensure that the rates, terms and conditions of jurisdictional services under the FPA are just and reasonable and not unduly discriminatory or preferential. Our proposal in this proceeding is a continuation of efforts pursuant to our authority under the FPA to ensure that the RTO/ISO tariffs and market rules produce just and reasonable rates, terms and conditions of service.[21] The Commission has observed that market rules designed for traditional generation resources can create barriers to entry for emerging technologies. The Commission has responded by promulgating rules that recognize the operational characteristics of non-traditional resources such as variable energy

[14] Request for Comments Regarding Rates, Accounting and Financial Reporting for New Electric Storage Technologies, Docket No. AD10–13–000 (June 11, 2010).

[15] *See, e.g., Frequency Regulation Compensation in the Organized Wholesale Power Markets,* Order No. 755, FERC Stats. & Regs. ¶ 31,324 (2011), *reh'g denied,* Order No. 755–A, 138 FERC ¶ 61,123 (2012) (addressing the provision of frequency regulation in organized wholesale electric markets); *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies,* Order No. 784, FERC Stats. & Regs. ¶ 31,349 (2013), *order on clarification,* Order No. 784–A, 146 FERC ¶ 61,114 (2014) (addressing third-party sales of ancillary services in bilateral markets); *Small Generator Interconnection Agreements and Procedures,* Order No. 792, 145 FERC ¶ 61,159 (2013), *clarifying,* Order No. 792–A, 146 FERC ¶ 61,214 (2014) (addressing interconnection for small generators, including electric storage resources).

[16] *See, e.g., California Indep. Sys. Operator Corp.,* 156 FERC ¶ 61,110 (2016); *Nev. Hydro Co., Inc.,* 122 FERC ¶ 61,272 (2008), *reh'g denied,* 133 FERC ¶ 61,155 (2010); *Western Grid Development, LLC,* 130 FERC ¶ 61,056, *reh'g denied,* 133 FERC ¶ 61,029 (2010); *Midwest Indep. Trans. Sys. Operator, Inc.,* 129 FERC ¶ 61,303 (2009); *New York Indep. Sys. Operator, Inc.,* 127 FERC ¶ 61,135 (2009); *California Indep. Sys. Operator Corp.,* 132 FERC ¶ 61,211 (2010); *PJM Interconnection L.L.C.,* 151 FERC ¶ 61,208, *order on reh'g,* 152 FERC ¶ 61,064 (2015), *order on reh'g and compliance,* 155 FERC ¶ 61,157, *order on reh'g and compliance,* 155 FERC ¶ 61,260 (2016); *PJM Interconnection, L.L.C.,* 132 FERC ¶ 61,203 (2010); *Commonwealth Edison Co.,* 129 FERC ¶ 61,185, at P 8 (2009).

[17] Specifically, Commission Staff requested information related to (1) the eligibility of electric storage resources to participate in the capacity, energy, and ancillary service markets in the RTOs/ISOs; (2) the technical qualification and performance requirements for market participants; (3) the bidding parameters for different types of resources; (4) opportunities for distribution-level and aggregated electric storage resources to participate in the organized wholesale electric markets; (5) the treatment of electric storage resources when they are receiving electricity for later injection to the grid; and (6) any forthcoming rule changes or other stakeholder initiatives that may affect the participation of electric storage resources in the organized wholesale electric markets.

[18] *See California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 (2016) (conditionally accepting tariff provisions to facilitate participation of aggregations of distribution-connected or distributed energy resources in CAISO's energy and ancillary service markets).

[19] *See* PJM Response at 20; MISO Response at 16; SPP Response at 7.

[20] ISO–NE Response at 26.

[21] *See, e.g., Integration of Variable Energy Resources,* Order No. 764, FERC Stats. & Regs. ¶ 31,331, *order on reh'g,* Order No. 764–A, 141 FERC ¶ 61,232 (2012), *order on reh'g,* Order No. 764–B, 144 FERC ¶ 61,222 (2013); *Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g,* Order No. 719–A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

resources and demand response.[22] For example, in Order No. 719, the Commission required each RTO/ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources met certain criteria.[23] In Order No. 764, the Commission took action to remedy operational and other challenges associated with the integration of variable energy resources caused by existing practices as well as the ancillary services used to manage system variability that were developed at a time when virtually all generation on the system could be scheduled with relative precision and when only load exhibited significant degrees of intra-hour variation.[24]

10. In this proceeding, we propose to require RTOs/ISOs to address barriers to participation of electric storage resources in the organized wholesale electric markets. As noted above, in this NOPR, we define an electric storage resource as a resource capable of receiving electric energy from the grid and storing it for later injection of electricity back to the grid regardless of where the resource is located on the electrical system.[25] These resources include all types of electric storage technologies, regardless of their size, storage medium (*e.g.,* batteries, flywheels, compressed air, pumped-hydro, etc.), or whether located on the interstate grid or on a distribution system.[26] Electric storage resources include a number of different technologies that can serve as a sink for, or source of, electricity. Electric storage resources' ability to charge and discharge electricity provides these resources with significant operational flexibility, and they can be designed to provide a variety of grid services, including bulk energy services (*e.g.,* capacity and energy) and ancillary services (*e.g.,* regulation and reserves).[27]

11. The RTOs/ISOs have taken different approaches to integrating electric storage resources into their organized wholesale electric markets. While electric storage resources (including batteries, flywheels, and pumped-hydro facilities) are already providing energy and ancillary services in some organized wholesale electric markets, these resources often must use existing participation models designed for traditional generation or load resources that do not recognize electric storage resources' unique physical and operational characteristics. Some organized wholesale electric markets have defined participation models in their tariffs for electric storage resources, but those models limit the services that electric storage resources may provide.[28] For example, these models often allow eligible electric storage resources to participate only in the regulation market. Other organized wholesale electric market rules are designed for electric storage resources with very specific characteristics, such as pumped-hydro facilities or resources with less than a one-hour maximum run time. Smaller electric storage resources are also generally restricted to participating in the organized wholesale electric markets as demand response, which can limit their ability to employ their full operational range, prohibit them from injecting power onto the grid, and preclude them from providing certain services that they are capable of providing such as operating reserves.

12. We take action in this NOPR so that electric storage resources will be able to participate in the organized wholesale electric markets to the extent they are technically capable of doing so based on rules that take into account their unique characteristics and not based on market rules designed for the unique characteristics of other types of resources. Requiring electric storage resources to use participation models designed for a different type of resource may fail to recognize electric storage resources' physical and operational characteristics and their capability to provide energy, capacity and ancillary services in the organized wholesale electric markets. Current tariffs that do not recognize the operational characteristics of electric storage resources serve to limit the participation of electric storage resources in the organized wholesale electric markets and result in inefficient use of these resources (*i.e.,* electric storage resources may be dispatched to provide one service when they could, absent market rule limitations, provide another service more economically). As a result, resources, including electric storage resources, do not get dispatched efficiently, thereby impacting the competitiveness of the market outcomes. Limiting the services an electric storage resource is eligible to provide and limiting the efficiency in which it is dispatched to provide services may also inhibit developers' incentives to design their electric storage resources to provide all capacity, energy and ancillary services these resources could otherwise provide. This further reduces competition for providing those services in the organized wholesale electric markets. Effective integration of electric storage resources into the organized wholesale electric markets would enhance competition and, in turn, help to ensure that these markets produce just and reasonable rates.

13. We are also concerned that existing RTO/ISO tariffs impede the participation of distributed energy resources in the organized wholesale electric markets by providing limited opportunities for distributed energy resource aggregations. Distributed energy resources include a variety of constantly evolving technologies (including, but not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment) that are connected to the power grid at distribution-level voltages. While these distributed energy resources can at times effectively supply the capacity, energy, and ancillary services that are exchanged in the organized wholesale electric markets, they can at times be too small to participate in these markets individually. In addition, responses to the Data Requests and Request for Comments demonstrate that current organized wholesale electric market rules often limit the services distributed energy resources are eligible to provide, in many cases only allowing these resources to be used as demand response or load-side resources when they are located behind a customer

[22] *See, e.g.,* Order No. 764, FERC Stats. & Regs. ¶ 31,331; Order No. 719, FERC Stats. & Regs. ¶ 31,281.

[23] Order No. 719, FERC Stats. & Regs. ¶ 31,281 at PP 19, 47–48.

[24] Order No. 764, FERC Stats. & Regs. ¶ 31,331.

[25] *See supra* note 1.

[26] *Id.*

[27] Sandia National Laboratories, *DOE/EPRI Electricity Storage Handbook in Collaboration with NRECA,* Report No. SAND2015–1002, Chapter 1 (Feb. 2015) (Sandia Report).

[28] *See, e.g., Midwest Indep. Trans. Sys. Operator, Inc.,* 129 FERC ¶ 61,303 at PP 40, 64 (Commission ''note[d] that the Midwest ISO [SER] proposal is intended to implement a specific technology, the fly-wheel technology developed by Beacon Power''; and SER category was ''specifically designed for a specific technology that provides short-term Stored Resources only in the regulating reserve market''); MISO FERC Electric Tariff, section 1.S (Stored Energy Resources); NYISO Services Tariff, section 2.12 (defining Limited Energy Storage Resource as a ''Generator authorized to offer Regulation Service only and characterized by limited Energy storage, that is, the inability to sustain continuous operation at maximum Energy withdrawal or maximum Energy injection for a minimum period of one hour.''). NYISO limits Limited Energy Storage Resources to providing regulation service only and Demand Side Resources and Generators that can sustain operation for longer than one hour are not eligible to be Limited Energy Storage Resources. NYISO Response at 3–4.

meter [29] or by imposing prohibitively expensive or otherwise burdensome requirements.[30]

14. As with electric storage resources, we preliminarily find that the barriers to the participation of distributed energy resources through distributed energy resource aggregations in the organized wholesale electric markets may, in some cases, unnecessarily restrict competition, which could lead to unjust and unreasonable rates. Effective wholesale competition encourages entry and exit and promotes innovation, incentivizes the efficient operation of resources, and allocates risk appropriately between consumers and producers. Removing these barriers will enhance the competitiveness, and in turn the efficiency, of organized wholesale electric markets and thereby help to ensure just and reasonable and not unduly discriminatory or preferential rates for wholesale electric services. We also note that participation of electric storage resources in the organized wholesale electric markets allows for more efficient operation of large thermal generators, enhances reliability, provides congestion relief, improves integration of variable energy resources, and reduces the burden on the transmission system.[31]

15. Distributed energy resource aggregations are often limited to participating in organized wholesale electric markets as demand response, which can limit the aggregations' design and operations, as well as the services they may provide. However, advancements in metering, telemetry, and communication technologies support the aggregation of distributed energy resources, allowing these resources to meet the minimum size requirements to participate in the organized wholesale electric markets under participation models other than demand response. Additionally, demand response models often prohibit distributed energy resources from injecting power back onto the grid or increasing consumption if there is an operational requirement for such performance.[32] By requiring RTOs/ISOs to allow the participation of distributed energy resource aggregations, aggregators will be able to bundle distributed energy resources to meet RTO/ISO qualification and performance requirements, and the RTOs/ISOs will be able to capitalize on the aggregation's full operational range. The recent proliferation of, and technological advancements in, distributed energy technologies, as well as their decreasing costs, create opportunities for distributed energy resource aggregations to be eligible to provide a variety of services to the organized wholesale electric markets.[33]

16. Accordingly, we propose to require the RTOs/ISOs to revise their tariffs to: (1) Establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, accommodates their participation in the organized wholesale electric markets and (2) define distributed energy resource aggregators as a type of market participant that can participate in the organized wholesale electric markets under the participation model that best accommodates the physical and operational characteristics of its distributed energy resource aggregation. These proposed requirements will clarify how electric storage resources and distributed energy resources of all types and sizes may provide services in the organized wholesale electric markets that they are technically capable of providing.

## III. Discussion

### *A. Elimination of Barriers to Electric Storage Resource Participation in Organized Wholesale Electric Markets*

#### 1. Creation of a Participation Model for Electric Storage Resources

##### i. Introduction

17. Resource participation in organized wholesale electric markets is currently governed by (1) participation models consisting of market rules designed for different types of resources and (2) the technical requirements for market services that those resources are eligible to provide. As noted above, in this NOPR, we define a participation model as a set of tariff provisions that accommodate the participation of resources with particular physical and operational characteristics in the organized wholesale electric markets of the RTOs and ISOs.[34] While these participation models are designed to

[29] *See, e.g.,* MISO Response at 15 (noting that electric storage resources connected to the distribution system can participate in its markets as Load Modifying Resources and Demand Response Resources—Types I or II); PJM Response at 3–6 (stating that, if an electric storage resource is located behind a customer meter, then PJM considers it demand response, which is not studied for deliverability and is not eligible to inject energy into the distribution or PJM transmission system and noting that any injection would subject it to generator interconnection obligations).

[30] *See* Energy Storage Association Comments at 29 (stating that metering and telemetry requirements and interconnection processes can pose prohibitively high transaction costs for the small project sizes that characterize behind-the-meter storage, which creates undue burdens on behind-the-meter storage participation in most RTOs/ISOs and noting that the ability to bid aggregated distributed resources into wholesale markets is not possible in some RTOs/ISOs and is unclear in others (such as NYISO, which does not allow aggregations to meet the 1 MW size for a Limited Energy Storage Resource)). Energy Storage Association also asserts that at present most RTOs/ISOs do not allow behind-the-meter storage to net inject power to provide wholesale generator services. *Id. See also* NextEra Comments at 11 (stating that every RTO/ISO prohibits behind-the-meter resources from having net injections to the grid).

[31] Among the benefits cited by a recent report by the Lawrence Berkeley National Laboratory are (1) a less costly, cleaner, and more competitive bulk power system and (2) greater reliability through consumer reliance upon distributed energy resources to provide resilience from bulk power and system and distribution service interruptions. Lawrence Berkeley National Laboratory, *Electric Industry Structure and Regulatory Responses in a High Distributed Energy Resources Future,* at 26–28 (Report 1, Nov. 2015), *https://emp.lbl.gov/sites/all/files/lbnl-1003823_0.pdf* (Berkeley Lab Report). *See also* DNV–GL, *A Review of Distributed Energy Resources: New York Independent System Operator,* at 18 (Sept. 2014) (DNV–GL Report), *http://www.nyiso.com/public/webdocs/media_room/publications_presentations/Other_Reports/Other_Reports/A_Review_of_Distributed_Energy_Resources_September_2014* (''Benefit streams commonly attributed to distributed energy resources include, among others: Avoided expansion of generation, transmission, or distribution facilities, power outage mitigation or critical power support during power outages (resiliency) and power quality improvement (enhanced reliability); U.S. Department of Energy, *The Potential Benefits of Distributed Generation and Rate-related Issues that May Impede Their Expansion: A Study Pursuant to Section1817 of the Energy Policy Act of 2005* (Feb. 2007), *https://www.ferc.gov/legal/fed-sta/exp-study.pdf*.; IEA, *Re-powering Markets: Market design and regulation during the transition to low-carbon power systems,* at 33 (2016) (''active management of renewable resources connected to distribution networks can help reduce or delay distribution network investments'').

[32] *See* PJM Response at 5 (stating that, like other types of resources that participate in PJM's markets only by providing load reductions, demand-side electric storage resources are not studied by PJM through the generation interconnection process and are not allowed to inject energy beyond the customer's meter and onto the distribution or transmission system, as applicable).

[33] The Berkeley Lab Report notes that technological and procedural innovation and advancements are leading to substantial reduction in the cost of some of these resources, such as through a continued long-term downward trend in the installed cost of solar PV. Berkeley Lab Report at 50, App. A. It adds that there is a wide range of forecasts of the potential for distributed energy resources over the coming decades, some of which suggest that penetrations could be significant. Estimated increases range from a current 11 percent distributed energy resource penetration rate to 19 percent of required capacity (MW) in the Eastern Interconnection under a base case analysis by 2030; and a projection of a 37.5 percent penetration in the Western Interconnection by 2032. *Id.* at 51 (citing Western Electricity Coordinating Council, *SPSC Study High EE/DR/DG* (Sept. 19, 2013), *https://www.wecc.biz/_layouts/15/WopiFrame.aspx?sourcedoc=/Reliability/2032_HighEEDSMDG_StudyReport.docx&action=default&DefaultItemOpen=1*; Navigant Consulting, Inc., *Assessment of Demand-Side Resources Within the Eastern Interconnection,* March 2013, *http://bit.ly/EISPCdsr*).

[34] *See supra* note 5.

accommodate the unique characteristics of different resources, new technologies may be required to fit into existing participation models when market rules for their unique characteristics have not been developed. Moreover, even where participation models for new technologies, such as electric storage resources, do exist, they may unnecessarily limit a resource's ability to qualify for the participation model or to provide certain services using it, despite the technical capabilities of the resource.

18. The Commission previously has allowed flexibility for each RTO/ISO to approach the integration of electric storage resources in its organized wholesale electric markets differently. RTOs/ISOs developed most of their participation models before electric storage resources achieved their current technical capability and commercial viability, so some markets rely on these existing models for the participation of electric storage resources. For example, ISO–NE indicates that, for an electric storage resource to be eligible to provide all wholesale services, it must register as a Generator Asset,[35] which is a participation model designed for traditional generation and which may not reflect the distinct operational characteristics or capabilities of electric storage resources. Alternatively, some RTOs/ISOs have created participation models for electric storage resources that limit the participation of those resources to the regulation market or are designed for electric storage resources with very specific characteristics, such as pumped-hydro facilities or resources with less than a one-hour maximum run time.[36] However, other RTOs/ISOs have created participation models for electric storage resources to provide a wider variety of services in the organized wholesale electric markets (such as PJM's Energy Storage Resource model [37] and CAISO's Non-Generator Resource model [38]). Establishing a robust participation model for electric storage resources will help remove barriers to the participation of electric storage resources in the organized wholesale electric markets and ensure that electric storage resources can provide the services that they are technically capable of providing.

ii. Current Rules

19. In their responses to the Data Requests, the RTOs/ISOs describe opportunities for electric storage resources to provide various energy and ancillary service market services. For example, in CAISO, electric storage resources are eligible to participate in the energy and ancillary service markets as Participating Generators, Non-Generator Resources, Pumped Storage Hydro Units, or Demand Response Resources, even as part of distributed energy resource aggregations.[39] Under ISO–NE's market rules, electric storage resources can provide all services when they qualify as a generator, provide all services except 10-minute spinning and 10-minute non-spinning reserves when they qualify as demand response, and provide regulation as an Alternative Technology Regulation Resource.[40]

20. In MISO, electric storage resources are eligible to participate as a Stored Energy Resource (which is only eligible to provide regulation), a Generation Resource, a Use-Limited Resource that is unable to operate continuously on a daily basis, and several types of demand response resources (some of which are limited in the products that they are eligible to provide).[41] NYISO allows electric storage resources to qualify as Energy Limited Resources, Limited Energy Storage Resources (which are eligible to provide regulation service only), or demand response resources.[42] PJM allows electric storage resources to participate as generation resources or demand-side resources (which are not eligible to provide non-synchronized reserves).[43] Finally, SPP allows electric storage resources to qualify as Demand Response Resources, Dispatchable Resources, External Resources, External Dynamic Resources, and Quick-Start Resources, if they can sustain output for 60 minutes.[44]

21. Some RTOs/ISOs concede that their existing participation models may fail to address the characteristics of certain electric storage resources.[45] CAISO urges the Commission to preserve some flexibility for the RTOs/ISOs to develop market rules and participation models that respond to electric storage developments.[46]

iii. Comments

22. Numerous commenters argue that the lack of a participation model that accommodates the participation of electric storage resources creates barriers to their participation in organized wholesale electric markets. For example, Alevo asserts that the lack of a defined asset class for electric storage resources poses a barrier to their participation, limiting market efficiency and competition and increasing costs.[47] Advanced Energy Economy claims that the failure to account for the unique attributes, characteristics, and benefits of advanced energy technologies prevents projects from obtaining financing.[48] More specifically, Energy Storage Association asserts that NYISO's Behind-the-Meter Net Generator design still effectively excludes participation of electric storage resources because it does not account for electric storage functionality.[49]

23. Many commenters request that the Commission require the RTOs/ISOs to establish a participation model for electric storage resources that allows them to provide all services.[50] Alevo argues that such a participation model should not limit duration of discharge or services provided,[51] while NY Battery and Energy Storage Consortium states that it should utilize appropriate bidding parameters and resource modeling for electric storage resources.[52] California Energy Storage Alliance asks the Commission to direct the RTOs/ISOs to develop a market model specific to behind-the-meter electric storage resources, which would allow them to respond to market signals to provide any wholesale market service (*e.g.,* frequency regulation, demand response, spinning reserve) without restrictions, with its market participation governed by minimum performance requirements.[53] Electric Vehicle R&D Group supports the creation of a separate participation model for electric storage resources that

[35] ISO–NE Response at 3–5.

[36] MISO Response at 2 (stating that MISO's Stored Energy Resource model is limited to regulation service); and NYISO Response at 3–4 (stating that NYISO limits Limited Energy Storage Resources to providing regulation service only).

[37] An Energy Storage Resource is defined as a ''flywheel or battery storage facility solely used for short term storage and injection of energy at a later time to participate in the PJM energy and/or Ancillary Services markets as a Market Seller.'' PJM Response at 6 (citing PJM Tariff, Att. K, section 1.3.).

[38] *See supra* note 7.

[39] CAISO Response at 2–8. *See California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229.

[40] ISO–NE Response at 3–5.

[41] MISO Response at 7–8.

[42] NYISO Response at 1–6.

[43] PJM Response at 4.

[44] SPP Response at 3–4.

[45] MISO Response at 3; NYISO Response at 17.

[46] CAISO Response at 1–2.

[47] Alevo Comments at 4, 7–17 (pointing to its analyses of the benefits that electric storage resource participation could provide to energy, capacity, and ancillary service markets).

[48] Advanced Energy Economy Comments at 7.

[49] Energy Storage Association Comments at 29–30.

[50] *Id.* at 8–9, 24; NY Battery and Energy Storage Consortium Comments at 5; Ormat Comments at 2–3; Electric Vehicle R&D Group Comments at 3.

[51] Alevo Comments at 8.

[52] NY Battery and Energy Storage Consortium Comments at 5.

[53] California Energy Storage Alliance Comments at 4–5.

allows for bidirectional power flow.[54] Duke Energy also encourages modifications to market rules to facilitate electric storage resource deployment, subject to reliability requirements and non-preferential treatment.[55]

Other commenters explain how the existing participation models for demand response resources, under which electric storage resources sometimes participate in the organized wholesale electric markets, do not adequately accommodate electric storage resource participation. Advanced Microgrid Solutions asserts that the compensation methods under demand response resource participation models should not be applied to electric storage resources because, unlike the demand reductions that demand response resources provide, the energy that electric storage resources deliver is purchased in the form of energy consumed during another time such that any net-benefit test is unnecessary.[56] Energy Storage Association, SolarCity, and California Energy Storage Alliance contend that the baselines used to measure demand response resource deliveries present a barrier to electric storage resource participation under demand response participation models and can limit the ability of behind-the-meter electric storage resources to provide their full capability into wholesale markets.[57] SolarCity further argues that requiring behind-the-meter electric storage resources to participate as demand response creates a barrier for these resources, as they are physically and economically capable of providing electricity beyond the customer's load.[58] Tesla contends that customer-sited resources (such as electric storage resources) are interactive grid resources that are often relegated to act as less flexible demand response resources when participating in organized wholesale electric markets.[59] Energy Storage Association argues that wholesale demand response constructs can prohibit behind-the-meter electric storage resources from offering other services.[60]

24. Many commenters also state that behind-the-meter electric storage resources should be permitted to inject power beyond the retail meter. Energy Storage Association and NextEra argue that no RTO/ISO allows behind-the-meter storage to net inject power to provide wholesale generator services.[61] Similarly, Advanced Energy Economy and Solar Grid Storage argue that PJM's restriction on the injection of energy past a customer's retail meter during operations for providing ancillary services in their markets is a barrier to storage.[62] Solar Grid Storage argues that PJM's ''no injection'' barrier effectively excludes all residential customers with storage from participation in the PJM ancillary service markets, despite the growing potential of this customer segment to provide meaningful resources to that organized market.[63]

25. Some commenters call for the creation of a ''load increase'' participation model for electric storage resources that allows electric storage resources to be dispatched to receive electricity from the grid. For example, National Hydropower Association states that pumped-storage projects are not adequately valued because they are regarded as either a generator or a load, which results in the undervaluation of these projects and no new major plants being built in the last 30 years.[64] National Hydropower Association asks the Commission to consider adding pumped-storage as a dispatchable ''load increase'' demand response resource.[65]

iv. Proposed Reforms

26. As numerous commenters state, existing RTO/ISO rules that govern participation of electric storage resources in some organized wholesale electric markets fail to ensure that electric storage resources that are technically capable of providing specific services are permitted to do so. Providing a participation model that recognizes the unique characteristics of electric storage resources will help eliminate barriers to their participation in the organized wholesale electric markets and promote competition and economic efficiency. We therefore propose to require each RTO/ISO to revise its tariff to include a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, accommodates their participation in organized wholesale electric markets.

27. As the costs of electric storage resources continue to decline and their technical potential expands, the ability of these resources to provide operational and economic benefits to the organized wholesale electric markets will increase. We preliminarily find that it is important to remove barriers to participation now so that the competitive benefits are realized without delay.

28. We thus preliminarily find that it is necessary to take action to remove barriers to the participation of electric storage resources in organized wholesale electric markets by requiring that the RTOs/ISOs revise their tariffs to establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, accommodates their participation in the organized wholesale electric markets. In addition, to accommodate the physical and operational characteristics of electric storage resources, we propose to require that this participation model satisfy each of the following requirements (as discussed in detail in Section III.A.2 of this NOPR):

a. Electric storage resources must be eligible to provide all capacity, energy and ancillary services that they are technically capable of providing in the organized wholesale electric markets;

b. The bidding parameters incorporated in the participation model must reflect and account for the physical and operational characteristics of electric storage resources;

c. Electric storage resources can be dispatched and can set the wholesale market clearing price as both a wholesale seller and a wholesale buyer consistent with existing rules that govern when a resource can set the wholesale price;

d. The minimum size requirement for electric storage resources to participate in the organized wholesale electric markets must not exceed 100 kW; and

e. The sale of energy from the organized wholesale electric markets to an electric storage resource that the resource then resells back to those markets must be at the wholesale LMP.

29. To further ensure that the proposed participation model for electric storage resources will accommodate both existing and future electric storage resource technologies, we propose that each RTO/ISO define the criteria in its tariff that a resource must meet to qualify to use this participation model based on the physical and operational attributes of electric storage resources, namely their ability to both charge and discharge energy. As such, the qualification

[54] Electric Vehicle R&D Group Comments at 3.

[55] Duke Energy Comments at 4.

[56] Advanced Microgrid Solutions Comments at 5.

[57] Energy Storage Association Comments at 28; SolarCity Comments at 8; California Energy Storage Alliance Comments at 4.

[58] SolarCity Comments at 4.

[59] Tesla Comments at 4.

[60] Energy Storage Association Comments at 28.

[61] *Id.* at 29; NextEra Comments at 11. NextEra explains that a net injection is when the output of an electric storage resource exceeds the customer's load that it is sited with and the electric storage resource exports power back to the grid.

[62] Advanced Energy Economy Comments at 16–17; Solar Grid Storage Comments at 2.

[63] Solar Grid Storage Comments at 3.

[64] National Hydropower Association Comments at 5–6.

[65] *Id.* at 6.

criteria for the proposed participation model must not limit participation to any particular type of electric storage resource or other technology. In addition, those qualification criteria should ensure that the RTO/ISO is able to dispatch the resource in a way that recognizes its physical constraints and optimizes its benefits to the RTO/ISO. We do not at this time propose to define the qualification criteria that each RTO/ISO use but rather propose to provide the RTOs/ISOs with flexibility to propose qualification criteria that best suit their proposed participation models. However, we invite comment on whether the Commission should establish the qualification criteria and, if so, what specific qualification criteria the Commission should require.

30. We are not proposing to limit the use of this participation model exclusively to electric storage resources as defined herein. While the requirements for the proposed participation model set forth here are designed to accommodate the physical and operational characteristics of electric storage resources, we acknowledge that there may be other types of resources whose physical or operational characteristics could qualify under the proposed participation model. This may be particularly true for the distributed energy resource aggregations considered in Section III.B below.[66]

31. In addition to including a participation model for electric storage resources in its tariff, we propose that each RTO/ISO propose any necessary additions or modifications to its existing tariff provisions to specify: (1) Whether resources that qualify to use the participation model for electric storage resources will participate in the organized wholesale electric markets through existing or new market participation agreements; and (2) whether particular existing market rules apply to resources participating under the electric storage resource participation model. CAISO, for example, has adopted numerous tariff revisions for its Non-Generator Resource participation model.[67]

32. Finally, we recognize that there are implementation costs for creating a new participation model for electric storage resources. While we believe the participation model and its characteristics described below will benefit the participation of electric storage resources in the organized wholesale electric markets, we acknowledge that the RTOs/ISOs will need to develop rules that govern the participation model as well as make software changes to reflect how these resources will be modeled and dispatched when they participate in the markets. We therefore seek comment from the RTOs/ISOs on the changes that would be required to implement the proposed participation model for electric storage resources as well as the associated costs and how those costs could be minimized.

2. Requirements for the Participation Model for Electric Storage Resources

a. Eligibility To Participate in Organized Wholesale Electric Markets

i. Introduction

33. Electric storage resources have the potential to provide a diverse array of services to the organized wholesale electric markets and to be designed to meet various technical requirements. However, in many cases, the existing participation models that electric storage resources are eligible to use in the RTOs/ISOs preclude electric storage resources from providing all of the services that they are technically capable of providing. In other instances, barriers may emerge as a result of the existing technical requirements for providing certain services that may not be appropriate for fast and controllable technologies such as electric storage resources. Market rules that were designed for traditional generation technologies or that otherwise prevent new technologies from providing services that they are technically capable of providing can have detrimental impacts on the competitiveness of the organized wholesale electric markets.

ii. Current Rules

34. Several of the RTOs/ISOs identify limitations on the services that electric storage resources may provide, depending on the participation model an electric storage resource elects to use. ISO–NE states that the non-dispatchability of Settlement Only Resources and non-dispatchable generators prohibits such resources from providing operating reserves. In addition, resources that cannot provide energy within 10 minutes cannot provide 10-minute spinning or 10-minute non-spinning reserves.[68] ISO–NE also states that demand response resources with one or more controllable generators, including storage resources, are not eligible to provide 10-minute spinning reserve. In ISO–NE, electric storage resources can only provide regulation as an Alternative Technology Regulation Resource.[69]

35. MISO states that a Stored Energy Resource is not qualified for capacity, energy, ramp capability and contingency reserves.[70] MISO states that Demand Response Resource—Type I is not eligible for regulating reserve and ramp capability products and that Dispatchable Intermittent Resources are a subset of Generation Resources that are not eligible to provide regulating reserves and contingency reserves. MISO states that the Load Modifying Resource category is designed to provide energy in emergency conditions and is only intended for the provision of capacity. MISO also states that Emergency Demand Response can only provide emergency energy, on a voluntary basis.

36. NYISO states that Limited Energy Storage Resources are limited to selling only regulation service in the ancillary service market.[71] NYISO further states that Emergency Demand Response Program resources are only eligible to provide energy, Special Case Resources are only eligible to provide energy and capacity, and Demand Side Ancillary Services Program Resources are only eligible to provide ancillary services. PJM states that demand response resources, including electric storage resources, are ineligible to provide non-synchronized reserves because demand response resources are already synchronized to the grid when consuming power, and so would always

[66] For example, resources such as thermal storage that can both increase and decrease their energy consumption could aggregate with other distributed energy resources with common physical or operational characteristics and qualify as a market participant using the participation model proposed here.

[67] *See, e.g.,* CAISO Tariff, sections 4.6 (Relationship Between CAISO and supply resources), 4.7 (Relationship between CAISO and participating loads), 8.4.1.2 (availability of Regulation Energy Management to Scheduling Coordinators for Non-Generator Resources), 8.10.8.4 (Rescission of Ancillary Service Capacity Payments for Non-Generator Resources), 8.10.8.6 (Rescission of Payments for Regulation Up and Regulation Down Capacity), 11.8 (Bid cost recovery for scheduling coordinators for Non-Generator Resources), 27.9 (MWh Constraints for Non-Generator Resources), 30.5.6 (bid components of Non-Generator Resource bids), 31.2 (Day-ahead market power mitigation process), 34.1.5 (Mitigating of Bids in the real time market), 40.10.3.2 Flexible Capacity Category—Base Ramping Resources (addressing inclusion of Non-Generator Resources), 40.10.3.3 Flexible Capacity Category—Peak Ramping Resources (addressing inclusion of Non-Generator Resources), 40.10.3.4 Flexible Capacity Category—Super-Peak Ramping Resources (addressing inclusion of Non-Generator Resources), 40.10.6.1 (Day-Ahead and Real-Time Availability providing for certain Non-Generator Resources bidding requirements).

[68] ISO–NE Response at 11.

[69] *Id.* at 3–5.

[70] MISO Response at 7–8.

[71] NYISO Response at 6–7.

be classified as sync reserves when curtailing.[72]

iii. Comments

37. Many commenters point to organized wholesale electric markets where electric storage resources cannot participate, or cannot participate fully, because market rules are either designed for traditional generation or they place unnecessary limitations on electric storage resources. Both Advanced Energy Economy and NextEra argue that a resource's eligibility to provide a particular service should be based on whether it has the technical attributes necessary to provide that service rather than on its participation model.[73] EEI argues that RTOs/ISOs may need to modify their tariffs to account for electric storage resources because many existing market rules went into place prior to the relatively recent advances in electric storage technology.[74] Likewise, Alevo contends that applying market rules to electric storage resources that were designed for transmission, generation, and demand assets unfairly disadvantages electric storage resources.[75] SolarCity claims that market rules that prevent the participation of electric storage resources in multiple markets, particularly for ancillary services, discriminate against behind-the-meter electric storage resources that can provide multiple services concurrently by preventing them from stacking multiple value streams.[76] SolarCity suggests that the provision of one wholesale market product should not preclude provision of other wholesale market products when resources are technically capable of providing multiple services.

38. Some commenters note concerns with the eligibility of electric storage resources to provide services in specific markets. According to AES Companies, Indianapolis Power & Light Company's Harding Street Battery Energy Storage System, a fully-developed grid-scale battery, cannot participate in MISO's markets because of the limitations placed on the services Stored Energy Resources are eligible to provide and the way they are dispatched.[77] AES Companies further note that MISO's Stored Energy Resource definition specifically disallows capacity accreditation, even though some electric storage resources have sufficient discharge duration to provide capacity and ancillary services.[78] Similarly, Minnesota Energy Storage Alliance contends that none of the participation models that allow electric storage resources to participate in MISO's capacity, energy, and ancillary service markets facilitate participation of battery storage technologies and, in some cases, they limit the products an electric storage resource can provide.[79] In contrast, Manitoba Hydro, which operates hydroelectric facilities with reservoir storage that participate in the MISO market as Use-Limited Resources, states that MISO's current market rules are not barriers to electric storage resource participation.[80]

39. NY Battery and Energy Storage Consortium asserts that NYISO's market rules prevent electric storage resources from fully participating in NYISO's markets, noting that electric storage resources with less than 60 minutes of output duration can only participate as Limited Energy Storage Resources and can only provide regulation.[81] NY Transmission Owners also argue that NYISO's rules do not reflect the ability of certain electric storage resources to provide their maximum output for regulation service over a multi-hour period and do not allow them to participate in the energy and ancillary service markets.[82]

40. According to Energy Storage Association, resources that participate under CAISO's Proxy Demand Response participation model are prohibited from providing frequency regulation, even though they may be technically capable of doing so.[83] Finally, NextEra notes that ISO–NE, NYISO, and MISO prohibit an electric storage resource offering regulation from offering any other service, even though a longer-duration electric storage resource could provide regulation from a portion of its capacity while providing other reserve services or energy from the remainder of its capacity.[84]

41. Other commenters focus on technical requirements that limit the ability of electric storage resource to provide certain services. NRECA states that minimum technical requirements should not create undue barriers to resources capable of performing a service.[85] Similarly, APPA states that RTOs/ISOs should establish reasonable qualification criteria on a resource-specific basis.[86] NY Battery and Energy Storage Consortium argues that distributed electric storage resources, both grid-connected and customer-sited, face barriers to market participation due to eligibility rules and qualification/performance requirements that should be eliminated.[87]

42. Some commenters focus on the technical requirements in the regulation markets. Viridity explains that, while the rapid ramp rates of electric storage resources allow them to provide regulation service, their discharge is of limited duration, so RTOs/ISOs should utilize these resources for short periods.[88] According to Viridity, requiring such resources to provide regulation service over longer periods is inconsistent with the nature of frequency response and is detrimental to the life span and effectiveness of these resources. NextEra contends that, despite implementation of Order No. 755 (which removed certain barriers to the ability of fast-acting resources to provide frequency regulation service), MISO and SPP continue to rely on the slow ramping automatic generation control signal developed for traditional generation resources for regulation service.[89] NextEra notes that advanced electric storage technologies can respond faster than these slower regulation signals allow. NextEra points out that, in contrast, NYISO matches the dispatch of regulation resources to the specific ramping capabilities of each resource.[90]

43. Other commenters contend that reliability standards may preclude electric storage resources from providing certain ancillary services. Specifically, Energy Storage Association states that NYISO suggested that the Northeast Power Coordinating Council's (NPCC) qualification criteria may prohibit grid-connected electric storage

[72] PJM Response at 4.

[73] Advanced Energy Economy Comments at 10–11; NextEra Comments at 5.

[74] EEI Comments at 4.

[75] Alevo Comments at 8.

[76] SolarCity Comments at 5.

[77] AES Companies Comments at 9–10 (citing MISO Response at 3).

[78] *Id.* at 2, 14.

[79] Minnesota Energy Storage Alliance Comments at 2, 4. For example, Minnesota Energy Storage Alliance contends that MISO's Demand Response Resource—Type I classification is inappropriate for advanced electric storage resources because it is designed for resources that respond as a single block, on or off, and cannot provide regulating reserve and ramping products.

[80] Manitoba Hydro Comments at 4.

[81] NY Battery and Energy Storage Consortium Comments at 5.

[82] NY Transmission Owners Comments at 3.

[83] Energy Storage Association Comments at 28.

[84] NextEra Comments at 5 (citing MISO Response at 7; ISO NE Response at 3; NYISO Response at 7).

[85] NRECA Comments at 6–7.

[86] APPA Comments at 10–11.

[87] NY Battery and Energy Storage Consortium Comments at 6.

[88] Viridity Comments at 3–4.

[89] NextEra Comments at 9 (citing *https://www.misoenergy.org/Library/Repository/Communication%20Material/Market%20Enhancements/Market%20Roadmap/Market%20Roadmap%20Priorities.pdf*) (noting that MISO is pursuing an automatic generation control enhancement that would implement a faster signal similar to those used by other RTOs/ISOs).

[90] *Id.* at 9.

resources from providing synchronized reserves because inverter-based resources like electric storage cannot comply with the required settings inherent to synchronous generators.[91] Similarly, ISO–NE states that demand response resources are precluded from providing 10-minute spinning reserve per the ISO–NE tariff definition, which is based on the NPCC requirement that loads cannot provide synchronized reserve if the reduction in load is dependent on starting a generator.[92]

44. National Electrical Manufacturers Association argues that, in ancillary service markets, spinning reserves are limited to online, synchronized spinning generation resources. According to National Electrical Manufacturers Association, electric storage systems capable of providing fast-reacting, synchronized electricity should be allowed to compete fully to provide spinning reserves.[93] Wellhead asks the Commission to require changes to NERC definitions so that non-synchronous resources are not categorically excluded from providing reserves. Wellhead notes that, under the NERC definition of ''Spinning Reserves,'' the phrase ''unloaded generation that is synchronized'' does not clearly allow electric storage resources to participate as spinning reserves. Wellhead also notes that NERC's definition of ''Operating Reserves—Spinning'' also does not clearly allow for market participation of electric storage resources because they are not generation synchronized to the system.[94]

45. Commenters also note that the requirement in some RTOs and ISOs to have an energy schedule to provide ancillary services is a barrier to electric storage resource participation in ancillary service markets. Commenting on MISO's market rules, Energy Storage Association argues that electric storage resources should not have to offer energy to participate in certain ancillary service markets because, unlike traditional generators, electric storage resources are able to ramp immediately to provide spinning reserve and ramping service without having to provide energy to do so.[95] Energy Storage Association explains that requiring an electric storage resource to offer energy greatly diminishes its capability to provide services in the ancillary service markets because storage resources are energy-limited.

46. For the capacity markets, commenters ask the Commission to clarify that an electric storage resource should be allowed to de-rate its capacity (*i.e.,* offer a quantity less than its nameplate capacity) to ensure it can satisfy the minimum run-time requirement.[96] Energy Storage Association states, for example, that, in the NYISO and MISO capacity markets, an electric storage resource with a run-time duration of less than four hours relative to its nameplate capacity should be able to qualify for capacity at a lower power level than it would be able to sustain for four hours at nameplate output. More specifically, NY Battery and Energy Storage Consortium states that a 10 MW/2-hour storage resource should be able to qualify for 5 MW of capacity as long as it can sustain 5 MW for 4 hours.

47. In contrast, some commenters, such as APPA, state that eligibility is not a significant problem for electric storage resources.[97] Similarly, Electric Power Supply Association argues that the RTO/ISO responses to the Data Requests show that electric storage resources can fully participate in the organized wholesale electric markets.[98] The PJM Market Monitor also claims there are no market rules that artificially preclude participation by electric storage resources in any of PJM's markets.[99] The PJM Market Monitor states that electric storage resources can make offers directly into PJM's wholesale markets to provide energy, capacity, and ancillary services or can participate as demand response resources.

iv. Proposed Reforms

48. We propose to require RTOs/ISOs to modify their tariffs to establish a participation model consisting of market rules for electric storage resources under which a participating resource is eligible to provide any capacity, energy, and ancillary service that it is technically capable of providing in the organized wholesale electric markets. In addition, we propose that electric storage resources should be able, as part of the participation model, to be eligible to provide services that the RTOs/ISOs do not procure through a market mechanism, such as blackstart, primary frequency response, and reactive power, if they are technically capable. Where compensation for these services exists, electric storage resources should also receive such compensation commensurate with the service provided.

49. We also propose to require each RTO/ISO to revise its tariff to clarify that an electric storage resource may de-rate its capacity to meet minimum run-time requirements to provide capacity or other services. This proposed requirement will help ensure that electric storage resources are able to provide all services that they are technically capable of providing by accommodating their physical and operational characteristics, while still maintaining the quality and reliability of services they seek to provide. In RTOs/ISOs with capacity markets, we propose that the de-rated capacity value for electric storage resources be consistent with the quantity of energy that must be offered into the day-ahead energy market for resources with capacity obligations. We preliminarily find that this reform will remove a barrier to the participation of electric storage resources in the organized wholesale electric markets related to minimum run-time requirements and help ensure that the resources that do de-rate their capacity will be able to meet their capacity supply obligations if called upon.

50. We preliminarily conclude that a market participant's eligibility to provide a particular reserve service should not be conditioned on requirements that were designed for synchronous generators, specifically the requirement to be online and synchronized to the grid to be eligible to provide ancillary services. Newer technologies, particularly electric storage resources, tend to be capable of faster start-up times and higher ramp rates than traditional synchronous generators and are therefore able to provide ramping, spinning, and regulating reserve services without already being online and running. Therefore, we preliminarily find that participation in ancillary service markets should be based on a resource's ability to provide services when it is called upon rather than on the real-time operating status of the resource.

51. However, we acknowledge that all of the RTOs/ISOs co-optimize energy and ancillary services dispatch and pricing and therefore may condition eligibility to provide ancillary services on having an energy schedule. As a result, it is not clear whether

[91] Energy Storage Association Comments at 14, 27.

[92] ISO–NE Response at 11.

[93] National Electrical Manufacturers Association Comments at 3.

[94] Wellhead Comments at 3–4.

[95] Energy Storage Association Comments at 13–14 (citing MISO Response at 11, n.9 (referring to Business Practice Manual sections that describe requirements for these products, which state ''Committed Generation Resources'' are eligible to provide these products), 14, 27).

[96] *Id.* at 22–23; NY Battery and Energy Storage Consortium Comments at 6; RES Americas Comments at 4.

[97] APPA Comments at 10.

[98] Electric Power Supply Association Comments at 9.

[99] PJM Market Monitor Comments at 4.

eliminating the requirement for a resource to be online and synchronized to the grid would be impactful given the continued need to have an energy schedule. Therefore we seek comment on whether the requirement to have an energy schedule to provide ancillary services could be adjusted so that electric storage resources and other technically-capable resources could participate in the ancillary service markets independent of offering energy to the RTO/ISO. Specifically, we seek comment on whether dispatch and pricing of energy and ancillary services would continue to be internally consistent if a resource were not required to offer to provide energy in order to offer to provide ancillary services. Further, we seek comment on whether the capability of resources to provide an ancillary service absent an energy schedule can be determined in the regular performance tests that the RTO/ISO conducts and whether a resource's start-up time and ramp capability are generally represented in bidding parameters and would adequately guarantee the resource's ability to provide other services absent energy market participation. Additionally, we seek comment on the extent of software changes necessary to factor the elimination of such an energy schedule requirement into the RTO/ISO co-optimization models.

52. Several commenters also identified concerns with how definitions in the Glossary of Terms used in NERC reliability standards could potentially limit participation of electric storage resources and other non-synchronous resources in the reserve markets. While it appears that some of the Glossary of Terms definitions were created for synchronous generation, it is unclear the extent to which these definitions could potentially limit participation of non-synchronous resources in the organized wholesale electric markets. Therefore, we seek comment on whether and to what extent the Commission-approved NERC Glossary of Terms and associated Reliability Standards or regional reliability requirements may create barriers to the participation of electric storage resources or other non-synchronous technologies in the organized wholesale electric markets.

b. Bidding Parameters for Electric Storage Resources

i. Introduction

53. Bidding parameters allow resources participating in the organized wholesale markets to identify their physical and operational characteristics so that the RTO/ISO can model and dispatch the resource consistent with its operational constraints. Due to an electric storage resource's ability to both receive and provide electricity at varying speeds and duration and to transition between operating modes, it may be more efficient for the RTOs/ISOs to model, optimize, and dispatch electric storage resources differently than they do traditional generation. By requiring electric storage resources to use bidding parameters developed for traditional generators or other supply resources, RTOs/ISOs may fail to effectively utilize these resources, possibly precluding electric storage resources from providing all of the services that they are physically and technically capable of providing in a way that optimizes their operational capabilities and maximizes the benefits they provide. This barrier to electric storage resource participation in organized wholesale electric markets could lead to over-procurement of less efficient resources and increased cost to load.

ii. Current Rules

54. Under current market rules, resource bidding parameters vary greatly between the RTOs/ISOs. Some RTOs/ISOs require the same bidding parameters from all resources offering into a specific market, regardless of the participation model under which these resources participate, while others tie bidding parameters to specific participation models. For example, ISO–NE requires the same bidding parameters from all resources, including electric storage resources, participating in its capacity, forward reserve, and regulation markets.[100] In ISO–NE's energy market, bidding parameters reflect the physical characteristics of each participation model such as maximum daily starts, maximum consumption for dispatch asset related demand, and minimum time between reduction for demand response resources. Similarly, SPP requires all resources participating in its day-ahead and real-time markets under any participation model to provide a specific set of bidding parameters to validate their offers.[101]

55. CAISO's market rules also require a defined list of parameters for all bids. In addition, however, CAISO requires supplemental parameters depending on the participation model under which a resource is participating in its market (*i.e.,* Participating Generator, Participating Load, or Non-Generator Resource).[102] Specifically, CAISO explains that bids for participating loads, which include pumping load or Pumped-Storage Hydro Units, may include pumping level (in megawatts (MW)), minimum load bid (generation mode of a pumped-storage hydro unit), load distribution factor, ramp rate, energy limit, pumping cost, and pump shut-down costs.[103] CAISO notes that, unlike under the generator resource model, these resources must submit lower and upper charge limits. Moreover, the Commission recently accepted revisions to CAISO's tariff to allow scheduling coordinators representing non-generator resources to include state-of-charge as a bidding parameter.[104]

56. Electric storage resources participating in NYISO's markets must generally submit the same bidding parameters as other resources, with some exceptions.[105] Limited Energy Storage Resources providing regulation service exchange a ''state of charge management'' signal with the NYISO to facilitate the efficient use of their capabilities. NYISO does not require Limited Energy Storage Resources, unlike other generators, to provide regulation capacity response rates, normal response rates, or emergency response rates with their regulation service bids. In addition, in NYISO, electric storage resources acting as a component of a Demand Side Ancillary Services Program resource may only submit one normal response rate equaling the electric storage resource's emergency response rate, while traditional generators may submit up to three normal response rates.

57. In MISO, bidding parameters vary between markets and participation models. MISO's market rules allow common bidding parameters for each participation model, with a few exceptions.[106] For example, since MISO manages the state of charge for Stored Energy Resources, it requires the following additional bidding parameters for these resources: Hourly maximum energy storage level; hourly maximum energy charge rate; hourly maximum energy discharge rate; hourly energy

[100] ISO–NE Response at 24–25.

[101] SPP Response at 5–6.

[102] CAISO Response at 13–14 (citing CAISO Tariff, section 30).

[103] *Id.* at 13–14 (citing CAISO Tariff, section 30.5.2.3).

[104] *California Indep. Sys. Operator Corp.,* 156 FERC ¶ 61,110.

[105] NYISO Response at 12 (citing NYISO's Market Participant User's Guide (Dec. 2015)).

[106] MISO Response at 14–15 (citing MISO FERC Electric Tariff, section 4.2.6 (Stored Energy Resource Offer)).

storage loss rate; and hourly full charge energy withdrawal rate.

58. Bidding parameters in PJM also vary between markets and participation models.[107] Additionally, pumped storage resources offering into the PJM energy markets may either self-schedule or have PJM dispatch their unit pursuant to the pumped storage optimization tool. In either case, the resource must submit the following parameters: initial storage; final storage; maximum storage; minimum storage; pumping efficiency factor; and min/max generating and pumping limits.[108]

iii. Comments

59. Some commenters focus on the current bidding parameters for electric storage resources. NRECA states that the Commission should not mandate bidding parameters for specific electric storage resources.[109] APPA states that, at this early stage of electric storage resource development, the required bidding parameters should not be so prescriptive as to determine the technologies allowed to deploy, which may constrain the ability of load-serving entities to adopt the least-cost solution.[110]

60. In contrast, NextEra suggests that each RTO/ISO evaluate how bidding parameters could allow electric storage resources to participate fully in the energy, ancillary service, and capacity markets.[111] NextEra states that the specific bidding parameters developed for pumped hydro are inadequate for batteries and other advanced electric storage technologies. California Energy Storage Alliance also urges evaluation of existing market bidding parameters to identify revisions focused on the unique characteristics of electric storage resources and their ability to act as both generation and load.[112] Energy Storage Association and NY Battery and Energy Storage Consortium agree, recommending that RTOs/ISOs establish a participation model that incorporates appropriate bidding parameters and resource modeling for electric storage resources.[113]

61. Some commenters address the physical and operational characteristics of electric storage resources that create a need for bidding parameters in a participation model for electric storage resources that may differ from those required under participation models for more traditional resources. For example, Alevo argues that electric storage resources are not certain that they can participate in RTO/ISO markets given modeling and bidding parameter limitations in the current RTO/ISO market clearing and dispatch engines.[114] Alevo and Energy Storage Association state that the RTOs'/ISOs' market modeling, which Alevo argues is based on traditional resource types that only withdraw electricity from or inject electricity to the grid, does not accommodate electric storage resources' charge and discharge cycles.[115] Alevo further contends that no current bidding parameters offer charge and discharge signals that would allow electric storage resources to provide peaking services.[116] Similarly, RES Americas contends that accounting for injections and withdrawals of energy to and from the grid in bidding parameters would improve optimization and dispatch across all asset classes.[117]

62. A few commenters address bidding parameters in specific organized wholesale electric markets. Energy Storage Association states that MISO's Stored Energy Resource, ISO–NE's Alternative Technology Regulation Resource, and NYISO's Limited Energy Storage Resource participation models explicitly allow electric storage resource participation.[118] According to Energy Storage Association, these participation models offer the bidding parameters and modeling mechanisms (such as energy-neutral signal or state-of-charge management) necessary for electric storage resource participation. Minnesota Energy Storage Alliance and AES Companies, however, believe that MISO's current dispatch algorithms do not effectively use electric storage resources because they were designed for flywheels, while advanced battery systems have the ability to continuously charge and discharge.[119]

63. Other commenters discuss bidding parameters that relate to specific services in the organized wholesale electric markets. National Hydropower Association states that bidding parameters should reflect electric storage resources' ability to respond to transients with automatic voltage regulation, power system stability, and generator droop.[120] National Hydropower Association claims that the NERC standards often require these services, but RTOs/ISOs do not include them in any bid evaluation parameters.

64. Some commenters focus on state of charge as a bidding parameter for electric storage resources. Alevo, NextEra, SolarCity, and Energy Storage Association agree that bidding parameters need to reflect an electric storage resource's state of charge.[121] Alevo states that the inability of the RTOs'/ISOs' dispatch and clearing engines to manage hourly and sub-hourly dispatch and consider electric storage resources' states of charge is a barrier to electric storage resource participation.[122] Alevo and Energy Storage Association recommend including a state of charge bidding parameter in market engine optimization and dispatch modeling because an electric storage resource's energy level at any given moment affects the services it is capable of providing in the subsequent interval.[123] NextEra asserts that, although some RTOs/ISOs manage batteries' state of charge when providing regulation service, it is unclear how electric storage resources (or the RTOs/ISOs) can reflect their state of charge in the unit commitment and dispatch algorithms when providing other services.[124]

65. Some commenters focus on the ability of electric storage resources to manage their own state of charge. SolarCity states that RTOs/ISOs should allow electric storage resources to manage their state of charge rather than relying on RTO/ISO accounting estimates of their state of charge, which could lead to faulty dispatch instructions.[125] Likewise, NextEra recommends that the RTOs/ISOs should allow electric storage resources to choose between RTO/ISO-management and self-management of state of charge.[126] Energy Storage Association asks that RTOs/ISOs clarify how they would model, optimize, dispatch, and settle electric storage resources using

[107] PJM Response at 18 (citing PJM Operating Agreement, Schedule 1, section 6.6(f)).

[108] *Id.* (citing PJM Manual 11, Attachment B).

[109] NRECA Comments at 7.

[110] APPA Comments at 11.

[111] NextEra Comments at 10–11.

[112] California Energy Storage Alliance Comments at 1–2.

[113] Energy Storage Association Comments at 8–12; NY Battery and Energy Storage Consortium Comments at 5.

[114] Alevo Comments at 20.

[115] *Id.;* Energy Storage Association Comments at 9.

[116] Alevo Comments at 20.

[117] RES Americas Comments at 4.

[118] Energy Storage Association Comments at 9–10.

[119] Minnesota Energy Storage Alliance Comments at 4; AES Companies Comments at 21.

[120] National Hydropower Association Comments at 4.

[121] Alevo Comments at 20; NextEra Comments at 10; SolarCity Comments at 9; Energy Storage Association Comments at 11.

[122] Alevo Comments at 20.

[123] *Id.;* Energy Storage Association Comments at 11.

[124] NextEra Comments at 10–11. NextEra points to CAISO's proposal to allow energy storage resources to submit their state of charge as a bid parameter in the day-ahead market. This proposal was accepted by the Commission. *See California Indep. Sys. Operator Corp.,* 156 FERC ¶ 61,110 at P 10.

[125] SolarCity Comments at 9.

[126] NextEra Comments at 10–11. *See also* Ormat Comments at 3.

negative generation and state of charge parameters so that electric storage resources understand how they will bid into the market, receive dispatch signals, respond to those signals, and be compensated.[127] AES Companies state that electric storage resources should be permitted to optimize their own state of charge because MISO's operating software ignores the benefits of constant charge and availability.[128]

iv. Proposed Reforms

66. We propose to require each RTO/ISO to revise its tariff to include a participation model for electric storage resources that incorporates bidding parameters that reflect and account for the physical and operational characteristics of electric storage resources. The lack of a state-of-charge bidding parameter and the lack of ability for electric storage resources to identify their maximum energy charge rate and maximum energy discharge rate could result in electric storage resources being dispatched in a manner that limits their operational effectiveness. While some existing bidding parameters were developed for older electric storage technologies (such as pumped-hydro facilities), newer storage technologies (such as battery storage) have greater flexibility to transition between charging and discharging. Therefore, bidding parameters designed for slower storage technologies or other types of generation resources that are not capable of charging and discharging energy may limit the opportunity for faster electric storage resources to participate in the organized wholesale electric markets. Appropriate bidding parameters will allow electric storage resources to provide all services they are technically capable of providing and allow the RTOs/ISOs to procure these services more efficiently.

67. Specifically, we propose that the RTOs/ISOs establish state of charge, upper charge limit, lower charge limit, maximum energy charge rate, and maximum energy discharge rate as bidding parameters for the participation model for electric storage resources that participating resources must submit, as applicable. The state of charge will allow resources using the participation model for electric storage resources to identify their forecasted state of charge at the end of a market interval,[129] as defined by the RTO/ISO, while the upper and lower charge limits will prevent the operator from trying to give or take too much energy from the resource. We expect that the state of charge would be telemetered in real time when the RTO/ISO is managing the state of charge, as discussed further below, so that the upper and lower charge limits are not exceeded, but do not propose any specific telemetry requirements. The maximum energy charge rate and maximum energy discharge rate will be used to indicate how quickly the resource can receive electricity from or inject it back to the grid. We preliminarily find that these are the minimum bidding parameters necessary for RTOs/ISOs to effectively dispatch electric storage resources because they provide the RTOs/ISOs with the information about the physical and operational characteristics of electric storage resources that allow these resources to provide the services that they are technically capable of providing.

68. We also propose to require that the participation models for electric storage resources include the following bidding parameters that market participants may submit, at their discretion, for their resource based on its physical constraints or desired operation: minimum charge time, maximum charge time, minimum run time, and maximum run time.[130] We preliminarily conclude that these optional bidding parameters are necessary to reflect the wide range of physical and operational characteristics of existing and future electric storage technologies. Specifically, electric storage technologies such as pumped-hydro facilities that seek to provide energy in the organized wholesale electric markets have some physical and operational characteristics that are closer to those of traditional generation than those of small electric storage resources designed primarily to provide regulation service. The optional bidding parameters that we propose here would allow electric storage resources to indicate their operational constraints to the RTO/ISO and would help these resources to manage any costs or operational constraints that they incur when transitioning between charging and discharging electricity. For example, the opportunity to submit these optional bidding parameters could allow an electric storage resource to prevent excessive variability in its operations to help optimize the services that it is available to provide and to preserve the life of the electric storage resource.

69. Also, where the RTO/ISO has reserved for itself the right to manage the state of charge of an electric storage resource, we propose to require that the RTOs/ISOs allow electric storage resources to self-manage their state of charge and upper and lower charge limits. An electric storage resource that opts to self-manage its state of charge and upper and lower charge limits would keep its state of charge at an optimal level through its own bidding strategy, rather than the RTO/ISO market processes ensuring that dispatch does not violate its physical constraints. The Commission recently accepted revisions to the CAISO tariff that allow non-generator resources to self-manage their energy limits and state-of-charge in real-time.[131]

70. Of course, an electric storage resource that self-manages its state of charge is subject to any penalties for deviating from a dispatch schedule to the extent the resource manages its state of charge by deviating from the dispatch schedule. While RTOs/ISOs may be in a better position to effectively manage the state of charge for an electric storage resource that, for example, exclusively provides regulation service in the organized wholesale electric markets, some electric storage resources may be interested in providing multiple service or providing services to another party, such as to a load with which it is co-located. Affording electric storage resources the option to manage their state of charge would allow these resources to optimize their operations to provide all of the services that they are technically capable of providing, similar to the operational flexibility that traditional generators have to manage the wholesale services that they offer. However, we seek comment on whether there are conditions under which an RTO/ISO should not allow an electric storage resource to manage its state of charge and upper and lower charge limits.

71. While the inclusion of these bidding parameters would allow for more efficient use of electric storage resources, their implementation also requires the RTOs/ISOs to program these bidding parameters into their modeling and dispatch software. The difficulty of implementing these bidding parameters would likely vary from RTO/ISO to RTO/ISO. Therefore, we seek

[127] Energy Storage Association Comments at 7.

[128] AES Companies Comments at 21.

[129] *See, e.g.,* CAISO Tariff, Att. A, section 30.5.6 (stating that scheduling coordinators representing Non-Generator Resources may submit bids including the state of charge for the day-ahead market to indicate the forecasted starting physical position of the Non-Generator Resource.).

[130] We acknowledge that some of these optional bidding parameters may not be necessary for resources participating under the proposed participation model for electric storage resources that provide certain information to the RTO/ISO through telemetry.

[131] *California Indep. Sys. Operator, Corp.,* 156 FERC ¶ 61,110 at P 10.

comment on the time and resources that would be necessary for the RTOs/ISOs to incorporate these bidding parameters, including the optional bidding parameters, into their modeling and dispatch software.

c. Eligibility To Participate as a Wholesale Seller and Wholesale Buyer

i. Introduction

72. The ability of electric storage resources to receive and provide electricity positions them to be both buyers and sellers in the organized wholesale electric markets. As the Commission has previously recognized, a market functions effectively only when both supply and demand can meaningfully participate.[132] Improving electric storage resources' opportunity to participate as both wholesale sellers of services and wholesale buyers of energy could improve market efficiency by allowing the RTO/ISO to dispatch these resources in accordance with their most economically efficient use (*i.e.,* as supply when the market clearing price for energy is higher than their offer and as demand when the market clearing price is lower than their bid). Moreover, allowing electric storage resources to participate in the organized wholesale electric markets as dispatchable load would allow these resources, under certain circumstances, to set the price in these markets, better reflecting the value of the marginal resource and ensuring that electric storage resources are dispatched in accordance with the highest value service that they are capable of providing during a set market interval.

ii. Current Rules

73. Each RTO's/ISO's market rules that govern the eligibility of electric storage resources to participate in the organized wholesale electric markets as a demand resource are different. For example, CAISO explains that an electric storage resource interconnected to the CAISO grid with a participating generator agreement and participating load agreement can submit offers to sell and bids to buy energy in the wholesale market.[133] According to SPP, submitting bids to purchase energy in its market is within the resource owner's discretion.[134] SPP notes that electric storage resources may submit virtual bids in the day-ahead market at any location and a fixed or price-sensitive bid at their registered load. In contrast, PJM explains that electric storage resources do not submit wholesale bids to buy electricity.[135]

74. ISO–NE states that, because it is dispatchable, an electric storage resource participating as a Dispatchable Asset Related Demand resource may submit bids to buy energy in both the day-ahead and real-time energy markets; however, if it is participating as a load asset or an Asset Related Demand, it may submit bids to buy energy in the day-ahead market but would be a price taker in real-time.[136]

75. MISO explains that, in the day-ahead market, electric storage resources may submit bids to buy energy at the LMP when they need to recharge as dispatchable demand or may submit virtual bids.[137] MISO further explains that in the real-time market, most load buys energy as fixed demand and only Demand Response Resources—Type II can submit demand response offers to buy energy.

76. NYISO states that Energy Limited Resources obtain charging energy through negative MW value generation offers, rather than a bid to buy energy.[138] NYISO explains that demand-side resources participating in the Special Case Resource Program, Emergency Demand Response Program, Demand Side Ancillary Services Program, or Day-Ahead Demand Response Program do not submit bids to buy energy in the wholesale markets unless the resource is a load-serving entity, in which case it purchases its entire load. NYISO states that a demand-side resource may submit price-responsive load bids to take advantage of off-peak prices to charge its electric storage resource. NYISO adds that electric storage resources are not required to bid to buy electricity from the NYISO market, but, like any load, may bid into the day-ahead market as a price cap load bid.[139]

77. The eligibility for an electric storage resource to set the price in the organized wholesale electric markets also varies among the RTOs/ISOs. For example, CAISO states that an electric storage resource that is the marginal resource may set the price of energy and ancillary services in CAISO's markets based on its economic bid.[140] PJM states that, with the exception of demand-side resources in the non-synchronized reserve market, electric storage resources may set the price as either a generation or as a demand-side resource in the capacity, energy, and ancillary service markets.[141] SPP states that any resource, including an electric storage resource, qualified to participate in an SPP market may set the price for the relevant market.[142]

78. ISO–NE states that, in each of its markets, electric storage resources may be able to set the clearing price, depending on the participation model that they are using to participate.[143] ISO–NE explains that only dispatchable resources (*i.e.,* dispatchable generator assets and dispatchable asset related demand) may set the clearing price in the real-time energy market. ISO–NE explains that, in the day-ahead energy market, an electric storage resource may set the price by offering into the market as a generator resource, Asset Related Demand, or Dispatchable Asset Related Demand. ISO–NE adds that, by qualifying as a new generator resource or as a demand resource, an electric storage resource may bid its qualified MWs into the capacity market and set the clearing price. ISO–NE notes that an electric storage resource or aggregation of electric storage resources may set the regulation market clearing prices by offering as an Alternative Technology Regulation Resource. ISO–NE states that an electric storage resource may also set the market-clearing regulation price by offering into the regulation market as a generator resource or Dispatchable Asset Related Demand.

79. MISO states that electric storage resources may set prices for products in the market(s) in which they are eligible to participate. MISO explains that, for example, an electric storage resource registered as a Load Modifying Resource may set the price in the capacity market. MISO states that an electric storage resource registered as a Stored Energy Resource may set the price for regulating reserve.[144]

80. NYISO explains that supply offers of electric storage resources that participate as Energy Limited Resources may set the price for capacity, energy, and ancillary services; Limited Energy Storage Resources may set the price for regulation service. NYISO explains that Special Case Resources and Emergency

[132] *Demand Response Compensation in Organized Wholesale Energy Markets,* Order No. 745, FERC Stats. & Regs. ¶ 31,322, at P 1, *order on reh'g,* Order No. 745–A, 137 FERC ¶ 61,215 (2011).

[133] CAISO Response at 16.

[134] SPP Response at 7.

[135] PJM Response at 22.

[136] ISO–NE Response at 28 (citing ISO–NE Tariff, section I.2.2).

[137] MISO Response at 16.

[138] NYISO Response at 14–15.

[139] *Id.* at 15 (citing NYISO Services Tariff, section 21.1).

[140] CAISO Response at 10.

[141] PJM Response at 10.

[142] SPP Response at 4.

[143] ISO–NE Response at 12–13. ISO–NE explains that, today, Real-Time Demand Response assets are price-takers in the real-time energy market but that, with the full integration of demand response into the energy market scheduled for June 1, 2018, demand response resources will have the potential to set market clearing prices.

[144] MISO Response at 10.

Demand Response Program resource energy offers do not directly set the price; rather, when these resources are dispatched, the NYISO's scarcity pricing rules are triggered in the zone(s) in which they are activated and may alter energy and certain ancillary services prices.[145]

iii. Proposed Reforms

81. We propose to require each RTO/ISO to revise its tariff to ensure that electric storage resources can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with existing rules that govern when a resource can set the wholesale price. This proposal includes the requirements that the RTOs/ISOs accept wholesale bids from electric storage resources to buy energy so that the economic preferences of the electric storage resources are fully integrated into the market, the electric storage resource can set the price as a load resource where market rules allow, and the electric storage resource can be available to the RTO/ISO as a dispatchable demand asset. However, we note that these requirements must not prohibit electric storage resources from participating in organized wholesale electric markets as price takers, consistent with the existing rules for self-scheduled load resources. We also clarify that, while resources are not dispatched when they clear the capacity markets, we are proposing that resources using the participation model for electric storage resources be able to set the price in the capacity markets, where applicable.

82. To optimize the capabilities of electric storage resources and for the RTOs/ISOs to use them efficiently, it is important for the RTOs/ISOs to be able to symmetrically utilize the capabilities of these resources to both receive electricity from the grid and inject it back to the grid. In other words, they must be able to dispatch electric storage resources as supply when the market clearing price exceeds their offers to sell and to dispatch electric storage resources as demand when their bids to buy exceed the market clearing price. The bidirectional capabilities of electric storage resources are what make them unique, and allowing electric storage resources to participate in the organized wholesale electric markets as both wholesale sellers and wholesale buyers will help optimize the value that they provide and enhance price formation, as they will be dispatched in accordance with their most economic use.

83. We preliminarily conclude that the proposed requirement to participate as a supply and demand resource simultaneously (*i.e.,* submit bids to buy and offers to sell during the same market interval) is necessary to maximize the value that electric storage resources can provide in the organized wholesale electric markets, allowing the markets to identify whether it is more economic to dispatch an electric storage resource as supply or demand during a given market interval. We expect that, through its bidding strategy, a resource using the electric storage resource participation model would be able to prevent any conflicting dispatch signals to itself. However, we seek comment on whether there should be a mechanism that identifies bids and offers coming from the same resource that ensures the price for the offer to sell is not lower than the price for the bid to buy during the same market interval so that an RTO/ISO does not accept both the offer and bid of a resource using the electric storage resource participation model for that interval.

84. Generally, in the organized wholesale electric markets, resources that cannot be dispatched by the RTO/ISO do not set wholesale prices. This is because the marginal clearing prices are based on the shadow price of the next unit of incremental production, and a resource that cannot be dispatched by the RTO/ISO cannot provide that incremental unit of production. Therefore, we propose that, for a resource using the proposed participation model for electric storage resources to be able to set prices in the organized wholesale electric markets as either a wholesale seller or a wholesale buyer, it must be available to the RTO/ISO as a dispatchable resource. We believe this proposal is consistent with RTO/ISO rules on price setting and are further proposing that the ability for resources using the participation model for electric storage resources to set the price be consistent with existing rules that govern when a resource can set the wholesale price. However, we seek comment on whether any existing RTO/ISO rules may unnecessarily limit the ability of resources using the participation model for electric storage resources to set prices in the organized wholesale electric markets.

85. We note that resources using the proposed participation model for electric storage resources that elect to submit economic bids as a wholesale buyer and participate as dispatchable demand resources would still be able to self-schedule their charging and be price takers. However, it is also possible that the RTO/ISO could dispatch an electric storage resource as load when the wholesale price for energy is above the price of their bid to buy (a circumstance under which they would lose the opportunity to earn greater revenues as a supply resource). Therefore, to help alleviate any potential financial risk to these resources when being dispatched as a demand resource, we seek comments on whether the proposed participation model for electric storage resources should allow make-whole payments when a resource participating under this participation model is dispatched as load and the price of energy is higher than the resource's bid price.

d. Minimum Size Requirement

i. Introduction

86. Depending on the technology, electric storage resources range in size from 1 kW to 1 GW,[146] and most of them tend to be under 1 MW.[147] RTO/ISO market rules may restrict electric storage resources from participating in the organized wholesale electric markets based on minimum size requirements [148] that may have been designed for different types of resources. This is particularly true for smaller electric storage resources, which may be limited to participating in the organized wholesale electric markets as demand response resources. Such restrictions can limit these resources' ability to employ their full operational range because they are prohibited from injecting electricity into the grid in excess of their host load and preclude them from providing services such as reserves.

ii. Current Rules

87. Under existing market rules, minimum capacity, minimum offer and minimum bid requirements for electric storage resources to participate in the organized wholesale electric markets vary across the RTOs/ISOs, with minimum size requirements ranging from 100 kW to 5 MW. PJM and SPP have minimum offer requirements of 100 kW for all resources, with other

[145] NYISO Response at 8.

[146] Sandia Report at 29, Figure 19 (Positioning of Energy Storage Technologies).

[147] U.S. Department of Energy, *Grid Energy Storage* at 12 (Dec. 2013) (stating that most storage systems are in the 10 kW to 10 MW range, with the largest proportion of those resources in the 100 kW to 1 MW range).

[148] We use the term ''minimum size requirement'' to collectively describe minimum capacity requirements to qualify to use a given participation model, ''minimum offer requirements'' for offers to sell services in the organized wholesale electric markets, and ''minimum bid requirements'' for bids to buy energy in these markets. When we are referring to a specific category of minimum size requirement, we will use that specific term.

RTO/ISO minimum size requirements varying across participation models and markets.[149]

88. CAISO states that the minimum capacity requirement for demand response resources is 100 kW and that all resources other than demand response have minimum capacity requirements of 500 kW. Resources can meet these minimum capacity requirements through aggregation.[150] Alternatively, ISO–NE minimum capacity requirements range from 100 kW for demand response resources, to 1 MW for Alternative Technology Regulation Resources, to 5 MW for generators seeking to provide demand response in the regulation market.[151] Under MISO tariff rules, minimum capacity requirements vary from 100 kW for Load Modifying Resources, to 1 MW for demand response resources, to 5 MW for generators.[152] MISO states that it has not determined a minimum size for Stored Energy Resources but believes a minimum of 1 MW is appropriate.[153] In NYISO, the minimum size requirement is 100 kW for demand response resources and 1 MW for Energy Limited Resources and Limited Energy Storage Resources.[154]

89. The RTOs/ISOs also define minimum bid requirements for load resources to buy energy from the organized wholesale electric markets. In CAISO, the minimum bid requirement is 10 kW, the same as for traditional generators.[155] In MISO and SPP, the minimum bid requirements are 100 kW.[156] In ISO–NE, energy market bids cannot be smaller than 100 kW.[157] In NYISO, the minimum bid requirement is 1 MW, with the option to aggregate to meet that requirement.[158] Electric storage resources do not submit bids to buy energy in the PJM wholesale markets.[159]

iii. Comments

90. Several commenters address the minimum size requirements to participate in the RTO/ISO markets, questioning whether the RTOs/ISOs based those standards on technological requirements and system needs. For example, NY Battery and Energy Storage Consortium argues that the minimum size requirement for participation in organized wholesale electric markets should be lowered.[160] Public Interest Organizations claim that minimum size requirements for electric storage resources to participate in the organized wholesale electric markets may be a barrier to distributed electric storage resources, especially those that are small. Public Interest Organizations contend that, while the opportunity to offer distributed energy resource aggregations into the markets could help mitigate this concern, that opportunity is lacking or unclear in some RTOs/ISOs.[161]

91. Several commenters specifically cite the variability in the minimum size requirements of the various RTO/ISO market participation models as a barrier to electric storage resource participation. Energy Storage Association contends that minimum size requirements for electric storage resources may prohibit storage participation and lead to inconsistencies across regions.[162] Advanced Energy Economy argues that it is not clear why the minimum size requirements for providing services should vary from RTO/ISO to RTO/ISO and that these market rule variations are a barrier to electric storage resource participation in the organized wholesale electric markets.[163] Public Interest Organizations assert that disparate requirements in the RTO/ISO reports indicate that some of these minimum limits may be arbitrary.[164]

92. Other commenters identify specific minimum size requirements in certain RTO/ISO markets as barriers to the participation of electric storage resources in those markets. Minnesota Energy Storage Alliance claims that MISO's 1 MW minimum size requirement for demand response resources is not appropriate due to the lower minimum size requirements in other RTOs/ISOs.[165] Minnesota Energy Storage Alliance further states that removing this requirement would allow electric storage resources to more readily participate, providing economic justification for project development and increasing MISO's operational flexibility. NY Battery and Energy Storage Consortium asserts that NYISO's 1 MW size requirement limits behind-the-meter electric storage resources from participating in NYISO's day-ahead market, despite having the technical capability to perform.[166]

93. Solar City and Viridity ask the Commission to consider requiring all RTOs/ISOs to set a minimum requirement of 100 kW for electric storage resource participation in their markets.[167] Solar City argues that a 100 kW minimum size requirement will ensure that electric storage resources can provide value to markets at relatively modest levels of penetration and participate in organized wholesale energy markets even when locational requirements reduce the area over which resources can be aggregated.[168]

iv. Proposed Reforms

94. We propose that the minimum size requirement to participate in the organized wholesale electric markets under the proposed electric storage resource participation model must not exceed 100 kW. While we acknowledge that minimum size requirements may be necessary to ensure that the RTOs/ISOs can effectively model and dispatch the resources participating in their markets, large minimum size requirements create a barrier to the participation of smaller electric storage resources. We preliminarily conclude that requiring that the minimum size requirement not exceed 100 kW balances the benefits of increased competition with the ability of RTO/ISO market clearing software to effectively model and dispatch smaller resources often located on the distribution system. Thus, we propose to require each RTO/ISO to revise its tariffs to include a participation model for electric storage resources that establishes a minimum size requirement for participation in the organized wholesale electric markets that does not exceed 100 kW. This would include any minimum capacity requirements, minimum offer requirements, and minimum bid requirements for resources participating in these markets under the electric storage resource participation model.

[149] PJM Response at 10 (citing PJM Tariff, Att. DD, section 5.6); SPP Response at 5 (citing SPP Tariff, Att. AE section 1.1 (definition of ''Offer'')).

[150] CAISO Response at 10–11 (citing CAISO Tariff, App. K, Part A 1.1.1; Part B1.1; Part C1.1).

[151] ISO–NE Response at 13–14 (citing ISO–NE Tariff, App. E2, section I–III).

[152] MISO Response at 10.

[153] *Id.* at 16–17.

[154] NYISO Response at 9.

[155] CAISO Response at 16.

[156] MISO Response at 17; SPP Response at 8.

[157] ISO–NE Response at 29.

[158] NYISO Response at 15.

[159] PJM Response at 22.

[160] NY Battery and Energy Storage Consortium Comments at 6.

[161] Public Interest Organizations Comments at 5.

[162] Energy Storage Association Comments at 29.

[163] Advanced Energy Economy Comments at 10–11.

[164] Public Interest Organizations Comments at 5.

[165] Minnesota Energy Storage Alliance notes that size restrictions do not apply to the load-modifying resource classification, but such resources are only eligible to provide capacity for MISO-declared emergency events and cannot provide energy or ancillary services. Minnesota Energy Storage Alliance Comments at 3–4.

[166] NY Battery and Energy Storage Consortium Comments at 5–6.

[167] SolarCity Comments at 9; Viridity Comments at 3.

[168] SolarCity Comments at 9.

e. Energy Used To Charge Electric Storage Resources

i. Introduction

95. Electric storage resources must absorb electricity (*i.e.,* charge) to sell that electricity, net of losses, back to an RTO/ISO as energy or ancillary services. The manner in which an electric storage resource charges (consumes) energy and discharges (produces) energy will determine whether the electric storage resource is engaging in a sale for resale subject to our jurisdiction.

ii. Current Rules

96. For the most part, the RTOs/ISOs indicate that electric storage resources that are charging to later provide wholesale services in their markets already pay LMP for that electricity. CAISO states that all electric storage resources participating in its wholesale markets pay LMP for their charging energy.[169] ISO–NE states that electric storage resources purchasing energy directly from the wholesale market pay the LMP for the electricity they receive.[170] MISO states that any resources eligible to participate in MISO's capacity, energy, and ancillary service markets pay LMP for the electricity they receive.[171] NYISO states that Energy Limited Resources using electric storage resource technology and Limited Energy Storage Resources will pay the wholesale price for the electricity they consume to meet a regulation service schedule or to charge the resource if the resource is either in front-of-the-meter (a generator) or a direct NYISO customer (a load-serving entity). NYISO notes that, if the resource is behind-the-meter and served by a separate load-serving entity, then it would pay the load-serving entity's retail rate.[172] PJM states that an electric storage resource would pay wholesale LMP if the resource is taking power off the system solely to inject into the energy or ancillary service markets at a later time.[173] SPP states that, in its real-time market, electric storage resources pay the real-time LMP for their load consumption, although they may also be subject to retail rules for electric consumption.[174]

iii. Comments

97. Several commenters address the issue of the price that electric storage resources should pay for charging electricity when that electricity is for later use in the organized wholesale electric markets. For example, Alevo argues that it is not clear whether an electric storage resource connected at the distribution level will pay the LMP for its charging electricity, even if it is charging to provide a wholesale service.[175] Electric Vehicle R&D Group and NextEra contend that current RTO/ISO tariffs do not provide enough clarity on the price that storage pays for electricity,[176] and that the RTOs/ISOs should revise their tariffs to settle discharging and recharging resources at LMP.[177] Similarly, Tesla asks the Commission to clarify that electricity stored for resale is not a retail sale and thus should be settled at the wholesale LMP.[178]

98. In contrast, Manitoba Hydro asserts that dispatchable electric storage resources should either pay a lower LMP than non-dispatchable resources or should receive a storage capacity credit for their services because a MWh received by a storage resource for later injection is different than a MWh consumed by traditional load.[179] Minnesota Energy Storage Alliance similarly requests that dispatchable electric storage resources pay a lower LMP or be compensated for the service.[180] AES Companies contend that it is inappropriate for an electric storage resource to pay LMP when it is directed to charge and that such a payment is a disincentive to new storage installation.[181]

99. SoCal Edison argues that behind-the-meter electric storage resources should not be allowed to charge at a wholesale rate and discharge to serve a retail customer to allow the retail customer to avoid paying the retail rate for its consumption.[182] Addressing this concern, some commenters suggest that metering and accounting practices can be designed to delineate between wholesale and retail activities.[183]

iv. Proposed Reforms

100. The Commission has found that the sale of energy from the grid that is used to charge electric storage resources for later resale into the energy or ancillary service markets constitutes a sale for resale.[184] As such, the just and reasonable rate for that wholesale sale of energy used to charge the electric storage resource is the RTO/ISO market's wholesale price for energy or LMP. We thus propose to require each RTO/ISO to revise its tariff to specify that the sale of energy from the organized wholesale electric markets to an electric storage resource that the resource then resells back to those markets must be at the wholesale LMP.

101. The proposed clarification also provides developers and operators of electric storage resources certainty about the price that they will be charged for purchasing charging electricity in the organized wholesale electric markets when they will use that electricity to provide wholesale services. We note that this proposed clarification is consistent with most current RTO/ISO practices as reflected in their responses.

102. We recognize SoCal Edison's concern that behind-the-meter electric storage resources should not be allowed to charge at a wholesale rate and discharge to serve a retail customer as a means for the retail customer to avoid paying the retail rate. This situation could be even more complex if the retail customer in question also uses a behind-the-meter generator in conjunction with its storage device. Given the comments in the record indicating that metering and accounting practices can be designed to delineate between

[169] CAISO Response at 17.

[170] ISO–NE Response at 29–30.

[171] MISO Response at 17.

[172] NYISO Response at 16.

[173] PJM Response at 23.

[174] SPP Response at 7.

[175] Alevo Comments at 29.

[176] Electric Vehicle R&D Group Comments at 13.

[177] NextEra Comments at 13.

[178] Tesla Comments at 5–6.

[179] Manitoba Hydro Comments at 10–12.

[180] Minnesota Energy Storage Alliance Comments at 5.

[181] AES Companies Comments at 23.

[182] SoCal Edison Comments at 8.

[183] Independent Energy Producers Association Comments, Att. at 7; Minnesota Energy Storage Alliance Comments at 5.

[184] *See Norton Energy Storage, L.L.C.,* 95 FERC ¶ 61,476, at 62,701–02 (2001) (citations omitted) (''[T]he use of compressed air as a medium for the storage of energy in an energy storage facility is a new technology. However, we find that a compressed air energy storage facility is analogous to a pumped storage hydroelectric facility, in that compressed air is used in a conversion/storage cycle just as water is used in a pumped storage hydroelectric facility in the conversion/storage cycle. . . . [T]he Commission views the pumping energy not as being consumed, but rather as being converted and stored, as water in the upper reservoir, for later re-conversion . . . back to electric energy. It is this conversion/storage cycle that distinguishes energy storage facilities, whether pumped storage hydroelectric facilities or compressed air energy storage facilities, from facilities that consume electricity (in the form of station power or otherwise). The fact that pumping energy or compression energy is not consumed means that the provision of such energy is *not* a sale for end use that this Commission cannot regulate. Rather, based on Norton's representations in its petition, we find that deliveries of compression energy to the Norton energy storage facility as part of energy exchange transactions employing the conversion/storage cycle are wholesale transactions subject to our exclusive authority under the FPA.''). *See also PJM Interconnection, L.L.C.,* 132 FERC at 62,053 (''Like pumping energy and compression energy, the energy used to charge Energy Storage Resources will be stored for later delivery and not used for operating the electric equipment on the site of a generation facility or associated buildings as Station Power is used.'').

wholesale and retail activities,[185] we seek comment on whether such metering and accounting practices would need to be established in the RTO/ISO tariffs to facilitate compliance with this proposal or whether it is possible to determine the end use for energy used to charge an electric storage resource under existing requirements.

*B. Participation of Distributed Energy Resource Aggregators in the Organized Wholesale Electric Markets*

1. Introduction

103. There has been significant industry attention paid to the development of distributed energy resources and the potential for such resources to contribute to grid services. More recently, the discussion has focused on new distributed energy resources that are smaller, interconnected to lower voltage networks, and geographically dispersed. These new distributed energy resources are enabled by increasing deployment of and improvements in metering, telemetry, and communication technologies. With such advances, more localized power and energy services and more supply resources and potential market participants have emerged. We are interested in removing barriers in current RTO/ISO market rules that would prevent these new, smaller distributed energy resources that are technically capable of participating in the organized wholesale electric markets from doing so.

104. As noted above, in this NOPR, we define distributed energy resources as a source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter.[186] These resources may include, but are not limited to, electric storage resources, distributed generation, thermal storage, and electric vehicles and their supply equipment.[187]

105. As a general matter, distributed energy resources tend to be too small to participate directly in the organized wholesale electric markets on a stand-alone basis. First, they often do not meet the minimum size requirements to participate in these markets under existing participation models. Second, they may have difficulty satisfying all of the operational performance requirements of the various participation models due to their small size. Allowing these resources to participate in the organized wholesale electric markets through distributed energy resource aggregations can help to remove these barriers to their participation, providing a means for these resources to, in the aggregate, satisfy minimum size and performance requirements that they could not meet on a stand-alone basis.

106. The Commission recently accepted CAISO's proposal[188] to allow distributed energy resource aggregations in its markets. In addition, the RTOs/ISOs have implemented some models for aggregated resources to participate in their organized wholesale electric markets. These are described in more detail below but are generally for demand response resources, with a few exceptions. As a result, the majority of distribution-connected electric storage and other distributed energy resources that seek to access the organized wholesale electric markets must do so by participating as behind-the-meter demand response. While these demand response programs have helped reduce barriers to load curtailment resources, they often limit the operations of other types of distributed energy resources, such as electric storage or distributed generation, as well as the services that they are eligible to provide.

2. Current Rules

107. The RTOs/ISOs describe the opportunities for electric storage resources connected to the distribution system and electric storage resource aggregations to participate in their capacity, energy, and ancillary service markets. CAISO supports the aggregation of distributed energy resources, including storage, seeking to participate in the CAISO markets.[189] In addition, CAISO states that electric storage resources that wish to aggregate into a resource that can participate in the wholesale markets can participate by providing load curtailment as Proxy Demand Resources or Reliability Demand Response Resources.[190]

108. ISO–NE explains that, under each participation model, a single resource may be composed of multiple resources if those resources are either physically in the same location or require coordinated control.[191] ISO–NE explains that Alternative Technology Regulation Resources may include aggregations of multiple end-use customers, each with less than 1 MW of regulation capacity.[192] ISO–NE adds that Asset Related Demands may be aggregated if they are served by the same point of electrical connection and meet a 1 MW threshold.[193]

109. ISO–NE states that electric storage resources that meet its definition of Distributed Generation (*i.e.,* behind-the-meter resources with an aggregate nameplate capacity of less than 5 MW or the demand of the end-use customer, whichever is greater) may qualify as Real-Time Demand Response Assets, which allows for participation in the forward capacity market, the transitional price-responsive demand program, and the regulation market if it is also registered as an Alternative Technology Regulation Resource.[194] ISO–NE explains that, for the capacity market, demand resources may consist of an aggregation of multiple end-use customers, though they must be at least 100 kW and located within a dispatch zone or load zone as required under the participation model through which they are participating.[195] ISO–NE further explains that for the energy and reserve markets, demand response resources may also be aggregated as long as they are individually at least 10 kW, have an expected maximum interruptible capacity of 5 MW or less, and are located within a dispatch zone and reserve zone.[196]

110. MISO states that Stored Energy Resources and Demand Response Resources—Type II are allowed to aggregate under a single elemental pricing node. MISO adds that Demand Response Resources—Type I and Load Modifying Resources are allowed to aggregate within one local balancing authority.[197]

111. NYISO states that aggregated resources can participate in the Emergency Demand Response Program, Day-Ahead Demand Response Program, Demand Side Ancillary Services Program, and Special Case Resource Programs. NYISO notes that aggregated electric storage resources may be used to generate demand reductions in any of those programs.[198]

112. PJM states that aggregated electric storage resources can participate in the capacity, energy, and ancillary service markets. In the capacity market, PJM states that demand-side resources

[185] Independent Energy Producers Association Comments, Att. at 7; Minnesota Energy Storage Alliance Comments at 5.

[186] *See supra* note 2.

[187] *Id.*

[188] *See California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229.

[189] CAISO Response at 2–3. *See also California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229.

[190] CAISO Response at 7.

[191] ISO–NE Response at 26 (citing ISO–NE Operating Procedure 14, section II.A).

[192] *Id.* (citing ISO–NE Tariff, section III.14.2(c)).

[193] *Id.* at 27 (citing ISO–NE Operating Procedure 14, section I.2.2).

[194] *Id.* at 6–7.

[195] *Id.* at 27 (citing ISO–NE Operating Procedure 14, section III.13.1.4.1).

[196] *Id.* (citing ISO–NE Operating Procedure 14, section III.E2.1.1).

[197] MISO Response at 15.

[198] NYISO Response at 13.

can be aggregated to provide load reductions.[199] Under PJM's capacity performance proposal, electric storage resources are eligible to aggregate with other electric storage resources, Intermittent Resources, Demand Resources, Energy Efficiency Resources, and Environmentally-Limited Resources to provide capacity.[200] In the PJM regulation market, PJM states that all resources, including electric storage resources, may elect to be part of a performance group for the purpose of improving their overall performance score.[201] In the PJM energy market, PJM adds that multiple batteries located behind a single node and owned by the same entity would be eligible to offer into the energy market as one resource.[202]

113. SPP states that resources at the same point of injection may register at the unit or plant level and electric storage resources may be aggregated if the resources are electrically equivalent from the transmission system perspective (*i.e.,* use the same point of injection).[203]

3. Comments

114. Many commenters note that it is important for distributed energy resources to be allowed to fully participate in organized wholesale electric markets. For example, Advanced Energy Economy contends that, absent legitimate technical needs, distributed energy resources should be allowed to fully participate in organized wholesale electric markets.[204] Advanced Energy Economy claims that certain RTOs/ISOs have excluded these resources through artificial classifications (*e.g.,* the inability of multiple behind-the-meter generation and electric storage resources to provide frequency regulation in PJM). Similarly, SolarCity asks the Commission to require RTOs/ISOs to revise or implement rules to ensure that behind-the-meter resources, including electric storage resources, have a clear path for participation in all wholesale energy markets.[205]

115. Energy Storage Association agrees that distribution-connected electric storage resources, including aggregation across multiple storage assets and sites, should be able to participate in the organized wholesale electric markets to enhance competition needed for just and reasonable rates.[206] Energy Storage Association asks the Commission to consider extending the best practices learned in CAISO to all organized wholesale electric markets to address common barriers in metering, telemetry, and resource eligibility. RES Americas supports Energy Storage Association's comments and encourages the Commission to investigate the barriers to the participation of distributed energy resources in organized wholesale electric markets.[207] NY Battery and Energy Storage Consortium argues that behind-the-meter energy storage resources should be able to participate in organized wholesale electric markets directly or in aggregate form, and points out that behind-the-meter storage participating in NYISO as a demand side ancillary services program resource is not allowed to bid into the day-ahead demand response market, even though it is technically capable of doing so.[208]

116. Some commenters cite the inability for distributed energy resources to inject energy when participating as demand response as a barrier to distributed energy resources. SolarCity states that this inability hinders the ability of behind-the-meter resources to provide energy services and limits their capacity.[209] Advanced Energy Economy and Solar Grid Storage argue that PJM's restriction on the injection of energy past a customer's retail meter during operations for providing ancillary services in its markets is a barrier to electric storage resources.[210] Energy Storage Association and NextEra argue that no RTO/ISO allows behind-the-meter storage to net inject power to provide wholesale generator services.[211] NextEra agrees that this prohibition effectively limits the size of electric storage resources designed for customer applications. Energy Storage Association notes that NYISO recently received the Commission's conditional acceptance of its behind-the-meter net generator enhancement, but Energy Storage Association asserts that it still effectively excludes participation of electric storage resources because it does not include electric storage functionality (*e.g.,* state of charge management).[212]

117. Other comments focus on the benefits of allowing distributed energy resources to participate in the organized wholesale markets as aggregations. RES Americas contends that aggregation of electric storage resources, either within the asset class or across other resources that can be limited in their ability to offer a breadth of market products (*i.e.,* renewables or demand response), could be a means to realize market efficiencies and other policy objectives without creating entirely new market products or otherwise disrupting grid operations.[213] Electric Vehicle R&D Group states that third-party aggregators are the most practical approach to utilizing distributed electric storage resources connected to the low- and medium-voltage system.[214] Electric Vehicle R&D Group argues that, given the value that distributed electric storage resources provide to both transmission and distribution system operators and the lack of technical abilities of a distribution system operator to-date to build, qualify, and cost-effectively operate a distributed storage system aggregator, rules should not prohibit third-party aggregators or require distribution operators to manage them. Electric Vehicle R&D Group adds that the Commission should allow third-party aggregators to provide service to both RTOs and distribution system operators.

118. National Electrical Manufacturers Association states that organized wholesale electric markets should accommodate aggregated electric storage resources, including electric storage resources installed behind-the-meter, without imposing excessive requirements that would preclude the participation of smaller resources (*e.g.,* arduous study processes and/or expensive data telemetry requirements).[215] Similarly, NY Battery and Energy Storage Consortium argues that NYISO should avoid creating metering and telemetry requirements with prohibitively high transaction costs and imposing undue burdens on behind-the-meter storage participation.[216] Energy Storage Association agrees that metering and telemetry requirements and

[199] PJM Response at 20 (citing PJM Tariff, Attachment DD, sections 11, 11A).

[200] *Id.* (citing PJM Tariff, Attachment DD, section 5.6.1(h)).

[201] *Id.* at 20–21 (citing PJM Manual 12, section 4.5.7).

[202] *Id.* at 21.

[203] SPP Response at 7.

[204] Advanced Energy Economy Comments at 16–18.

[205] SolarCity Comments at 4.

[206] Energy Storage Association Comments at 30 (citing *California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229).

[207] RES Americas Comments at 4–5.

[208] NY Battery and Energy Storage Consortium Comments at 6.

[209] SolarCity Comments at 4.

[210] Advanced Energy Economy Comments at 16–17; Solar Grid Storage Comments at 2.

[211] Energy Storage Association Comments at 29; NextEra Comments at 12.

[212] Energy Storage Association Comments at 29–30.

[213] RES Americas Comments at 5.

[214] Electric Vehicle R&D Group Comments at 2.

[215] National Electrical Manufacturers Association Comments at 5.

[216] NY Battery and Energy Storage Consortium Comments at 6.

interconnection processes can pose prohibitively high transaction costs for the small project sizes that characterize behind-the-meter electric storage resources, creating undue burdens on their participation in most RTOs/ISOs.[217]

119. Similarly, California Energy Storage Alliance claims that the overhead costs of registering individual resources within an aggregation can be burdensome and costly.[218] Specifically, California Energy Storage Alliance argues that the registration of individual customer sites with load-serving entities, the California Public Utilities Commission, and CAISO can impose significant costs that discourage participation as proxy demand response and other wholesale market resources. California Energy Storage Alliance asserts that a separate administrative process under a behind-the-meter electric storage resource-specific model, or a streamlined version under existing constructs, could reduce these administrative costs by standardizing forms and processes across all individual resources and allowing the submission of a single application.

120. Some commenters identify problems with opportunities for aggregations in the RTOs/ISOs. Energy Storage Association is concerned that aggregated distributed energy resources are not permitted to offer into some RTO/ISO markets, while it is not clear how they can offer into others.[219] Energy Storage Association claims that market rules present barriers to aggregation (particularly minimum size requirements) because they are often designed around individual sites as a resource, rather than the capabilities of an aggregated set of sites.[220] NextEra asserts that, to enable aggregators to participate effectively in the organized wholesale electric markets, more work is needed by the RTOs/ISOs, like the recent CAISO initiative that led to new aggregation opportunities for small distributed resources.[221]

121. Public Interest Organizations agree that the opportunity to aggregate distributed energy resources could help mitigate minimum size or duration requirements, but state that this opportunity is lacking or unclear in some RTOs/ISOs.[222] NY Battery and Energy Storage Consortium and NY Transmission Owners point out that NYISO rules do not allow smaller resources with a capacity less than 1 MW to aggregate and provide generation above their host loads, though they can participate as an aggregated demand response resource.[223] Similarly, Minnesota Energy Storage Alliance states that MISO's market rules prevent robust participation of distributed electric storage resources in its energy and ancillary service markets because they do not permit the aggregation of these resources to meet the 5 MW minimum capacity requirement for a Demand Response Resource.[224]

122. Solar Grid Storage states that, while PJM's 100 kW minimum size requirement to participate in its ancillary service markets allows electric storage resources to aggregate their dispatch, aggregated resources must be part of a ''performance group'' in the same location.[225] Solar Grid Storage asserts that, because some ancillary services like frequency regulation are not site specific and can be provided with equal value to PJM over vastly different areas within the ISO, this locational restriction is unreasonable.

123. Some commenters stress the need to ensure that grid reliability concerns are addressed in rules governing behind-the-meter resources, including aggregations of such resources. EEI states that, because behind-the-meter resources are interconnected to the distribution grid and ultimately impact the transmission system, EEI members are interested in ensuring that any actions the RTOs/ISOs take to allow these resources, including aggregated resources, to participate in the organized wholesale electric markets do not negatively affect the electric distribution company's ability to maintain the reliability of the distribution system.[226] EEI claims that electric distribution utilities need to have visibility and input/control of the resources that are integrated to the distribution system for planning and operating purposes. SoCal Edison states that safety and reliability needs must take precedence over wholesale market dispatch and asks the Commission to consider the safe and reliable operation of the distribution system as a key principle when addressing the participation of distribution system-connected electric storage resources in the organized wholesale electric markets.[227]

4. Proposed Reforms

124. We are interested in removing barriers in current RTO/ISO market rules that would prevent these new, smaller distributed energy resources that are technically capable of participating in the organized wholesale electric markets from doing so. It is clear from the comments that the ability to meaningfully participate in the organized wholesale electric markets for these smaller distributed energy resources is through aggregations. Thus, we propose to require each RTO/ISO to revise its tariff as necessary to allow distributed energy resource aggregators to offer to sell capacity, energy, and ancillary services in the organized wholesale electric markets. Specifically, we propose to require each RTO/ISO to revise its tariff to define distributed energy resource aggregators as a type of market participant that can participate in the organized wholesale electric markets under the participation model that best accommodates the physical and operational characteristics of its distributed energy resource aggregation. This proposal is similar to CAISO's market rules that establish a distributed energy resource provider as a new type of market participant.[228] Our proposal would expand the types of resources that are eligible to participate in the organized wholesale electric markets through aggregators and require the RTOs/ISOs to remove any unnecessary limitations on how the distributed energy resources that participate in such aggregations must be operated.

125. Distributed energy resources may be unable or unwilling to participate in the organized wholesale electric markets absent the opportunity to participate as part of a distributed energy resource aggregation. Distributed energy resources are generally smaller than other resources connected to the grid and therefore may be unable to meet all of the qualification or performance requirements for participation in the organized wholesale electric markets. Specifically, they may be too small to satisfy minimum size requirements on a stand-alone basis and, as small resources, may face operational constraints that prevent them from satisfying minimum performance

[217] Energy Storage Association Comments at 29.

[218] California Energy Storage Alliance Comments at 7.

[219] Energy Storage Association Comments at 29 (citing ISO–NE Response at 26; NYISO Response at 13).

[220] *Id.* at 27–28.

[221] NextEra Comments at 12–13 (citing *California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 at P 60).

[222] Public Interest Organizations Comments at 5.

[223] NY Battery and Energy Storage Consortium Comments at 6; NY Transmission Owners Comments at 3 (citing NYISO Installed Capacity Manual at 108, 110).

[224] Minnesota Energy Storage Alliance Comments at 4.

[225] Solar Grid Storage Comments at 4.

[226] EEI Comments at 5.

[227] SoCal Edison Comments at 2, 5–6.

[228] *See, e.g., California Indep. Sys. Operator Corp.,* 155 FERC ¶ 61,229 at PP 3–7.

requirements.[229] However, if these distributed energy resources were permitted to aggregate with other distributed energy resources to participate in the organized wholesale electric markets, they may be able to, in the aggregate, meet any minimum size and performance requirements, particularly if the operational characteristics of different distributed energy resources in a given distributed energy resource aggregation complement each other.

126. Distributed energy resource aggregations will also help to address the commercial and transactional barriers to distributed energy resource participation in the organized wholesale electric markets. Owners and operators of individual distributed energy resources may be reluctant to incur the significant costs of participating in the organized wholesale electric markets, such as the costs of the necessary metering, telemetry and communication equipment. The smaller a resource is, the more likely the transaction costs to sell services into the organized wholesale electric markets outweigh the benefits that the prospective market participant may realize from selling wholesale services. However, some of these costs can be reduced by participating in the organized wholesale electric markets through a distributed energy resource aggregation, for example the time and resources necessary to learn the market rules and actively submit bids and/or offers into the organized wholesale electric markets.

127. We also believe that some of the restrictions placed on aggregators in the RTOs/ISOs, such as the types of resources that can participate in those aggregations and the inability to inject energy onto the grid, may limit the operation and effectiveness of existing RTO/ISO programs for aggregations. Therefore, as discussed further below, we propose to expand the types of distributed energy resources that are eligible to participate in the organized wholesale electric markets through aggregators and require RTOs/ISOs to remove any unnecessary limitations on how the distributed energy resources that participate in such aggregations must be operated.

128. Our proposal requires the RTOs/ISOs to define distributed energy resource aggregators as a type of market participant that can participate in the organized wholesale electric markets under the participation model that best accommodates the physical and operational characteristics of its distributed energy resource aggregation. This proposed requirement means that the distributed energy resource aggregator would register as, for example, a generation asset if that is the participation model that best reflects its physical characteristics. While we expect efficiencies to be gained by allowing distributed energy resources aggregations to participate under existing participation models, we also acknowledge that the use of existing participation models may not be possible in every RTO/ISO based on how market participation is structured. However, where this is possible, we emphasize that the distributed energy resource aggregation must still satisfy any eligibility requirements of the applicable participation model before it can participate in the organized wholesale electric markets under that participation model. Therefore, to accommodate the participation of distributed energy resource aggregations under the various participation models, we propose that each RTO/ISO modify the eligibility requirements for existing participation models as necessary to allow for the participation of distributed energy resource aggregators.

129. The costs of distributed energy resources have decreased significantly,[230] which when paired with alternative revenue streams and innovative financing solutions, is increasing these resources' potential to compete in and deliver value to the organized wholesale electric markets. Moreover, integrating these resources' capabilities into the organized wholesale electric markets will help the RTOs/ISOs to account for their impacts on installed capacity requirements and day-ahead energy demand, thereby reducing uncertainty in load forecasts and reducing the risk of over procurement of resources and the associated costs.

130. We believe that our proposal will provide numerous supplementary benefits to the RTO/ISO systems. For example, by removing barriers to the participation of distributed energy resources in organized wholesale electric markets through aggregators, these resources may locate where price signals indicate that new capacity is most needed, potentially helping to alleviate congestion and congestion costs during peak load conditions and to reduce transmission investment costs for transmitting energy into persistently high-priced load pockets. Moreover, unlike larger fossil fuel generators that often are not able to locate in load pockets due to environmental or other citing concerns, distributed energy resources are more able to co-locate with load and provide associated benefits. We also believe that the shorter lead time to develop many forms of distributed energy resources compared to traditional generators or transmission lines allows them to rapidly respond to near-term generation or transmission reliability-related requirements, further improving their ability to enhance reliability and reduce system costs.

131. Additionally, we agree with the comments of Advanced Energy Economy and Public Interest Organizations that electric storage resources and other resources connected to the distribution system should be able to participate in all of the organized wholesale electric markets in which they are technically capable of participating and that barriers that unnecessarily prevent distributed energy resources from providing certain services may be caused by market rules that are unduly discriminatory. The most commonly cited example of these barriers to participation in the comments we received are market rules that relegate electric storage resources, particularly behind-the-meter electric storage resources, to market participation using demand response programs. We agree with commenters that existing RTO/ISO demand response programs may restrict the ability of electric storage and other distributed energy resources from providing the full suite of services that they are capable of providing, and therefore propose this alternative path for distributed energy resources to access the organized wholesale electric markets.

132. As such, we propose to require each RTO/ISO to revise its tariff to allow distributed energy resource aggregators to participate directly in the organized wholesale electric markets and to establish market rules to accommodate the participation of distributed energy resource aggregations, consistent with the following:

a. Eligibility to participate in the organized wholesale electric markets through a distributed energy resource aggregator;

b. Locational requirements for distributed energy resource aggregations;

c. Distribution factors and bidding parameters for distributed energy resource aggregations;

[229] For example, combining the discharge times of multiple electric storage resources and/or combining them with distributed generation resources could allow aggregated resources to meet minimum run-time requirements that individual electric storage resources may not be able to meet.

[230] *See, e.g., Revolution . . . Now, The Future Arrives for Five Clean Energy Technologies,* 2016 Update, at 1; and *Tracking the Sun VIII,* Lawrence Berkeley National Lab, at 15 (Aug. 2015).

d. Information and data requirements for distributed energy resource aggregations;

e. Modifications to the list of resources in a distributed energy resource aggregation;

f. Metering and telemetry system requirements for distributed energy resource aggregations;

g. Coordination between the RTO/ISO, the distributed energy resource aggregator, and the distribution utility; and

h. Market participation agreements for distributed energy resource aggregators.

a. Eligibility To Participate in the Organized Wholesale Electric Markets Through a Distributed Energy Resource Aggregator

133. We preliminarily find that limiting the types of technologies that are allowed to participate in the organized wholesale electric markets through distributed energy resource aggregator would create a barrier to entry for emerging or future technologies, potentially precluding them from being eligible to provide all of the capacity, energy and ancillary services that they are technically capable of providing. While some individual resources or certain technologies may not be able to meet the qualification or performance requirements to provide services to the organized wholesale electric markets on their own, they may satisfy such requirements as part of a distributed energy resource aggregation where resources complement one another's capabilities.[231] To help ensure that the market rules that the RTOs/ISOs develop to comply with any Final Rule issued in this proceeding are sufficiently flexible to accommodate the participation of new distributed energy resources as technology continues to evolve and to acknowledge the potential for distributed energy resources to satisfy qualification or performance requirements through a distributed energy resource aggregator, we propose that each RTO/ISO revise its tariff so that it does not prohibit the participation of any particular type of technology in the organized wholesale electric markets through a distributed energy resource aggregator. However, to the extent existing rules or regulations explicitly prohibit certain technologies from participating in the organized wholesale electric markets, we do not intend to overturn those rules or regulations.

134. We also propose that it is appropriate for each RTO/ISO to limit the participation of resources in the organized wholesale electric markets through a distributed energy resource aggregator that are receiving compensation for the same services as part of another program. Since resources able to register as part of a distributed energy resources aggregation will be located on the distribution system, they may also be eligible to participate in retail compensation programs, such as net metering, or other wholesale programs, such as demand response programs. Therefore, to ensure that there is no duplication of compensation, we propose that distributed energy resources that are participating in one or more retail compensation programs such as net metering or another wholesale market participation program will not be eligible to participate in the organized wholesale electric markets as part of a distributed energy resource aggregation.

135. With respect to the capacity of the individual distributed energy resources that can participate in the wholesale electric markets through a distributed energy resource aggregator, we propose not to establish a minimum or maximum capacity requirement. We believe participation in the organized wholesale electric markets through a distributed energy resource aggregator should not be conditioned on the size of the resource, but we recognize that existing organized wholesale electric market rules may require resources to meet certain minimum or maximum capacity requirements under certain participation models. Therefore, we seek comment on whether we should establish a minimum or maximum capacity limit for individual resources seeking to participate in the organized wholesale electric markets through a distributed energy resource aggregator, or whether we should allow each RTO/ISO to propose such a minimum or maximum capacity requirement on compliance with any Final Rule issued in this rulemaking proceeding. To the extent that commenters think that we should adopt a minimum or maximum capacity requirement for individual distributed energy resources participating in the organized wholesale markets through a distributed energy resource aggregator, we seek comment on what that requirement should be.

136. With respect to the size of the distributed energy resource aggregations themselves, we propose that these aggregations meet any minimum size requirements of the participation model under which they elect to participate in the organized wholesale electric markets. For example, if a distributed energy resource aggregator decides to register using the participation model for electric storage resources proposed above given the cumulative physical and operational characteristics of the distributed energy resources in its aggregation, then its distributed energy resource aggregation would be required to meet the 100 kW minimum size requirement we propose for that participation model. Alternatively, if the distributed energy resource aggregator decides to register as a generator, then its aggregation would be required to meet the minimum size requirement for the generator participation model in the relevant RTO/ISO market. We seek comment on this proposal to require distributed energy resource aggregations to meet the minimum size requirements of the participation model that they use to participate in the organized wholesale electric markets.

137. Consistent with Order No. 719, we also propose that each RTO/ISO revise its tariff to allow a single qualifying distributed energy resource to avail itself of the proposed distributed energy resource aggregation rules by serving as its own distributed energy resource aggregator.[232]

b. Locational Requirements for Distributed Energy Resource Aggregations

138. Some RTO/ISO market rules permit only those resources that are located behind the same point of interconnection or at a single pricing node to aggregate. These limitations could be the result of several concerns. For instance, an RTO/ISO may be concerned that geographically dispersed resources participating in the organized wholesale electric markets through a distributed energy resource aggregation may exacerbate a transmission constraint or otherwise cause a reliability concern if dispatched as a single resource by the RTO/ISO. Similarly, an RTO/ISO may be concerned about price formation for services with geographically specific prices if geographically dispersed resources participating in the organized wholesale electric markets through a distributed energy resource aggregation were dispatched as a single resource by the RTO/ISO. That said, we are concerned that some existing

[231] Combining electric storage resources with distributed generation could allow the aggregate resource to achieve performance requirements (such as minimum run times) that an electric storage resource could not meet on its own and provide services (such as regulation) that distributed generation may not be able to provide on its own.

[232] *See* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158(d) (''An [aggregator of retail customers] can bid demand response either on behalf of only one retail customer or multiple retail customers.'').

requirements for aggregations to be located behind a single point of interconnection or pricing node may be overly stringent and may unnecessarily restrict the opportunities for distributed energy resources to participate in the organized wholesale electric markets through a distributed energy resource aggregator. We also note that recent improvements in metering, telemetry, and communication technology should facilitate better situational awareness and enable management of geographically disperse distributed energy resource aggregations, potentially rendering such restrictive locational requirements unnecessary.

139. Therefore, we propose to require each RTO/ISO to revise its tariff to establish locational requirements for distributed energy resources to participate in a distributed energy resource aggregation that are as geographically broad as technically feasible. Our proposal would give each RTO/ISO flexibility to adopt locational requirements that both allow for the participation of geographically disperse distributed energy resources in the organized wholesale electric markets through a distributed energy resource aggregation, where technically feasible, and account for the modeling and dispatch of the RTO's/ISO's transmission system. We further acknowledge that the appropriate locational requirements may differ based on the services that a distributed energy resource aggregator seeks to provide (*e.g.,* the locational requirements for participation in the day-ahead energy market may differ from those for participation in the ancillary service markets).

140. To the extent that commenters would prefer that we require the RTOs/ISOs to adopt consistent locational requirements, we seek further comment on what locational requirements we could require each RTO/ISO to adopt that would allow distributed energy resources to be aggregated as widely as possible without threatening the reliability of the transmission grid or the efficiency of the organized wholesale electric markets. We note that, in some RTOs/ISOs and for some services, the only geographic limitations imposed on distributed energy resource aggregations are by zone or due to modeled transmission constraints.[233]

141. We seek comment on potential concerns about dispatch, pricing, or settlement that the RTOs/ISOs must address if the distributed energy resources in a particular distributed energy resource aggregation are not limited to the same pricing node or behind the same point of interconnection. We also note that, as discussed in Section III.B.4.g, we propose to allow the relevant distribution utility or utilities to review the list of distributed energy resources in a distributed energy resource aggregation, which will also help ensure that dispatch of the aggregated distributed energy resources as a single resource will not cause any reliability concerns.

c. Distribution Factors and Bidding Parameters for Distributed Energy Resource Aggregations

142. RTOs/ISOs need to know which resources in a distributed energy resource aggregation will be responding to their dispatch signals and where those resources are located. This information is particularly important if the resources in a distributed energy resource aggregation are located across multiple points of interconnection, multiple transmission or distribution lines, or multiples nodes on the grid.

143. We, therefore, propose that the market rules governing distributed energy resource aggregations allow the RTOs/ISOs to require sufficient information from the resources in a distributed energy resource aggregation to reliably operate their systems. Specifically, we propose to require each RTO/ISO to revise its tariff to include the requirement that distributed energy resource aggregators (1) provide default distribution factors[234] when they register their distributed energy resource aggregation and (2) update those distribution factors if necessary when they submit offers to sell or bids to buy into the organized wholesale electric markets. In turn, we propose to require each RTO/ISO to revise the bidding parameters for each participation model in its tariff to allow distributed energy resource aggregators to update their distribution factors when participating in the organized wholesale electric markets. In addition to comments on this proposal, we seek comment on alternative approaches that may provide the RTOs/ISOs with the information from geographically or electrically disperse resources in a distributed energy resource aggregation necessary to reliably operate their systems.

144. Moreover, we preliminarily find that the bidding parameters for each participation model in the RTO/ISO tariffs may have to account for the physical and operational characteristics of distributed energy resource aggregations. Therefore, we seek comment on whether bidding parameters in addition to those already incorporated into existing participation models may be necessary to adequately characterize the physical or operational characteristics of distributed energy resource aggregations.

d. Information and Data Requirements for Distributed Energy Resource Aggregations

145. The RTOs/ISOs need sufficient information about the distributed energy resource aggregation and the individual resources in a distributed energy resource aggregation to effectively model, dispatch, and settle the aggregation. We preliminarily find that the information and data requirements that apply to distributed energy resource aggregations must not pose barriers to the participation of small distributed energy resources or distributed energy resources relying on any specific technology in the organized wholesale electric markets through a distributed energy resource aggregator. We refer to information and data requirements as the information that the distributed energy resource aggregator is required to provide to the RTO/ISO when the distributed energy resource aggregator and its list of resources register as a market participant as well as the information and data necessary for settlement and auditing purposes. In this NOPR, we seek to balance the information needs of RTOs/ISOs with information requirements so burdensome that they could limit the benefit of these proposed changes. The RTO/ISO will require certain information for the distributed energy resource aggregation as a whole, as well as the individual resources in the aggregation. While some of this information may be replicated in bidding parameters, we propose that the distributed energy resource aggregator

[233] *See, e.g.,* CAISO Tariff, Att. A, section 4.17.3 (e) (''Each Distributed Energy Resource Aggregation must be located in a single Sub-LAP.''). CAISO defines a sub-LAP as a subset of pricing nodes within a default load aggregation point. *See* CAISO Tariff, Appendix A, Master Definitions and Supplement. *See also* NYISO Market Administration and Control Area Service Tariff, section 2.4 (Definitions–D) (''Demand Side Ancillary Service Program Resource (DSASP Resource): A Demand Side Resource or an aggregation of Demand Side Resources located in the [New York Control Area (NYCA)] with at least 1 MW of load reduction that is represented by a point identifier (PTID) and is assigned to a Load Zone or Subzone by the ISO . . . .''); NYISO Day-Ahead Demand Response Program Manual at 2.16.4 (''A process and procedures will be drawn to . . . set limits to aggregation projects by zone, provider, program, or any other category.'').

[234] For purposes of this NOPR, distribution factors indicate how much of the total response from a distributed energy resource aggregation would be coming from each pricing node at which one or more resources participating in the aggregation are located.

initially provide to the RTO/ISO a description of the physical parameters of the distributed energy resource aggregation, including (1) the total capacity; (2) the minimum and maximum operating limits; (3) the ramp rate; (4) the minimum run time; and (5) the default distribution factors, if applicable. We propose to require each RTO/ISO to revise its tariff to require distributed energy resource aggregators to provide the RTO/ISO with a list of the distributed energy resources in the distributed energy resource aggregation that includes information about each of those distributed energy resources, including each resource's capacity, location on the distribution system, and its operating limits.

146. Electric Vehicle R&D Group identifies PJM's requirement for resources in a distributed energy resource aggregation to provide a one-line diagram of the resource as too cumbersome, especially for small resources at residential locations.[235] Additionally, in CAISO's distributed energy resource provider filing, CAISO declined to require renewable generation resources in an aggregation to provide the same meteorological data that standalone intermittent generators are required to provide because they believed the requirement would create an undue burden on individual distributed energy resources.[236] We agree that certain information requirements may be so burdensome for individual distributed energy resources that they pose a barrier to the participation of these distributed energy resources in the organized wholesale electric markets through aggregations. We therefore seek comment on whether there are information and data requirements imposed by RTOs/ISOs that apply to other market participants that should not apply to individual distributed energy resources participating in the organized wholesale electric markets through a distributed energy resource aggregation.

147. We also propose to require each RTO/ISO to revise its tariff to require distributed energy resource aggregators to maintain aggregate settlement data for the distributed energy resource aggregation so that the RTO/ISO can regularly settle with the distributed energy resource aggregator for its market participation. Finally, we propose to require distributed energy resource aggregators to maintain data for a length of time consistent with the RTO's/ISO's auditing requirements, for each individual resource in its distributed energy resource aggregation so that each resource can verify its performance if audited. We seek comment on these proposed data requirements and on whether distributed energy resource aggregators should be required to provide additional data to the RTO/ISO.

e. Modifications to the List of Resources in a Distributed Energy Resource Aggregation

148. The requirements for a distributed energy resource aggregator associated with modifications to the list of resources in a distributed energy resource aggregation can present a barrier to the participation of distributed energy resource aggregations in the organized wholesale electric markets. Electric Vehicle R&D Group notes that, to modify its distributed energy resource aggregation in PJM, it has to un-register all resources in its aggregation and then re-run the testing protocol for the revised aggregation to re-qualify to participate in the PJM markets.[237] Electric Vehicle R&D Group argues that testing every incremental addition to an aggregation is unnecessary because they are required to continuously report their available capacity and meter their aggregate power response. Because the incremental impacts on the organized wholesale electric markets of the addition or removal of individual distributed energy resources from a distributed energy resource aggregation will likely be minimal, and they are short lead time resources that can be developed and built quickly, we preliminarily conclude that they should be able to enter and exit distributed energy resource aggregations participating in the organized wholesale electric markets without undue burden.

149. We therefore propose that each RTO/ISO revise its tariff to allow a distributed energy resource aggregator to modify the list of resources in its distributed energy resource aggregation without reregistering all of the resources if the modification will not result in any safety or reliability concerns. We emphasize, however, pursuant to the proposed requirements in Section III.B.4.g below, that the relevant distribution utility or utilities must have the opportunity to review the list of individual resources that are located on their distribution system in a distributed energy resource aggregation before those resources may participate in the organized wholesale electric markets through the aggregation, so that they can assess whether the resources would be able to respond to RTO/ISO dispatch instructions without posing any significant risk to the distribution system.

f. Metering and Telemetry System Requirements for Distributed Energy Resource Aggregations

150. While the distributed energy resources in an aggregation will need to be directly metered, the metering and telemetry system, *i.e.,* hardware and software, requirements RTOs/ISOs impose on distributed energy resource aggregators and individual resources in distributed energy resource aggregations can pose a barrier to the participation of these aggregations in organized wholesale electric markets. We recognize that RTOs/ISOs need metering data for settlement purposes, and telemetry data to determine a resource's real-time operational capabilities so that they can efficiently dispatch resources. However, metering and telemetry systems are often expensive potentially creating a burden for small distributed energy resources. While telemetry data about a distributed energy resource aggregation as a whole is necessary for the RTO/ISO to efficiently dispatch the aggregation, telemetry data for each individual resource in the aggregation may not be.

151. While we are not proposing to prescribe specific metering and telemetry systems for distributed energy resource aggregators, we propose to require each RTO/ISO to revise its tariff to identify any necessary metering and telemetry hardware and software requirements for distributed energy resource aggregators and the individual resources in a distributed energy resource aggregation. These requirements must ensure that the distributed energy resource aggregator will be able to provide the necessary information and data to the RTO/ISO discussed in Section III.B.4.d but also not impose unnecessarily burdensome costs on the distributed energy resource aggregators and individual resources in a distributed energy resource aggregation that may create a barrier to their participation in the organized wholesale electric markets. We also note that there may be different types of resources in these aggregations, some in front of the meter, some behind the meter with the ability to inject energy back to the grid, and some behind the meter without the ability to inject energy to the grid. We therefore seek comment on whether the RTOs/ISOs need to establish metering and telemetry hardware and software requirements for each of the different types of distributed energy resources that participate in the

[235] Electric Vehicle R&D Group Comments at 8–9.

[236] *See* CAISO Transmittal Letter, Docket No ER16–1085–000, at 22. (Mar. 4, 2016).

[237] Electric Vehicle R&D Group Comments at 9.

organized wholesale electric markets through distributed energy resource aggregations, as well as whether we should establish specific metering and telemetry system requirements and, if so, what requirements would be appropriate.

152. With respect to telemetry, we believe that the distributed energy resource aggregator should be able to provide to the RTO/ISO the real-time capability of its resource in a manner similar to the requirements for generators, so the RTO/ISO knows the operating level of the resource and how much that resource can ramp up or ramp down over its full range of capability, including its charging capability for distributed energy resource aggregations that include electric storage resources. These telemetry system requirements may also need to be in place at different locations for geographically dispersed distributed energy resource aggregations that have to provide distribution factors or other similar factors, as discussed above. With respect to metering, we recognize that distributed energy resources may be subject to metering system requirements established by the distribution utility or local regulatory authority. Therefore, we propose that each RTO/ISO should rely on meter data obtained through compliance with these distribution utility or local regulatory authority metering system requirements whenever possible for settlement and auditing purposes, only applying additional metering system requirements for distributed energy resource aggregations when this data is insufficient.

g. Coordination Between the RTO/ISO, the Distributed Energy Resource Aggregator, and the Distribution Utility

153. The market rules that each RTO/ISO adopts to facilitate the participation of distributed energy resource aggregations must address coordination between the RTO/ISO, the distributed energy resource aggregator, and the distribution utility to ensure that the participation of these resources in the organized wholesale electric markets does not present reliability or safety concerns for the distribution or transmission system. Thus, we propose to require each RTO/ISO to revise its tariff to provide for coordination among the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utilities with respect to (1) the registration of new distributed energy resource aggregations and (2) ongoing coordination, including operational coordination, between the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utility or utilities. We seek comment on the detailed proposals described below.

154. First, we propose that each RTO/ISO revise its tariff to provide for coordination among itself, a distributed energy resource aggregator, and the relevant distribution utility or utilities when a distributed energy resource aggregator registers a new distributed energy resource aggregation or modifies an existing distributed energy resource aggregation to include new resources. The purpose of this coordination would be to ensure that all of the individual resources in the distributed energy resource aggregation are technically capable of providing services to the RTO/ISO through the aggregator and are eligible to be part of the aggregation (*i.e.,* are not participating in another retail or wholesale compensation program, as discussed in Section III.B.4.a above). In addition, we propose that this coordination provide the relevant distribution utility or utilities with the opportunity to review the list of individual resources that are located on their distribution system that enroll in a distributed energy resource aggregation before those resources may participate in the organized wholesale electric markets through the aggregation. The opportunity for the relevant distribution utility or utilities to review the list of these resources would allow them to assess whether the resources would be able to respond to RTO/ISO dispatch instructions without posing any significant risk to the distribution system and to ensure these resources are not participating in any other retail compensation programs. Finally, we propose that this coordination provide the relevant distribution utility or utilities the opportunity to report such information to the RTO/ISO for its consideration prior to the RTO/ISO allowing the new or modified distributed energy resource aggregation to participate in the organized wholesale electric market. We seek comment on whether the RTO/ISO tariffs should provide for any additional review by or coordination with other parties prior to a new or existing distributed energy resource aggregation participating in the organized wholesale electric markets.

155. Second, we acknowledge that ongoing coordination between the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utility or utilities may be necessary to ensure that the distributed energy resource aggregator is disaggregating dispatch signals from the RTO/ISO and dispatching individual resources in a distributed energy resource aggregation consistent with the limitations of the distribution system. Thus, we propose that each RTO/ISO revise its tariff to establish a process for ongoing coordination, including operational coordination, among itself, the distributed energy resource aggregator, and the distribution utility to maximize the availability of the distributed energy resource aggregation consistent with the safe and reliable operation of the distribution system. To account for the possibility that distribution facilities may be out of service and impair the operation of certain individual resources in a distributed energy resource aggregation, we also propose to require each RTO/ISO to revise its tariff to require the distributed energy resource aggregator to report to the RTO/ISO any changes to its offered quantity and related distribution factors that result from distribution line faults or outages. We seek comment on the level of detail necessary in the RTO/ISO tariffs to establish a framework for ongoing coordination between the RTO/ISO, a distributed energy resource aggregator, and the relevant distribution utility or utilities. We also seek comment on any related reliability, safety, and operational concerns and how they may be effectively addressed.

156. Further, we seek comment on the appropriate lines of communication to require. While it may be commercially efficient for the distributed energy resource aggregator to have the burden of communicating with both the RTO/ISO and the distribution utility, and acknowledging the assumption that the distributed energy resource aggregator will be the single point of contact with the RTO/ISO, are there reasons (*e.g.,* distribution operations or a distributed energy resource aggregator's commercial interest) why this would be insufficient communication? Does a distribution utility that serves distributed energy resources need real-time direct communication with the RTO/ISO, such as in the form of operating procedures or software-enabled communications, in order to operate its distribution system, or can that communication be organized through the distributed energy resource aggregator? Finally, we welcome comments on how the distributed energy resource aggregator model proposed herein would interact with or complement the distribution system operator (DSO) model being discussed in some states, and whether a DSO model might add value to the distributed energy resource aggregator model in terms of facilitating communication among affected entities?

h. Market Participation Agreements for Distributed Energy Resource Aggregators

157. To ensure that a distributed energy resource aggregator complies with all relevant provisions of the RTO/ISO tariffs, it must execute an agreement with the RTO/ISO that defines its roles and responsibilities and its relationship with the RTO/ISO before it can participate in the organized wholesale electric markets. Since the individual resources in these distributed energy resource aggregations will likely fall under the purview of multiple organizations (*e.g.,* the RTO/ISO, state regulatory commissions, relevant distribution utilities, and local regulatory authorities), these agreements must also require that the distributed energy resource aggregator attests that its distributed energy resource aggregation is compliant with the tariffs and operating procedures of the distribution utilities and the rules and regulations of any other relevant regulatory authority.[238] We therefore propose that each RTO/ISO revise its tariff to include a market participation agreement for distributed energy resource aggregators. We do not propose specific requirements for such agreements at this time, but instead seek comment on the information these agreements should contain.

158. While these agreements will define the roles and responsibilities of the distributed energy resource aggregator, they should not limit the business models under which distributed energy resource aggregators can operate. Therefore, we propose that the market participation agreement for distributed energy resource aggregators that each RTO/ISO must include in its tariff does not restrict the business models that distributed energy resource aggregators may adopt. For example, while the third-party aggregator is a common business model, the market participation agreement for distributed energy resource aggregators should not preclude distribution utilities, cooperatives, or municipalities from aggregating distributed energy resources on their systems or even microgrids from participating in the organized wholesale electric markets as a distributed energy resource aggregation.

## IV. Compliance

159. We propose to require each RTO/ISO to submit a compliance filing to demonstrate that it satisfies the proposed requirements set forth in the Final Rule within six months of the date the Final Rule in this proceeding is published in the **Federal Register**. While we believe that six months is sufficient for each RTO/ISO to develop and submit its compliance filing, we recognize that implementation of the reforms proposed herein could take more time due to the changes that may be necessary to each RTO's/ISO's modeling and dispatch software. Therefore, we propose to allow twelve months from the date of the compliance filing for implementation of the proposed reforms to become effective.

160. We seek comment on the proposed deadline for each RTO/ISO to submit its compliance filing, as well as the proposed deadline for each RTO's/ISO's implementation of the proposed reforms to become effective. Specifically, we seek comment on whether the proposed compliance and implementation timeline would allow sufficient time for each RTO/ISO to implement changes to its technological systems and business processes in response to a Final Rule. We also seek comment on whether the RTOs/ISOs will require more or less time to implement certain reforms versus others.

161. To the extent that any RTO/ISO believes that it already complies with any of the requirements adopted in a Final Rule in this proceeding, the RTO/ISO would be required to demonstrate how it complies in the filing due within six months of the date any Final Rule in this proceeding is published in the **Federal Register**. The proposed implementation deadline would apply only to the extent that an RTO/ISO does not already comply with the reforms proposed in this NOPR.

## V. Information Collection Statement

162. The Paperwork Reduction Act (PRA)[239] requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB's regulations,[240] in turn, require approval of certain information collection requirements imposed by agency rules. Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collection(s) of information unless the collection(s) of information display a valid OMB control number.

163. In this NOPR, we are proposing to amend the Commission's regulations under Part 35 to require each RTO/ISO to propose revisions to its tariff to (1) establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, accommodates their participation in the organized wholesale electric markets and (2) define distributed energy resource aggregators as a type of market participant that can participate in the organized wholesale electric markets under the participation model that best accommodates the physical and operational characteristics of its distributed energy resource aggregation. Accordingly, we encourage comments regarding the time burden expected to be required to comply with the proposed rule regarding the requirement for the RTOs/ISOs to change their tariffs to conform to the proposed rule. Specifically, this NOPR seeks comment on the additional burden and cost (human, hardware, and software) associated with implementation, operation, and maintenance of these new provisions in RTO/ISO tariffs. The Commission will provide estimates for these costs in any future Final Rule, as appropriate.

*Burden Estimate and Information Collection Costs:* We believe that the burden estimates below are representative of the average burden on respondents. The estimated burden and cost for the requirements contained in this NOPR follow.

[238] This may include any laws or regulations of the relevant retail regulatory authority that do not permit demand response resources to participate in the RTO/ISO markets as the Commission considered in Order No. 719. *See* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 154.

[239] 44 U.S.C. 3501–3520.

[240] 5 CFR 1320 (2016).

FERC–516, AS MODIFIED BY THE NOPR IN DOCKET RM16–23–000

| | Number of respondents (1) | Annual number of responses per respondent (2) | Total number of responses (1) × (2) = (3) | Average burden (hours) & cost per response (4) | Total annual burden hours & total annual cost (3) × (4) = (5) | Cost per respondent ($) (5) ÷ (1) |
|---|---|---|---|---|---|---|
| *One-Time Tariff Filings (Year 1).* | [241] 6 | 1 | 6 | 1,040 hrs; $76,960 [242] ..... | 6,240 hrs; $461,760 ..... | $76,960 |

*Title:* FERC–516, Electric Rate Schedules and Tariff Filings.

*Action:* Proposed revisions to an information collection.

*OMB Control No.:* 1902–0096.

*Respondents for this Rulemaking:* RTOs and ISOs.

*Frequency of Information:* One-time during Year One.

*Necessity of Information:* The Commission implements this rule to eliminate barriers to electric storage resource participation in the organized wholesale electric markets and allow for participation of aggregated distributed energy resources in the organized wholesale electric markets.

*Internal Review:* The Commission has reviewed the changes and has determined that such changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has specific, objective support for the burden estimates associated with the information collection requirements.

Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director] Email: *DataClearance@ferc.gov* Phone: (202) 502–8663; fax: (202) 273–0873. Comments concerning the collection of information and the associated burden estimate(s) may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address: *oira_submission@omb.eop.gov*. Comments submitted to OMB should refer to FERC–516 and OMB Control No. 1902–0096.

## VI. Regulatory Flexibility Act Certification

164. The Regulatory Flexibility Act of 1980 (RFA) [243] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[244] These standards are provided on the SBA Web site.[245]

165. The SBA classifies an entity as an electric utility if it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale. Under this definition, the six RTOs/ISOs are considered electric utilities, specifically focused on electric bulk power and control. The size criterion for a small electric utility is 500 or fewer employees.[246] Since every RTO/ISO has more than 500 employees, none are considered small entities.

166. Furthermore, because of their pivotal roles in wholesale electric power markets in their regions, none of the RTOs/ISOs meet the last criterion of the two-part RFA definition of a small entity: ''Not dominant in its field of operation.'' [247] As a result, we certify that the reforms required by this NOPR would not have a significant economic impact on a substantial number of small entities.

## VII. Environmental Analysis

167. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[248] We conclude that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale of electric energy subject to the Commission's jurisdiction, plus the classification, practices, contracts and regulations that affect rates, charges, classifications, and services.[249]

## VIII. Comment Procedures

168. The Commission invites interested persons to submit comments on all matters and issues proposed in this Proposal to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due January 30, 2017. Comments must refer to Docket No. RM16–23–000 and must include the commenter's name, the organization they represent, if applicable, and their address.

169. The Commission encourages comments to be filed electronically via

[241] Respondent entities are either RTOs or ISOs.

[242] The estimated hourly cost (salary plus benefits) provided in this section is based on the salary figures for May 2015 posted by the Bureau of Labor Statistics for the Utilities sector (*http://www.bls.gov/oes/current/naics2_22.htm#13-0000*) and scaled to reflect benefits using the relative importance of employer costs in employee compensation from June 2016 (*http://www.bls.gov/news.release/ecec.nr0.htm*). The hourly estimates for salary plus benefits are:

Legal (code 23–0000), $128.94

Computer and mathematical (code 15–0000), $60.54

Information systems manager (code 11–3021), $91.63

IT security analyst (code 15–1122), $63.55

Auditing and accounting (code 13–2011), $53.78

Information and record clerk (code 43–4199), $37.69

Electrical Engineer (code 17–2071), $64.20

Economist (code 19–3011), $74.43

Management (code 11–0000), $88.94

The average hourly cost (salary plus benefits), weighting all of these skill sets evenly, is $73.74. The Commission rounds it to $74 per hour.

[243] 5 U.S.C. 601–12.

[244] 13 CFR 121.101.

[245] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (effective Feb. 26, 2016), *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf*.

[246] 13 CFR 121.201 (Sector 22, Utilities).

[247] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation. The Small Business Administration's regulations at 13 CFR 121.201 define the threshold for a small Electric Bulk Power Transmission and Control entity (NAICS code 221121) to be 500 employees. *See* 5 U.S.C. 601(3) (citing to section 3 of the Small Business Act, 15 U.S.C. 632).

[248] *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs., ¶ 30,783 (1987).

[249] 18 CFR 380.4(a)(15).

the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

170. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this Proposal are not required to serve copies of their comments on other commenters.

**IX. Document Availability**

171. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

172. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number of this document, excluding the last three digits, in the docket number field.

173. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov*.

**List of Subjects in 18 CFR Part 35**

Electric power rates; Electric utilities.

By direction of the Commission.

Issued: November 17, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

In consideration of the foregoing, the Commission proposes to amend Part 35 Chapter 1, Title 18 of the *Code of Federal Regulations* as follows:

## PART 35—FILING OF RATE SCHEDULES AND TARIFFS

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

**Authority:** 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.28 by adding new paragraphs (b)(9) through (12), (g) (9), and (g)(10).

**§ 35.28 Non-discriminatory open access transmission tariff.**

* * * * *

(b) * * *

(9) *Electric storage resource* as used in this section means a resource capable of receiving electric energy from the grid and storing it for later injection of electricity back to the grid regardless of where the resource is located on the electrical system.

(10) *Distributed energy resource* as used in this section means a source or sink of power that is located on the distribution system, any subsystem thereof, or behind a customer meter.

(11) *Distributed energy resource aggregator* as used in this section means the entity that aggregates one or more distributed energy resources for purposes of participation in the capacity, energy and ancillary service markets of the regional transmission organizations and independent system operators.

(12) *Organized wholesale electric markets* as used in this section means the capacity, energy, and ancillary service markets operated by regional transmission organizations and independent system operators.

* * * * *

(g) * * *

(9) *Electric Storage Resources.* (i) Each Commission-approved independent system operator and regional transmission organization must have tariff provisions providing a participation model for electric storage resources that

(A) Ensures that electric storage resources are eligible to provide all capacity, energy and ancillary services that they are technically capable of providing in the organized wholesale electric markets;

(B) Incorporates bidding parameters that reflect and account for the physical and operational characteristics of electric storage resources;

(C) Ensures that electric storage resources can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with existing rules that govern when a resource can set the wholesale price;

(D) Establishes a minimum size requirement for participation in the organized wholesale electric markets that does not exceed 100 kW; and

(E) Specifies that the sale of energy from the organized wholesale electric markets to an electric storage resource that the resource then resells back to those markets must be at the wholesale locational marginal price.

(ii) [Reserved]

(10) *Distributed Energy Resource Aggregators.* (i) Each independent system operator and regional transmission organization must have tariff provisions that allow distributed energy resource aggregations to participate directly in the organized wholesale electric markets. Each regional transmission organization and independent system operator must establish distributed energy resource aggregators as a type of market participant and must allow the distributed energy resource aggregators to register distributed energy resource aggregations under the participation model in the regional transmission operator or the independent system operator's tariff that best accommodates the physical and operational characteristics of the distributed energy resource aggregation.

(ii) Each regional transmission operator and independent system operator, to accommodate the participation of distributed energy resource aggregations, must establish market rules on:

(A) Eligibility to participate in the organized wholesale electric markets through a distributed energy resource aggregation;

(B) Locational requirements for distributed energy resource aggregations;

(C) Distribution factors and bidding parameters for distributed energy resource aggregations;

(D) Information and data requirements for distributed energy resource aggregations;

(E) Modification to the list of resources in a distributed energy resource aggregation;

(F) Metering and telemetry system requirements for distributed energy resource aggregations;

(G) Coordination between the regional transmission organization or independent system operator, the distributed energy resource aggregator, and the distribution utility;

(H) Market participation agreements for distributed energy resource aggregators.

**Note:** *The following appendix will not appear in the Code of Federal Regulations*

**Appendix A: Abbreviated Names of Commenters**

The following table contains the abbreviated names of the commenters that are used in this Notice of Proposed Rulemaking.

| Abbreviation | Commenters |
|---|---|
| Advanced Energy Economy | Advanced Energy Economy |
| AEP | American Electric Power Service Corporation |

| Abbreviation | Commenters |
|---|---|
| AES Companies | Indianapolis Power & Light Company, The Dayton Power and Light Company, AES Energy Storage LLC, AES ES Tait LLC and all other AES U.S. operating companies that own generation and storage |
| Alevo | Alevo Analytics |
| Advanced Microgrid Solutions | Advanced Microgrid Solutions, Inc. |
| APPA | American Public Power Association |
| Advanced Rail Energy Storage | Advanced Rail Energy Storage, LLC |
| Brookfield Renewable | Brookfield Renewable |
| California Department of Water Resources | California Department of Water Resources |
| California Energy Storage Alliance | California Energy Storage Alliance |
| Delaware Commission | Delaware Public Service Commission |
| Duke Energy | Duke Energy Corporation |
| EEI | Edison Electric Institute |
| Enel Green Power | Enel Green Power North America, Inc. |
| Electric Power Supply Association | Electric Power Supply Association |
| Electric Vehicle R&D Group | University of Delaware Electric Vehicle R&D Group |
| Energy Storage Association | Energy Storage Association |
| FirstLight | FirstLight Power Resources Management LLC |
| Golden Spread | Golden Spread Electric Cooperative, Inc. |
| Ice Energy | Ice Energy |
| Independent Energy Producers Association | Independent Energy Producers Association |
| Manitoba Hydro | Manitoba Hydro |
| Minnesota Energy Storage Alliance | Minnesota Energy Storage Alliance |
| National Electrical Manufacturers Association | National Electrical Manufacturers Association |
| National Hydropower Association | National Hydropower Association |
| New York Battery and Energy Storage Consortium | New York Battery and Energy Storage Technology Consortium |
| NextEra | NextEra Energy Resources, LLC |
| NRECA | National Rural Electric Cooperative Association |
| NY Transmission Owners | Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., Power Supply Long Island, and Rochester Gas and Electric Corporation |
| Ormat | Ormat Nevada Inc. |
| Pacific Gas & Electric | Pacific Gas and Electric Company |
| Public Interest Organizations | Sustainable FERC Project on behalf of Natural Resources Defense Council and Union of Concerned Scientists |
| PJM Market Monitor | Independent Market Monitor For PJM |
| Quanta | Ralph Masiello, Quanta Technologies, LLC |
| RES Americas | Renewable Energy Systems Americas Inc. |
| SoCal Edison | Southern California Edison Company |
| Schulte Associates | Schulte Associates LLC |
| Solar Grid Storage | Solar Grid Storage, LLC |
| SolarCity | SolarCity Corporation |
| Steffes | Steffes |
| Tesla | Tesla Motors, Inc. |
| Viridity | Viridity Energy, Inc. |
| Wellhead | Wellhead Electric Company |
| Xcel Energy Services | Xcel Energy Services, Inc., on behalf of its operating company affiliates, Northern States Power and Southwestern Public Service Company |

[FR Doc. 2016–28194 Filed 11–29–16; 8:45 am]

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# FEDERAL REGISTER

Vol. 81 Wednesday,
No. 230 November 30, 2016

Part V

## The President

Proclamation 9546—Thanksgiving Day, 2016

Federal Register
Vol. 81, No. 230
Wednesday, November 30, 2016

# Presidential Documents

**Title 3—**

**The President**

**Proclamation 9546 of November 23, 2016**

## Thanksgiving Day, 2016

**By the President of the United States of America**

**A Proclamation**

Nearly 400 years ago, a small band of Pilgrims fled persecution and violence and came to this land as refugees in search of opportunity and the freedom to practice their faith. Though the journey was rough and their first winter harsh, the friendly embrace of an indigenous people, the Wampanoag—who offered gracious lessons in agriculture and crop production—led to their successful first harvest. The Pilgrims were grateful they could rely on the generosity of the Wampanoag people, without whom they would not have survived their first year in the new land, and together they celebrated this bounty with a festival that lasted for days and prompted the tradition of an annual day of giving thanks.

This history teaches us that the American instinct has never been to seek isolation in opposite corners; it is to find strength in our common creed and forge unity from our great diversity. On that very first thanksgiving celebration, these same ideals brought together people of different backgrounds and beliefs, and every year since, with enduring confidence in the power of faith, love, gratitude, and optimism, this force of unity has sustained us as a people. It has guided us through times of great challenge and change and allowed us to see ourselves in those who come to our shores in search of a safer, better future for themselves and their families.

On this holiday, we count our blessings and renew our commitment to giving back. We give thanks for our troops and our veterans—and their families—who give of themselves to protect the values we cherish; for the first responders, teachers, and engaged Americans who serve their communities; and for the chance to live in a country founded on the belief that all of us are created equal. But on this day of gratitude, we are also reminded that securing these freedoms and opportunities for all our people is an unfinished task. We must reflect on all we have been afforded while continuing the work of ensuring no one is left out or left behind because of who they are or where they come from.

For generations, our Nation's progress has been carried forward by those who act on the obligations we have to one another. Each year on Thanksgiving, the selflessness and decency of the American people surface in food banks and shelters across our country, in time spent caring for the sick and the stranger, and in efforts to empathize with those with whom we disagree and to recognize that every individual is worthy of compassion and care. As we gather in the company of our friends, families, and communities—just as the Pilgrims and the Wampanoag did centuries ago—let us strive to lift up others, promote tolerance and inclusiveness, and give thanks for the joy and love that surround all of us.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 24, 2016, as a National Day of Thanksgiving. I encourage the people of the United States to join together—whether in our homes, places of worship, community centers, or any place of fellowship for friends and neighbors—and give

thanks for all we have received in the past year, express appreciation to those whose lives enrich our own, and share our bounty with others.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of November, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

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