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Presidential Documents

Title 3—

The President

Proclamation 9198—United Nations Day, 2014

Correction

In Presidential document 2014–25788 beginning on page 64293 in the issue of Tuesday, October 28, 2014, make the following correction:

On page 64293, the date following "Proclamation 9198 of" should read "October 23, 2014".

[FR Doc. C1–2014–25788
Filed 12–5–14; 8:45 am]
Billing Code 1505–01–D

Presidential Documents

Proclamation 9215—National Impaired Driving Prevention Month, 2014

Correction

In Presidential document 28554 beginning on page 71951 in the issue of Wednesday, December 3, 2014, make the following correction:

On page 71951, the date following "Proclamation 9215 of" should read "November 28, 2014".

[FR Doc. C1–2014–28554
Filed 12–5–14; 8:45 am]
Billing Code 1505–01–D

Presidential Documents

Proclamation 9216—World AIDS Day, 2014

Correction

In Presidential document 28560 beginning on page 71953 in the issue of Wednesday, December 3, 2014, make the following correction:

On page 71953, the date following "Proclamation 9216 of" should read "November 28, 2014".

[FR Doc. C1–2014–28560
Filed 12–5–14; 8:45 am]
Billing Code 1505–01–D

Rules and Regulations

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 551

[BOP Docket No. 1140–F]

RIN 1120–AB42

Smoking/No Smoking Areas

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes without change a proposed rule that was published on this subject on May 12, 2006, to revise regulations pertaining to smoking/no smoking in Bureau facilities. The revised regulations generally prohibit smoking in and on the grounds of Bureau institutions and offices, except as part of an authorized inmate religious activity; and, for Bureau staff and official visitors, only in smoking areas designated by the Warden. Possession of smoking apparatus and tobacco in any form is prohibited for inmates under this rule, unless as part of an authorized inmate religious activity. We intend this amendment to promote a clean air environment and to protect the health and safety of staff and inmates.

DATES: This rule is effective January 7, 2015.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105.

SUPPLEMENTARY INFORMATION: In this document, the Bureau revises regulations pertaining to smoking/no smoking for inmates in Bureau facilities. The revised regulations indicate that smoking is generally prohibited in and on the grounds of Bureau institutions and offices, with the following two exceptions: Smoking is permitted as part of an authorized inmate religious activity; and, for Bureau staff and official visitors, smoking is permitted only in smoking areas designated by the Warden.

This rule also clarifies that possession of smoking apparatus and tobacco in any form is prohibited for inmates, unless as part of an authorized inmate religious activity. Smoking is defined as inhaling the smoke of any substance through the use of smoking apparatus including, but not limited to, cigars, cigarettes, or pipes. We intend this amendment to promote a clean air environment and to protect the health and safety of staff and inmates.

A proposed rule was published on this subject on May 12, 2006 (71 FR 27652). The Bureau received a total of 66 comments. Approximately 57 of the comments were copies of the same six form letters. The remaining nine comments addressed issues raised in the six form letters. Because all the comments related to the same set of issues, we address each issue raised by the commenters below.

Comment: The rule is contrary to 5 U.S.C. 7301, E.O. 13058 (banning smoking of tobacco products in all federal buildings except—see sec. 2(b)), which says the order does not extend to residential accommodation for persons involuntarily residing in a federal government building.

Bureau's response: 5 U.S.C. 7301 states only that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." Executive Order 13058, Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace, issued on August 9, 1997, states that the smoking of tobacco products is thus prohibited in all interior space owned, rented, or leased by the executive branch of the Federal Government, and in any outdoor areas under executive branch control in front of air intake ducts. The Executive Order carves out an exception to its smoking prohibition for any residential accommodation for persons voluntarily or involuntarily residing, on a temporary or long-term basis, in a building owned, leased, or rented by the Federal Government.

Although the Executive Order prohibiting smoking in federal buildings does not extend to buildings such as Bureau facilities, it does not affirmatively preclude the Bureau from exercising its authority to regulate in this manner. The Bureau therefore has determined that this regulation is necessary to conform with the intention of the Executive Order to protect Federal Government employees and members of the public from exposure to tobacco smoke in the Federal workplace.

The dangers of secondhand smoke exposure are well-documented. An August 2005 report from the American Lung Association states that secondhand smoke lingers in the air hours after cigarettes have been extinguished and can cause or exacerbate a wide range of adverse health effects, including cancer, respiratory infections, and asthma. Secondhand smoke has been classified by the Environmental Protection Agency (EPA) as a known cause of cancer in humans (Group A carcinogen). Secondhand smoke exposure causes approximately 3,400 lung cancer deaths and 22,700–69,600 heart disease deaths in adult nonsmokers in the United States each year. Nonsmokers exposed to environmental smoke were 25 percent more likely to have coronary heart diseases compared to nonsmokers not exposed to smoke.

Further, a June 2006 report from the Surgeon General concluded that scientific evidence indicates that there is no risk-free level of exposure to second hand smoke. Even short exposures to second hand smoke can cause blood platelets to become stickier, damage the lining of blood vessels, decrease coronary flow velocity reserves, and reduce heart rate variability, potentially increasing the risk of heart attack.

Comment: The Bureau increased prices on other commissary items when it removed tobacco products from the commissary.

Bureau's response: There has been no policy change related to pricing of institution commissary items for several years. Prices of items in the commissary fluctuate on a regular basis due to changes in the cost to the Bureau of the products themselves. Any increase in pricing that may have been observed when the Bureau removed tobacco products from the commissaries would be due to such regular fluctuations. There was no change in the Bureau's pricing policy related to the removal of tobacco from the commissaries.

Comment: Banning tobacco products will decrease the safety of staff. The price of contraband tobacco will increase, inciting inmate security issues.

Bureau's response: Previous regulations on inmate smoking allowed Wardens to prohibit smoking at their institutions with the concurrence of the Regional Director where the institution is located. At those institutions where the Warden has prohibited smoking, there has been no increase in assaults on staff.

However, Bureau regulations on inmate discipline were amended, through a separate rulemaking document, to increase the severity of sanctions that may be imposed for violation of the prohibited act codes (75 FR 76263, Dec. 8, 2010). The code prohibiting possession of non-hazardous contraband now includes smoking apparatus and tobacco in any form where prohibited. The specifically worded code, combined with more severe sanctions for violations, will deter possession of tobacco products in Bureau facilities.

Further, the Bureau implemented measures to increase searches of employees, to further ensure that Bureau staff are not a source of contraband on Bureau grounds. In a rule published on June 6, 2007 (72 FR 31178), the Bureau revised its regulations on searching non-inmates (including staff) to include random searches and searches using electronic devices other than metal detectors. This enhanced the Bureau's ability to detect and prevent contraband, thereby increasing the safety of staff and inmates in Bureau facilities.

Comment: The prohibition on smoking and possession of tobacco and smoking-related apparatus should also apply to staff.

Bureau's response: As a practical matter, smoking is a lawful activity for Bureau employees. In the interests of balancing staff morale with institution safety and security, the Director has decided to allow for the possibility of limited opportunities for staff smoking.

Under current policy, Warden-designated staff smoking areas must be outdoors, to minimize the impact of second-hand smoke inhalation. Also, current Bureau policy requires that Bureau facilities maintain staff smoking cessation programs, which are intended to further minimize the likelihood that tobacco or smoking apparatus will be introduced upon institution grounds.

However, to ensure that persons visiting inmates are prohibited from smoking in and on the grounds of Bureau institutions and offices, we are altering the rule to state that smoking is permitted, in smoking areas designated by the Warden, *only* for Bureau staff and official visitors.

The Bureau intends for § 551.162 (b) of the rule to allow smoking for non-inmates only in areas designated by the Warden. Currently, Warden-designated staff smoking areas are carefully determined based on the unique circumstances at each Bureau facility.

Comment: The Bureau violated the Administrative Procedure Act by discontinuing the sale of tobacco products.

Bureau's response: By discontinuing the sale of tobacco products, the Bureau did not violate any requirement set by the Administrative Procedure Act (5 U.S.C. 551, *et al.*). The removal of tobacco products from institution commissaries was not a prohibition of inmate possession of tobacco, which Wardens were permitted to authorize under the previous regulations. The listing of products available for sale in institution commissaries is not appropriate subject matter for federal regulations because particular brands, items, and cost will vary frequently depending on market fluctuations and what particular products are available or needed in different locales or in institutions with different security levels and needs.

Comment: The rule prohibiting possession of tobacco in any form is too broad in that it applies to snuff and/or chewing tobacco, which produce no smoke and do not implicate air quality—the rule should only apply to "lighted" tobacco products.

Bureau's response: Snuff and chewing tobacco are also harmful to health in the same way that "lighted" tobacco products are. A February 13, 2006, report by the American Cancer Society (*http://www.cancer.org/docroot/PED/content/PED_10_13X_Quitting_Smokeless_Tobacco.asp?#why_quit*) states that smokeless tobacco can cause serious health problems, including nicotine addiction, cancer of the mouth and pharynx, leukoplakia, gum recession, bone loss around the teeth, and abrasion and staining of teeth. The Bureau is therefore committed to reducing these health risks in inmates by prohibiting use and possession of tobacco in any form.

Further, inmates may attempt to smoke snuff and chewing tobacco if such products are permitted in Bureau facilities and smoking tobacco is not permitted. To prevent this disparity, the Bureau now prohibits all forms of tobacco for inmates in Bureau facilities.

Comment: The regulation leads to forced medical treatment that is not properly implemented by qualified medical staff, in violation of the Constitution.

Bureau's response: The inmate Smoking Cessation Program is not "forced" treatment. Participation in the program is voluntary—inmates decide of their own volition whether to participate in the program. Under current Bureau policy, Wardens are required to establish an institution Smoking Cessation Program consistent with local resources. A Smoking Cessation Program must, at a minimum, address nutrition, physical activity (exercise), stress management, and nicotine replacement therapy (NRT). Use of the NRT is optional, just as program participation is voluntary.

Further, the programs are run by qualified medical staff at each institution. Either Bureau health services or psychology services staff coordinate Smoking Cessation Programs at the institution level, and are trained specifically to do so.

Comment: The smoking cessation program is not available to indigent inmates.

Bureau's response: The Smoking Cessation Program is available to indigent inmates. Inmates may participate on a voluntary basis in all aspects of the program. There is no charge for any aspect of the program except for the nicotine replacement therapy, which is optional. The NRT is not considered medically necessary by health services staff, and therefore will not be provided to inmates who cannot pay for it. However, inmates without funds may participate in all other aspects of the program.

Comment: This regulation is an additional punishment on inmates suffering from nicotine addiction.

Bureau's response: This regulation is no different from current policies and regulations in place that prohibit inmate possession of other contraband that is harmful to health, such as illegal drugs. The Bureau offers drug abuse treatment programs for inmates who suffer from drug addiction, and offers smoking cessation programs for inmates suffering from nicotine addiction. Prohibiting the possession of tobacco and smoking apparatus does not constitute punishment.

Comment: The regulation is subject to review under SBREFA because it creates a black market that exceeds the threshold of $100,000,000. It blocks access to a long-standing market segment for legitimate businesses. The inmate trust fund is also impacted.

Bureau's response: Title 5 of the United States Code, section 804(1), requires the Office of Management and Budget (OMB) to review any federal

regulation which "the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in . . . (A) an annual effect on the economy of $100,000,000 or more." Notwithstanding the fact that Congress did not intend "economy" to encompass the "black market" or other illegal business ventures, this regulation was, in fact, submitted to OMB for review. OMB found this regulation to not be significant under 5 U.S.C. 804(1), and therefore decided that it did not warrant further review. Therefore, even if the regulation has an arguable economic impact, the Bureau has complied with SBREFA by submitting it to the Office of Management and Budget for review and approval.

Comment: This regulation creates a massive enforcement burden for Bureau staff.

Bureau's response: Bureau staff are trained to intercept contraband in all forms. Intercepting tobacco and smoking apparatus imposes no additional burden on Bureau staff, but may be done while staff perform routine searches of non-inmates and their belongings, and routine searches of inmates, their living and working areas, and belongings.

Also, the previous regulation allowed any Warden to decide, with the Regional Director's concurrence, not to designate smoking areas for general use. Several Wardens have already made this choice for their facilities, and the Bureau has not observed any further enforcement burden on staff with relation to this change.

Comment: The regulation discriminates against the mentally ill, who may find it difficult/impossible to quit smoking.

Bureau's response: A 2002 *Psychiatric Services* journal article entitled, "Smoking Cessation Approaches for Persons With Mental Illness or Addictive Disorders," a summary of 24 empirical studies with results from 1991–2001, found that the recorded "quit rates" of patients with psychiatric disorders were similar to those of the general population. It was no more difficult for the mentally ill to quit smoking than it was for someone with no mental disorder.

Also, mentally ill inmates are typically housed in no-smoking units already, and are permitted only limited time, under supervision, to visit any currently-existing authorized outdoor smoking areas. Such inmates already have decreased their smoking activity by virtue of limited access to smoking areas. This regulation does not, therefore, apply any differently to a mentally ill inmate than to any other inmate.

Comment: The regulation creates a substantial burden as defined in 42 U.S.C. 2000cc on the religious exercise of Native Americans in that it is not the least restrictive means of furthering the compelling government interest.

Bureau's response: 42 U.S.C. 2000cc relates to government imposition of a state, not Federal, "land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" without demonstrating that it is the "least restrictive means of furthering [a] compelling governmental interest." With regard to state governments, courts have acknowledged the application of this statute in a prison setting. *See Ephraim* v. *Angelone,* 313 F.Supp.2d 569 (E.D.Va. 2003) (State prison's refusal to provide inmate with vegetarian religious diet was not required to be analyzed under strict scrutiny test set forth in Religious Land Use and Institutionalized Persons Act (RLUIPA) because there was no showing prison was receiving federal funding, or that burden imposed on inmate affected interstate commerce, as required for Act to be applicable); *Borzych* v. *Frank,* 439 F.3d 388, (C.A.7 Wis. 2006) (State prison procedure, prohibiting activities and literature advocating racial or ethnic supremacy or purity, was not overbroad and therefore not substantial in relation to its proper application under RLUIPA).

The Bureau's action in this document is a Federal regulation, not a state regulation, and therefore does not violate RLUIPA. Further, the regulation permits smoking as part of an authorized inmate religious activity, and therefore does not impact inmate religious activity.

The statute governing Federal action in this context is the Religious Freedom Restoration Act (42 U.S.C. 2000bb, *et seq.*) (RFRA). Although the regulation does not burden inmate religious activity, we note that preserving inmate health has been found to constitute a "compelling penological interest" under both RLUIPA and RFRA that would override a burden on inmate religious activity, if such a burden existed. *Ragland* v. *Angelone,* 420 F.Supp.2d 507 (W.D.Va. 2006) (Virginia's inmate grooming policy did not violate RLUIPA; policy furthered compelling penological interests in security, staff safety, inmate identification, and inmate health.); *See also Weir* v. *Nix,* C.A.8 (1997), 114 F.3d 817 (Prison's prohibition of personal property in prison yard did not place "substantial burden" on inmate's rights under RFRA, he was free to use his Bible in his cell.); *Davie* v. *Wingard,* (1997) 958 F.Supp. 1244, 166 A.L.R. Fed. 709 (Prison officials' safety, security, and discipline concerns presented "compelling government interest" justifying hair length regulations challenged under RFRA.).

For the aforementioned reasons, the Bureau finalizes this rule without change.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", section 1(b), Principles of Regulation. The Director of the Bureau of Prisons has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

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 $100,000,000 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.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 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 companies to compete with foreign-based companies in domestic and export markets. Inmate smoking has been gradually decreasing in Bureau facilities since publication of the final rule in 2004 (*see* 69 FR 13737, Mar. 24, 2004), which restricted smoking to authorized outdoor areas except for authorized religious activities, and allowed Wardens to choose, with Regional Director concurrence, not to designate smoking areas at all for general inmate use (except for authorized religious activity). The determination to remove tobacco products from sale in the inmate commissaries likewise occurred several years ago when it became apparent that inmate smoking was decreasing. Therefore, the economic impact is expected to be minimal.

List of Subjects in 28 CFR Part 551

Prisoners.

Charles E. Samuels, Jr.,

Director, Bureau of Prisons.

Under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we amend 28 CFR part 551 as set forth below:

Subchapter C—Institutional Management

PART 551—MISCELLANEOUS

■ 1. The authority citation for 28 CFR part 551 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1512, 3621, 3622, 3624, 4001, 4005, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; Pub. L. 99–500 (sec. 209); Attorney General's May 1, 1995 Guidelines for Victim and Witness Assistance.

■ 2. Revise subpart N to read as follows:

Subpart N—Smoking/No Smoking Areas

Sec.

§ 551.160 Purpose and scope.

To advance towards becoming a clean air environment and to protect the health and safety of staff and inmates, the Bureau of Prisons will restrict areas and circumstances where smoking is permitted within its institutions and offices.

§ 551.161 Definitions.

For the purposes of this subpart, *smoking* is defined as inhaling the smoke of any substance through the use of smoking apparatus including, but not limited to, cigars, cigarettes, or pipes.

§ 551.162 Smoking generally prohibited.

Smoking is generally prohibited in and on the grounds of Bureau institutions and offices, with the following two exceptions:

(a) Smoking is permitted as part of an authorized inmate religious activity; and

(b) For Bureau staff and official visitors, smoking is permitted only in smoking areas designated by the Warden.

§ 551.163 Possession of smoking apparatus and tobacco prohibited.

Possession of smoking apparatus and tobacco in any form is prohibited for inmates, unless as part of an authorized inmate religious activity.

[FR Doc. 2014–28620 Filed 12–5–14; 8:45 am]

BILLING CODE 4410–05–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2014–0790; FRL–9918–76–Region 10]

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

AGENCY: Environmental Protection Agency.

ACTION: Final rule; administrative change.

SUMMARY: The Environmental Protection Agency (EPA) is updating the materials that are incorporated by reference (IBR) into the Washington State Implementation Plan (SIP). The regulations affected by this update have been previously submitted by the Washington State Department of Ecology (Ecology) and approved by the EPA. In this action, the EPA is also notifying the public of a correction to a typographical error the IBR tables. This update affects the SIP materials that are available for public inspection at the National Archives and Records Administration (NARA), the Air and Radiation Docket and Information Center located at EPA Headquarters in Washington, DC, and the EPA Regional Office.

DATES: This action is effective December 8, 2014.

ADDRESSES: SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Environmental Protection Agency, Region 10, Office of Air, Waste, and Toxics (AWT–150), 1200 Sixth Avenue, Seattle, WA 98101; the Air and Radiation Docket and Information Center, Environmental Protection Agency, 1301 Constitution Avenue NW., Room Number 3334, EPA West Building, Washington, DC 20460; or the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, (206) 553–0256, *hunt.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The SIP is a living document which a state revises as necessary to address its unique air pollution problems. Therefore, the EPA from time to time, must take action on SIP revisions containing new and/or revised regulations as being part of the SIP. On May 22, 1997, the EPA revised the procedures for incorporating by reference Federally-approved SIPs, as a result of consultations between the EPA and the Office of the Federal Register (OFR) (62 FR 27968). The description of the revised SIP document, IBR procedures and "Identification of plan" format are discussed in further detail in the May 22, 1997 **Federal Register** document. On March 20, 2013, the EPA published a **Federal Register** beginning the new IBR procedure for Washington (78 FR 17108).

Since the publication of the last IBR update, the EPA approved into the Washington SIP the regulatory changes listed below. The EPA also reorganized the content and order of the tables contained in 40 CFR 52.2470 paragraph (c) *"EPA approved regulations"* in order to acknowledge the EPA's approval of Washington Administrative Code

(WAC) 173–400–020 which divides implementation of portions of the Washington SIP on a jurisdictional basis, with a corresponding effect on the air program agencies listed in Tables 4 through 10. This division of the Washington SIP on a jurisdictional basis is described in more detail in a final rulemaking published October 3, 2014 (79 FR 59653).

A. Added Regulations

Table 1—Regulations Approved Statewide

- Washington Administrative Code, Chapter 173–433—Solid Fuel Burning Device Standards, sections 173–433–140 (Criteria for Impaired Air Quality Burn Bans) and 173–433–155 (Criteria for Prohibiting the Use of Solid Fuel Burning Devices that Are Not Certified). For more information see 79 FR 26628 (May 9, 2014).
- Washington Administrative Code, Chapter 173–476—Ambient Air Quality Standards, sections 173–476–010 (Purpose), 173–476–020 (Applicability), 173–476–030 (Definitions), 173–476–100 (Ambient Air Quality Standard for PM–10), 173–476–110 (Ambient Air Quality Standards for PM–2.5), 173–476–120 (Ambient Air Quality Standard for Lead (Pb)), 173–476–130 (Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)), 173–476–140 (Ambient Air Quality Standards for Nitrogen Oxides (Nitrogen Dioxide)), 173–476–150 (Ambient Air Quality Standard for Ozone), 173–476–160 (Ambient Air Quality Standards for Carbon Monoxide), 173–476–170 (Monitor Siting Criteria), 173–476–180 (Reference Conditions), and 173–476–900 (Table of Standards). For more information see 79 FR 12077 (March 4, 2014).

Table 2—Additional Regulations Approved for Washington Department of Ecology (Ecology) Direct Jurisdiction

- Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources, sections 173–400–036 (Relocation of Portable Sources), 173–400–111 (Processing Notice of Construction Applications for Sources, Stationary Sources and Portable Sources), 173–400–118 (Designation of Class I, II, and III Areas), 173–400–175 (Public Information), and 173–400–560 (General Order of Approval). For more information see 79 FR 59653 (October 3, 2014).

Table 6—Additional Regulations Approved for the Olympic Region Clean Air Agency (Orcaa) Jurisdiction

- Rule 6.2 Outdoor Burning, sections 6.2.3 (No Residential or Land Clearing Burning), 6.2.6 (Curtailment), and 6.2.7 (Recreational Burning). For more information see 78 FR 61188 (October 3, 2013).
- Rule 8.1 Wood Heating, sections 8.1.1 (Definitions), 8.1.2 (b) and (c) (General Emission Standards), 8.1.3 (Prohibited Fuel Types), 8.1.4 (Curtailment), 8.1.5 (Exceptions), 8.1.7 (Sale and Installation of Uncertified Woodstoves), and 8.1.8 (Disposal of Uncertified Woodstoves). For more information see 78 FR 61188 (October 3, 2013).

Table 7—Additional Regulations Approved for the Puget Sound Clean Air Agency (PSCAA) Jurisdiction

- Regulation I—Article 13: Solid Fuel Burning Device Standards, section 13.06 (Emission Performance Standards). For more information see 78 FR 32131 (May 29, 2013).

B. Revised Regulations

Table 1—Regulations Approved Statewide

- Washington Administrative Code, Chapter 173–433—Solid Fuel Burning Device Standards, sections 173–433–010 (Purpose), 173–433–030 (Definitions), 173–433–100 (Emission Performance Standards), 173–433–110 (Opacity Standards), 173–433–120 (Prohibited Fuel Types), and 173–433–150 (Restrictions on Operation of Solid Fuel Burning Devices). For more information see 79 FR 26628 (May 9, 2014).

Table 2—Additional Regulations Approved for Washington Department of Ecology (Ecology) Direct Jurisdiction

- Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources, sections 173–400–020 (Applicability), 173–400–030 (Definitions), 173–400–040 (General Standards for Maximum Emissions), 173–400–050 (Emission Standards for Combustion and Incineration Units), 173–400–060 (Emission Standards for General Process Units), 173–400–070 (Emission Standards for Certain Source Categories), 173–400–081 (Startup and Shutdown), 173–400–091 (Voluntary Limits on Emissions), 173–400–105 (Records, Monitoring, and Reporting), 173–400–110 (New Source Review (NSR) for Sources and Portable Sources), 173–400–112 (Requirements for New Sources in Nonattainment Areas—Review for Compliance with Regulations), 173–400–113 (New Sources in Attainment or Unclassifiable Areas—Review for Compliance with Regulations), 173–400–151 (Retrofit Requirements for Visibility Protection), 173–400–171 (Opportunity for Public Comment), and 173–400–200 (Creditable Stack Height and Dispersion Techniques). For more information see 79 FR 59653 (October 3, 2014).

Table 7—Additional Regulations Approved for the Puget Sound Clean Air Agency (PSCAA) Jurisdiction

- Regulation I—Article 12: Standards of Performance for Continuous Emission Monitoring Systems, section 12.03 (Continuous Emission Monitoring Systems). For more information see 78 FR 57073 (September 17, 2013).
- Regulation I—Article 13: Solid Fuel Burning Device Standards, sections 13.01 (Policy and Purpose), 13.02 (Definitions), 13.03 (Opacity Standards), 13.04 (Allowed and Prohibited Fuel Types), 13.05 (Restrictions on Operation of Solid Fuel Burning Devices), and 13.07 (Prohibitions on Wood Stoves that are not Certified Wood Stoves). For more information see 78 FR 32131 (May 29, 2013).
- Regulation II—Article 1: Purpose, Policy, Short Title, and Definitions, section 1.05 (Special Definitions). For more information see 78 FR 57073 (September 17, 2013).
- Regulation II—Article 3: Miscellaneous Volatile Organic Compound Emission Standards, section 3.04 (Motor Vehicle and Mobile Equipment Coating Operations). For more information see 78 FR 57073 (September 17, 2013).

C. Removed Regulations

Table 1—Regulations Approved Statewide

- Washington Administrative Code, Chapter 173–433—Solid Fuel Burning Device Standards, section 173–433–170 (Retail Sales Fee). For more information see 79 FR 26628 (May 9, 2014).
- Washington Administrative Code, Chapter 173–470—Ambient Air Quality Standards for Particulate Matter, sections 173–470–010 (Purpose), 173–470–020 (Applicability), 173–470–030 (Definitions), 173–470–100 (Ambient Air Quality Standards), and 173–470–160 (Reporting of Data). For more information see 79 FR 12077 (March 4, 2014).

Table 2—Additional Regulations Approved for Washington Department of Ecology (Ecology) Direct Jurisdiction

- Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources, section 173–

400–100 (Registration). For more information see 79 FR 59653 (October 3, 2014).

Table 7—Additional Regulations Approved for the Puget Sound Clean Air Agency (PSCAA) Jurisdiction

• Regulation II—Article 3: Miscellaneous Volatile Organic Compound Emission Standards, section 3.11 (Coatings and Ink Manufacturing). For more information see 78 FR 57073 (September 17, 2013).

D. Approved, But Not Incorporated by Reference Regulations

As described in the proposed approval for the Thurston County second 10-year coarse particulate matter (PM_{10}) limited maintenance plan, the EPA reviews and approves state submissions to ensure they provide adequate enforcement authority (78 FR 47259, August 5, 2013). However, regulations describing agency enforcement authority are not incorporated into the SIP to avoid potential conflict with the EPA's independent authorities. The EPA originally erred in incorporating WAC 173–433–200, "Regulatory Actions and Penalties" by reference into the SIP. In the final approval of the Thurston County Second 10-year PM_{10} Limited Maintenance Plan the EPA corrected this error by moving WAC 173–433–200 from 40 CFR 52.2470(c) *EPA approved regulations* to 40 CFR 52.2470(e) *EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures* (78 FR 61188, October 3, 2013).

E. Source-Specific Requirements

The EPA modified 40 CFR 52.2470(d) to include the following source-specific requirements: BP Cherry Point Refinery (Administrative Order No. 7836), Alcoa Intalco Works (Administrative Order No. 7837, Revision 1), Tesoro Refining and Marketing Company (Administrative Order 7838), Port Townsend Paper Corporation (Administrative Order No. 7839, Revision 1), Lafarge North America, Inc. Seattle, Wa. (Administrative Revised Order No. 7841), and Weyerhaeuser Corporation, Longview, Wa. (Administrative Order No. 7840). For more information see 79 FR 33438 (June 11, 2014).

II. EPA Action

In this action, the EPA is announcing the update to the IBR material as of October 7, 2014. The EPA is also correcting a typographical error in paragraph 52.2470(c). In "Table 2—Additional Regulations Approved for Washington Department of Ecology (Ecology) Direct Jurisdiction" the EPA is correcting the entry for WAC 173–400–050 to add 173–400–050(2) as an exception in the "Explanations" column.

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

III. Statutory and Executive Order Reviews

A. General Requirements

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

• Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);

• does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because this action does not involve technical standards; and

• does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land in Washington except as specifically noted below and is also not approved to apply in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law. Washington's SIP is approved to apply on non-trust land within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided state and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

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

List of Subjects in 40 CFR Part 52

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

Dated: October 22, 2014.

Dennis J. McLerran,

Regional Administrator, Region 10.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart WW—Washington

■ 2. Section 52.2470 is amended by:

■ a. Revising paragraph (b);

■ b. Revising paragraph (c), entry 173–400–050 in Table 2—Additional Regulations Approved for Washington Department of Ecology (Ecology) Direct Jurisdiction.

The revised text read as follows:

§ 52.2470 Identification of plan.

* * * * *

(b) Incorporation by reference.

(1) Material listed as incorporated by reference in paragraphs (c) and (d) of this section with an EPA approved date of October 7, 2014 was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The material incorporated is as it exists on the date of the approval, and notice of any change in the material will be published in the **Federal Register** Entries in paragraphs (c) and (d) of this section with EPA approval dates on or after October 7, 2014 will be incorporated by reference in the next update to the SIP compilation.

(2)(i) EPA Region 10 certifies that the rules and regulations provided by the EPA at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State rules and regulations which have been approved as part of the State Implementation Plan as of October 7, 2014.

(ii) EPA Region 10 certifies that the following source-specific requirements provided by the EPA at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated State source-specific requirements which have been approved as part of the State Implementation Plan as of October 7, 2014.

(3) Copies of the materials incorporated by reference may be inspected at the EPA Region 10 Office at 1200 Sixth Ave, Seattle, WA 98101. For further information, call (206) 553–0256; the EPA Air and Radiation Docket and Information Center, Room Number 3334, EPA West Building, 1301 Constitution Avenue NW., Washington, DC 20460. For further information, call (202) 566–1742; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) * * *

TABLE 2—ADDITIONAL REGULATIONS APPROVED FOR WASHINGTON DEPARTMENT OF ECOLOGY (ECOLOGY) DIRECT JURISDICTION

[Applicable in Adams, Asotin, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, San Juan, Stevens, Walla Walla, and Whitman counties, excluding facilities subject to Energy Facilities Site Evaluation Council (EFSEC) jurisdiction. These regulations also apply statewide for facilities subject to the applicability sections of WAC 173–405–012, WAC 173–410–012, and WAC 173–415–012.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources				
*	*	*	*	*
173–400–050	Emission Standards for Combustion and Incineration Units.	12/29/12	10/3/14, 79 FR 59653 ..	Except: 173–400–050(2); 173–400–050(4); 173–400–050(5).
*	*	*	*	*

* * * * *

[FR Doc. 2014–28588 Filed 12–5–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R03–OAR–2014–0525; FRL–9920–17–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation of the Harrisburg-Lebanon-Carlisle-York Nonattainment Areas to Attainment for the 1997 Annual and the 2006 24-Hour Fine Particulate Matter Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the Commonwealth of Pennsylvania's requests to redesignate to attainment the Harrisburg-Lebanon-Carlisle-York nonattainment areas (hereafter "the Areas") for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS). EPA is also determining that the Areas continue to attain the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS. EPA is also approving as revisions to the Pennsylvania State Implementation Plan (SIP) the associated maintenance plans to show maintenance of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS through 2025 for the Areas. The maintenance plans include the 2017 and 2025 $PM_{2.5}$ and nitrogen oxides (NO_X) mobile vehicle emissions budgets (MVEBs) for the Areas for the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS. EPA is finding the 2017 and 2025 $PM_{2.5}$ and NO_X MVEBs adequate for transportation conformity purposes and is finalizing the approval of the budgets. Furthermore, EPA is approving as revisions to the Pennsylvania SIP the 2007 base year emissions inventory for the Areas for the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS.

DATES: This final rule is effective on December 8, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2014–0525. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, *i.e.*, 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 either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by email at *quinto.rose@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On October 17, 2014 (79 FR 62389), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania that included proposals for several rulemaking actions. First, EPA proposed to find that the Areas met the requirements for redesignations from nonattainment to attainment for the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS under section 107(d)(3)(E) of the Clean Air Act (CAA). Second, EPA proposed approval of the associated maintenance plans for the Areas submitted on April 22, 2014, as revisions to the Pennsylvania SIP because they meet the requirements of section 175A of the CAA. Third, EPA proposed approval of the 2007 base year emissions inventory as meeting the requirements of section 172(a)(3) of the CAA. Fourth, EPA proposed approval of the 2017 and 2025 $PM_{2.5}$ and NO_X MVEBs submitted by Pennsylvania for Cumberland, Dauphin, Lebanon, and York Counties for transportation conformity purposes. Details of Pennsylvania's submittal and the rationale for EPA's proposed actions are explained in the NPR and will not be restated here. No public comments were received on the NPR.

As stated in the NPR, EPA's proposed approvals were contingent upon the U.S. Court of Appeals for the District of Columbia (D.C. Circuit Court) granting EPA's June 26, 2014 motion to lift the stay of the Cross State Air Pollution Rule (CSAPR). Following a favorable decision from the Supreme Court on April 29, 2014, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), EPA filed a motion asking the D.C. Circuit Court to lift the stay and toll all deadlines in CSAPR by three years, and on October 23, 2014, the D.C. Circuit Court granted EPA's motion. *EME Homer City Generation, L.P.* v. *EPA*, No. 11–1302 (D.C. Cir. Oct. 23, 2014), ECF No. 1518738 at 3.

EPA plans to take administrative action to amend the regulatory text of CSAPR to reflect the D.C. Circuit Court's October 23, 2014 order tolling all deadlines in CSAPR by three years, including provisions governing the sunsetting of the Clean Air Interstate Rule (CAIR). CAIR will therefore sunset at the end of 2014 and be replaced by CSAPR beginning January 1, 2015. Relative to CAIR, CSAPR requires similar or greater emission reductions from relevant upwind areas starting in 2015 and beyond. The emission reductions associated with CAIR that helped the Areas achieve attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS can therefore be considered permanent and enforceable for purposes of redesignation under section 107(d)(3)(E)(iii) of the CAA.

II. Final Action

EPA is approving the redesignation of the Areas from nonattainment to attainment for the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS. EPA has evaluated Pennsylvania's redesignation requests and determines that the Areas meet the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. EPA finds that the monitoring data demonstrate that the Areas have attained the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS. EPA also finds that the attainment of the Areas is in part due to the emissions reductions resulting from the implementation of CAIR in Pennsylvania and in the states upwind of Pennsylvania. As stated previously, EPA intends to commence implementation of CSPAR beginning on January 1, 2015 and those emission reductions originally required under CAIR will be permanent and enforceable through the implementation of CSAPR. EPA is determining that the Areas continue to attain the 1997 annual and the 2006 24-hour $PM_{2.5}$ NAAQS. Final approval of these redesignation requests would change the designation of: (a) Harrisburg-Lebanon-Carlisle and York Areas from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS, and (b) Harrisburg-Lebanon-Carlisle-York Area from nonattainment to attainment for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA is also approving the associated maintenance plans for the Areas submitted on April 22, 2014, as revisions to the Pennsylvania SIP because they meet the requirements of section 175A of the CAA. In addition,

EPA is approving the 2007 base year emissions inventory as meeting the requirement of section 172(a)(3) of the CAA. Furthermore, in this rulemaking action, EPA finds adequate and is approving the 2017 and 2025 $PM_{2.5}$ and NO_X MVEBs submitted by Pennsylvania for Cumberland, Dauphin, Lebanon, and York Counties for transportation conformity purposes. Within 24 months from the effective date of EPA's adequacy determination, the transportation partners will need to demonstrate conformity to the 2017 and 2025 $PM_{2.5}$ and NO_X MVEBs pursuant to 40 CFR 93.104(e).

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for this action to become effective immediately upon publication. A delayed effective date is unnecessary due to the nature of a redesignation to attainment, which eliminates CAA obligations that would otherwise apply. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction," and section 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the Commonwealth of Pennsylvania of the obligation to comply with nonattainment-related planning requirements for the Areas pursuant to Part D of the CAA and approves certain emissions inventories and MVEBs for the Areas. For these reasons, EPA finds good cause under 5 U.S.C. 553(d) for this action to become effective on the date of publication of this notice.

III. Statutory and Executive Order

A. General Requirements

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 6, 2015. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action approving Pennsylvania's redesignation requests, maintenance plans, 2007 base year emissions inventory, and MVEBs for transportation conformity purposes for the Harrisburg-Lebanon-Carlisle and York Areas for the 1997 annual $PM_{2.5}$ NAAQS and the Harrisburg-Lebanon-Carlisle-York Area for the 2006 24-hour $PM_{2.5}$ NAAQS, may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: November 21, 2014.

Shawn M. Garvin,

Regional Administrator, Region III.

40 CFR parts 52 and 81 are amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (e)(1) is amended by adding two entries for 1997 Annual $PM_{2.5}$ Maintenance Plan and one entry for 2006 24-Hour $PM_{2.5}$ Maintenance Plan at the end of the table. The added text read as follows:

§ 52.2020 Identification of plan.

* * * * *

(e) * * *

(1) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
1997 Annual $PM_{2.5}$ Maintenance Plan.	Harrisburg-Lebanon-Carlisle $PM_{2.5}$ Nonattainment Area.	4/22/14	12/08/14 *[Insert* ***Federal Register*** *citation].*	See § 52.2036(r) and § 52.2059(k).
1997 Annual $PM_{2.5}$ Maintenance Plan.	York $PM_{2.5}$ Nonattainment Area	4/22/14	12/08/14 *[Insert* ***Federal Register*** *citation].*	See § 52.2036(r) and § 52.2059(l).
2006 24-Hour $PM_{2.5}$ Maintenance Plan.	Harrisburg-Lebanon-Carlisle-York $PM_{2.5}$ Nonattainment Area.	4/22/14	12/08/14 *[Insert* ***Federal Register*** *citation].*	See § 52.2036(r) and § 52.2059(m).

■ 3. Section 52.2036 is amended by adding paragraph (r) to read as follows:

§ 52.2036 Base year emissions inventory.

* * * * *

(r) EPA approves as revisions to the Pennsylvania State Implementation Plan the 2007 base year emissions inventory for the Harrisburg-Lebanon-Carlisle and York 1997 annual fine particulate matter ($PM_{2.5}$) nonattainment areas, and the Harrisburg-Lebanon-Carlisle-York 2006 24-hour $PM_{2.5}$ nonattainment area submitted by the Pennsylvania Department of Environmental Protection on April 22, 2014. The emissions inventory includes emissions estimates that cover the general source categories of point, area, nonroad, and onroad sources. The pollutants that comprise the inventory are nitrogen oxides (NO_X), volatile organic compounds (VOCs), $PM_{2.5}$, ammonia (NH_3), and sulfur dioxide (SO_2).

■ 4. Section 52.2059 is amended by adding paragraphs (k), (l) and (m) to read as follows:

§ 52.2059 Control strategy: Particular matter.

* * * * *

(k) EPA approves the maintenance plan for the Harrisburg-Lebanon-Carlisle nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS submitted by the Commonwealth of Pennsylvania on April 22, 2014. The maintenance plan includes the 2017 and 2025 $PM_{2.5}$ and NO_X mobile vehicle emissions budgets (MVEBs) for the Dauphin, Lebanon and Cumberland Counties to be applied to all future transportation conformity determination and analyses for the Harrisburg-Lebanon-Carlisle nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS.

HARRISBURG-LEBANON-CARLISLE AREA'S MOTOR VEHICLE EMISSION BUDGETS FOR THE 1997 ANNUAL $PM_{2.5}$ NAAQS IN TONS PER YEAR

Type of control strategy SIP	Year	$PM_{2.5}$	NO_X	Effective date of SIP approval
Maintenance Plan	2017	365	10,287	12/08/14
	2025	275	7,024	12/08/14

(l) EPA approves the maintenance plan for the York nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS submitted by the Commonwealth of Pennsylvania on April 22, 2014. The maintenance plan includes the 2017 and 2025 $PM_{2.5}$ and NO_X mobile vehicle emissions budgets (MVEBs) for the York County to be applied to all future transportation conformity determination and analyses for the York nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS.

YORK AREA'S MOTOR VEHICLE EMISSION BUDGETS FOR THE 1997 ANNUAL $PM_{2.5}$ NAAQS IN TONS PER YEAR

Type of control strategy SIP	Year	$PM_{2.5}$	NO_X	Effective date of SIP approval
Maintenance Plan	2017	192	5,390	12/08/14
	2025	144	3,398	12/08/14

(m) EPA approves the maintenance plan for the Harrisburg-Carlisle-Lebanon-York $PM_{2.5}$ nonattainment area for the 2006 24-hour $PM_{2.5}$ submitted by the Commonwealth of Pennsylvania on April 22, 2014. The maintenance plan includes the 2017 and 2025 $PM_{2.5}$ and NO_X mobile vehicle emissions budgets (MVEBs) for the Dauphin, Lebanon, Cumberland, and York Counties be applied to all future transportation conformity determination and analyses for the Harrisburg-Carlisle-Lebanon-York nonattainment area for the 2006 24-hour $PM_{2.5}$ NAAQS.

HARRISBURG-CARLISLE-LEBANON-YORK AREA'S MOTOR VEHICLE EMISSION BUDGETS FOR THE 2006 24-HOUR $PM_{2.5}$ NAAQS IN TONS PER YEAR

Type of control strategy SIP	Year	$PM_{2.5}$	NO_X	Effective date of SIP approval
Maintenance Plan	2017	365	10,287	12/08/14
	2025	275	7,024	12/08/14
Maintenance Plan	2017	76	2,252	12/08/14
	2025	56	1,446	12/08/14
Maintenance Plan	2017	192	5,390	12/08/14
	2025	144	3,398	12/08/14

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 5. The authority citation for part 81 continues to read as follows:

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

■ 6. In § 81.339:

■ a. The 1997 Annual $PM_{2.5}$ NAAQS table is amended by revising the entries for the Harrisburg-Lebanon-Carlisle, PA and York, PA Areas.

■ b. The 2006 24-Hour $PM_{2.5}$ NAAQS tables are amended by revising the entry for the Harrisburg-Lebanon-Carlisle-York, PA Area.

The revisions read as follows:

§ 81.339 Pennsylvania.

* * * * *

PENNSYLVANIA—1997 ANNUAL $PM_{2.5}$ NAAQS

[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
Harrisburg-Lebanon-Carlisle, PA:				
Cumberland County	12/08/14	Attainment		Moderate.
Dauphin County	12/08/14	Attainment		Moderate.
Lebanon County	12/08/14	Attainment		Moderate.
* * * *	*		*	*
York, PA:				
York County	12/08/14	Attainment		Moderate.
* * * *	*		*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is 90 days after January 5, 2005, unless otherwise noted.
[2] This date is July 2, 2014, unless otherwise noted.

* * * * *

PENNSYLVANIA—2006 24-HOUR $PM_{2.5}$ NAAQS

[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [2]	Type
* * * *	*		*	*
Harrisburg-Lebanon-Carlisle-York, PA:				
Cumberland County	12/08/14	Attainment		Moderate.
Dauphin County	12/08/14	Attainment		Moderate.
Lebanon County	12/08/14	Attainment		Moderate.
York County	12/08/14	Attainment		Moderate.
* * * *	*		*	*

[a] Includes Indian County located in each county or area, except as otherwise specified.
[1] This date is 30 days after November 13, 2009, unless otherwise noted.
[2] This date is July 2, 2014, unless otherwise noted.

* * * * *

[FR Doc. 2014–28591 Filed 12–5–14; 8:45 am]
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 140828724–4992–02]

RIN 0648–BE23

Framework Action To Modify the Commercial Annual Catch Limit/ Annual Catch Target Regulations for Three Individual Fishing Quota Species Complexes

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement a framework action to the Fishery Management Plan (FMP) for the Reef Fish Resources of the Gulf of Mexico (Gulf) (Reef Fish FMP) as prepared by the Gulf of Mexico Fishery Management Council (Council). The action modifies the commercial annual catch limit (ACL) and annual catch target (ACT) regulations for three individual fishing quota (IFQ) program species complexes in the Gulf. This rule clarifies that the established commercial quotas are equal to the commercial ACTs and adds commercial ACLs to the regulations for three IFQ species complexes: Other shallow-water grouper (Other SWG), deep-water grouper (DWG), and tilefishes. The purpose of this rule is to optimize allowable harvest of IFQ species in the Gulf, while preventing overfishing, in accordance with National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: This rule is effective January 7, 2015.

ADDRESSES: Electronic copies of the framework action, which includes a regulatory impact review and a Regulatory Flexibility Act analysis, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Rich Malinowski, Southeast Regional Office, telephone: 727–824–5305.

SUPPLEMENTARY INFORMATION: NMFS and the Council manage the fisheries for Gulf Reef Fish Resources, which includes the complexes for Other SWG, DWG, and tilefishes, under the Reef Fish FMP. Other SWG includes black grouper, scamp, yellowmouth grouper, yellowfin grouper; DWG includes warsaw grouper, snowy grouper, speckled hind, yellowedge grouper; and tilefishes include golden tilefish, blueline tilefish, and goldface tilefish. The Reef Fish FMP is implemented under the authority of the Magnuson-Stevens Act by regulations at 50 CFR part 622. All weights specified in this rule are in gutted weight.

On October 1, 2014, NMFS published a proposed rule for this framework action and requested public comment (79 FR 59204). The proposed rule and framework action outline the rationale for the actions contained in this final rule. This final rule clarifies that the commercial quotas for the Other SWG, DWG, and tilefishes complexes are equal to the commercial ACTs specified in the Generic Annual Catch Limit/ Accountability Measures Amendment (Generic ACL Amendment) and adds commercial ACLs to the regulations for these same three complexes. This final rule also removes outdated quotas for these species complexes.

Comments and Responses

NMFS received one comment letter on the proposed rule from a commercial fishing organization. The comment and NMFS' response is summarized below.

Comment: The commercial quotas should be set equivalent to the ACL, not the ACT, because they are managed under a highly functioning and certain IFQ program. The present commercial IFQ program for SWG, DWG, and tilefish demonstrates that management uncertainty is effectively zero and therefore setting the commercial quota for these species complexes at their ACLs rather than their ACTs is justified.

Response: NMFS disagrees that the commercial quotas for IFQ species complexes should be set equal to the ACLs and not the ACTs. At the June Council meeting, the Council voted to use the ACL/ACT control rule adopted in the Generic ACL Amendment and retain the 4 percent buffer between the ACL and ACT for species in the IFQ program. Using the ACL/ACT control rule results in a recommended 4 percent buffer because of the uncertainty in managing stock complexes. While the aggregate quota is unlikely to be exceeded in an IFQ program, there is less control over the individual stocks within the aggregate. The Other SWG complex and DWG complex each consist of four stocks, and the tilefish complex consists of three stocks. If the proportion of each stock that makes up the landings changes, it may be possible to overfish a single stock within the complex even when the aggregate quota is not exceeded.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined that this final rule is necessary for the conservation and management of Gulf reef fish and is consistent with the framework action, the FMP, the Magnuson-Stevens Act and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. NMFS received one comment on the proposed rule concerning the decision to keep the commercial quota at the commercial ACT level, which does not affect the current level of landings. Therefore, the basis for the certification that this final rule would not have any impact on small entities has not changed. Accordingly, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Gulf of Mexico, Individual fishing quota.

Dated: November 25, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.39, paragraphs (a)(1)(ii) and (a)(1)(iii)(A) are revised to read as follows:

§ 622.39 Quotas.

* * * * *

(a) * * *

(1) * * *

(ii) Deep-water groupers (DWG) have a combined quota, as specified in paragraphs (a)(1)(ii)(A) through (C) of

this section. These quotas are specified in gutted weight, that is eviscerated, but otherwise whole.

(A) For fishing year 2014—1.110 million lb (0.503 million kg).

(B) For fishing year 2015—1.101 million lb (0.499 million kg).

(C) For fishing year 2016 and subsequent fishing years—1.024 million lb (0.464 million kg).

(iii) * * *

(A) *Other SWG combined.* (*1*) For fishing year 2014—523,000 lb (237,229 kg).

(*2*) For fishing year 2015 and subsequent fishing years—525,000 lb (238,136 kg).

* * * * *

■ 3. In § 622.41, paragraphs (c)(1), (f)(1), and (g)(1) are revised to read as follows:

§ 622.41 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(c) * * *

(1) *Commercial sector.* The IFQ program for groupers and tilefishes in the Gulf of Mexico serves as the accountability measure for commercial Other SWG. The commercial ACT for Other SWG is equal to the applicable quota specified in § 622.39(a)(1)(iii)(A). The commercial ACL for Other SWG, in gutted weight, is 545,000 lb (247,208 kg) for 2014, and 547,000 lb (248,115 kg) for 2015 and subsequent fishing years.

* * * * *

(f) * * *

(1) *Commercial sector.* The IFQ program for groupers and tilefishes in the Gulf of Mexico serves as the accountability measure for commercial DWG. The commercial ACT for DWG is equal to the applicable quota specified in § 622.39(a)(1)(ii). The commercial ACL for DWG, in gutted weight, is 1.160 million lb (0.526 million kg) for 2014, 1.150 million lb (0.522 million kg) for 2015, and 1.070 million lb (0.485 million kg) for 2016 and subsequent fishing years.

* * * * *

(g) * * *

(1) *Commercial sector.* The IFQ program for groupers and tilefishes in the Gulf of Mexico serves as the accountability measure for commercial tilefishes. The commercial ACT for tilefishes is equal to the quota specified in § 622.39(a)(1)(iv). The commercial ACL for tilefishes, in gutted weight, is 606,000 lb (274,877 kg).

* * * * *

[FR Doc. 2014–28630 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 140324263–4990–02]

RIN 0648–BE12

Atlantic Highly Migratory Species; Transshipment, Port Inspection, and Vessel Identification

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

ACTION: Final rule.

SUMMARY: This final rule implements regulations governing transshipment and international port inspection for vessels with Atlantic highly migratory species (HMS) permits to fulfill recent recommendations adopted by the International Commission for the Conservation of Atlantic Tunas (ICCAT). The final rule expands the current prohibition on transfer at sea to include any tuna, tuna-like species, or other Atlantic HMS both at sea and in port inside the Atlantic Ocean, and prohibits the transfer of Atlantic HMS by U.S. vessels outside of the Atlantic Ocean and its surrounding seas. However, Atlantic tuna purse seine category vessels are still allowed to transfer Atlantic bluefin tuna from the catcher vessel to the receiving vessel in certain limited circumstances. Additionally, this final rule revises current regulations for U.S.-permitted vessels landing tuna, tuna-like species, or other HMS in foreign ports or making port calls in foreign ports by updating information and reporting procedures. Finally, NMFS is notifying commercial HMS permit holders with vessels 20 meters or larger of an ICCAT requirement that they provide an International Maritime Organization (IMO)/Lloyd's Registry (LR) number on their permit application by no later than January 1, 2016. The purpose of this rule is to ensure U.S. compliance with ICCAT recommendations and to facilitate implementation of international monitoring, control, and surveillance measures for Atlantic HMS fisheries.

DATES: This rule is effective on January 7, 2015.

ADDRESSES: Other documents relevant to this final rule are available from the Atlantic HMS Management Division Web site at *http://www.nmfs.noaa.gov/sfa/hms/* or upon request from the Atlantic HMS Management Division at 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Rick Pearson at 727–824–5399 or LeAnn Hogan at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries are managed under the 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and regulations at 50 CFR part 635, pursuant to the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Atlantic Tunas Convention Act (ATCA). Under ATCA, the Secretary promulgates such regulations as may be necessary and appropriate to carry out ICCAT recommendations.

Background

A brief summary of the background of this final action is provided below. The details are described in the proposed rule for this action (79 FR 54247, September 11, 2014) and are not repeated here. Additional information regarding Atlantic HMS management can be found in the 2006 Consolidated Atlantic HMS FMP and its amendments, the annual HMS Stock Assessment and Fishery Evaluation (SAFE) Reports, and online at *http://www.nmfs.noaa.gov/sfa/hms/*. The comments received on the proposed rule for this action, and our responses to those comments, are summarized below in the section labeled "Response to Comments."

In 2012 and 2013, ICCAT adopted binding measures for its Contracting Parties to further combat illegal, unregulated, and unreported (IUU) fishing activities. Consistent with these recent ICCAT recommendations, this final rule implements domestic regulations pertaining to transfer at sea and transshipment, and international port inspection for vessels that are issued, or required to be issued, Atlantic HMS permits. It also notifies owners of commercial HMS-permitted vessels that are 20 meters in length or greater of the need to obtain an IMO/LR number and to provide that number on their permit applications by no later than January 1, 2016.

Transfer at Sea and Transshipment

ICCAT Recommendation 12–06 expands and strengthens ICCAT's previously adopted program for transshipment. These changes were designed to enhance the quality of data collected for use in compliance assessments and for scientific purposes, and to eliminate any incentive for vessels to transship outside of the ICCAT convention area in order to circumvent ICCAT rules. Current

domestic transfer at sea regulations already prohibit the transfer at sea of Atlantic HMS within the Convention Area (*i.e.*, all waters of the Atlantic Ocean including adjacent seas), regardless of where the fish were harvested. The current regulations also require that permitted vessels offload Atlantic HMS to permitted dealers, thereby precluding transfers in port. In this rulemaking, NMFS is amending the regulations to expand the prohibition on transfer at sea to include any tuna, tuna-like species, or other HMS within the Convention Area both at sea or in port, and to also prohibit the transfer of these species at sea outside of the Convention Area, regardless of where the fish were harvested. With these minor changes, it would become unlawful for Atlantic HMS-permitted vessels (or vessels required to have an Atlantic HMS permit) to transfer tuna, tuna-like species, or other HMS in port or at sea, both within or outside the Convention Area. However, Atlantic tuna purse seine category vessels would continue to be allowed to transfer only Atlantic bluefin tuna from the catcher vessel to the receiving vessel provided that the amount transferred does not cause the receiving vessel to exceed its currently authorized vessel allocation, including incidental catch limits.

The HMS transfer at sea prohibition was first implemented in 1999 (64 FR 29090, May 28, 1999) in conjunction with publication of the 1999 Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (1999 FMP) and was analyzed in the environmental impact statement for that action. The transfer at sea regulation has remained largely unchanged since then, with only two minor amendments in 2010 and 2011. This final action does not significantly alter the regulation. Also, there have been no known transfers of Atlantic tuna, tuna-like species, or other HMS by U.S. permitted vessels outside of the Convention Area (*e.g.*, in the Panama Canal or Pacific Ocean). Thus, this final action is limited in magnitude and is not a significant change from the original environmental action. It is not expected to result in socio-economic impacts on U.S. fishermen.

Port Inspection

ICCAT Recommendation 12–07 establishes a scheme for minimum standards for inspection in port and revises and strengthens ICCAT's previous port inspection program (Recommendation 97–10). Pursuant to Recommendation 12–07, port State responsibilities include: (1) Designating and publicizing their ports where foreign fishing vessels can land or transship ICCAT-managed species that have not previously been landed or transshipped at port; (2) requiring advance notice from foreign fishing vessels seeking to enter those ports; (3) deciding whether or not to grant entry to such vessels in consideration of the information received; and, (4) carrying out inspections of at least five percent of landing or transshipment operations made by foreign vessels once in port. The provisions of Recommendation 12–07 are to be applied to foreign fishing vessels equal to or greater than 12 meters in length overall. Notwithstanding the above minimum standards, port States may adopt more stringent port inspection requirements.

ICCAT Recommendation 12–07 also requires that flag States take necessary action to ensure that masters facilitate safe access to the fishing vessel, cooperate with the competent authorities of the port State, facilitate the inspection and communication and not obstruct, intimidate or interfere, or cause other persons to obstruct, intimidate or interfere with port State inspectors in the execution of their duties.

NOAA, the United States Coast Guard (USCG), and other relevant Federal agencies are in inter-agency discussions on implementation of those provisions of Recommendation 12–07 that pertain to U.S. responsibilities as a port State, such as advance notice of arrival by foreign fishing vessels. Full implementation of those provisions will require separate, additional rulemaking in the future by one or more U.S. agencies and may be addressed in concert with other port State requirements stemming from measures adopted by other Regional Fishery Management Organizations (RFMOs), as well as the Agreement on Port State Measures to Prevent and Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, adopted by the United Nations Food and Agricultural Organization (FAO) in 2009, should the United States become a party. The U.S. Senate gave its advice and consent for ratification of this treaty in April 2014 and Congress is currently considering implementing legislation.

In this final rule, NMFS is only implementing certain provisions of Recommendation 12–07. It revises 50 CFR 635.52 to include technical and electronic equipment, records, and other relevant documents deemed necessary to ensure compliance with ICCAT measures as examples of what may be inspected by an authorized officer of a port State when offloading tuna, tuna-like species or other HMS in a foreign port or when making a port call in foreign ports. It also adds new language at § 635.53 to inform U.S. vessel operators of the information that they must provide to a port State prior to arrival in a foreign port. Finally, this rule adds § 635.54, which notifies U.S. vessel operators of the updated procedures for the port State when reporting the results of any port inspection conducted by an authorized foreign port State inspector. These final regulations are necessary to maintain consistency with current ICCAT recommendations and to ensure that operators of U.S. permitted fishing vessels have the most current information available to comply with the requirements of foreign countries pursuant to ICCAT Recommendation 12–07. These changes are limited in magnitude and are not expected to result in socio-economic impacts on U.S. fishermen.

Unique Vessel Identifiers

ICCAT Recommendation 13–13 requires vessels 20 meters or greater in length to obtain an IMO/LR number by no later than January 1, 2016. Current HMS regulations at § 635.4(h) are sufficient to comply with this Recommendation, as they allow NMFS to collect required supporting documents, which would include an IMO/LR number, as a condition for obtaining an Atlantic HMS permit and for being included on the ICCAT list of authorized large scale fishing vessels. Permit applications that do not contain the required supporting documents are considered incomplete. However, NMFS will need to amend the HMS permit applications to add a new field for the IMO/LR number. NMFS intends to amend the permit applications so that affected constituents can provide their IMO/LR number on the application for their 2015 permits. Therefore, through this rulemaking, NMFS is informing affected constituents about the need to obtain an IMO/LR number and to provide that number on their permit application by no later than January 1, 2016. No regulatory changes are being implemented to comply with ICCAT Recommendation 13–13.

Technical Correction

A final rule to lift trade restrictions on bigeye tuna from Bolivia and Georgia was published in the **Federal Register** on August 29, 2012 (77 FR 52259). The prohibition on the import of bigeye tuna from Bolivia and Georgia at 50 CFR 635.71(b)(29) was inadvertently not removed by NMFS in that final rule. A technical correction to remove and reserve § 635.71(b)(29) is included in this final rule.

Response to Comments

The comment period for the proposed rule closed on October 14, 2014. NMFS did not receive any written comments from non-governmental organizations, fishermen, dealers, and other interested parties. NMFS received one comment from a constituent participating on the conference call/webinar on September 19, 2014. A summary of that comment is provided below along with NMFS' response.

Comment 1: I support the proposed measures because implementation would demonstrate U.S. compliance with ICCAT trade measures.

Response: NMFS agrees that the measures implemented by this rule would demonstrate U.S. compliance with ICCAT trade measures.

Changes From the Proposed Rule (79 FR 54247, September 11, 2014)

The proposed rule for this action added a new paragraph at § 635.71(a)(57). However, another rulemaking, the proposed rule for Amendment 7 to the Consolidated Atlantic HMS FMP (78 FR 52032, August 21, 2013), proposed to add provisions at the same paragraph number and others (§ 635.71(a)(57)–(60)). Because the paragraphs in the final rule for Amendment 7 to the Consolidated Atlantic HMS FMP published and became effective prior to this action, the provisions proposed to be codified at § 635.71(a)(57) are now codified at § 635.71(a)(61) in this final rule. There is no change to the regulatory language contained in the proposed paragraph.

Classification

The NMFS Assistant Administrator has determined that this final action is necessary for the conservation and management of the Atlantic HMS fisheries, and that it is consistent with the Magnuson-Stevens Act, the 2006 Consolidated Atlantic HMS FMP and its amendments, ATCA, and other applicable laws.

This final action has been determined to be categorically excluded from the requirement to prepare an environmental assessment in accordance with NOAA Administrative Order 216–6. A memorandum for the file has been prepared that sets forth the decision to use a categorical exclusion because the rule would implement minor adjustments to the regulations and would not have a significant effect, individually or cumulatively, on the human environment.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). ICCAT Recommendation 13–13 requires commercial vessels 20 meters or greater to obtain an IMO/LR number by no later than January 1, 2016. To comply with this Recommendation, as a condition for obtaining an Atlantic HMS permit, NMFS will require that an IMO/LR number be provided on the HMS permit application from affected constituents by no later than January 1, 2016. A permit application will be considered incomplete if an IMO/LR number is not provided by an affected constituent. An amendment to OMB Control Number 0648–0205 (Southeast Region Federal Fisheries Permit Family of Forms) and Control Number 0648–0327 (HMS Vessel Permits) will be submitted to the Office of Management and Budget for approval.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: November 25, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set out in the preamble, NMFS amends 50 CFR part 635 as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 2. Section 635.29 is revised to read as follows:

§ 635.29 Transfer at sea and transshipment.

(a) A person who owns or operates a vessel issued a permit, or required to be issued a permit, under § 635.4 may not transfer any tuna or tuna-like species, or other HMS, at sea or in port, regardless of where the fish was harvested, except as provided in paragraph (c) of this section.

(b) For the purposes of this part, "transfer" means the act of "transshipping" as defined at 50 CFR 300.301. Notwithstanding the definition of "harvest" at § 600.10, for the purposes of this part, transfer also includes, but is not limited to, moving or attempting to move a tuna that is on fishing gear or other gear in the water from one vessel to another vessel.

(c) An owner or operator of a vessel for which an Atlantic Tunas Purse Seine category permit has been issued under § 635.4 may transfer large medium and giant Atlantic BFT at sea from the net of the catching vessel to another vessel for which an Atlantic Tunas Purse Seine category permit has been issued, provided the amount transferred does not cause the receiving vessel to exceed its currently authorized vessel allocation, including incidental catch limits.

■ 3. Section 635.51 is revised to read as follows:

§ 635.51 Authorized officer.

For the purposes of this subpart, an authorized officer is a person appointed by an ICCAT contracting party to conduct inspections for the purpose of determining compliance with ICCAT conservation and management measures and who possesses identification issued by the authorized officer's national government.

■ 4. Section 635.52 is revised to read as follows:

§ 635.52 Vessels subject to inspection.

(a) All U.S. fishing vessels carrying fish species subject to regulation pursuant to a recommendation of ICCAT that have not been previously landed or transshipped at port, as well as the vessel's catch, gear, equipment, records, and any documents the authorized officer deems necessary to determine compliance with ICCAT conservation and management measures, are subject to inspection when in a port of any ICCAT contracting or cooperating non-contracting party. A list of ports, designated by ICCAT contracting or cooperating non-contracting parties, to which foreign vessels carrying fish species subject to regulation pursuant to a recommendation of ICCAT may seek entry is available on the ICCAT Web site.

(b) While in port, the master, crewmember, or any other person on a U.S. vessel carrying fish species subject to regulation pursuant to a recommendation of ICCAT must

cooperate with an authorized officer during the conduct of an inspection, including by facilitating safe boarding. ICCAT recommendations require that inspections be carried out so that the vessel suffers minimum interference and inconvenience, and so that degradation of the quality of catch is avoided.

■ 5. Section 635.53 is revised to read as follows:

§ 635.53 Prior notification.

(a) U.S. vessels carrying tuna or tuna-like species or other HMS that are seeking to enter the port of another ICCAT contracting or cooperating party must provide to the port State, at least 72 hours before the estimated time of arrival at the port or in accordance with any other time period specified by the foreign government, the following information:

(1) Vessel identification (External identification; Name; Flag State; ICCAT Record No., if any; IMO No., if any; and international radio call sign);

(2) Name of the designated port, as referred to in the ICCAT register, to which it seeks entry and the purpose of the port call;

(3) Fishing authorization or, where appropriate, any other authorization held by the vessel to support fishing operations on ICCAT-managed species and/or fish products originating from such species;

(4) Estimated date and time of arrival in port;

(5) In kilograms, the estimated quantities of each ICCAT-managed species and/or fish products originating from such species to be held on board and to be landed, with associated catch areas;

(6) Other information, as requested by the foreign ICCAT contracting or cooperating non-contracting party, to determine whether a vessel has engaged in IUU fishing, or related activities;

(b) After receiving information pursuant to paragraph (a) of this section, the foreign ICCAT contracting or cooperating non-contracting party should decide whether to authorize or deny the entry of a vessel into its port.

■ 6. Section 635.54 is added to read as follows:

§ 635.54 Reports.

Owners and operators of U.S. vessels subject to inspection under § 635.23 are hereby notified that the ICCAT recommendation establishing a scheme for minimum standards for inspection in port requires that:

(a) Upon completion of the inspection, the authorized officer shall provide the Master of the U.S. fishing vessel with the inspection report containing the findings of the inspection, including any violations found and possible subsequent measures that could be taken by the foreign ICCAT contracting or cooperating non-contracting party. The Master of the U.S. vessel is entitled to add or have added to the report any comments or objections, and to add his or her own signature as an acknowledgement of receipt,

(b) Copies of the inspection report shall also be provided by the port State to the ICCAT Secretariat and, as appropriate, to NMFS and other contracting or cooperating non-contracting parties of ICCAT,

(c) Any enforcement action taken by the foreign ICCAT contracting or cooperating non-contracting party in response to an infringement shall be reported to the United States and to the ICCAT Secretariat, and

(d) The foreign ICCAT contracting or cooperating non-contracting party shall refer any infringements found that do not fall within its jurisdiction, or with respect to which it has not taken action, to the flag State of the vessel (*i.e.*, to NMFS).

■ 7. In § 635.71:

■ a. Add paragraph (a)(61);

■ b. Revise paragraph (b)(21);

■ c. Remove and reserve paragraph (b)(29);

■ d. Revise paragraphs (c)(2), (d)(5), and (e)(5) to read as follows:

§ 635.71 Prohibitions.

* * * * *

(a) * * *

(61) Transfer in port or at sea any tuna, tuna-like species, or other HMS, as specified in § 635.29(a).

(b) * * *

(21) Transfer a tuna, except as may be authorized for the transfer of Atlantic BFT between purse seine vessels, as specified in § 635.29(c).

* * * * *

(c) * * *

(2) Transfer a billfish in port or at sea, as specified in§ 635.29(a).

* * * * *

(d) * * *

(5) Transfer a shark in port or at sea, as specified in§ 635.29(a).

* * * * *

(e) * * *

(5) Transfer a swordfish in port or at sea, as specified in § 635.29(a).

* * * * *

[FR Doc. 2014–28628 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 140214138–4482–02]

RIN 0648–XD638

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

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of Maryland is transferring a portion of its 2014 commercial bluefish quota to the State of Rhode Island. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

DATES: Effective December 3, 2014, through December 31, 2014.

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

SUPPLEMENTARY INFORMATION:

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

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

Maryland has agreed to transfer 50,000 lb (22,679.6 kg) of its 2014 commercial quota to Rhode Island. This transfer was prompted by the diligent efforts of state officials in Rhode Island not to exceed the commercial bluefish quota. The Regional Administrator has determined that the criteria set forth in § 648.162(e)(1) have been met. The revised bluefish quotas for calendar year

2014 are: Maryland, 173,891 lb (78,875.6 kg); and Rhode Island, 607,786 lb (275,687 kg).

Classification

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

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

Dated: December 3, 2014.

Alan D. Risenhoover,

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

[FR Doc. 2014–28685 Filed 12–3–14; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 79, No. 235
Monday, December 8, 2014

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–1001; Directorate Identifier 2014–CE–034–AD]

RIN 2120–AA64

Airworthiness Directives; Short Brothers & Harland Ltd. Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Short Brothers & Harland Ltd. Model SC–7 Series 3 airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as fatigue cracking, which could lead to structural failure of the nose landing gear (NLG). We are issuing this proposed AD to require actions to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 22, 2015

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Fax: (202) 493–2251.
- Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For Short Brothers & Harland Ltd. service information identified in this proposed AD, contact Airworthiness, Short Brothers PLC, P.O. Box 241, Airport Road, Belfast, BT3 9DZ Northern Ireland, United Kingdom; phone: +44–2890–462469, fax: 44–2890–733647, email: *michael.mulholland@aero.bombardier.com*, internet: None; and for SAFRAN Messier-Buggatti-Dowty service information contact Messier-Dowty Limited, Cheltenham Road, Gloucester GL2 9QH, ENGLAND; phone: +44(0)1452 712424; fax: +44(0)1452 713821; email: *americacsc@safranmbd.com*, Internet: *http://www.safranmbd.com*. You may review this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–1001; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090; email: *doug.rudolph@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2014–1001; Directorate Identifier 2014–CE–034–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2014–0246, dated November 12, 2014 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> A fracture of the nose landing gear (NLG) sliding tube was reported. The subsequent investigation determined fatigue cracking as possible cause of the failure.
> This condition, if not detected and corrected, could lead to structural failure of the NLG, possibly resulting in loss of control of the aeroplane during take-off or landing.
> To address this unsafe condition, the Messier-Dowty Ltd, the NLG manufacturer, issued Service Bulletin (SB) 32–17M to provide inspection instructions.
> Consequently Short Brothers PLC issued SB 32–74 which references Messier-Dowty Ltd SB 32–17M.
> For the reasons described above, this AD requires one-time visual and fluorescent penetrant inspections and, depending on findings, accomplishment of applicable corrective action(s).

The MCAI requires you report the findings to Short Brothers PLC to obtain approved repair instructions and accomplish the repair accordingly. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–1001.

Relevant Service Information

Short Brothers & Harland Ltd. has issued Shorts Service Bulletin Number 32–74, dated November 1, 2014; and SAFRAN Messier-Buggatti-Dowty has issued Service Bulletin No. 32–17M, dated November 1, 2014. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

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

Costs of Compliance

We estimate that this proposed AD will affect 24 products of U.S. registry. We also estimate that it would take about 5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $10,200, or $425 per product.

In addition, we estimate that any necessary follow-on actions would take about 16 work-hours and require parts costing $25,000, for a cost of $26,360 per product. We have no way of determining the number of products that may need these actions.

Paperwork Reduction Act

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Short Brothers & Harland Ltd.: Docket No. FAA–2014–1001; Directorate Identifier 2014–CE–034–AD.

(a) Comments Due Date

We must receive comments by January 22, 2015.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Short Brothers & Harland Ltd. Model SC–7 Series 3 airplanes, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as fatigue cracking which could lead to structural failure of the nose landing gear (NLG). We are issuing this proposed AD to detect and correct fatigue cracking which, if not detected and corrected, could lead to structural failure of the NLG, possibly resulting in loss of control of the airplane during take-off or landing.

(f) Actions and Compliance

Unless already done, comply with this AD within the compliance times specified in paragraphs (f)(1) through (f)(5) of this AD, unless already done.

(1) Within 30 days after the effective date of this AD, accomplish a visual inspection of the NLG sliding tube following the instructions of paragraph 3.A of SAFRAN Messier-Buggatti-Dowty Service Bulletin No. 32–17M, dated November 1, 2014.

Note 1 to paragraphs (f)(1), (f)(2), (f)(4), and (f)(5) of this AD: Instructions provided by SAFRAN Messier-Buggatti-Dowty Service Bulletin No. 32–17M, dated November 1, 2014, are referenced in Shorts Service Bulletin Number 32–74, dated November 1, 2014.

(2) Within 90 days after the effective date of this AD, do a fluorescent penetrant inspection of the sliding tube following the instructions of paragraph 3.B of SAFRAN Messier-Buggatti-Dowty Service Bulletin No. 32–17M, dated November 1, 2014.

(3) If any crack is detected during the inspection required by paragraph (f)(1) or (f)(2) of this AD, before further flight, obtain FAA-approved repair instructions approved specifically for compliance with this AD by reporting the findings to Short Brothers & Harland Ltd. and incorporating those instructions. You can find contact information for Short Brothers & Harland Ltd. in paragraph (h) of this AD.

(4) Within 30 days after any inspection required by paragraphs (f)(1) and (f)(2) of this AD or within 30 days after the effective date of this AD, whichever occurs later, report the inspection results to Short Brothers &

Harland Ltd. by completing the Inspection Results Proforma following the instructions of paragraph 3.C.(2) of SAFRAN Messier-Buggatti-Dowty Service Bulletin No. 32–17M, dated November 1, 2014. You can find contact information for Short Brothers & Harland Ltd. in paragraph (h) of this AD.

(5) From the effective date of this AD, you may install a sliding tube on an NLG provided that, before next flight after installation, the NLG sliding tube passes the inspections in paragraphs (f)(1) and (f)(2) of this AD following the instructions of paragraph 3 of SAFRAN Messier-Buggatti-Dowty Service Bulletin No. 32–17M, dated November 1, 2014.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

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

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

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

(h) Related Information

MCAI European Aviation Safety Agency (EASA) AD No.: 2014–0246, dated November 12, 2014; and Shorts Service Bulletin Number 32–74, dated November 1, 2014, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–1001. For Short Brothers & Harland Ltd. service information identified in this proposed AD, contact Airworthiness, Short Brothers PLC, P.O. Box 241, Airport Road, Belfast, BT3 9DZ Northern Ireland, United Kingdom; phone: +44–2890–462469, fax: +44–2890–733647, email: *michael.mulholland@aero.bombardier.com*, Internet: None; and for Messier-Buggatti-Dowty service information contact Messier-Dowty Limited, Cheltenham Road, Gloucester GL2 9QH, ENGLAND; phone: +44(0)1452 712424; fax: +44(0)1452 713821; email: *americacsc@safranmbd.com*, Internet: *http://www.safranmbd.com.* You may review this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on December 2, 2014.

Robert Busto,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–28700 Filed 12–5–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–1002; Directorate Identifier 2014–CE–033–AD]

RIN 2120–AA64

Airworthiness Directives; Pacific Aerospace Limited Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Pacific Aerospace Limited (PAL) Model 750XL airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as PAL Model 750XL airplanes manufactured with only one attitude indicator. A second attitude indicator is required for flights under instrument flight rules. We are issuing this proposed AD to require actions to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 22, 2015.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Fax: (202) 493–2251.
- Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- Hand Delivery: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Pacific Aerospace Limited, Airport Road, Private Bag 3027, Hamilton 3240, New Zealand; telephone: +64 7 843 6144; fax: +64 7 843 6134; email: *pacific@aerospace.co.nz;* Internet: *http://www.aerospace.co.nz/.* You may review this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–1002; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090; email: *karl.schletzbaum@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2014–1002; Directorate Identifier 2014–CE–033–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory,

economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for New Zealand, has issued AD DCA/750XL/17A, dated November 6, 2014 (referred to after this as "the MCAI"), to correct an unsafe condition for Pacific Aerospace Limited Model 750XL airplanes and was based on mandatory continuing airworthiness information originated by an aviation authority of another country. The MCAI states:

> This AD with effective date 10 November 2014 is prompted by a recent determination that certain PAL750XL aircraft were inadvertently manufactured with instrument panels with only one Attitude Indicator (AI). A second AI is required for PAL750XL operating under Instrument Flight Rules (IFR).
>
> The AD mandates the installation of either a second AI, or the enablement of Reversionary Attitude mode in the Sandel Electronic Horizontal Situation Indicator (EHSI), if fitted, when operating under IFR.

You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–1002.

Relevant Service Information

Pacific Aerospace Limited has issued Pacific Aerospace Limited Mandatory Service Bulletin PACSB/XL/074, Issue 2, dated November 4, 2014. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

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

Costs of Compliance

We estimate that this proposed AD will affect 17 products of U.S. registry. We also estimate that it would take about 6 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $3,500 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $68,170, or $4,010 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Pacific Aerospace Limited: Docket No. FAA–2014–1002; Directorate Identifier 2014–CE–033–AD.

(a) Comments Due Date

We must receive comments by January 22, 2015.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pacific Aerospace Limited Model 750XL airplanes, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 34: Navigation.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as Pacific Aerospace Limited Model 750XL airplanes manufactured with instrument panels with only one attitude indicator. A second attitude indicator is required to operate under instrument flight rules (IFR). A reversionary attitude indicator reduces the probability of a single point failure, which could result in loss of control. We are issuing this proposed AD to install a reversionary attitude indicator before operating in IFR conditions.

(f) Actions and Compliance

Unless already done, before the next flight requiring instrument flight rules (IFR) after the effective date of this AD, install a second attitude indicator into the right hand instrument panel or enable the reversionary mode on a Sandel SN3500 electronic horizontal situation indicator (EHSI), if installed, whichever is applicable, following the ACCOMPLISHMENT INSTRUCTIONS in Pacific Aerospace Limited Mandatory Service Bulletin PACSB/XL/074, Issue 2, dated November 4, 2014.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Karl Schletzbaum, Aerospace Engineer, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090; email: *karl.schletzbaum@faa.gov*. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(h) Related Information

Refer to MCAI Civil Aviation Authority (CAA) AD DCA/750XL/17A, dated November 6, 2014, for related information. You may examine the MCAI on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–1002. For service information related to this AD, contact Pacific Aerospace Limited, Airport Road, Private Bag 3027, Hamilton 3240, New Zealand; telephone: +64 7 843 6144; fax: +64 7 843 6134; email: *pacific@aerospace.co.nz;* Internet: *http://www.aerospace.co.nz/*. You may review this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on December 2, 2014.

Robert Busto,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–28699 Filed 12–5–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 141104927–4927–01]

RIN 0648–BE61

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Resources of the Gulf of Mexico; Commercial Reef Fish Fishery of the Gulf of Mexico; Control Date

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

ACTION: Advanced notice of proposed rulemaking; request for comments.

SUMMARY: This document announces the establishment of a control date of January 1, 2015, that the Gulf of Mexico Fishery Management Council (Council) may use if it decides to create additional restrictions limiting participation in the individual fishing quota (IFQ) program for the grouper and tilefish component of the commercial sector of the reef fish fishery in the Gulf of Mexico (Gulf) exclusive economic zone. Anyone entering the program after the control date will not be assured of future access should a management regime that limits participation in the program be prepared and implemented. NMFS invites comments on the establishment of this control date.

DATES: Written comments must be received on or before January 7, 2015.

ADDRESSES: You may submit comments on the proposed rule identified by "NOAA–NMFS–2014–0140" by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0140*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, telephone: 727–824–5305, or email: *Susan.Gerhart@noaa.gov*.

SUPPLEMENTARY INFORMATION: The IFQ program for Gulf grouper and tilefish species (Gulf Grouper and Tilefish IFQ Program) was implemented on January 1, 2010 (74 FR 44732, August 31, 2009). The species included in the IFQ program are deep-water groupers (yellowedge grouper, misty grouper, warsaw grouper, snowy grouper, speckled hind, plus scamp under certain circumstances); red grouper, gag, and other shallow-water groupers (black grouper, scamp, yellowfin grouper, rock hind, red hind, yellowmouth grouper, plus warsaw grouper and speckled hind under certain circumstances); and tilefishes (goldface tilefish, blackline tilefish, anchor tilefish, blueline tilefish, and tilefish). The program includes a provision that, beginning January 1, 2015, all U.S. citizens or permanent resident aliens are eligible to receive transfers of grouper and tilefish IFQ shares or allocation. A Gulf commercial reef fish permit will still be required to harvest, land, and sell grouper and tilefish. This document is to inform current and potential participants of the Gulf Grouper and Tilefish IFQ program that possession of IFQ shares or allocation after this date may not ensure participation under future management of the program. The Council could consider options that include re-establishing a requirement to possess a Gulf commercial reef fish permit to receive shares or allocation under the program. If the Council prepares an amendment to the Fishery Management Plan (FMP) for Reef Fish Resources in the Gulf to restrict participation in the Gulf Grouper and Tilefish IFQ Program in relation to this control date, an analysis of the specific biological, economic, and social effects of the action will be prepared at that time.

Publication of the control date in the **Federal Register** informs participants of the Council's considerations, and gives notice to anyone entering the fishery after the control date that they would not be assured of future access to the Gulf Grouper and Tilefish IFQ Program should management changes be implemented that would restrict participation. Implementation of any such changes would require preparation of an amendment to the FMP and publication of a notice of availability and proposed rule in the **Federal Register** with pertinent public comment periods.

Since the first control date document of November 1, 1989, 54 FR 46755 (November 7, 1989), the Council has established a total of six control dates for various aspects of the reef fish fishery. As stated in the documents, they were intended to provide additional notice to the public that the Council was considering certain future management actions potentially

restricting public access to fishery resources. The most recent control date was a similar control date for the Gulf Red Snapper IFQ program, which published on November 30, 2011 (76 FR 74038). This document considered a control date of January 1, 2012, and stated that anyone entering the program after the control date will not be assured future access should a management regime that limits participation in the program be prepared and implemented. To date, the Council and NMFS have not implemented any management changes to the Gulf Red Snapper IFQ Program that utilize this control date. The current document does not supersede any of the prior documents, and is intended only to provide additional public notice of potential future action being considered relative to the Gulf Grouper and Tilefish IFQ program.

The establishment of a control date does not commit the Council or NMFS to any particular management regime. The Council may or may not make use of this control date as part of the requirements for participation in the Gulf Grouper and Tilefish IFQ Program. Fishermen are not guaranteed future participation in the program, regardless of their entry date. The Council may take action that would affect participants who were in the program prior to the control date or the Council may choose to take no further action to control entry or access to the Gulf Grouper and Tilefish IFQ program.

This notification also gives the public notice that interested participants should locate and preserve records that substantiate and verify their participation in the Gulf reef fish fishery.

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

Dated: November 25, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2014–28625 Filed 12–5–14; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 141107936–4988–01]

RIN 0648–BE55

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 29

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 29 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) (Amendment 29), as prepared and submitted by the South Atlantic Fishery Management Council (Council). If implemented, Amendment 29 and this rule would revise annual catch limits (ACLs) and recreational annual catch targets (ACTs) for four unassessed snapper-grouper species and three snapper-grouper species complexes based on an update to the acceptable biological catch (ABC) control rule and revised ABCs for 14 snapper-grouper stocks. Additionally, this proposed rule would revise management measures for gray triggerfish in Federal waters in the South Atlantic region, including modifying minimum size limits, establishing a split commercial season, and establishing a commercial trip limit. The purpose of this rule is to revise ACLs and recreational ACTs for select snapper-grouper species using the best scientific information available, and to address concerns about inconsistent minimum size limits among states, and early harvest closures in the commercial sector for gray triggerfish.

DATES: Written comments must be received on or before January 7, 2015.

ADDRESSES: You may submit comments on the proposed rule, identified by "NOAA–NMFS–2014–0132" by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0132*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to Karla Gore, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Electronic copies of Amendment 29, which includes an environmental assessment, an initial regulatory flexibility analysis (IRFA) and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Karla Gore, telephone: 727–824–5305, or email: *karla.gore@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Council's Scientific and Statistical Committee (SSC) has recommended revising the Council's ABC control rule to incorporate new methodology for species without assessments but for which there are reliable catch data. Amendment 29 updates the ABC control rule for unassessed stocks and revises the ABCs for 14 snapper-grouper species through application of the new control rule. Amendment 29 and this proposed rule would revise ACLs and recreational ACTs for three snapper-grouper species complexes and four snapper-grouper species based on the revised ABCs. The Council's SSC determined that these management measures are based on the best scientific information available.

A stock assessment for the South Atlantic stock of gray triggerfish was initiated in 2013 but completion of the

assessment has been postponed until 2015. Meanwhile, fishermen have approached the Council with requests for management measures due to concerns about early closures in the commercial sector and the stock status of gray triggerfish. While the Council had intended to wait for the results of the stock assessment to make changes to management measures for this stock, the unforeseen delays in the assessment prompted the Council to be proactive and consider management measures in Amendment 29. These management measures include modifying minimum size limits for gray triggerfish, and establishing a split commercial season, and a commercial trip limit for gray triggerfish.

Management Measures Contained in This Proposed Rule

This rule would revise ACLs for three species complexes and four snapper-grouper species based on the Council's updated ABC control rule and the adjusted ABCs for unassessed species contained in Amendment 29. In addition, this rule would revise management measures for gray triggerfish in Federal waters of the South Atlantic region.

Amendment 29 To Update the ABC Control Rule

Amendment 29 modifies the ABC control rule to use the Only Reliable Catch Stocks (ORCS) approach, recommended by the Council's SSC, to calculate ABC values for unassessed stocks for which there is only reliable catch information available. The approach involved selection of a "catch statistic" based on the maximum landings from 1999–2007, similar to the period of landings used in the Council's Comprehensive ACL Amendment, and to minimize the impact of a decrease in landings that may have been caused by the economic downturn and the effect of recent regulations. The catch statistic was then multiplied by a scalar (number) ranging from 1.25 to 2, based on SSC consensus and expert judgment, to denote the stock's risk of overexploitation (how likely the stock is to become overfished), and a scalar ranging from 0.50 to 0.90 to denote the stock's management risk level. The SSC provided the first two criteria for each stock at issue and the Council developed the risk tolerance level. The amendment employed the ORCS approach to revise ABC values for the following unassessed snapper-grouper species: Bar jack, margate, red hind, cubera snapper, yellowedge grouper, silk snapper, Atlantic spadefish, gray snapper, lane snapper, rock hind, tomtate, white grunt, scamp, and gray triggerfish.

Revise Annual Catch Limits for Select Species

This rule would revise the ACLs for three species complexes and four snapper-grouper species based on the revised ABCs using the ORCS approach. In Amendment 29, the Council defines ACL = OY = ABC for the snappers complex, grunts complex, shallow-water complex, bar jack, Atlantic spadefish, and gray triggerfish. For scamp, the Council chose to revise the definition to ACL = OY = 0.90(ABC) to provide more of a buffer between the ABC and the ACL for scamp due to concerns about stock status of scamp.

The specified sector allocations and the recreational ACT definitions for the snapper-grouper species contained in Amendment 29 would not change from those established in the Comprehensive ACL Amendment (77 FR 15916, March 16, 2012).

Modify Minimum Size Limit for Gray Triggerfish

This rule would establish a 12-inch (30.5-cm), fork length (FL) minimum size limit for gray triggerfish in Federal waters off North Carolina, South Carolina, and Georgia for both the commercial and recreational sectors. This rule would also increase the minimum size limit for gray triggerfish off the east coast of Florida from 12 inches (30.5 cm), total length to 14 inches (35.6 cm), FL, for both the commercial and recreational sectors, which is consistent with the commercial and recreational minimum size limit in place for this species off the west coast of Florida, however, this is inconsistent with the 12-inch (30.5-cm) FL minimum size limit for gray triggerfish in state waters off the east coast of Florida. The rationale for increasing the minimum size limit to 14 inches (35.6 cm), FL, off the east coast of Florida is to implement consistent regulations for fishermen in South Florida, specifically off the Florida Keys. The Florida Fish and Wildlife Commission is expected to discuss implementing compatible regulations for state waters off the east coast of Florida.

Establish a Split Commercial Season for Gray Triggerfish

The fishing year for gray triggerfish begins on January 1. Weather conditions can be poor off North Carolina and South Carolina during the early part of the year making fishing for gray triggerfish difficult. This rule would divide the annual commercial fishing season for gray triggerfish into two six-month fishing seasons to provide opportunities to fish for gray triggerfish throughout the South Atlantic and throughout the calendar year. This rule proposes to allocate 50 percent of the commercial gray triggerfish ACL for the time period January 1 through June 30, and 50 percent for the time period July 1 through December 31. As a result, the commercial ACL would be divided into two seasonal quotas of equal amounts of 156,162 lb (70,834 kg), round weight. When the quota is reached for a given season, the commercial sector would close. In addition, any unused portion of the quota from the first season would be added to the quota in the second season. Any unused portion of the quota specified in the second season, including any addition of quota from the first season, would become void and would not be added to any subsequent quota.

Establish a Commercial Trip Limit for Gray Triggerfish

This rule would establish a commercial trip limit of 1,000 lb (454 kg), round weight, for gray triggerfish, in order to extend the commercial fishing season for this species.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendment 29, the FMP, the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an IRFA for this rule, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603. The IRFA describes the economic impact that this proposed rule, if implemented, would have on small entities. A description of the action, why it is being considered, and the objectives of and legal basis for this action are contained in the preamble. A copy of the full analysis is available from the NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The proposed changes to management measures would directly apply to businesses in the finfish fishing industry (NAICS 114111) that harvest Atlantic spadefish, bar jack, gray triggerfish, scamp, and species of the grunts, shallow-water groupers, and snapper complexes of the South Atlantic snapper-grouper fishery. The proposed changes would also directly apply to anglers; however, anglers aboard for-hire fishing or private and

leased vessels are not considered small entities as that term is defined in 5 U.S.C. 601(6).

Every commercial fishing vessel in the South Atlantic snapper-grouper fishery must have a valid commercial snapper-grouper vessel permit, which is a limited access permit for either an unlimited quantity of pounds per trip or up to 225 lb (102.1 kg) round weight (whole weight) per trip (a 225-lb (102.1-kg) whole weight trip-limited permit). It is estimated that up to 613 commercial fishing businesses own these vessels.

According to Small Business Act Size Standards, a business in the finfish fishing industry is small if its annual receipts are less than $20.5 million. It is expected that a substantial number of the commercial finfish fishing businesses are small businesses.

Two proposed changes are administrative actions and, as such, do not have a direct economic impact on any small entity. None of the proposed changes would impose additional reporting or record-keeping requirements on small businesses.

The proposed increases in the commercial ACLs for Atlantic spadefish and the shallow-water groupers and snappers complexes are expected to have no impact on annual landings of and dockside revenues from those species/complexes because baseline landings are less than the current ACLs. The proposed decreases in the commercial ACLs for scamp and the grunts complex are also expected to have no impact on annual landings or dockside revenues because baseline landings are less than the current and proposed ACLs.

The proposed increase in the commercial ACL for gray triggerfish is expected to increase annual landings of gray triggerfish by 22,978 lb (10,423 kg) to 34,726 lb (15,751 kg) whole weight and dockside revenues from those landings from $44,118 to $66,674. The proposed increase in the commercial ACL for bar jack would increase landings of bar jack from 0 lb (0 kg) to 1,429 lb (648 kg) whole weight and dockside revenue from those landings from $0 to $1,943. The combined impact of those increases would be an annual economic benefit from $44,118 to $68,617 (2013 dollars). The average annual benefit per commercial finfish business would range from $72 to $112.

The proposed minimum size limits for gray triggerfish would reduce commercial landings of the species. Two baselines are used to estimate the range of the adverse economic impact of this action. Under baseline 1, the total loss of annual dockside revenue from gray triggerfish landings would range from $14,775 to $29,654, while it would range from $21,586 to $39,609 under baseline 2. When that adverse impact is combined with the beneficial economic impact from the increase in the commercial ACL for gray triggerfish, there would be a net increase in annual dockside revenue from $22,532 to $37,020 (2013 dollars) from gray triggerfish landings.

The combined economic impact of the gray triggerfish size limit and increase in the commercial ACL would not be the same across the states. There would be a net economic benefit in Georgia, North Carolina, and South Carolina and a net economic cost in Florida. Businesses in Florida would incur a combined annual loss ranging from $135 to $11,661 (2013 dollars) and the average annual loss of dockside revenue from the combined actions would range from $0.3 to $26 per Florida business. Businesses in Georgia, North Carolina, and South Carolina would incur a combined annual benefit ranging from $33,435 to $38,726 (2013 dollars), and the average annual net benefit would range from $201 to $233 per business.

The proposed division of the commercial gray triggerfish season into two 6-month seasons is expected to have no beneficial or adverse economic impact beyond the status quo. However, the divided commercial season would provide fishermen increased opportunity to fish for gray triggerfish in the summer months when weather conditions are more favorable.

The proposed 1,000-lb (454-kg) whole weight commercial trip limit is not expected to affect annual landings and dockside revenues from those landings, but instead would increase the numbers of trips and days with gray triggerfish landings during a fishing year. The trip limit would not affect commercial fishing vessels equally. It is estimated that 2.29 percent of trips currently land more than 1,000 lb (454 kg) whole weight. Vessels that make those trips may experience economies of scale by landing more than 1,000 lb (454 kg) whole weight, and the trip limit would decrease their net revenue per pound by increasing their average cost per pound.

A considered but not adopted alternative of Action 3 would have set a larger commercial ACL for scamp and smaller commercial ACLs for the other species/complexes, particularly bar jack and gray triggerfish, which would yield smaller beneficial economic impacts than the preferred alternative. Two other considered but not adopted alternatives would further reduce the beneficial impacts.

A larger minimum size limit for gray triggerfish in Federal waters off Georgia, North Carolina, and South Carolina was considered but not adopted for Action 4. It would have a larger adverse economic impact on small businesses that harvest gray triggerfish in Federal waters off North Carolina, South Carolina and, Georgia. A smaller minimum size limit for gray triggerfish in Federal waters off Florida was considered but not adopted although it would have a smaller adverse economic impact on small businesses of Florida than the preferred alternative. A considered but not adopted alternative of Action 5 would have allocated a smaller percentage (40 percent) of the commercial ACL to the first half of the season and larger percentage (60 percent) to the second half, which would result in smaller economic benefits in the first half of the year and larger economic benefits in the second half. However, there would be no expected difference in annual landings and dockside revenues across the various alternatives.

A lower trip limit was considered but not adopted for Action 6, which would yield smaller dockside revenues per trip. Another considered but not adopted alternative would have established a higher commercial trip limit; however, it would also have allowed for a higher rate of landings and likely shorter open seasons. There would be no expected difference in annual landings and dockside revenues across the various alternatives.

List of Subjects in 50 CFR Part 622

Annual Catch Limit, Annual Catch Target, Commercial Trip Limits, Fisheries, Fishing, Quotas, Size Limits, Snapper-Grouper, South Atlantic.

Dated: November 25, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.185, paragraph (c)(2) is revised to read as follows:

§ 622.185 Size limits.

* * * * *

(c) * * *

(2) *Gray triggerfish*—(i) *In the South Atlantic EEZ off Florida*—14 inches (35.6 cm), FL.

(ii) *In the South Atlantic EEZ off North Carolina, South Carolina, and Georgia*—12 inches (30.5 cm), FL.

* * * * *

■ 3. In § 622.190, paragraph (a)(8) is added and paragraph (c)(1) introductory text is revised to read as follows:

§ 622.190 Quotas.

* * * * *

(a) * * *

(8) *Gray triggerfish.* (i) For the period January through June each year—156,162 lb (70,834 kg), round weight.

(ii) For the period July through December each year—156,162 lb (70,834 kg), round weight.

(iii) Any unused portion of the quota specified in paragraph (a)(8)(i) of this section will be added to the quota specified in paragraph (a)(8)(ii) of this section. Any unused portion of the quota specified in paragraph (a)(8)(ii) of this section, including any addition of quota specified in paragraph (a)(8)(i) of this section that was unused, will become void and will not be added to any subsequent quota.

* * * * *

(c) * * *

(1) *South Atlantic gag, greater amberjack, snowy grouper, golden tilefish, vermilion snapper, black sea bass, red porgy, wreckfish, and gray triggerfish.*

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■ 4. In § 622.191, paragraph (a)(10) is added to read as follows:

§ 622.191 Commercial trip limits.

* * * * *

(a) * * *

(10) *Gray triggerfish.* Until the applicable quota specified in either § 622.190(a)(8)(i) or (ii) is reached, 1,000 lb (454 kg), round weight. See § 622.190(c)(1) for the limitations regarding gray triggerfish after either quota specified in § 622.190(a)(8)(i) or (ii) is reached or projected to be reached.

* * * * *

■ 5. In § 622.193, the first sentence of paragraphs (i)(1)(i), (i)(2), (j)(1)(i), (j)(2), (m)(1)(i), (m)(2), (p)(1)(i), (p)(2), (q)(1)(i), (q)(2), (t)(1)(i), and (t)(2) are revised; paragraph (x) is revised; and the heading for paragraph (p) is revised to read as follows:

§ 622.193 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(i) * * *

(1) * * *

(i) If commercial landings for scamp, as estimated by the SRD, reach or are projected to reach the commercial ACL of 219,375 lb (99,507 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(2) *Recreational sector.* If recreational landings for scamp, as estimated by the SRD, exceed the recreational ACL of 116,369 lb (52,784 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

(j) * * *

(1) * * *

(i) If commercial landings for other SASWG, as estimated by the SRD, reach or are projected to reach the commercial ACL of 55,542 lb (25,193 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

* * * * *

(2) *Recreational sector.* If recreational landings for other SASWG, as estimated by the SRD, exceed the recreational ACL of 48,648 lb (22,066 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(m) * * *

(1) * * *

(i) If commercial landings for bar jack, as estimated by the SRD, reach or are projected to reach the commercial ACL of 13,228 lb (6,000 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(2) *Recreational sector.* If recreational landings for bar jack, as estimated by the SRD, exceed the recreational ACL of 49,021 lb (22,236 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(p) *Other snappers complex (including cubera snapper, gray snapper, lane snapper, dog snapper, and mahogany snapper)*—

(1) * * *

(i) If commercial landings combined for this other snappers complex, as estimated by the SRD, reach or are projected to reach the complex commercial ACL of 344,884 lb (156,437 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

* * * * *

(2) *Recreational sector.* If the combined recreational landings for this other snappers complex, as estimated by the SRD, exceed the recreational ACL of 1,172,832 lb (531,988 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL for this complex in the following fishing year. * * *

(q) * * *

(1) * * *

(i) If commercial landings for gray triggerfish, as estimated by the SRD, reach or are projected to reach the applicable commercial ACL (commercial quota) specified in § 622.190(a)(8)(i) or (ii), the AA will file a notification with the Office of the Federal Register to close the commercial sector for that portion of the fishing year applicable to the respective quota.

* * * * *

(2) *Recreational sector.* If recreational landings for gray triggerfish, as estimated by the SRD, exceed the recreational ACL of 404,675 lb (183,557 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational

landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(t) * * *

(1) * * *

(i) If commercial landings for Atlantic spadefish, as estimated by the SRD, reach or are projected to reach the commercial ACL of 150,552 lb (68,289 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(2) *Recreational sector.* If recreational landings for Atlantic spadefish, as estimated by the SRD, exceed the recreational ACL of 661,926 lb (300,245 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(x) *Grunts complex (including white grunt, sailor's choice, tomtate, and margate)*—(1) *Commercial sector.* (i) If commercial landings for the grunts complex, as estimated by the SRD, reach or are projected to reach the commercial complex ACL of 217,903 lb (98,839 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. On and after the effective date of such a notification, all sale or purchase of the grunts complex, is prohibited, and harvest or possession of these species in or from the South Atlantic EEZ is limited to the bag and possession limit. This bag and possession limit applies in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.*, in state or Federal waters.

(ii) If the combined commercial landings for the grunts complex exceed the ACL, and at least one of the species in the complex is overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the overage in the prior fishing year.

(2) *Recreational sector.* If recreational landings for the grunts complex, as estimated by the SRD, exceed the recreational ACL of 618,122 lb (280,375 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season for the grunts complex by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. However, the length of the recreational season will not be reduced during the following fishing year if the RA determines, using the best scientific information available, that a reduction in the length of the following fishing season is unnecessary.

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[FR Doc. 2014–28626 Filed 12–5–14; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 141021887–4887–01]

RIN 0648–XD587

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands; 2015 and 2016 Harvest Specifications for Groundfish

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2015 and 2016 harvest specifications, apportionments, and prohibited species catch allowances for the groundfish fisheries of the Bering Sea and Aleutian Islands (BSAI) management area. This action is necessary to establish harvest limits for groundfish during the 2015 and 2016 fishing years, and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area. The intended effect of this action is to conserve and manage the groundfish resources in the BSAI in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments must be received by January 7, 2015.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2014–0134, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0134*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

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), 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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Electronic copies of the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (Final EIS), Record of Decision (ROD), Supplementary Information Report (SIR), and the Initial Regulatory Flexibility Analysis (IRFA) prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov*. The final 2013 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the BSAI, dated November 2013, is available from the North Pacific Fishery Management Council (Council) at 605 West 4th Avenue, Suite 306, Anchorage, AK 99501–2252, phone 907–271–2809, or from the Council's Web site at *http://alaskafisheries.noaa.gov/npfmc*. The draft 2014 SAFE report for the BSAI will be available from the same sources in November 2014.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: Federal regulations at 50 CFR part 679 implement the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) and govern the groundfish fisheries in the BSAI. The Council prepared the FMP and NMFS approved

it under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). General regulations governing U.S. fisheries also appear at 50 CFR part 600.

The FMP and its implementing regulations require NMFS, after consultation with the Council, to specify annually the total allowable catch (TAC) for each target species category. The sum TAC for all groundfish species must be within the optimum yield (OY) range of 1.4 million to 2.0 million metric tons (mt) (see § 679.20(a)(1)(i)). Section 679.20(c)(1) further requires NMFS to publish proposed harvest specifications in the **Federal Register** and solicit public comments on proposed annual TACs and apportionments thereof, prohibited species catch (PSC) allowances, prohibited species quota (PSQ) reserves established by § 679.21, seasonal allowances of pollock, Pacific cod, and Atka mackerel TAC, American Fisheries Act allocations, Amendment 80 allocations, and Community Development Quota (CDQ) reserve amounts established by § 679.20(b)(1)(ii). The proposed harvest specifications set forth in Tables 1 through 17 of this action satisfy these requirements.

Under § 679.20(c)(3), NMFS will publish the final harvest specifications for 2014 and 2015 after (1) considering comments received within the comment period (see **DATES**), (2) consulting with the Council at its December 2014 meeting, and (3) considering information presented in the SIR that assesses the need to prepare a Supplemental EIS (see **ADDRESSES**) and the final 2014 SAFE reports prepared for the 2015 and 2016 groundfish fisheries.

Other Actions Affecting the 2015 and 2016 Harvest Specifications

On September 23, 2014 (79 FR 56671), NMFS published the final rule to implement Amendment 105 to the FMP, which creates acceptable biological catch (ABC) surpluses for three flatfish species: flathead sole, rock sole, and yellowfin sole. From these ABC surpluses, ABC reserves are derived for each CDQ group and each Amendment 80 cooperative. These ABC surpluses and ABC reserves are listed in Table 7 of this proposed rule. Each CDQ group and each Amendment 80 cooperative will be able to exchange allocations between the three flatfish species during each fishing year, as long as they do not exceed any of their ABC reserves. This action is necessary to mitigate the operational variability, environmental conditions, and economic factors that may constrain the CDQ groups and Amendment 80 cooperatives from achieving, on a continuing basis, the optimum yield in the BSAI groundfish fisheries.

NMFS published a proposed rule on July 1, 2014 (79 FR 37486), to implement Steller sea lion protection measures in the BSAI. NMFS is currently drafting final regulations for this action. These regulations are intended to insure that the western distinct population segment of Steller sea lions' continued existence is not jeopardized or its critical habitat is not destroyed or adversely modified. These regulations will alter areas open for directed fishing in the Aleutian Islands subarea of the BSAI. They also will alter the harvest limitation proposed in these harvest specifications for Atka mackerel, Pacific cod, and pollock primarily in the Aleutian Islands subarea of the BSAI.

The Board of Fisheries (BOF) for the State of Alaska (State) established a guideline harvest level (GHL) in State waters between 164 and 167 degrees west longitude in the Bering Sea subarea equal to 3 percent of the Pacific cod ABC for the BSAI. The action by the State does not require a downward adjustment of the proposed 2015 and 2016 Bering Sea subarea Pacific cod TAC because the combined TAC and GHL (260,325 mt) are less than the proposed ABC of 272,000 mt.

The BOF for the State established a GHL in State waters in the Aleutian Islands subarea equal to 3 percent of the Pacific cod ABC for the BSAI. The action by the State does not require a downward adjustment of the proposed Aleutian Islands subarea Pacific cod TAC because the combined TAC and GHL (15,100 mt) equal the proposed ABC of 15,100 mt.

Accordingly, the Council will need to consider these GHLs when recommending the final 2015 and 2016 BSAI TACs. The Council is expected to set the final Bering Sea subarea and Aleutian Islands subarea Pacific cod TACs less than the ABCs by amounts that account for these 2015 and 2016 GHLs. In addition, the Council's BSAI Groundfish Plan Team (Plan Team) is reviewing the stock structure of BSAI groundfish and may recommend allocating current overfishing levels (OFLs) or ABCs by subareas or reporting areas.

Proposed ABC and TAC Harvest Specifications

At the October 2014 Council meeting, the Scientific and Statistical Committee (SSC), Advisory Panel (AP), and Council reviewed the most recent biological and harvest information on the condition of the BSAI groundfish stocks. The Plan Team compiled and presented this information, which was initially compiled by the Plan Team and presented in the final 2013 SAFE report for the BSAI groundfish fisheries, dated November 2013 (see **ADDRESSES**). The amounts proposed for the 2015 and 2016 harvest specifications are based on the 2013 SAFE report, and are subject to change in the final harvest specifications to be published by NMFS following the Council's December 2014 meeting. In November 2014, the Plan Team will update the 2013 SAFE report to include new information collected during 2014, such as NMFS stock surveys, revised stock assessments, and catch data. At its December 2014 meeting, the Council will consider information contained in the final 2014 SAFE report, recommendations from the November 2014 Plan Team meeting, public testimony from the December 2014 SSC and AP meetings, and relevant written comments in making its recommendations for the final 2015 and 2016 harvest specifications.

In previous years, the OFLs and ABCs that have had the most significant changes (relative to the amount of assessed tonnage of fish) from the proposed to the final harvest specifications have been for OFLs and ABCs that are based on the most recent NMFS stock surveys, which provide updated estimates of stock biomass and spatial distribution, and changes to the models used in the stock assessments. These changes are recommended by the Plan Team in November 2014 and are included in the final 2014 SAFE report. The final 2014 SAFE report includes the most recent information, such as 2014 catch. The final harvest specification amounts for these stocks are not expected to vary greatly from the proposed specification amounts published here.

If the final 2014 SAFE report indicates that the stock biomass trend is increasing for a species, then the final 2015 and 2016 harvest specifications may reflect that increase from the proposed harvest specifications. Conversely, if the final 2014 SAFE report indicates that the stock biomass trend is decreasing for a species, then the final 2015 and 2016 harvest specifications may reflect a decrease from the proposed harvest specifications. In addition to changes driven by biomass trends, there may be changes in TACs due to the sum of ABCs exceeding 2 million mt. Since the FMP requires TACs to be set to an OY between 1.4 and 2 million mt, the Council may be required to recommend TACs that are lower than the ABCs recommended by the Plan Team, if

setting TACs equal to ABCs would cause TACs to exceed an OY of 2 million mt. Generally, ABCs greatly exceed 2 million mt in years with a large pollock biomass. NMFS anticipates that, both for 2015 and 2016, the sum of the ABCs will exceed 2 million mt. NMFS expects that the final total TAC for the BSAI for both 2015 and 2016 will equal 2 million mt.

The proposed ABCs and TACs are based on the best available biological and socioeconomic data, including projected biomass trends, information on assumed distribution of stock biomass, and revised methods used to calculate stock biomass. The FMP specifies a series of six tiers to define OFLs and ABCs based on the level of reliable information available to fishery scientists. Tier one represents the highest level of information quality available while tier six represents the lowest.

In October 2014, the SSC adopted the proposed 2015 and 2016 OFLs and ABCs recommended by the Plan Team for all groundfish species. The Council adopted the SSC's OFL and ABC recommendations. These amounts are unchanged from the final 2015 harvest specifications published in the **Federal Register** on March 4, 2014 (79 FR 12108). The Council adopted the AP's TAC recommendations. For 2015 and 2016, the Council recommended and NMFS proposes the OFLs, ABCs, and TACs listed in Table 1. The proposed ABCs reflect harvest amounts that are less than the specified OFLs. The sum of the proposed 2015 and 2016 ABCs for all assessed groundfish is 2,472,832 mt, which is the same as the final 2015 ABC total in the final 2014 and 2015 BSAI groundfish harvest specifications (79 FR 12108, March 4, 2014).

Specification and Apportionment of TAC Amounts

The Council recommended proposed TACs for 2015 and 2016 that are equal to proposed ABCs for Bering Sea pollock, sablefish, Greenland turbot, Kamchatka flounder, Pacific ocean perch, shortraker rockfish, rougheye rockfish, Aleutian Islands (AI) "other rockfish," and Eastern AI/Bering Sea Atka mackerel. The Council recommended proposed TACs for 2015 and 2016 that are less than the proposed ABCs for Aleutian Island pollock, Bogoslof pollock, Pacific cod, yellowfin sole, arrowtooth flounder, rock sole, flathead sole, Alaska plaice, "other flatfish," northern rockfish, Bering Sea "other rockfish," Western and Central AI Atka mackerel, skates, sculpins, sharks, squids, and octopuses.

Section 679.20(a)(5)(iii)(B)(*1*) requires the AI pollock TAC to be set at 19,000 mt when the AI pollock ABC equals or exceeds 19,000 mt. The Bogoslof pollock TAC is set to accommodate incidental catch amounts. TACs are set so that the sum of the overall TAC does not exceed the BSAI OY.

The proposed groundfish OFLs, ABCs, and TACs are subject to change pending the completion of the final 2014 SAFE report and the Council's recommendations for final 2015 and 2016 harvest specifications during its December 2014 meeting. These proposed amounts are consistent with the biological condition of groundfish stocks as described in the 2013 SAFE report, and are adjusted for other biological and socioeconomic considerations. Pursuant to Section 3.2.3.4.1 of the FMP, the Council could recommend adjusting the TACs if "warranted on the basis of bycatch considerations, management uncertainty, or socioeconomic considerations, or if required in order to cause the sum of the TACs to fall within the OY range." Table 1 lists the proposed 2015 and 2016 OFL, ABC, TAC, initial TAC (ITAC), and CDQ amounts for groundfish for the BSAI. The proposed apportionment of TAC amounts among fisheries and seasons is discussed below.

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TABLE 1– PROPOSED 2015 AND 2016 OVERFISHING LEVEL (OFL), ACCEPTABLE BIOLOGICAL CATCH (ABC), TOTAL ALLOWABLE CATCH (TAC), INITIAL TAC (ITAC), AND CDQ RESERVE ALLOCATION OF GROUNDFISH IN THE BSAI[1]

[Amounts are in metric tons]

Species	Area	Proposed 2015 and 2016				
		OFL	ABC	TAC	ITAC[2]	CDQ[3,4,5]
Pollock	BS	2,693,000	1,258,000	1,258,000	1,132,200	125,800
	AI	47,713	39,412	19,000	17,100	1,900
	Bogoslof	13,413	10,059	75	75	0
Pacific cod	BS	319,000	272,000	251,712	224,779	26,933
	AI	20,100	15,100	6,487	5,793	694
Sablefish	BS	1,432	1,210	1,210	514	45
	AI	1,936	1,636	1,636	348	31
Yellowfin sole	BSAI	268,900	248,300	187,000	166,991	20,009
Greenland turbot	BSAI	3,864	3,173	3,173	2,697	0
	BS	n/a	2,478	2,478	2,106	265
	AI	n/a	695	695	591	0
Arrowtooth flounder	BSAI	125,025	106,089	25,000	21,250	2,675
Kamchatka flounder	BSAI	8,500	7,300	7,300	6,205	0
Northern rock sole[6]	BSAI	213,310	190,100	85,000	75,905	9,095
Flathead sole[7]	BSAI	77,023	64,127	25,129	22,440	2,689
Alaska plaice	BSAI	66,300	54,700	25,000	21,250	0
Other flatfish[8]	BSAI	16,700	12,400	3,000	2,550	0
Pacific Ocean perch	BSAI	37,817	31,641	31,641	27,940	2,600
	BS	n/a	7,340	7,340	6,239	0
	EAI	n/a	8,833	8,833	7,888	945
	CAI	n/a	6,299	6,299	5,625	674
	WAI	n/a	9,169	9,169	8,188	981
Northern rockfish	BSAI	11,943	9,652	3,000	2,550	0
Rougheye rockfish[9]	BSAI	580	478	478	406	0
	EBS/EAI	n/a	201	201	171	0
	CAI/WAI	n/a	277	277	235	0
Shortraker rockfish	BSAI	493	370	370	315	0
Other rockfish[10]	BSAI	1,550	1,163	873	742	0
	BS	n/a	690	400	340	0
	AI	n/a	473	473	402	0
Atka mackerel	BSAI	74,898	64,477	32,491	29,014	3,477
	EAI/BS	n/a	21,769	21,769	19,440	2,329
	CAI	n/a	20,685	9,722	8,682	1,040
	WAI	n/a	22,023	1,000	893	107
Skates	BSAI	39,746	33,545	26,000	22,100	0
Sculpins	BSAI	56,424	42,318	5,750	4,888	0
Sharks	BSAI	1,363	1,022	125	106	0
Squids	BSAI	2,624	1,970	325	276	0
Octopuses	BSAI	3,450	2,590	225	191	0
TOTAL		4,107,104	2,472,832	2,000,000	1,788,625	196,213

[1] These amounts apply to the entire BSAI management area unless otherwise specified. With the exception of pollock, and for the purpose of these harvest specifications, the Bering Sea (BS) subarea includes the Bogoslof District.

[2] Except for pollock, the portion of the sablefish TAC allocated to hook-and-line and pot gear, and Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, yellowfin sole, rock sole, flathead sole, and Pacific cod), 15 percent of each TAC is put into a reserve. The ITAC for these species is the remainder of the TAC after the subtraction of these reserves.

[3] Under § 679.20(a)(5)(i)(A)(1), the annual Bering Sea subarea pollock TAC, after subtracting first for the CDQ directed fishing allowance (10 percent) and second for the incidental catch allowance (4.0 percent), is further allocated by sector for a directed pollock fishery as follows: inshore - 50 percent; catcher/processor - 40 percent; and motherships - 10 percent. Under § 679.20(a)(5)(iii)(B)(2)(i) and (ii), the annual Aleutian Islands subarea pollock TAC, after subtracting first for the CDQ directed fishing allowance (10 percent) and second for the incidental catch allowance (2,400 mt), is allocated to the Aleut Corporation for a directed pollock fishery.

[4] The Bering Sea subarea and Aleutian Islands subarea Pacific cod TACs are set to account for the State of Alaska guideline harvest level in state waters of the Bering Sea subarea and Aleutian Islands subarea.

[5] For the Amendment 80 species (Atka mackerel, Aleutian Islands Pacific ocean perch, yellowfin sole, rock sole, flathead sole, and Pacific cod), 10.7 percent of the TAC is reserved for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31). Twenty percent of the sablefish TAC is allocated to hook-and-line gear or pot gear, and 7.5 percent of the sablefish TAC is allocated to trawl gear. The 2015 hook-and-line and pot gear portion of the sablefish ITAC and CDQ reserve will not be specified until the final 2015 and 2016 harvest specifications. 10.7 percent of the TACs for Bering Sea Greenland turbot and arrowtooth flounder are reserved for use by CDQ participants (see § 679.20(b)(1)(ii)(B) and (D)). Aleutian Islands Greenland turbot, ''other flatfish,'' Alaska plaice, Bering Sea Pacific ocean perch, Kamchatka flounder, northern rockfish, shortraker rockfish, rougheye rockfish, ''other rockfish,'' squids, octopuses, skates, sculpins, and sharks are not allocated to the CDQ program.

[6] ''Rock sole'' includes Lepidopsetta polyxystra (Northern rock sole) and Lepidopsetta bilineata (Southern rock sole).

[7] ''Flathead sole'' includes Hippoglossoides elassodon (flathead sole) and Hippoglossoides robustus (Bering flounder).

[8] ''Other flatfish'' includes all flatfish species, except for halibut (a prohibited species), flathead sole, Greenland turbot, rock sole, yellowfin sole, arrowtooth flounder, Kamchatka flounder, and Alaska plaice.

[9] ''Rougheye rockfish'' includes Sebastes aleutianus (rougheye) and Sebastes melanostictus (blackspotted).

[10] ''Other rockfish'' includes all Sebastes and Sebastolobus species except for Pacific ocean perch, northern, shortraker, and rougheye rockfish.

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Groundfish Reserves and the Incidental Catch Allowance (ICA) for Pollock, Atka Mackerel, Flathead Sole, Rock Sole, Yellowfin Sole, and AI Pacific Ocean Perch

Section 679.20(b)(1)(i) requires NMFS to reserve 15 percent of the TAC for each target species category, except for pollock, hook-and-line or pot gear allocation of sablefish, and Amendment 80 species, in a non-specified reserve. Section 679.20(b)(1)(ii)(B) requires NMFS to allocate 20 percent of the hook-and-line or pot gear allocation of sablefish to the fixed gear sablefish CDQ reserve. Section 679.20(b)(1)(ii)(D) requires NMFS to allocate 7.5 percent of the trawl gear allocation of sablefish and 10.7 percent of Bering Sea Greenland turbot and arrowtooth flounder to the respective CDQ reserves. Section 679.20(b)(1)(ii)(C) requires NMFS to allocate 10.7 percent of the TACs for Atka mackerel, AI Pacific ocean perch, yellowfin sole, rock sole, flathead sole, and Pacific cod to the CDQ reserves. Sections 679.20(a)(5)(i)(A) and 679.31(a) also require allocation of 10 percent of the BSAI pollock TACs to the pollock CDQ directed fishing allowance (DFA). The entire Bogoslof District pollock TAC is allocated as an ICA (see § 679.20(a)(5)(ii)). With the exception of the hook-and-line and pot gear sablefish CDQ reserve, the regulations do not further apportion the CDQ reserves by gear.

Pursuant to § 679.20(a)(5)(i)(A)(*1*), NMFS proposes a pollock ICA of 45,288 mt for the Bering Sea subarea pollock TAC after subtracting the 10 percent CDQ reserve. This allowance is based on NMFS' examination of the pollock incidentally retained and discarded catch, including the incidental catch by CDQ vessels, in target fisheries other than pollock from 2000 through 2014. During this 15-year period, the pollock incidental catch ranged from a low of 2.4 percent in 2006 to a high of 4.8 percent in 2014, with a 15-year average of 3.2 percent. Pursuant to § 679.20(a)(5)(iii)(B)(*2*)(*i*) and (*ii*), NMFS proposes a pollock ICA of 2,400 mt for the AI subarea after subtracting the 10 percent CDQ DFA. This allowance is based on NMFS' examination of the pollock incidental catch, including the incidental catch by CDQ vessels, in target fisheries other than pollock from 2003 through 2014. During this 12-year period, the incidental catch of pollock ranged from a low of 5 percent in 2006 to a high of 17 percent in 2013, with a 12-year average of 8 percent.

Pursuant to § 679.20(a)(8) and (10), NMFS proposes ICAs of 5,000 mt of flathead sole, 8,000 mt of rock sole, 3,500 mt of yellowfin sole, 10 mt of Western Aleutian District Pacific ocean perch, 75 mt of Central Aleutian District Pacific ocean perch, 100 mt of Eastern Aleutian District Pacific ocean perch, 40 mt for Western Aleutian District Atka mackerel, 75 mt for Central Aleutian District Atka mackerel, and 1,000 mt of Eastern Aleutian District and Bering Sea subarea Atka mackerel after subtracting the 10.7 percent CDQ reserve. These ICAs are based on NMFS' examination of the average incidental retained and

discarded catch in other target fisheries from 2003 through 2014.

The regulations do not designate the remainder of the non-specified reserve by species or species group. Any amount of the reserve may be apportioned to a target species that contributed to the non-specified reserve, provided that such apportionments do not result in overfishing (see § 679.20(b)(1)(i)).

Allocations of Pollock TAC Under the American Fisheries Act (AFA)

Section 679.20(a)(5)(i)(A) requires that Bering Sea pollock TAC be apportioned after subtracting 10 percent for the CDQ program and 4.0 percent for the ICA as a DFA as follows: 50 percent to the inshore sector, 40 percent to the catcher/processor sector, and 10 percent to the mothership sector. In the Bering Sea subarea, 40 percent of the DFA is allocated to the A season (January 20 to June 10) and 60 percent of the DFA is allocated to the B season (June 10 to November 1) (§ 679.20(a)(5)(i)(B)). The AI directed pollock fishery allocation to the Aleut Corporation is the amount of pollock remaining in the AI subarea after subtracting 1,900 mt for the CDQ DFA (10 percent), and 2,400 mt for the ICA (§ 679.20(a)(5)(iii)(B)(*2*)(*ii*)). In the AI subarea, the A season pollock TAC may equal up to 40 percent of the ABC, and the remainder of the pollock TAC is allocated to the B season. Table 2 lists these proposed 2015 and 2016 amounts.

Section 679.20(a)(5)(i)(A)(*4*) also includes several specific requirements regarding Bering Sea subarea pollock allocations. First, 8.5 percent of the pollock allocated to the catcher/processor sector will be available for harvest by AFA catcher vessels with catcher/processor sector endorsements, unless the Regional Administrator receives a cooperative contract entered into by listed AFA catcher/processors and all AFA catcher vessels with catcher/processor sector endorsements, and the Regional Administrator determines the contract provides for the distribution of harvest among AFA catcher/processors and AFA catcher vessels in a manner agreed to by all members. Second, AFA catcher/processors not listed in the AFA are limited to harvesting not more than 0.5 percent of the pollock allocated to the catcher/processor sector. Table 2 lists the proposed 2015 and 2016 allocations of pollock TAC. Tables 14 through 17 list the AFA catcher/processor and catcher vessel harvesting sideboard limits. In past years, the proposed harvest specifications included text and tables describing pollock allocations to the Bering Sea subarea inshore pollock cooperatives and open access sector. These allocations are based on the submission of AFA inshore cooperative applications due to NMFS on December 1 of each calendar year. Because AFA inshore cooperative applications for 2015 have not been submitted to NMFS, and NMFS therefore cannot calculate 2015 allocations, NMFS has not included inshore cooperative text and tables in these proposed harvest specifications. NMFS will post 2015 AFA inshore cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2015, based on the harvest specifications effective on that date.

Table 2 also lists proposed seasonal apportionments of pollock and harvest limits within the Steller Sea Lion Conservation Area (SCA). The harvest of pollock within the SCA, as defined at § 679.22(a)(7)(vii), is limited to no more than 28 percent of the DFA before 12:00 noon, April 1, as provided in § 679.20(a)(5)(i)(C). The A season pollock SCA harvest limit will be apportioned to each sector in proportion to each sector's allocated percentage of the DFA. Table 2 lists these proposed 2015 and 2016 amounts by sector.

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TABLE 2–PROPOSED 2015 AND 2016 ALLOCATIONS OF POLLOCK TACS TO THE DIRECTED POLLOCK FISHERIES AND TO THE CDQ DIRECTED FISHING ALLOWANCES (DFA)[1]

[Amounts are in metric tons]

Area and sector	2015 and 2016 Allocations	A season[1]		B season[1]
		A season DFA	SCA harvest limit[2]	B season DFA
Bering Sea subarea TAC	1,258,000	N/A	N/A	N/A
CDQ DFA	125,800	50,320	35,224	75,480
ICA[1]	45,288	N/A	N/A	N/A
AFA Inshore	543,456	217,382	152,168	326,074
AFA Catcher/Processors[3]	434,765	173,906	121,734	260,859
Catch by C/Ps	397,810	159,124	N/A	238,686
Catch by C/Vs[3]	36,955	14,782	N/A	22,173
Unlisted C/P Limit[4]	2,174	870	N/A	1,304
AFA Motherships	108,691	43,476	30,434	65,215
Excessive Harvesting Limit[5]	190,210	N/A	N/A	N/A
Excessive Processing Limit[6]	326,074	N/A	N/A	N/A
Total Bering Sea DFA (non-CDQ)	1,086,912	434,765	304,335	652,147
Aleutian Islands subarea TAC	19,000	N/A	N/A	N/A
CDQ DFA	1,900	760	N/A	1,140
ICA	2,400	1,200	N/A	1,200
Aleut Corporation	14,700	13,960	N/A	540
Bogoslof District ICA[7]	75	N/A	N/A	N/A

[1] Pursuant to § 679.20(a)(5)(i)(A), the annual Bering Sea subarea pollock TAC, after subtracting the CDQ DFA (10 percent) and the ICA (4.0 percent), is allocated as a DFA as follows: inshore sector 50 percent, catcher/processor sector 40 percent, and mothership sector 10 percent. In the Bering Sea subarea, 40 percent of the DFA is allocated to the A season (January 20–June 10) and 60 percent of the DFA is allocated to the B season (June 10–November 1). Pursuant to § 679.20(a)(5)(iii)(B)(2)(i) and (ii), the annual AI pollock TAC, after subtracting first for the CDQ DFA (10 percent) and second the ICA (2,400 mt), is allocated to the Aleut Corporation for a directed pollock fishery. In the AI subarea, the A season is allocated 40 percent of the ABC, and the B season is allocated the remainder of the directed pollock fishery.

[2] In the Bering Sea subarea, no more than 28 percent of each sector's annual DFA may be taken from the SCA before noon, April 1.

[3] Pursuant to § 679.20(a)(5)(i)(A)(4), not less than 8.5 percent of the DFA allocated to listed catcher/processors (C/Ps) shall be available for harvest only by eligible catcher vessels (CVs) delivering to listed catcher/processors.

[4] Pursuant to § 679.20(a)(5)(i)(A)(4)(iii), the AFA unlisted catcher/processors are limited to harvesting not more than 0.5 percent of the catcher/processor sector's allocation of pollock.

[5] Pursuant to § 679.20(a)(5)(i)(A)(6), NMFS establishes an excessive harvesting share limit equal to 17.5 percent of the sum of the pollock DFAs not including CDQ.

[6] Pursuant to § 679.20(a)(5)(i)(A)(7), NMFS establishes an excessive processing share limit equal to 30.0 percent of the sum of the pollock DFAs not including CDQ.

[7] The Regional Administrator proposes closing the Bogoslof pollock fishery for directed fishing under the final 2015 and 2016 harvest specifications for the BSAI. The amounts specified are for incidental catch only and are not apportioned by season or sector.

BILLING CODE 3510–22–C

Allocation of the Atka Mackerel TACs

Section 679.20(a)(8) allocates the Atka mackerel TACs to the Amendment 80 and BSAI trawl limited access sectors, after subtracting the CDQ reserves, jig gear allocation, and ICAs for the BSAI trawl limited access sector and non-trawl gear (Table 3). The percentage of the ITAC for Atka mackerel allocated to the Amendment 80 and BSAI trawl limited access sectors is listed in Table 33 to part 679 and in § 679.91. Pursuant to § 679.20(a)(8)(i), up to 2 percent of the Eastern Aleutian District and Bering Sea subarea Atka mackerel ITAC may be allocated to jig gear. The percent of this allocation is recommended annually by the Council based on several criteria, including the anticipated harvest capacity of the jig gear fleet. The Council recommended, and NMFS proposes, a 0.5 percent allocation of the Atka mackerel ITAC in the Eastern Aleutian District and Bering Sea subarea to jig gear in 2015 and 2016. This percentage is applied to the TAC after subtracting the CDQ reserve and the ICA. Section 679.20(a)(8)(ii)(C)(3) limits the annual TAC for Area 542 to no more than 47 percent of the Area 542 ABC. Section 679.7(a)(19) prohibits retaining Atka mackerel in Area 543, and the proposed TAC is set to account for discards in other fisheries.

Section 679.20(a)(8)(ii)(A) apportions the Atka mackerel TAC (including the CDQ reserve) into two equal seasonal allowances. Section 679.23(e)(3) sets the first seasonal allowance for directed fishing with trawl gear from January 20 to June 10 (A season), and the second seasonal allowance from June 10 to November 1 (B season). Section 679.23(e)(4)(iii) applies Atka mackerel

seasons to CDQ Atka mackerel fishing. The jig gear and ICA allocations are not apportioned by season.

Sections 679.20(a)(8)(ii)(C)(*1*)(*i*) and (*ii*) require the Amendment 80 cooperatives and CDQ groups to limit harvest to 10 percent of their Central Aleutian District Atka mackerel allocation, equally divided between the A and B seasons within waters 10 nautical miles (nm) to 20 nm of Gramp Rock and Tag Island, as described on Table 12 to part 679. Vessels not fishing under the authority of an Amendment 80 cooperative quota or CDQ allocation are prohibited from conducting directed fishing for Atka mackerel inside Steller sea lion critical habitat in the Central Aleutian District.

Two Amendment 80 cooperatives have formed for the 2015 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2015 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2015, based on the harvest specifications effective on that date.

Table 3 lists these 2015 and 2016 Atka mackerel season allowances, area allowances, and the sector allocations. The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015. NMFS will post 2016 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2016, based on the harvest specifications effective on that date.

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TABLE 3–PROPOSED 2015 AND 2016 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector[1]	Season[2,3,4]	Allocation by area		
		Eastern Aleutian District/Bering Sea	Central Aleutian District	Western Aleutian District
TAC	n/a	21,769	9,722	1,000
CDQ reserve	Total	2,329	1,040	107
	A	1,165	520	54
	Critical habitat[5]	n/a	52	n/a
	B	1,165	520	54
	Critical habitat[5]	n/a	52	n/a
ICA	Total	1,000	75	40
Jig[6]	Total	92	0	0
BSAI trawl limited access	Total	1,835	861	0
	A	917	430	0
	B	917	430	0
Amendment 80[7]	Total	16,513	7,746	853
Alaska Groundfish Cooperative for 2015	Total	9,581	4,619	499
	A	4,791	2,310	250
	Critical habitat[5]	n/a	231	n/a
	B	4,791	2,310	250
	Critical habitat[5]	n/a	231	n/a
Alaska Seafood Cooperative for 2015	Total	6,931	3,127	354
	A	3,466	1,564	177
	Critical habitat[5]	n/a	156	n/a
	B	3,466	1,564	177
	Critical habitat[5]	n/a	156	n/a

[1] Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtracting the CDQ reserves, ICAs, and the jig gear allocation, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31).

[2] Sections 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.

[3] The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

[4] Section 679.23(e)(3) authorizes directed fishing for Atka mackerel with trawl gear during the A season from January 20 to June 10, and the B season from June 10 to November 1.

[5] Section 679.20(a)(8)(ii)(C) requires the TAC in Area 542 shall be no more than 47 percent of ABC, and Atka mackerel harvests for Amendment 80 cooperatives and CDQ groups within waters 10 nm to 20 nm of Gramp Rock and Tag Island, as described in Table 12 to part 679, in Area 542 are limited to no more than 10 percent of the Amendment 80 cooperative Atka mackerel allocation or 10 percent of the CDQ Atka mackerel allocation.

[6] Section 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian District and Bering Sea subarea TAC be allocated to jig gear after subtraction of the CDQ reserve and ICA. The amount of this allocation is 0.5 percent. The jig gear allocation is not apportioned by season.

[7] The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015.

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Allocation of the Pacific Cod TAC

The Council recommended and NMFS proposes separate BS subarea and AI subarea OFLs, ABCs, and TACs for Pacific cod. Section 679.20(b)(1)(ii)(C) allocates 10.7 percent of the BS TAC and AI TAC to the CDQ program. After CDQ allocations have been deducted from the respective BS and AI Pacific cod TACs, the remaining BS and AI Pacific cod TACs will be combined for calculating further BSAI Pacific cod sector allocations. If the non-CDQ Pacific cod TAC is or will be reached in either the BS or AI subareas, NMFS will prohibit non-CDQ directed

fishing for Pacific cod in that subarea, as provided in § 679.20(d)(1)(iii).

Sections 679.20(a)(7)(i) and (ii) allocate the Pacific cod TAC in the combined BSAI TAC, after subtracting 10.7 percent for the CDQ program, as follows: 1.4 percent to vessels using jig gear, 2.0 percent to hook-and-line and pot catcher vessels less than 60 ft (18.3 m) length overall (LOA), 0.2 percent to hook-and-line catcher vessels greater than or equal to 60 ft (18.3 m) LOA, 48.7 percent to hook-and-line catcher/processors, 8.4 percent to pot catcher vessels greater than or equal to 60 ft (18.3 m) LOA, 1.5 percent to pot catcher/processors, 2.3 percent to AFA trawl catcher/processors, 13.4 percent to non-AFA trawl catcher/processors, and 22.1 percent to trawl catcher vessels. The BSAI ICA for the hook-and-line and pot sectors will be deducted from the aggregate portion of BSAI Pacific cod TAC allocated to the hook-and-line and pot sectors. For 2015 and 2016, the Regional Administrator proposes a BSAI ICA of 500 mt, based on anticipated incidental catch by these sectors in other fisheries.

The allocation of the BSAI ITAC for Pacific cod to the Amendment 80 sector is established in Table 33 to part 679 and § 679.91. Two Amendment 80 cooperatives have formed for the 2015 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2015 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2015, based on the harvest specifications effective on that date.

The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015. NMFS will post 2016 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2016, based on the harvest specifications effective on that date.

The Pacific cod ITAC is apportioned into seasonal allowances to disperse the Pacific cod fisheries over the fishing year (see §§ 679.20(a)(7) and 679.23(e)(5)). In accordance with § 679.20(a)(7)(iv)(B) and (C), any unused portion of a seasonal Pacific cod allowance will become available at the beginning of the next seasonal allowance.

The CDQ and non-CDQ season allowances by gear based on the proposed 2015 and 2016 Pacific cod TACs are listed in Table 4 based on the sector allocation percentages of Pacific cod set forth at §§ 679.20(a)(7)(i)(B) and 679.20(a)(7)(iv)(A); and the seasonal allowances of Pacific cod set forth at § 679.23(e)(5).

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TABLE 4–PROPOSED 2015 AND 2016 GEAR SHARES AND SEASONAL ALLOWANCES OF THE BSAI[1] PACIFIC COD TAC

[Amounts are in metric tons]

Sector	Percent	2015 and 2016 share of gear sector total	2015 and 2016 share of sector total	2015 and 2016 seasonal apportionment	
				Season	Amount
Total Bering Sea TAC		251,712	n/a	n/a	n/a
Bering Sea CDQ		26,933	n/a	See §679.20(a)(7)(i)(B)	n/a
Bering Sea non-CDQ TAC		224,779	n/a	n/a	n/a
Total Aleutian Islands TAC		6,487	n/a	n/a	n/a
Aleutian Islands CDQ		694	n/a	See §679.20(a)(7)(i)(B)	n/a
Aleutian Islands non-CDQ TAC		5,793	n/a	n/a	n/a
Total BSAI non-CDQ TAC[1]	100	230,572	n/a	n/a	n/a
Total hook-and-line/pot gear	60.8	140,188	n/a	n/a	n/a
Hook-and-line/pot ICA[2]	n/a	n/a	500	n/a	n/a
Hook-and-line/pot sub-total	n/a	139,688	n/a	n/a	n/a
Hook-and-line catcher/processors	48.7	n/a	111,888	Jan-1-Jun 10	57,063
				Jun 10-Dec 31	54,825
Hook-and-line catcher vessels≥ 60 ft LOA	0.2	n/a	459	Jan 1-Jun 10	234
				Jun 10-Dec 31	225
Pot catcher/processors	1.5	n/a	3,446	Jan 1-Jun 10	1,758
				Sept 1-Dec 31	1,689
Pot catcher vessels≥ 60 ft LOA	8.4	n/a	19,299	Jan 1-Jun 10	9,842
				Sept-1-Dec 31	9,456
Catcher vessels < 60 ft LOA using hook-and-line or pot gear	2	n/a	4,595	n/a	n/a
Trawl catcher vessels	22.1	50,956	n/a	Jan 20-Apr 1	37,708
				Apr 1-Jun 10	5,605
				Jun 10-Nov 1	7,643
AFA trawl catcher/processors	2.3	5,303	n/a	Jan 20-Apr 1	3,977
				Apr 1-Jun 10	1,326
				Jun 10-Nov 1	0
Amendment 80	13.4	30,897	n/a	Jan 20-Apr 1	23,172
				Apr 1-Jun 10	7,724
				Jun 10-Nov 1	0
Alaska Groundfish Cooperative for 2014[3]	n/a	4,877	n/a	Jan 20-Apr 1	3,658
				Apr 1-Jun 10	1,219
				Jun 10-Nov 1	0
Alaska Seafood Cooperative for 2014[3]	n/a	26,020	n/a	Jan 20- Apr 1	19,515
				Apr 1-Jun 10	6,505
				Jun 10-Nov 1	0
Jig	1.4	3,228	n/a	Jan 1-Apr 30	1,937
				Apr 30-Aug 31	646
				Aug 31-Dec 31	646

[1] The gear shares and seasonal allowances for BSAI Pacific cod TAC are based on the sum of the BS and AI Pacific cod TACs. If the TAC for Pacific cod in either the AI or BS is reached, then directed fishing for Pacific cod in that subarea may be prohibited, even if a BSAI allowance remains.

[2] The ICA for the hook-and-line and pot sectors will be deducted from the aggregate portion of Pacific cod TAC allocated to the hook-and-line and pot sectors. The Regional Administrator proposes an ICA of 500 mt for 2015 and 2016 based on anticipated incidental catch in these fisheries.

[3]The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015.

Sablefish Gear Allocation

Sections 679.20(a)(4)(iii) and (iv) require allocation of sablefish TACs for the BS and AI subareas between trawl gear and hook-and-line or pot gear. Gear allocations of the TACs for the Bering Sea subarea are 50 percent for trawl gear and 50 percent for hook-and-line or pot gear. Gear allocations for the AI subarea are 25 percent for trawl gear and 75 percent for hook-and-line or pot gear. Section 679.20(b)(1)(ii)(B) requires NMFS to apportion 20 percent of the hook-and-line and pot gear allocation of sablefish to the CDQ reserve. Additionally, § 679.20(b)(1)(ii)(D)(*1*) requires that 7.5 percent of the trawl gear allocation of sablefish from the nonspecified reserves, established under § 679.20(b)(1)(i), be assigned to the CDQ reserve. The Council recommended that only trawl sablefish TAC be established biennially. The harvest specifications for the hook-and-line gear and pot gear sablefish Individual Fishing Quota (IFQ) fisheries will be limited to the 2015 fishing year to ensure those fisheries are conducted concurrently with the halibut IFQ fishery. Concurrent sablefish and halibut IFQ fisheries would reduce the potential for discards of halibut and sablefish in those fisheries. The sablefish IFQ fisheries would remain closed at the beginning of each fishing year until the final harvest specifications for the sablefish IFQ fisheries are in effect. Table 5 lists the proposed 2015 and 2016 gear allocations of the sablefish TAC and CDQ reserve amounts.

TABLE 5–PROPOSED 2015 AND 2016 GEAR SHARES AND CDQ RESERVE OF BSAI SABLEFISH TACS

[Amounts are in metric tons]

Subarea and gear	Percent of TAC	2015 Share of TAC	2015 ITAC[1]	2015 CDQ reserve	2016 Share of TAC	2016 ITAC	2016 CDQ reserve
Bering Sea							
Trawl	50	605	514	45	605	514	45
Hook-and-line dear[2]	50	605	n/a	121	n/a	n/a	n/a
TOTAL	100	1,210	514	166	605	514	45
Aleutian Islands							
Trawl	25	409	348	31	409	348	31
Hook-and-line gear[2]	75	1,227	n/a	245	n/a	n/a	n/a
TOTAL	100	1,636	348	276	409	348	31

[1] Except for the sablefish hook-and-line or pot gear allocation, 15 percent of TAC is apportioned to the reserve. The ITAC is the remainder of the TAC after the subtraction of these reserves.

[2] For the portion of the sablefish TAC allocated to vessels using hook-and-line or pot gear, 20 percent of the allocated TAC is reserved for use by CDQ participants. Section 679.20(b)(1) does not provide for the establishment of an ITAC for sablefish allocated to hook-and-line or pot gear.

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Allocation of the Aleutian Islands Pacific Ocean Perch, and BSAI Flathead Sole, Rock Sole, and Yellowfin Sole TACs

Sections 679.20(a)(10)(i) and (ii) require that NMFS allocate AI Pacific ocean perch, and BSAI flathead sole, rock sole, and yellowfin sole TACs between the Amendment 80 and BSAI trawl limited access sectors, after subtracting 10.7 percent for the CDQ reserve and an ICA for the BSAI trawl limited access sector and vessels using non-trawl gear. The allocation of the ITAC for AI Pacific ocean perch, and BSAI flathead sole, rock sole, and yellowfin sole to the Amendment 80 sector is established in Tables 33 and 34 to part 679 and in § 679.91.

Two Amendment 80 cooperatives have formed for the 2015 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2015 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2015, based on the harvest specifications effective on that date.

The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015. NMFS will post 2016 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2016, based on the harvest specifications effective on that date. Table 6 lists the proposed 2015 and 2016 allocations of the AI Pacific ocean perch, and BSAI flathead sole, rock sole, and yellowfin sole TACs.

TABLE 6–PROPOSED 2015 AND 2016 COMMUNITY DEVELOPMENT QUOTA (CDQ) RESERVES, INCIDENTAL CATCH AMOUNTS (ICAS), AND AMENDMENT 80 ALLOCATIONS OF THE ALEUTIAN ISLANDS PACIFIC OCEAN PERCH, AND BSAI FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE TACS

[Amounts are in metric tons]

Sector	2015 and 2016 allocations					
	Pacific ocean perch			Flathead sole	Rock sole	Yellowfin sole
	Eastern Aleutian District	Central Aleutian District	Western Aleutian District	BSAI	BSAI	BSAI
TAC	8,833	6,299	9,169	25,129	85,000	187,000
CDQ	945	674	981	2,689	9,095	20,009
ICA	200	75	10	5,000	10,000	2,400
BSAI trawl limited access	769	555	164	0	0	30,779
Amendment 80	6,919	4,995	8,014	17,440	65,905	133,812
Alaska Groundfish Cooperative for 2015[1]	3,669	2,649	4,250	1,789	16,303	53,164
Alaska Seafood Cooperative for 2015[1]	3,250	2,346	3,765	15,651	49,602	80,649

[1] The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015.

As discussed above under the section, Other Actions Affecting the 2015 and 2016 Harvest Specifications, NMFS published the final rule to implement Amendment 105 to the FMP (79 FR 56671, September 23, 2014). Section 679.2 defines the ABC surplus for flathead sole, rock sole, and yellowfin sole as the difference between the annual ABC and TAC for each species. Section 679.20(b)(1)(iii) establishes ABC reserves for flathead sole, rock sole, and yellowfin sole. NMFS, after consultation with the Council, may set the ABC reserve at or below the ABC surplus for each species, thus maintaining the TAC below ABC limits. An amount equal to 10.7 percent of the ABC reserves will be allocated as CDQ reserves for flathead sole, rock sole, and yellowfin sole. The Amendment 80 ABC reserves shall be the ABC reserves minus the CDQ ABC reserves. Section 679.91(i)(2) establishes each Amendment 80 cooperative ABC reserve to be the ratio of each cooperative's quota share (QS) units and the total Amendment 80 QS units, multiplied by the Amendment 80 ABC reserve for each respective species. Table 7 lists the proposed 2015 and 2016 ABC surplus and ABC reserves for BSAI flathead sole, rock sole, and yellowfin sole.

TABLE 7–PROPOSED 2015 AND 2016 ABC SURPLUS,COMMUNITY DEVELOPMENT QUOTA (CDQ) ABC RESERVES, AND AMENDMENT 80 ABC RESERVES IN THE BSAI FOR FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE

[Amounts are in metric tons]

Sector	Flathead sole	Rock sole	Yellowfin sole
ABC	64,127	190,100	248,300
TAC	25,129	85,000	187,000
ABC surplus	38,998	105,100	61,300
ABC reserve	38,998	105,100	61,300
CDQ ABC reserve	4,173	11,246	6,559
Amendment 80 ABC reserve	34,825	93,854	54,741
Alaska Groundfish Cooperative for 2015[1]	3,572	23,217	21,750
Alaska Seafood Cooperative for 2015[1]	31,253	70,637	32,991

[1] The 2016 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015.

Allocation of PSC Limits for Halibut, Salmon, Crab, and Herring

Section 679.21(e) sets forth the BSAI PSC limits. Pursuant to § 679.21(e)(1)(iv) and (e)(2), the 2015 and 2016 BSAI halibut mortality limits are 3,675 mt for trawl fisheries, and 900 mt for the non-trawl fisheries. Sections 679.21(e)(3)(i)(A)(*2*) and (e)(4)(i)(A) allocate 326 mt of the trawl halibut mortality limit and 7.5 percent, or 67 mt, of the non-trawl halibut mortality limit as the PSQ reserve for use by the groundfish CDQ program.

Section 679.21(e)(4)(i) authorizes apportionment of the non-trawl halibut PSC limit into PSC bycatch allowances among six fishery categories. Table 10 lists the fishery bycatch allowances for the trawl fisheries, and Table 11 lists the

fishery bycatch allowances for the non-trawl fisheries.

Pursuant to section 3.6 of the FMP, the Council recommends, and NMFS agrees, that certain specified non-trawl fisheries be exempt from the halibut PSC limit. As in past years after consultation with the Council, NMFS exempts pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from halibut bycatch restrictions for the following reasons: (1) The pot gear fisheries have low halibut bycatch mortality; (2) NMFS estimates halibut mortality for the jig gear fleet to be negligible because of the small size of the fishery and the selectivity of the gear; and (3) the sablefish and halibut IFQ fisheries have low halibut bycatch mortality because the IFQ program requires legal-size halibut to be retained by vessels using hook-and-line gear if a halibut IFQ permit holder or a hired master is aboard and is holding unused halibut IFQ (subpart D of 50 CFR part 679). In 2014, total groundfish catch for the pot gear fishery in the BSAI was 29,397 mt, with an associated halibut bycatch mortality of 3 mt.

The 2014 jig gear fishery harvested about 3 mt of groundfish. Most vessels in the jig gear fleet are exempt from observer coverage requirements. As a result, observer data are not available on halibut bycatch in the jig gear fishery. However, as mentioned above, NMFS estimates a negligible amount of halibut bycatch mortality because of the selective nature of jig gear and the low mortality rate of halibut caught with jig gear and released.

Under § 679.21(f)(2), NMFS annually allocates portions of either 47,591 or 60,000 Chinook salmon PSC among the AFA sectors, depending on past catch performance and on whether Chinook salmon bycatch incentive plan agreements are formed. If an AFA sector participates in an approved Chinook salmon bycatch incentive plan agreement, then NMFS will allocate a portion of the 60,000 PSC limit to that sector as specified in § 679.21(f)(3)(iii)(A). If no Chinook salmon bycatch incentive plan agreement is approved, or if the sector has exceeded its performance standard under § 679.21(f)(6), NMFS will allocate a portion of the 47,591 Chinook salmon PSC limit to that sector as specified in § 679.21(f)(3)(iii)(B). In 2015, the Chinook salmon PSC limit is 60,000, and the AFA sector Chinook salmon allocations are seasonally allocated, with 70 percent of the allocation for the A season pollock fishery and 30 percent of the allocation for the B season pollock fishery, as stated in § 679.21(f)(3)(iii)(A). The basis for these PSC limits is described in detail in the final rule implementing management measures for Amendment 91 (75 FR 53026, August 30, 2010). NMFS publishes the approved Chinook salmon bycatch incentive plan agreements, allocations and reports at: *http://alaskafisheries.noaa.gov/sustainablefisheries/bycatch/default.htm.*

Section 679.21(e)(1)(viii) specifies 700 fish as the 2015 and 2016 Chinook salmon PSC limit for the AI subarea pollock fishery. Section 679.21(e)(3)(i)(A)(*3*)(*i*) allocates 7.5 percent, or 53 Chinook salmon, as the AI subarea PSQ for the CDQ program and allocates the remaining 647 Chinook salmon to the non-CDQ fisheries.

Section 679.21(e)(1)(vii) specifies 42,000 fish as the 2015 and 2016 non-Chinook salmon PSC limit in the Catcher Vessel Operational Area (CVOA). Section 679.21(e)(3)(i)(A)(*3*)(*ii*) allocates 10.7 percent, or 4,494, non-Chinook salmon in the CVOA as the PSQ for the CDQ program, and allocates the remaining 37,506 non-Chinook salmon to the non-CDQ fisheries.

PSC limits for crab and herring are specified annually based on abundance and spawning biomass. Due to the lack of new information as of October 2014 regarding Zone 1 red king crab and BSAI herring PSC limits and apportionments, the Council recommended and NMFS proposes basing the crab and herring 2015 and 2016 PSC limits and apportionments on the 2013 survey data. The Council will reconsider these amounts in December 2014. Pursuant to § 679.21(e)(3)(i)(A)(*1*), 10.7 percent of each PSC limit specified for crab is allocated as a PSQ reserve for use by the groundfish CDQ program.

Based on 2013 survey data, the red king crab mature female abundance is estimated at 19.9 million red king crabs, and the effective spawning biomass is estimated at 49.3 million lbs (22,362 mt). Based on the criteria set out at § 679.21(e)(1)(i), the proposed 2015 and 2016 PSC limit of red king crab in Zone 1 for trawl gear is 97,000 animals. This limit derives from the mature female abundance estimate of more than 8.4 million red king crab and the effective spawning biomass estimate of more than 14.5 million lbs (6,577 mt), but less than 55 million lbs (24,948 mt).

Section 679.21(e)(3)(ii)(B)(*2*) establishes criteria under which NMFS must specify an annual red king crab bycatch limit for the Red King Crab Savings Subarea (RKCSS). The regulations limit the RKCSS to up to 25 percent of the red king crab PSC allowance. NMFS proposes the Council's recommendation that the red king crab bycatch limit be equal to 25 percent of the red king crab PSC allowance within the RKCSS (Table 8). Based on 2013 survey data, Tanner crab (*Chionoecetes bairdi*) abundance is estimated at 946 million animals. Pursuant to criteria set out at § 679.21(e)(1)(ii), the calculated 2015 and 2016 *C. bairdi* crab PSC limit for trawl gear is 980,000 animals in Zone 1, and 2,970,000 animals in Zone 2. These limits derive from the *C. bairdi* crab abundance estimate being in excess of 400 million animals for both the Zone 1 and Zone 2 allocations. Pursuant to § 679.21(e)(1)(iii), the PSC limit for snow crab (*C. opilio*) is based on total abundance as indicated by the NMFS annual bottom trawl survey. The *C. opilio* crab PSC limit is set at 0.1133 percent of the Bering Sea abundance index minus 150,000 crabs. Based on the 2013 survey estimate of 10.005 billion animals, the calculated limit is 11,185,892 animals.

Pursuant to § 679.21(e)(1)(v), the PSC limit of Pacific herring caught while conducting any trawl operation for BSAI groundfish is 1 percent of the annual eastern Bering Sea herring biomass. The best estimate of 2015 and 2016 herring biomass is 217,153 mt. This amount was derived using 2013 survey data and an age-structured biomass projection model developed by the Alaska Department of Fish and Game. Therefore, the herring PSC limit proposed for 2015 and 2016 is 2,172 mt for all trawl gear as listed in Tables 8 and 9.

Section 679.21(e)(3)(i)(A) requires PSQ reserves to be subtracted from the total trawl PSC limits. The amount of the 2015 PSC limits assigned to the Amendment 80 and BSAI trawl limited access sectors are specified in Table 35 to part 679. The resulting allocations of PSC to CDQ PSQ, the Amendment 80 sector, and the BSAI trawl limited access sector are listed in Table 8. Pursuant to § 679.21(e)(1)(iv) and § 679.91(d) through (f), crab and halibut trawl PSC assigned to the Amendment 80 sector is then further allocated to Amendment 80 cooperatives as PSC cooperative quota, as listed in Table 12. Two Amendment 80 cooperatives have formed for the 2015 fishing year. Because all Amendment 80 vessels are part of a cooperative, no allocation to the Amendment 80 limited access sector is required. NMFS will post 2015 Amendment 80 cooperative allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2015, based on the harvest specifications effective on that date.

The 2016 PSC allocations between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2015. NMFS will post 2016 Amendment 80 cooperatives and Amendment 80 limited access allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* prior to the start of the fishing year on January 1, 2016, based on the harvest specifications effective on that date.

Section 679.21(e)(5) authorizes NMFS, after consulting with the Council, to establish seasonal apportionments of PSC amounts for the BSAI trawl limited access and Amendment 80 limited access sectors to maximize the ability of the fleet to harvest the available groundfish TAC and to minimize bycatch. The factors considered are (1) seasonal distribution of prohibited species, (2) seasonal distribution of target groundfish species, (3) PSC bycatch needs on a seasonal basis relevant to prohibited species biomass, (4) expected variations in bycatch rates throughout the year, (5) expected start of fishing effort, and (6) economic effects of seasonal PSC apportionments on industry sectors. The Council recommended and NMFS proposes the seasonal PSC apportionments in Table 10 to maximize harvest among gear types, fisheries, and seasons while minimizing bycatch of PSC based on the above criteria.

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TABLE 10–PROPOSED 2015 AND 2016 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL LIMITED ACCESS SECTOR

BSAI trawl limited access fisheries	Prohibited species and area[1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	C. opilio (animals) COBLZ	C. bairdi (animals)	
				Zone 1	Zone 2
Yellowfin sole	167	23,338	3,026,465	346,228	1,185,500
Rock sole/flathead sole/other flatfish[2]	0	0	0	0	0
Turbot/arrowtooth/sablefish[3]	0	0	0	0	0
Rockfish April 15-December 31	5	0	5,000	0	1,000
Pacific cod	453	2,954	129,000	60,000	50,000
Pollock/Atka mackerel/other species[4]	250	197	50,000	5,000	5,000
Total BSAI trawl limited access PSC	875	26,489	3,210,465	411,228	1,241,500

[1] Refer to § 679.2 for definitions of areas.

[2] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), arrowtooth flounder, flathead sole, Greenland turbot, Kamchatka flounder, rock sole, and yellowfin sole.

[3] "Arrowtooth flounder" for PSC monitoring includes Kamchatka flounder.

[4] "Other species" for PSC monitoring includes sculpins, sharks, skates, and octopuses.

TABLE 11–PROPOSED 2015 AND 2016 HALIBUT PROHIBITED SPECIES BYCATCH ALLOWANCES FOR NON-TRAWL FISHERIES

Halibut mortality (mt) BSAI		
Non-trawl fisheries	Catcher/processor	Catcher vessel
Pacific cod-Total	760	15
January 1-June 10	455	10
June 10-August 15	190	3
August 15-December 31	115	2
Other non-trawl-Total		58
May 1-December 31		58
Groundfish pot and jig		Exempt
Sablefish hook-and-line		Exempt
Total non-trawl PSC		833

TABLE 12–PROPOSED 2015 PROHIBITED SPECIES BYCATCH ALLOWANCE FOR THE BSAI AMENDMENT 80 COOPERATIVES

Cooperative	Prohibited species and zones[1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	C. opilio (animals) COBLZ	C. bairdi (animals)	
				Zone 1	Zone 2
Alaska Groundfish Cooperative	632	12,459	1,545,561	96,980	161,899
Alaska Seafood Cooperative	1,693	30,834	3,364,033	271,542	465,879

[1] Refer to § 679.2 for definitions of zones.

TABLE 10–PROPOSED 2015 AND 2016 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL LIMITED ACCESS SECTOR

BSAI trawl limited access fisheries	Prohibited species and area[1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	C. opilio (animals) COBLZ	C. bairdi (animals)	
				Zone 1	Zone 2
Yellowfin sole	167	23,338	3,026,465	346,228	1,185,500
Rock sole/flathead sole/other flatfish[2]	0	0	0	0	0
Turbot/arrowtooth/sablefish[3]	0	0	0	0	0
Rockfish April 15-December 31	5	0	5,000	0	1,000
Pacific cod	453	2,954	129,000	60,000	50,000
Pollock/Atka mackerel/other species[4]	250	197	50,000	5,000	5,000
Total BSAI trawl limited access PSC	875	26,489	3,210,465	411,228	1,241,500

[1] Refer to § 679.2 for definitions of areas.

[2] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), arrowtooth flounder, flathead sole, Greenland turbot, Kamchatka flounder, rock sole, and yellowfin sole.

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January 1-June 10	455	10
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August 15-December 31	115	2
Other non-trawl-Total		58
May 1-December 31		58
Groundfish pot and jig		Exempt
Sablefish hook-and-line		Exempt
Total non-trawl PSC		833

TABLE 12–PROPOSED 2015 PROHIBITED SPECIES BYCATCH ALLOWANCE FOR THE BSAI AMENDMENT 80 COOPERATIVES

Cooperative	Prohibited species and zones[1]				
	Halibut mortality (mt) BSAI	Red king crab (animals) Zone 1	C. opilio (animals) COBLZ	C. bairdi (animals)	
				Zone 1	Zone 2
Alaska Groundfish Cooperative	632	12,459	1,545,561	96,980	161,899
Alaska Seafood Cooperative	1,693	30,834	3,364,033	271,542	465,879

[1] Refer to § 679.2 for definitions of zones.

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Halibut Discard Mortality Rates (DMRs)

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator uses observed halibut bycatch rates, DMRs, and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. The DMRs are based on the best information available, including information contained in the annual SAFE report.

NMFS proposes the halibut DMRs developed and recommended by the International Pacific Halibut Commission (IPHC) and the Council for the 2015 and 2016 BSAI groundfish fisheries for use in monitoring the 2015 and 2016 halibut bycatch allowances (see Tables 8, 10, 11, and 12). The IPHC developed these DMRs for the 2013 to 2015 BSAI fisheries using the 10-year mean DMRs for those fisheries. The IPHC will analyze observer data annually and recommend changes to the DMRs when a fishery DMR shows large variation from the mean. A discussion of the DMRs and their justification is available from the Council (see **ADDRESSES**). Table 13 lists the 2015 and 2016 DMRs.

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TABLE 13–PROPOSED 2015 AND 2016 ASSUMED PACIFIC HALIBUT DISCARD MORTALITY RATES FOR THE BSAI

Gear	Fishery	Halibut discard mortality rate (percent)
Non-CDQ hook-and-line	Greenland turbot	13
	Other species[1]	9
	Pacific cod	9
	Rockfish	4
Non-CDQ trawl	Alaska plaice	71
	Arrowtooth flounder[2]	76
	Atka mackerel	77
	Flathead sole	73
	Greenland turbot	64
	Kamchatka flounder	71
	Non-pelagic pollock	77
	Pelagic pollock	88
	Other flatfish[3]	71
	Other species[1]	71
	Pacific cod	71
	Rockfish	79
	Rock sole	85
	Sablefish	75
	Yellowfin sole	83
Non-CDQ pot	Other species[1]	8
	Pacific cod	8
CDQ trawl	Atka mackerel	86
	Arrowtooth flounder[2]	76
	Flathead sole	79
	Kamchatka flounder	90
	Non-pelagic pollock	83
	Pelagic pollock	90
	Pacific cod	90
	Greenland turbot	89
	Rockfish	80
	Rock sole	88
	Yellowfin sole	86
CDQ hook-and-line	Greenland turbot	4
	Pacific cod	10
CDQ pot	Pacific cod	8
	Sablefish	34

[1] "Other species" includes skates, sculpins, sharks, squids, and octopuses.

[2] Arrowtooth flounder includes Kamchatka flounder.

[3] "Other flatfish" includes all flatfish species, except for halibut (a prohibited species), flathead sole, Greenland turbot, rock sole, yellowfin sole, Kamchatka flounder, and arrowtooth flounder.

Listed AFA Catcher/Processor Sideboard Limits

Pursuant to § 679.64(a), the Regional Administrator is responsible for restricting the ability of listed AFA catcher/processors to engage in directed fishing for groundfish species other than pollock, to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery. These restrictions are set out as "sideboard" limits on catch. The basis for these proposed sideboard limits is described in detail in the final rules implementing the major provisions of the AFA (67 FR 79692, December 30, 2002) and Amendment 80 (72 FR 52668, September 14, 2007). Table 14 lists the proposed 2015 and 2016 catcher/processor sideboard limits.

All harvests of groundfish sideboard species by listed AFA catcher/processors, whether as targeted catch or incidental catch, will be deducted from the sideboard limits in Table 14. However, groundfish sideboard species that are delivered to listed AFA catcher/processors by catcher vessels will not be deducted from the 2015 and 2016 sideboard limits for the listed AFA catcher/processors.

TABLE 14–PROPOSED 2015 AND 2016 BSAI GROUNDFISH SIDEBOARD LIMITS FOR LISTED AMERICAN FISHERIES ACT CATCHER/PROCESSORS (C/Ps)

[Amounts are in metric tons]

Target species	Area	1995-1997			2015 and 2016 ITAC available to all trawl C/Ps[1]	2015 and 2016 AFA C/P sideboard limit
		Retained catch	Total catch	Ratio of retained catch of total catch		
Sablefish trawl	BS	8	497	0.016	514	8
	AI	0	145	0	348	0
Greenland turbot	BS	121	17,305	0.007	2,106	15
	AI	23	4,987	0.005	591	3
Arrowtooth flounder	BSAI	76	33,987	0.002	21,250	43
Kamchatka flounder	BSAI	76	33,987	0.002	6,205	12
Rock sole	BSAI	6,317	169,362	0.037	75,905	2,808
Flathead sole	BSAI	1,925	52,755	0.036	22,440	808
Alaska plaice	BSAI	14	9,438	0.001	21,250	21
Other flatfish	BSAI	3,058	52,298	0.058	2,550	148
Pacific ocean perch	BS	12	4,879	0.002	6,239	12
	Eastern AI	125	6,179	0.02	7,888	158
	Central AI	3	5,698	0.001	5,625	6
	Western AI	54	13,598	0.004	8,188	33
Northern rockfish	BSAI	91	13,040	0.007	2,550	18
Rougheye rockfish	EBS/EAI	50	2,811	0.018	171	3
	CAI/WAI	50	2,811	0.018	235	4
Shortraker rockfish	BSAI	50	2,811	0.018	315	6
Other rockfish	BS	18	621	0.029	340	10
	AI	22	806	0.027	402	11
Atka mackerel	Central AI					
	A season[2]	n/a	n/a	0.115	4,341	499
	B season[2]	n/a	n/a	0.115	4,341	499
	Western AI					
	A season[2]	n/a	n/a	0.2	500	100
	B season[2]	n/a	n/a	0.2	500	100
Skates	BSAI	553	68,672	0.008	22,100	177
Sculpins	BSAI	553	68,672	0.008	4,888	39
Sharks	BSAI	553	68,672	0.008	106	1
Squids	BSAI	73	3,328	0.022	276	6
Octopuses	BSAI	553	68,672	0.008	191	2

[1] Aleutians Islands Pacific ocean perch, and BSAI Atka mackerel, flathead sole, rock sole, and yellowfin sole are multiplied by the remainder of the TAC after the subtraction of the CDQ reserve under § 679.20(b)(1)(ii)(C).

[2] The seasonal apportionment of Atka mackerel in the open access fishery is 50 percent in the A season and 50 percent in the B season. Listed AFA catcher/processors are limited to harvesting no more than zero in the Eastern Aleutian District and Bering Sea subarea, 20 percent of the annual ITAC specified for the Western Aleutian District, and 11.5 percent of the annual ITAC specified for the Central Aleutian District.

Note: Section 679.64(a)(1)(v) exempts AFA catcher/processors from a yellowfin sole sideboard limit because the 2015 and 2016 aggregate ITAC of yellowfin sole assigned to the Amendment 80 sector and BSAI trawl limited access sector is greater than 125,000 mt.

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Section 679.64(a)(2) and Tables 40 and 41 to part 679 establish a formula for calculating PSC sideboard limits for listed AFA catcher/processors. The basis for these sideboard limits is described in detail in the final rules implementing the major provisions of the AFA (67 FR 79692, December 30, 2002) and Amendment 80 (72 FR 52668, September 14, 2007), and in the proposed rule (77 FR 72791, December 6, 2012).

PSC species listed in Table 15 that are caught by listed AFA catcher/processors participating in any groundfish fishery other than pollock will accrue against the proposed 2015 and 2016 PSC sideboard limits for the listed AFA catcher/processors. Section 679.21(e)(3)(v) authorizes NMFS to close directed fishing for groundfish other than pollock for listed AFA catcher/processors once a proposed 2015 or 2016 PSC sideboard limit listed in Table 15 is reached.

Crab or halibut PSC caught by listed AFA catcher/processors while fishing for pollock will accrue against the bycatch allowances annually specified

for either the midwater pollock or the pollock/Atka mackerel/"other species" fishery categories, according to regulations at § 679.21(e)(3)(iv).

TABLE 15–PROPOSED 2015 AND 2016 BSAI PROHIBITED SPECIES SIDEBOARD LIMITS FOR AMERICAN FISHERIES ACT LISTED CATCHER/PROCESSORS

PSC species and area[1]	Ratio of PSC to total PSC	Proposed 2015 and 2016 PSC available to trawl vessels after subtraction of PSQ[2]	Proposed 2015 and 2016 C/P sideboard limit[2]
BSAI Halibut mortality	n/a	n/a	286
Red king crab Zone 1	0.007	86,621	606
C. opilio (COBLZ)	0.153	9,989,002	1,528,317
C. bairdi	n/a	n/a	n/a
Zone 1	0.14	875,140	122,520
Zone 2	0.05	2,652,210	132,611

[1] Refer to § 679.2 for definitions of areas.

[2] Halibut amounts are in metric tons of halibut mortality. Crab amounts are in numbers of animals

AFA Catcher Vessel Sideboard Limits

Pursuant to § 679.64(b), the Regional Administrator is responsible for restricting the ability of AFA catcher vessels to engage in directed fishing for groundfish species other than pollock, to protect participants in other groundfish fisheries from adverse effects resulting from the AFA and from fishery cooperatives in the directed pollock fishery. Section 679.64(b) establishes formulas for setting AFA catcher vessel groundfish and PSC sideboard limits for the BSAI. The basis for these sideboard limits is described in detail in the final rules implementing the major provisions of the AFA (67 FR 79692, December 30, 2002) and Amendment 80 (72 FR 52668, September 14, 2007).

Tables 16 and 17 list the proposed 2015 and 2016 AFA catcher vessel sideboard limits.

All catch of groundfish sideboard species made by non-exempt AFA catcher vessels, whether as targeted catch or as incidental catch, will be deducted from the 2015 and 2016 sideboard limits listed in Table 16.

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TABLE 16–PROPOSED 2015 AND 2016 BSAI GROUNDFISH SIDEBOARD LIMITS FOR AMERICAN FISHERIES ACT CATCHER VESSELS (CVs)

[Amounts are in metric tons]

Species	Fishery by area/gear/season	Ratio of 1995-1997 AFA CV catch to 1995-1997 TAC	2015 and 2016 initial TAC[1]	2015 and 2016 AFA catcher vessel sideboard limits
Pacific cod	BSAI	n/a	n/a	n/a
	Jig gear	0	3,228	0
	Hook-and-line CV	n/a	n/a	n/a
	Jan 1-Jun 10	0.0006	234	0
	Jun 10-Dec 31	0.0006	225	0
	Pot gear CV	n/a	n/a	n/a
	Jan 1-Jun 10	0.0006	9,842	6
	Sept 1-Dec 31	0.0006	9,456	6
	CV< 60 ft LOA using hook-and-line or pot gear	0.0006	4,595	3
	Trawl gear CV	n/a	n/a	n/a
	Jan 20-Apr 1	0.8609	37,708	32,463
	Apr 1-Jun 10	0.8609	5,605	4,825
	Jun 10-Nov 1	0.8609	7,643	6,580
Sablefish	BS trawl gear	0.0906	514	47
	AI trawl gear	0.0645	348	22
Greenland turbot	BS	0.0645	2,106	136
	AI	0.0205	591	12
Arrowtooth flounder	BSAI	0.069	21,250	1,466
Kamchatka flounder	BSAI	0.069	6,205	428
Rock sole	BSAI	0.0341	75,905	2,588
Flathead sole	BS trawl gear	0.0505	22,440	1,133
Alaska plaice	BSAI	0.0441	21,250	937
Other flatfish	BSAI	0.0441	2,550	112
Pacific ocean perch	BS	0.1	6,239	624
	Eastern AI	0.0077	7,888	61
	Central AI	0.0025	5,625	14
	Western AI	0	8,188	0
Northern rockfish	BSAI	0.0084	2,550	21
Rougheye rockfish	EBS/EAI	0.0037	171	1
	CAI/WAI	0.0037	235	1
Shortraker rockfish	BSAI	0.0037	315	1
Other rockfish	BS	0.0048	340	2
	AI	0.0095	402	4
Atka mackerel	Eastern AI/BS	n/a	n/a	n/a
	Jan 1-Jun 10	0.0032	9,720	31
	Jun 10-Nov 1	0.0032	9,720	31
	Central AI	n/a	n/a	n/a
	Jan 1-Jun 10	0.0001	4,341	0
	Jun 10-Nov 1	0.0001	4,341	0
	Western AI	n/a	n/a	n/a
	Jan 1-Jun 10	0	500	0
	Jun 10-Nov 1	0	500	0
Skates	BSAI	0.0541	22,100	1,196
Sculpins	BSAI	0.0541	4,888	264
Sharks	BSAI	0.0541	106	6
Squids	BSAI	0.3827	276	106
Octopuses	BSAI	0.0541	191	10

[1] Aleutians Islands Pacific ocean perch, Atka mackerel, flathead sole, rock sole, and yellowfin sole are multiplied by the remainder of the TAC of that species after the subtraction of the CDQ reserve under § 679.20(b)(1)(ii)(C).

Note: Section 679.64(b)(6) exempts AFA catcher vessels from a yellowfin sole sideboard limit because the 2015 and 2016 aggregate ITAC of yellowfin sole assigned to the Amendment 80 sector and BSAI trawl limited access sector is greater than 125,000 mt.

Halibut and crab PSC limits listed in Table 17 that are caught by AFA catcher vessels participating in any groundfish fishery other than pollock will accrue against the 2015 and 2016 PSC sideboard limits for the AFA catcher

vessels. Sections 679.21(e)(7) and 679.21(e)(3)(v) authorize NMFS to close directed fishing for groundfish other than pollock for AFA catcher vessels once a proposed 2015 and 2016 PSC sideboard limit listed in Table 17 is reached. The PSC that is caught by AFA catcher vessels while fishing for pollock in the Bering Sea subarea will accrue against the bycatch allowances annually specified for either the midwater pollock or the pollock/Atka mackerel/"other species" fishery categories under regulations at § 679.21(e)(3)(iv).

TABLE 17–PROPOSED 2015 AND 2016 AMERICAN FISHERIES ACT CATCHER VESSEL PROHIBITED SPECIES CATCH SIDEBOARD LIMITS FOR THE BSAI[1]

PSC species and area[1]	Target fishery category[2]	AFA catcher vessel PSC sideboard limit ratio	Proposed 2015 and 2016 PSC limit after subtraction of PSQ reserves[3]	Proposed 2015 and 2016 AFA catcher vessel PSC sideboard limit[3]
Halibut	Pacific cod trawl	n/a	n/a	887
	Pacific cod hook-and-line or pot	n/a	n/a	2
	Yellowfin sole total	n/a	n/a	101
	Rock sole/flathead sole/other flatfish[4]	n/a	n/a	228
	Greenland turbot/arrowtooth/sablefish[5]	n/a	n/a	0
	Rockfish	n/a	n/a	2
	Pollock/Atka mackerel/other species[6]	n/a	n/a	5
Red king crab Zone 1	n/a	0.299	86,621	25,900
C. opilio COBLZ	n/a	0.168	9,989,002	1,678,152
C. bairdi Zone 1	n/a	0.33	875,140	288,796
C. bairdi Zone 2	n/a	0.186	2,652,210	493,311

[1] Refer to § 679.2 for definitions of areas.

[2] Target fishery categories are defined in regulation at § 679.21(e)(3)(iv).

[3] Halibut amounts are in metric tons of halibut mortality. Crab amounts are in numbers of animals.

[4] "Other flatfish" for PSC monitoring includes all flatfish species, except for halibut (a prohibited species), arrowtooth flounder, flathead sole, Greenland turbot, rock sole, and yellowfin sole.

[5] Arrowtooth flounder for PSC monitoring includes Kamchatka flounder.

[6] "Other species" for PSC monitoring includes skates, sculpins, sharks, and octopuses.

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Classification

NMFS has determined that the proposed harvest specifications are consistent with the FMP and preliminarily determined that the proposed harvest specifications are consistent with the Magnuson-Stevens Act and other applicable laws, subject to further review after public comment.

This action is authorized under 50 CFR 679.20 and is exempt from review under Executive Orders 12866 and 13563.

NMFS prepared an EIS for this action and made it available to the public on January 12, 2007 (72 FR 1512). On February 13, 2007, NMFS issued the Record of Decision (ROD) for the Final EIS. A Supplemental Information Report (SIR) that assesses the need to prepare a Supplemental EIS is being prepared for the final action. Copies of the Final EIS, ROD, and SIR for this action are available from NMFS (see **ADDRESSES**). The Final EIS analyzes the environmental consequences of the proposed groundfish harvest specifications and alternative harvest strategies on resources in the action area. The Final EIS found no significant environmental consequences from the proposed action or its alternatives.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA), as required by section 603 of the Regulatory Flexibility Act, analyzing the methodology for establishing the relevant TACs. The IRFA evaluates the impacts on small entities of alternative harvest strategies for the groundfish fisheries in the exclusive economic zone off Alaska. As set forth in the methodology, TACs are set to a level that fall within the range of ABCs recommended by the SSC; the sum of the TACs must achieve OY specified in the FMP. While the specific numbers that the methodology may produce vary from year to year, the methodology itself remains constant.

A description of the proposed action, why it is being considered, and the legal basis for this proposed action are contained in the preamble above. A copy of the analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The action under consideration is a harvest strategy to govern the catch of groundfish in the BSAI. The preferred alternative is the existing harvest strategy in which TACs fall within the range of ABCs recommended by the SSC, but, as discussed below, NMFS considered other alternatives. This action is taken in accordance with the FMP prepared by the Council pursuant to the Magnuson-Stevens Act.

The entities directly regulated by this action are those that harvest groundfish in the exclusive economic zone of the BSAI and in parallel fisheries within State waters. These include entities operating catcher vessels and catcher/processors within the action area and entities receiving direct allocations of groundfish.

On June 12, 2014, the Small Business Administration issued an interim final rule revising the small business size standards for several industries effective July 14, 2014 (79 FR 33647, June 12, 2014). The rule increased the size standard for Finfish Fishing from $19.0 million to $20.5 million, Shellfish Fishing from $ 5.0 million to $5.5 million, and Other Marine Fishing from $7.0 million to $7.5 million. The new size standards were used to prepare the IRFA for this action. Fishing vessels are considered small entities if their total annual gross receipts, from all their activities combined, are less than $25.0

million. The IRFA estimates the number of harvesting vessels that are considered small entities, but these estimates may overstate the number of small entities because (1) some vessels may also be active as tender vessels in the salmon fishery, fish in areas other than Alaska and the West Coast, or generate revenue from other non-fishing sources; and (2) all affiliations are not taken into account, especially if the vessel has affiliations not tracked in available data (*i.e.*, ownership of multiple vessel or affiliation with processors) and may be misclassified as a small entity. Because the 353 CVs and seven C/Ps meet this size standard, they are considered to be small entities for the purposes of this analysis.

The estimated directly regulated small entities include approximately 353 catcher vessels, four catcher/processors, and six CDQ groups. Some of these vessels are members of AFA inshore pollock cooperatives, GOA rockfish cooperatives, or crab rationalization cooperatives, which, since under the RFA it is the aggregate gross receipts of all participating members of the cooperative that must meet the "under $20.5 million" threshold, are considered to be large entities within the meaning of the RFA. Thus, the estimate of 353 catcher vessels may be an overstatement of the number of small entities. Average gross revenues were $320,000 for small hook-and-line vessels, $1.25 million for small pot vessels, and $3.56 million for small trawl vessels. Revenue data for catcher/processors is confidential; however, in 2013, NMFS estimates that there are four catcher/processor small entities with gross receipts less than $20.5.

The preferred alternative (Alternative 2) was compared to four other alternatives. Alternative 1 would have set TACs to generate fishing rates equal to the maximum permissible ABC (if the full TAC were harvested), unless the sum of TACs exceeded the BSAI OY, in which case TACs would have been limited to the OY. Alternative 3 would have set TACs to produce fishing rates equal to the most recent 5-year average fishing rates. Alternative 4 would have set TACs equal to the lower limit of the BSAI OY range. Alternative 5, the "no action" alternative, would have set TACs equal to zero.

The TACs associated with the preferred harvest strategy are those adopted by the Council in October 2014, as per Alternative 2. OFLs and ABCs for the species were based on recommendations prepared by the Council's BSAI Plan Team in September 2014, and reviewed and modified by the Council's SSC in October 2014. The Council based its TAC recommendations on those of its AP, which were consistent with the SSC's OFL and ABC recommendations.

Alternative 1 selects harvest rates that would allow fishermen to harvest stocks at the level of ABCs, unless total harvests were constrained by the upper bound of the BSAI OY of two million mt. As shown in Table 1 of the preamble, the sum of ABCs in 2015 and 2016 would be about 2,472,832 mt, which falls above the upper bound of the OY range. The sum of TACs is equal to the sum of ABCs. In this instance, Alternative 1 is consistent with the preferred alternative (Alternative 2), meets the objectives of that action, and has small entity impacts that are equivalent to the preferred alternative.

Alternative 3 selects harvest rates based on the most recent 5 years of harvest rates (for species in Tiers 1 through 3) or for the most recent 5 years of harvests (for species in Tiers 4 through 6). This alternative is inconsistent with the objectives of this action (the Council's preferred harvest strategy), because it does not take account of the most recent biological information for this fishery. NMFS annually conducts at-sea stock surveys for different species, as well as statistical modeling, to estimate stock sizes and permissible harvest levels. Actual harvest rates or harvest amounts are a component of these estimates, but in and of themselves may not accurately portray stock sizes and conditions. Harvest rates are listed for each species category for each year in the SAFE report (see **ADDRESSES**).

Alternative 4 would lead to significantly lower harvests of all species and reduce TACs from the upper end of the OY range in the BSAI, to its lower end of 1.4 million mt. Overall, this would reduce 2015 TACs by about 30 percent, which would lead to significant reductions in harvests of species by small entities. While reductions of this size would be associated with offsetting price increases, the size of these increases is very uncertain. While production declines in the BSAI would undoubtedly be associated with significant price increases in the BSAI, these increases would still be constrained by production of substitutes, and are very unlikely to offset revenue declines from smaller production. Thus, this alternative action would have a detrimental impact on small entities.

Alternative 5, which sets all harvests equal to zero, would have a significant adverse impact on small entities and would be contrary to obligations to achieve OY on a continuing basis, as mandated by the Magnuson-Stevens Act.

The proposed harvest specifications extend the current 2015 OFLs, ABCs, and TACs to 2015 and 2016. As noted in the preamble to this rule and the IRFA, the Council may modify these OFLs, ABCs, and TACs in December 2014, when it reviews the November 2014 SAFE report from its groundfish Plan Team, and the December Council meeting reports of its SSC and AP. Because 2015 TACs in the proposed 2015 and 2016 harvest specifications are unchanged from the 2015 harvest specification TACs, NMFS does not expect adverse impacts on small entities. Also, NMFS does not expect any changes made by the Council in December 2014 to be large enough to have an impact on small entities.

This action does not modify recordkeeping or reporting requirements, or duplicate, overlap, or conflict with any Federal rules.

Adverse impacts on marine mammals resulting from fishing activities conducted under these harvest specifications are discussed in the Final EIS (see **ADDRESSES**), and in the 2014 SIR (*http://www.alaskafisheries.noaa.gov/analyses/groundfish/041014bsaigoaspecssir.pdf*).

Authority: 16 U.S.C. 773 *et seq.*; 16 U.S.C. 1540(f); 16 U.S.C. 1801 *et seq.*; 16 U.S.C. 3631 *et seq.*; Pub. L. 105–277; Pub. L. 106–31; Pub. L. 106–554; Pub. L. 108–199; Pub. L. 108–447; Pub. L. 109–241; Pub. L. 109–479.

Dated: December 2, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2014–28633 Filed 12–5–14; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 140918791–4989–01]

RIN 0648–XD516

Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska; Proposed 2015 and 2016 Harvest Specifications for Groundfish

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2015 and 2016 harvest specifications, apportionments, and Pacific halibut prohibited species catch limits for the groundfish fishery of the Gulf of Alaska (GOA). This action is necessary to establish harvest limits for groundfish during the 2015 and 2016 fishing years and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska. This action will conserve and manage the groundfish resources in the GOA in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments must be received by January 7, 2015.

ADDRESSES: You may submit comments on this document, identified by Docket Number NOAA–NMFS–2014–0118, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0118*, 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), 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). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Electronic copies of the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (Final EIS), Record of Decision (ROD) for the EIS, Supplementary Information Report (SIR) to the EIS, and the Initial Regulatory Flexibility Analysis (IRFA) prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov*. The final 2013 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the GOA, dated November 2013, is available from the North Pacific Fishery Management Council (Council) at 605 West 4th Avenue, Suite 306, Anchorage, AK 99501, phone 907–271–2809, or from the Council's Web site at *http://alaskafisheries.noaa.gov/npfmc*. The draft 2014 SAFE report for the GOA will be available from the same source.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the GOA groundfish fisheries in the exclusive economic zone (EEZ) of the GOA under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The Council prepared the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801, *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600, 679, and 680.

The FMP and its implementing regulations require NMFS, after consultation with the Council, to specify the total allowable catch (TAC) for each target species, the sum of which must be within the optimum yield (OY) range of 116,000 to 800,000 metric tons (mt). Section 679.20(c)(1) further requires NMFS to publish and solicit public comment on proposed annual TACs, Pacific halibut prohibited species catch (PSC) limits, and seasonal allowances of pollock and Pacific cod. The proposed harvest specifications in Tables 1 through 25 of this document satisfy these requirements. For 2015 and 2016, the sum of the proposed TAC amounts is 511,599 mt.

Under § 679.20(c)(3), NMFS will publish the final 2015 and 2016 harvest specifications after (1) considering comments received within the comment period (see DATES), (2) consulting with the Council at its December 2014 meeting, (3) considering information presented in the 2014 SIR that assesses the need to prepare a Supplemental EIS (see **ADDRESSES**) and, (4) the final 2014 SAFE report prepared for the 2015 and 2016 groundfish fisheries.

Other Actions Potentially Affecting the 2015 and 2016 Harvest Specifications

Amendment 97: Chinook Salmon Prohibited Species Catch Limits in the Non-Pollock Trawl Groundfish Fisheries

In June 2013, the Council took final action to implement measures to control Chinook salmon PSC in all non-pollock trawl groundfish fisheries in the Western and Central GOA. This proposed action, Amendment 97 to the FMP, would set an initial annual PSC limit of 7,500 Chinook salmon apportioned among the sectors of trawl catcher/processors, trawl catcher vessels participating in the Central GOA Rockfish Program, and trawl catcher vessels not participating in the Central GOA Rockfish Program fishing for groundfish species other than pollock. The pollock directed fishery is not included in the Council's recommended action, as that fishery is already subject to Chinook salmon PSC limits (§ 679.21(h)). If a sector reached its Chinook salmon PSC limit, NMFS would prohibit further fishing for non-pollock groundfish by vessels in that sector. NMFS published a notice of availability for Amendment 97 on June 5, 2014 (79 FR 32525). The public comment period for the notice of availability on Amendment 97 ended on August 4, 2014. On September 3, 2014, the Secretary approved Amendment 97. The proposed rule that would implement Amendment 97 published on June 25, 2014 (79 FR 35971), with public comments accepted through July 25, 2014. The proposed rule contains a description of the affected management areas and groundfish fisheries, the non-pollock trawl groundfish fisheries and associated sectors, the history and goals of Amendment 97, and the provisions of the proposed action. Those provisions include proposed Chinook salmon PSC limits by sector, seasonal allocations, and other aspects associated with the implementation of Chinook salmon PSC limits for the non-pollock trawl groundfish fisheries in the Western and Central GOA. One provision that could affect the 2016 Chinook salmon PSC limits is the "incentive buffer." This mechanism provides for an increased annual Chinook salmon PSC limit if sectors catch less than their limit of Chinook salmon in the previous year. If NMFS publishes a final rule by December 1, 2014, these Chinook salmon PSC limits could be in effect January 1, 2015.

Proposed Acceptable Biological Catch (ABC) and TAC Specifications

In October 2014, the Council, its Scientific and Statistical Committee (SSC), and its Advisory Panel (AP) reviewed the most recent biological and harvest information about the condition of groundfish stocks in the GOA. This information was compiled by the GOA Groundfish Plan Team (Plan Team) and presented in the final 2013 SAFE report for the GOA groundfish fisheries, dated November 2013 (see **ADDRESSES**). The

SAFE report contains a review of the latest scientific analyses and estimates of each species' biomass and other biological parameters, as well as summaries of the available information on the GOA ecosystem and the economic condition of the groundfish fisheries off Alaska. From these data and analyses, the Plan Team estimates and the SSC sets an overfishing level (OFL) and ABC for each species or species group. The amounts proposed for the 2015 and 2016 OFLs and ABCs are based on the 2013 SAFE report. The AP and Council recommended that the proposed 2015 and 2016 TACs be set equal to proposed ABCs for all species and species groups, with the exception of the species categories further discussed below. The proposed ABCs and TACs could be changed in the final harvest specifications depending on the most recent scientific information contained in the final 2014 SAFE report. The draft stock assessments that will comprise, in part, the 2014 SAFE report are available at *http://www.afsc.noaa.gov/REFM/stocks/plan_team/draft_assessments.htm.*

In November 2014, the Plan Team will update the 2013 SAFE report to include new information collected during 2014, such as NMFS stock surveys, revised stock assessments, and catch data. The Plan Team compiles this information and will produce the draft 2014 SAFE report for presentation at the December 2014 Council meeting. At that meeting, the Council will consider information in the draft 2014 SAFE report, recommendations from the November 2014 Plan Team meeting and December 2014 SSC and AP meetings, public testimony, and relevant written public comments in making its recommendations for the final 2015 and 2016 harvest specifications. Pursuant to Section 3.2.3.4.1 of the FMP, the Council could recommend adjusting the TACs if "warranted on the basis of bycatch considerations, management uncertainty, or socioeconomic considerations, or if required in order to cause the sum of the TACs to fall within the OY range."

In previous years, the OFLs and ABCs that have had the most significant changes (relative to the amount of assessed tonnage of fish) from the proposed to the final harvest specifications have been for OFLs and ABCs that are based on the most recent NMFS stock surveys. These surveys provide updated estimates of stock biomass and spatial distribution, and changes to the models used for producing stock assessments. NMFS scientists presented updated and new survey results, changes to assessment models, and accompanying stock estimates at the September 2014 Plan Team meeting, and the SSC reviewed this information at the October 2014 Council meeting. The species with possible model changes are demersal shelf rockfish, Pacific cod, Pacific ocean perch, and rock sole. In November 2014, the Plan Team will consider updated stock assessments for groundfish, which will then be included in the draft 2014 SAFE report.

If the draft 2014 SAFE report indicates that the stock biomass trend is increasing for a species, then the final 2015 and 2016 harvest specifications for that species may reflect an increase from the proposed harvest specifications. Conversely, if the draft 2014 SAFE report indicates that the stock biomass trend is decreasing for a species, then the final 2015 and 2016 harvest specifications may reflect a decrease from the proposed harvest specifications.

The proposed 2015 and 2016 OFLs, ABCs, and TACs are based on the best available biological and socioeconomic information, including projected biomass trends, information on assumed distribution of stock biomass, and revised methods used to calculate stock biomass. The FMP specifies the formulas, or tiers, to be used to compute OFLs and ABCs. The formulas applicable to a particular stock or stock complex are determined by the level of reliable information available to the fisheries scientists. This information is categorized into a successive series of six tiers to define OFL and ABC amounts, with Tier one representing the highest level of information quality available and Tier six representing the lowest level of information quality available. The Plan Team used the FMP tier structure to calculate OFLs and ABCs for each groundfish species. The SSC adopted the proposed 2015 and 2016 OFLs and ABCs recommended by the Plan Team for all groundfish species. The Council adopted the SSC's OFL and ABC recommendations and the AP's TAC recommendations. These amounts are unchanged from the final 2015 harvest specifications published in the **Federal Register** on March 6, 2014 (79 FR 12890).

The Council also adopted the SSC's recommendation to revise the terminology used when apportioning pollock in the Western, Central, and West Yakutat Regulatory Areas. The SSC recommended describing apportionments of pollock to the Western, Central, and West Yakutat Regulatory Areas as "apportionments of annual catch limit (ACLs)" rather than "ABCs". The SSC annually recommends a combined pollock ABC for the Western, Central, and West Yakutat Regulatory Areas based on factors such as scientific uncertainty in the estimate of the area-wide OFL, data uncertainty, and recruitment variability. Section 3.2.3.3.2 of Fishery Management Plan for Groundfish of the Gulf of Alaska specifies that the ACL is equal to the ABC. Historically, the SSC has recommended apportioning the combined Western, Central, and West Yakutat ABC between these three individual Regulatory Areas. However, the subarea ABCs have not been based on scientific uncertainty in the OFL, data uncertainty, or other conservation or biological concerns, but rather on seasonal and spatial apportionment procedures established under the Steller sea lion protection measures for pollock TAC in the Western and Central Regulatory Areas. The SSC noted that describing subarea apportionments as "apportionments of the ACL" more accurately reflects that such apportionments address management, rather than biological or conservation, concerns. In addition, apportionments of the ACL in this manner allow NMFS to balance any transfer of TAC from one area to another pursuant to regulations at § 679.20(a)(5)(iv)(B) to ensure that the area-wide ACL and ABC are not exceeded. The SSC noted that this terminology change is acceptable for pollock in the Western, Central, and West Yakutat Regulatory Areas only. There is one aggregate pollock OFL in these areas, and Steller sea lion protection measures provide a spatial and seasonal apportionment procedure for the pollock TAC in the Western and Central Regulatory Areas. This change is not applicable for pollock in the Southeast Outside GOA Regulatory Area, which is managed as a separate stock.

Specification and Apportionment of TAC Amounts

The Council recommended proposed 2015 and 2016 TACs that are equal to proposed ABCs for all species and species groups, with the exceptions of Pacific cod, shallow-water flatfish in the Western GOA, arrowtooth flounder, flathead sole in the Western and Central GOA, "other rockfish" in Southeast Outside, and Atka mackerel. The shallow-water flatfish, arrowtooth flounder, and flathead sole TACs are set to allow for harvest opportunities while conserving the halibut PSC limit for use in other fisheries. The "other rockfish" TAC is set to reduce the potential amount of discards in the Southeast Outside (SEO) District. The Atka mackerel TAC is set to accommodate

incidental catch amounts of this species in other directed fisheries.

The 2015 and 2016 Pacific cod TACs are set to accommodate the State's guideline harvest levels (GHLs) for Pacific cod in State waters in the Western and Central Regulatory Areas, as well as in Prince William Sound (PWS). The Plan Team, SSC, AP, and Council recommended that the sum of all State and Federal water Pacific cod removals from the GOA not exceed ABC recommendations. Accordingly, the Council reduced the proposed 2015 and 2016 Pacific cod TACs in the Eastern, Central, and Western Regulatory Areas to account for State GHLs. Therefore, the proposed 2015 and 2016 Pacific cod TACs are less than the proposed ABCs by the following amounts: (1) Eastern GOA, 631 mt; (2) Central GOA, 12,615 mt; and (3) Western GOA, 9,335 mt. These amounts reflect the sum of the State's 2015 and 2016 GHLs in these areas, which are 25 percent of the Eastern and Central and 30 percent of the Western GOA proposed ABCs.

The ABC for the pollock stock in the combined Western, Central, and West Yakutat Regulatory Areas (W/C/WYK) has been adjusted to reflect the GHL established by the State for the PWS pollock fishery since its inception in 1995. Based on genetic studies, fisheries scientists believe that the pollock in PWS is not a separate stock from the combined W/C/WYK population. Thus, the Plan Team calculates the initial ABC for the entire stock at the level that accounts for the scientific uncertainty in the estimate of the stock's OFL. Since 1996, the Plan Team has further reduced the ABC from the level that accounts for scientific uncertainty in the estimate of the OFL to account for the annual State waters GHL catch in PWS. Thus, the initial, total ABC is reduced by the annual GHL amount prior to apportioning the remaining ABC by management area and season. Accordingly, the Council recommended adopting a W/C/WYK pollock ABC that has been reduced to account for the State's PWS GHL. For 2015 and 2016, the proposed PWS pollock GHL is 4,646 mt, as recommended by State fisheries managers. The proposed 2015 and 2016 ABC is 181,184 mt, and the proposed TAC is 181,184 mt.

NMFS proposed apportionment for groundfish species are based on the distribution of biomass among the regulatory areas under which NMFS manages the species. Additional regulations govern the apportionment of Pacific cod, pollock, and sablefish. Additional detail on these apportionments are described below, and briefly summarized here.

NMFS proposes pollock TACs in the Western, Central, West Yakutat Regulatory Areas, and the Southeast Outside District of the GOA (see Table 1). NMFS also proposes seasonal apportionment of the annual pollock TAC in the Western and Central Regulatory Areas of the GOA among Statistical Areas 610, 620, and 630, and divided equally among each of the following four seasons: The A season (January 20 through March 10), the B season (March 10 through May 31), the C season (August 25 through October 1), and the D season (October 1 through November 1) (§ 679.23(d)(2)(i) through (iv), and § 679.20(a)(5)(iv)(A) and (B)). Additional detail is provided below; Table 2 lists these amounts.

NMFS proposes Pacific cod TACs in the Western, Central, and Eastern GOA (see Table 1). NMFS also proposes seasonal apportionment of the Pacific cod TACs in the Western and Central Regulatory Areas. Sixty percent of the annual TAC is apportioned to the A season for hook-and-line, pot, or jig gear from January 1 through June 10, and for trawl gear from January 20 through June 10. Forty percent of the annual TAC is apportioned to the B season for jig gear from June 10 through December 31, for hook-and-line or pot gear from September 1 through December 31, and for trawl gear from September 1 through November 1 (§§ 679.23(d)(3) and 679.20(a)(12)). The Western and Central GOA Pacific cod gear and sector apportionments are discussed in detail below; Table 3 lists these amounts.

The Council's recommendation for sablefish area apportionments takes into account the prohibition on the use of trawl gear in the SEO District of the Eastern Regulatory Area and makes available 5 percent of the combined Eastern Regulatory Area TACs to trawl gear for use as incidental catch in other directed groundfish fisheries in the WYK District (§ 679.20(a)(4)(i)). Additional detail is provided below; Tables 4 and 5 list these amounts.

The sum of the proposed TACs for all GOA groundfish is 511,599 mt for 2015 and 2016, which is within the OY range specified by the FMP. The sums of the proposed 2015 and 2016 TACs are higher than the final 2014 TACs currently specified for the GOA groundfish fisheries (79 FR 12890, March 6, 2014). The proposed 2015 and 2016 TACs for pollock, Pacific ocean perch, and rougheye rockfish are higher than the final 2014 TACs for these species. The proposed 2015 and 2016 TACs for Pacific cod, sablefish, shallow-water flatfish, deep-water flatfish, rex sole, flathead sole, northern rockfish, and dusky rockfish are lower than the final 2014 TACs for these species. The proposed 2015 and 2016 TACs for the remaining species are equal to the final 2014 TACs.

For 2015 and 2016, the Council recommends and NMFS proposes the OFLs, ABCs, and TACs listed in Table 1. The proposed ABCs reflect harvest amounts that are less than the specified overfishing levels. Table 1 lists the proposed 2015 and 2016 OFLs, ABCs, TACs, and area apportionments of groundfish in the GOA. These amounts are consistent with the biological condition of groundfish stocks as described in the 2013 SAFE report, and adjusted for other biological and socioeconomic considerations, including maintaining the total TAC within the required OY range. These proposed amounts and apportionments by area, season, and sector are subject to change pending consideration of the draft 2014 SAFE report and the Council's recommendations for the final 2015 and 2016 harvest specifications during its December 2014 meeting.

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Table 1. Proposed 2015 and 2016 ABCs, TACs, and OFLs of Groundfish for the Western/Central/West Yakutat, Western, Central, Eastern Regulatory Areas, and in the West Yakutat, Southeast Outside, and Gulfwide Districts of the Gulf of Alaska (Values are rounded to the nearest metric ton.)

Species	Area[1]	OFL	ABC	TAC[2]
Pollock[2]	Shumagin (610)	n/a	40,254	40,254
	Chirikof (620)	n/a	91,272	91,272
	Kodiak (630)	n/a	44,367	44,367
	WYK (640)	n/a	5,291	5,291
	W/C/WYK (subtotal)	248,384	181,184	181,184
	SEO (650)	16,833	12,625	12,625
	Total	265,217	193,809	193,809
Pacific cod[3]	W	n/a	31,117	21,782
	C	n/a	50,460	37,845
	E	n/a	2,523	1,892
	Total	101,800	84,100	61,519
Sablefish[4]	W	n/a	1,338	1,338
	C	n/a	4,230	4,230
	WYK	n/a	1,551	1,551
	SEO	n/a	2,435	2,435
	E (WYK and SEO) (subtotal)	n/a	3,986	3,986
	Total	11,300	9,554	9,554
Shallow-water flatfish[5]	W	n/a	18,728	13,250
	C	n/a	16,372	16,372
	WYK	n/a	1,875	1,875
	SEO	n/a	530	530
	Total	46,207	37,505	32,027
Deep-water flatfish[6]	W	n/a	300	300
	C	n/a	3,680	3,680
	WYK	n/a	5,462	5,462
	SEO	n/a	3,861	3,861
	Total	15,955	13,303	13,303
Rex sole	W	n/a	1,245	1,245
	C	n/a	6,106	6,106
	WYK	n/a	796	796
	SEO	n/a	1,008	1,008
	Total	11,963	9,155	9,155
Arrowtooth flounder	W	n/a	30,217	14,500
	C	n/a	112,178	75,000
	WYK	n/a	36,126	6,900
	SEO	n/a	11,035	6,900
	Total	222,160	189,556	103,300
Flathead sole	W	n/a	12,661	8,650

	C	n/a	24,670	15,400
	WYK	n/a	3,506	3,506
	SEO	n/a	170	170
	Total	50,376	41,007	27,726
Pacific ocean perch[7]	W	n/a	2,456	2,456
	C	n/a	13,158	13,158
	WYK	n/a	1,976	1,976
	W/C/WYK	16,555	17,590	-
	SEO	2,046	2,174	2,174
	Total	22,849	19,764	19,764
Northern rockfish[8]	W	n/a	1,229	1,229
	C	n/a	3,781	3,781
	E	n/a	-	-
	Total	5,978	5,010	5,010
Shortraker rockfish[9]	W	n/a	92	92
	C	n/a	397	397
	E	n/a	834	834
	Total	1,764	1,323	1,323
Dusky rockfish[10]	W	n/a	295	295
	C	n/a	3,318	3,318
	WYK	n/a	1,277	1,277
	SEO	n/a	191	191
	Total	6,213	5,081	5,081
Rougheye and blackspotted rockfish[11]	W	n/a	83	83
	C	n/a	877	877
	E	n/a	302	302
	Total	1,518	1,262	1,262
Demersal shelf rockfish[12]	SEO	438	274	274
Thornyhead rockfish[13]	W	n/a	235	235
	C	n/a	875	875
	E	n/a	731	731
	Total	2,454	1,841	1,841
Other rockfish[14,15]	W/C combined	n/a	1,031	1,031
	WYK	n/a	580	580
	SEO	n/a	2,470	200
	Total	5,347	4,081	1,811
Atka mackerel	GW	6,200	4,700	2,000
Big skates[16]	W	n/a	589	589
	C	n/a	1,532	1,532
	E	n/a	1,641	1,641
	Total	5,016	3,762	3,762
Longnose skates[17]	W	n/a	107	107

	C	n/a	1,935	1,935
	E	n/a	834	834
	Total	3,835	2,876	2,876
Other skates[18]	GW	2,652	1,989	1,989
Sculpins	GW	7,448	5,569	5,569
Sharks	GW	7,986	5,989	5,989
Squid	GW	1,530	1,148	1,148
Octopuses	GW	2,009	1,507	1,507
Total		808,215	644,165	511,599

[1] Regulatory areas and districts are defined at § 679.2. (W=Western Gulf of Alaska; C=Central Gulf of Alaska; E=Eastern Gulf of Alaska; WYK=West Yakutat District; SEO=Southeast Outside District; GW=Gulf-wide).

[2] The combined pollock ABC for the Western, Central, and West Yakutat areas is apportioned in the Western/Central Regulatory Areas among four statistical areas. These apportionments are considered subarea ACLs, rather than ABCs, for specification and reapportionment purposes. Table 2 lists the proposed 2015 and 2016 seasonal apportionments. In the West Yakutat and Southeast Outside Districts of the Eastern Regulatory Area, pollock is not divided into seasonal allowances.

[3] Section 679.20(a)(12)(i) requires the allocation of the Pacific cod TACs in the Western and Central Regulatory Areas of the GOA among gear and operational sectors. The annual Pacific cod TAC is apportioned among various sectors 60 percent to the A season and 40 percent to the B season in the Western and Central Regulatory Areas of the GOA. In the Eastern Regulatory Area of the GOA, Pacific cod is allocated 90 percent for processing by the inshore component and 10 percent for processing by the offshore component. Table 3 lists the proposed 2015 and 2016 Pacific cod seasonal apportionments.

[4] Sablefish is allocated to hook-and-line and trawl gear in 2015 and trawl gear in 2016. Tables 4 and 5 list the proposed 2015 and 2016 allocations of sablefish TACs.

[5] "Shallow-water flatfish" means flatfish not including "deep-water flatfish," flathead sole, rex sole, or arrowtooth flounder.

[6] "Deep-water flatfish" means Dover sole, Greenland turbot, Kamchatka flounder, and deep-sea sole.

[7] "Pacific ocean perch" means Sebastes alutus.

[8] "Northern rockfish" means Sebastes polyspinous. For management purposes the 3 mt apportionment of ABC to the WYK District of the Eastern Gulf of Alaska has been included in the slope rockfish species group.

[9] "Shortraker rockfish" means Sebastes borealis.

[10] "Dusky rockfish" means Sebastes variabilis.

[11] "Rougheye rockfish" means Sebastes aleutianus (rougheye) and Sebastes melanostictus (blackspotted).

[12] "Demersal shelf rockfish" means Sebastes pinniger (canary), S. nebulosus (china), S. caurinus (copper), S. maliger (quillback), S. helvomaculatus (rosethorn), S. nigrocinctus (tiger), and S. ruberrimus (yelloweye).

[13] "Thornyhead rockfish" means "Sebastes species"

[14] "Other rockfish (slope rockfish)" means Sebastes aurora (aurora), S. melanostomus (blackgill), S. paucispinis (bocaccio), S. goodei (chilipepper), S. crameri (darkblotch), S. elongatus (greenstriped), S. variegatus (harlequin), S. wilsoni (pygmy), S. babcocki (redbanded), S. proriger (redstripe), S. zacentrus (sharpchin), S. jordani (shortbelly), S. brevispinis (silvergray), S. diploproa (splitnose), S. saxicola (stripetail), S. miniatus (vermilion), S. reedi (yellowmouth), S. entomelas (widow), and S. flavidus (yellowtail). In the Eastern GOA only, other rockfish also includes northern rockfish, S. polyspinous.

[15] "Other rockfish" in the Western and Central Regulatory Areas and in the West Yakutat District means other rockfish and demersal shelf rockfish.

[16] "Big skate" means Raja binoculata.

[17] "Longnose skate" means Raja rhina.

[18] "Other skates" means Bathyraja spp.

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Proposed Apportionment of Reserves

Section 679.20(b)(2) requires NMFS to set aside 20 percent of each TAC for pollock, Pacific cod, flatfish, sculpins, sharks, squids, and octopuses in reserves for possible apportionment at a later date during the fishing year. In 2014, NMFS apportioned all of the reserves in the final harvest specifications. For 2015 and 2016, NMFS proposes reapportionment of all the reserves for pollock, Pacific cod, flatfish, sculpins, sharks, squids, and octopuses in anticipation of the

projected annual catch of these species. The TACs in Table 1 reflect the apportionment of reserve amounts for these species and species groups. Each proposed TAC for the above mentioned species categories contains the full TAC recommended by the Council, since none of the relevant species and species groups' TACs contributed to a reserve that could be used for future reapportionments.

Proposed Apportionments of Pollock TAC Among Seasons and Regulatory Areas, and Allocations for Processing by Inshore and Offshore Components

In the GOA, pollock is apportioned by season and area, and is further allocated for processing by inshore and offshore components. Pursuant to § 679.20(a)(5)(iv)(B), the annual pollock TAC specified for the Western and Central Regulatory Areas of the GOA is apportioned into four equal seasonal allowances of 25 percent. As established by § 679.23(d)(2)(i) through (iv), the A, B, C, and D season allowances are available from January 20 through March 10, March 10 through May 31, August 25 through October 1, and October 1 through November 1, respectively.

Pollock TACs in the Western and Central Regulatory Areas of the GOA are apportioned among Statistical Areas 610, 620, and 630, pursuant to § 679.20(a)(5)(iv)(A). In the A and B seasons, the apportionments have historically been based on the proportional distribution of pollock biomass based on the four most recent NMFS winter surveys. In the C and D seasons, the apportionments are in proportion to the distribution of pollock biomass based on the four most recent NMFS summer surveys. However, for 2015 and 2016, the Council recommends, and NMFS proposes, averaging the winter and summer distribution of pollock in the Central Regulatory Area for the A season instead of using the distribution based on only the winter surveys. This combination of summer and winter distribution has been used for area apportionments since 2002. The average is intended to reflect the best available information about migration patterns, distribution of pollock, and the performance of the fishery in the area during the A season. For the A season, the apportionment is based on the proposed adjusted estimate of the relative distribution of pollock biomass of approximately 12 percent, 66 percent, and 22 percent in Statistical Areas 610, 620, and 630, respectively. For the B season, the apportionment is based on the relative distribution of pollock biomass of approximately 12 percent, 79 percent, and 9 percent in Statistical Areas 610, 620, and 630, respectively. For the C and D seasons, the apportionment is based on the relative distribution of pollock biomass of approximately 34 percent, 32 percent, and 35 percent in Statistical Areas 610, 620, and 630, respectively.

Within any fishing year, the amount by which a seasonal allowance is underharvested or overharvested may be added to, or subtracted from, subsequent seasonal allowances in a manner to be determined by the Regional Administrator (§ 679.20(a)(5)(iv)(B)). The rollover amount is limited to 20 percent of the unharvested seasonal apportionment for the statistical area. Any unharvested pollock above the 20-percent limit could be further distributed to the other statistical areas, in proportion to the estimated biomass in the subsequent season in those statistical areas (§ 679.20(a)(5)(iv)(B)). The proposed 2015 and 2016 pollock TACs in the WYK District of 5,291 mt and SEO District of 12,625 mt are not allocated by season.

Section 679.20(a)(6)(i) requires the allocation of 100 percent of the pollock apportionments in all regulatory areas and all seasonal allowances to vessels catching pollock for processing by the inshore component after subtraction of pollock amounts projected by the Regional Administrator to be caught by, or delivered to, the offshore component incidental to directed fishing for other groundfish species. Thus, the amount of pollock available for harvest by vessels harvesting pollock for processing by the offshore component is that amount that will be taken as incidental catch during directed fishing for groundfish species other than pollock, up to the maximum retainable amounts allowed under § 679.20(e) and (f). At this time, these incidental catch amounts of pollock are unknown and will be determined as fishing activity occurs during the fishing year by the offshore component.

Table 2 lists the proposed 2015 and 2016 seasonal biomass distribution of pollock in the Western and Central Regulatory Areas, area apportionments, and seasonal allowances. The amounts of pollock for processing by the inshore and offshore components are not shown.

TABLE 2—PROPOSED 2015 AND 2016 DISTRIBUTION OF POLLOCK IN THE CENTRAL AND WESTERN REGULATORY AREAS OF THE GULF OF ALASKA; SEASONAL BIOMASS DISTRIBUTION, AREA APPORTIONMENTS; AND SEASONAL ALLOWANCES OF ANNUAL TAC [1]

[Values are rounded to the nearest metric ton]

Season [2]	Shumagin (Area 610)		Chirikof (Area 620)		Kodiak (Area 630)		Total
A (Jan 20–Mar 10)	5,357	(16.06%)	28,932	(61.50%)	9,687	(22.45%)	43,973
B (Mar 10–May 31)	5,356	(16.06%)	34,555	(67.25%)	4,059	(9.80%)	43,973
C (Aug 25–Oct 1)	14,771	(36.47%)	13,892	(28.44%)	15,311	(32.10%)	43,973
D (Oct 1–Nov 1)	14,771	(36.47%)	13,892	(28.44%)	15,311	(32.10%)	43,973
Annual Total [3]	40,254		91,272		44,367		175,893

[1] Area apportionments and seasonal allowances may not total precisely due to rounding.

[2] As established by § 679.23(d)(2)(i) through (iv), the A, B, C, and D season allowances are available from January 20 through March 10, March 10 through May 31, August 25 through October 1, and October 1 through November 1, respectively. The amounts of pollock for processing by the inshore and offshore components are not shown in this table.

[3] The West Yakutat and Southeast Outside District pollock TACs are not allocated by season and are not included in the total pollock TACs shown in this table.

Proposed Annual and Seasonal Apportionments of Pacific Cod TAC

Pursuant to § 679.20(a)(12)(i), NMFS proposes allocations for the 2015 and 2016 Pacific cod TACs in the Western and Central Regulatory Areas of the GOA among gear and operational sectors. Pursuant § 679.20(a)(6)(ii) NMFS proposes the allocation of the Pacific cod TAC between the inshore and offshore components in the Eastern Regulatory Area of the GOA. In the Central GOA, the Pacific cod TAC is apportioned seasonally first to vessels using jig gear, and then among catcher vessels (CVs) less than 50 feet in length overall using hook-and-line gear, CVs equal to or greater than 50 feet in length overall using hook-and-line gear, catcher/processors (C/Ps) using hook-and-line gear, CVs using trawl gear, C/Ps using trawl gear, and vessels using pot gear. In the Western GOA, the Pacific cod TAC is apportioned seasonally first to vessels using jig gear, and then among CVs using hook-and-line gear, C/Ps using hook-and-line gear, CVs using trawl gear, and vessels using pot gear. The overall seasonal apportionments in the Western and Central GOA are 60 percent of the annual TAC to the A season and 40 percent of the annual TAC to the B season.

Under § 679.20(a)(12)(ii), any overage or underage of the Pacific cod allowance from the A season will be subtracted from, or added to, the subsequent B season allowance. In addition, any portion of the hook-and-line, trawl, pot, or jig sector allocations that is determined by NMFS as likely to go unharvested by a sector may be reapportioned to other sectors for harvest during the remainder of the fishery year.

In accordance with the FMP, the annual jig sector allocations may increase up to 6 percent of the annual Western and Central GOA Pacific cod TACs depending on the annual performance of the jig sector. If such allocation increases are not harvested by the jig sector, then the annual jig sector allocations may subsequently be reduced (See Table 1 of Amendment 83 to the FMP for a detailed discussion of the jig sector allocation process (76 FR 74670, December 1, 2011)). NMFS proposes that the jig sector receive 2.5 percent of the annual Pacific cod TAC in the Western GOA. This includes a base allocation of 1.5 percent and an additional 1.0 percent because this sector harvested greater than 90 percent of its initial 2012 allocation in the Western GOA. NMFS also proposes that the jig sector would receive 2.0 percent of the annual Pacific cod TAC in the Central GOA. This includes a base allocation of 1.0 percent and an additional 1.0 percent because this sector harvested greater than 90 percent of its initial 2012 allocation in the Central GOA. In 2013, neither the Western nor Central GOA jig sectors harvested 90 percent of their respective 2013 Pacific cod allocations. However, allocation increases to the jig sector are established for a minimum of 2 years. NMFS will re-evaluate the annual 2013 and 2014 harvest performance of each jig sector when the 2014 fishing year is complete to determine whether to change the jig sector allocations proposed by this action in conjunction with the final 2015 and 2016 harvest specifications. Based on the current catch (through October 2014) by the Western GOA jig sector, the 2015 Pacific cod allocation to this sector may increase by an additional 1 percent of the annual Western GOA Pacific cod TAC in 2015. Conversely, the current catch by the Central GOA jig sector indicates that this sector's 2015 Pacific cod allocation may decrease by 1 percent of the annual Central GOA Pacific cod TAC. The jig sector allocations are further apportioned between the A (60 percent) and B (40 percent) seasons.

Table 3 lists the seasonal apportionments and allocations of the proposed 2015 and 2016 Pacific cod TACs.

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Table 3. Proposed 2015 and 2016 Seasonal Apportionments and Allocations of Pacific Cod Total Allowable Catch Amounts in the GOA; Allocations in the Western GOA and Central GOA Sectors, and the Eastern GOA for Processing by the Inshore and Offshore Components (Values are rounded to the nearest metric ton.)

Regulatory area and sector	Annual allocation (mt)	A Season		B Season	
		Sector percentage of annual non-jig TAC	Seasonal allowances (mt)	Sector percentage of annual non-jig TAC	Seasonal allowances (mt)
Western GOA					
Jig (2.5% of TAC)	545	N/A	327	N/A	218
Hook-and-line CV	297	0.70	149	0.70	149
Hook-and-line C/P	4,205	10.90	2,315	8.90	1,890
Trawl CV	8,155	27.70	5,883	10.70	2,272
Trawl C/P	510	0.90	191	1.50	319
Pot CV and Pot C/P	8,070	19.80	4,205	18.20	3,865
Total	21,782	60.00	13,069	40.00	8,713
Central GOA					
Jig (2.0% of TAC)	757	N/A	454	N/A	303
Hook-and-line < 50 CV	5,416	9.32	3,455	5.29	1,961
Hook-and-line ≥ 50 CV	2,487	5.61	2,080	1.10	407
Hook-and-line C/P	1,893	4.11	1,523	1.00	370
Trawl CV	15,423	21.13	7,839	20.45	7,584
Trawl C/P	1,557	2.00	743	2.19	814
Pot CV and Pot C/P	10,312	17.83	6,613	9.97	3,700
Total	37,845	60.00	22,707	40.00	15,138
Eastern GOA		Inshore (90% of Annual TAC)		Offshore (10% of Annual TAC)	
	1,892		1,703		189

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Proposed Allocations of the Sablefish TACs Amounts to Vessels Using Hook-and-Line and Trawl Gear

Sections 679.20(a)(4)(i) and (ii) require allocations of sablefish TACs for each of the regulatory areas and districts to hook-and-line and trawl gear. In the Western and Central Regulatory Areas, 80 percent of each TAC is allocated to hook-and-line gear, and 20 percent of each TAC is allocated to trawl gear. In the Eastern Regulatory Area, 95 percent of the TAC is allocated to hook-and-line gear and 5 percent is allocated to trawl gear. The trawl gear allocation in the Eastern GOA may only be used to support incidental catch of sablefish in directed fisheries for other target species (§ 679.20(a)(4)(i)).

In recognition of the prohibition against trawl gear in the SEO District of the Eastern Regulatory Area, the Council recommended and NMFS proposes the allocation of 5 percent of the combined Eastern Regulatory Area sablefish TAC

to trawl gear in the WYK District, making the remainder of the WYK sablefish TAC available to vessels using hook-and-line gear. NMFS proposes to allocate 100 percent of the sablefish TAC in the SEO District to vessels using hook-and-line gear. This action results in a proposed 2015 allocation of 199 mt to trawl gear and 1,352 mt to hook-and-line gear in the WYK District, and 2,435 mt to hook-and-line gear in the SEO District. Table 4 lists the allocations of the proposed 2015 sablefish TACs to hook-and-line and trawl gear. Table 5 lists the allocations of the proposed 2016 sablefish TACs to trawl gear.

The Council recommended that the hook-and-line sablefish TAC be established annually to ensure that the sablefish Individual Fishery Quota (IFQ) fishery is conducted concurrent with the halibut IFQ fishery and is based on recent survey information. The Council also recommended that only the trawl sablefish TAC be established for 2 years so that retention of incidental catch of sablefish by trawl gear could commence in January in the second year of the groundfish harvest specifications. Since there is an annual assessment for sablefish and the final harvest specifications are expected to be published before the IFQ season begins (typically, in early March), the Council recommended that the sablefish TAC be set on an annual basis, rather than for 2 years, so that the best available scientific information could be considered in establishing the ABCs and TACs. With the exception of the trawl allocations that are provided to the Rockfish Program cooperatives (see Table 28c to part 679), directed fishing for sablefish with trawl gear is closed during the fishing year. Also, fishing for groundfish with trawl gear is prohibited prior to January 20. Therefore, it is not likely that the sablefish allocation to trawl gear would be reached before the effective date of the final 2015 and 2016 harvest specifications.

TABLE 4—PROPOSED 2015 SABLEFISH TOTAL ALLOWABLE CATCH (TAC) IN THE GULF OF ALASKA AND ALLOCATIONS TO HOOK-AND-LINE AND TRAWL GEAR

[Values are rounded to the nearest metric ton]

Area/district	TAC	Hook-and-line allocation	Trawl allocation
Western	1,338	1,070	268
Central	4,230	3,384	846
West Yakutat [1]	1,551	1,352	199
Southeast Outside	2,435	2,435	0
Total	9,554	8,241	1,313

[1] The proposed trawl allocation is based on allocating 5 percent of the combined Eastern Regulatory Area (West Yakutat and Southeast Outside Districts combined) sablefish TAC to trawl gear in the West Yakutat District.

TABLE 5—PROPOSED 2016 SABLEFISH TOTAL ALLOWABLE CATCH (TAC) IN THE GULF OF ALASKA AND ALLOCATION TO TRAWL GEAR [1]

[Values are rounded to the nearest metric ton]

Area/district	TAC	Hook-and-line allocation	Trawl allocation
Western	1,338	n/a	268
Central	4,230	n/a	846
West Yakutat [2]	1,551	n/a	199
Southeast Outside	2,435	n/a	0
Total	9,554	n/a	1,313

[1] The Council recommended that harvest specifications for the hook-and-line gear sablefish Individual Fishing Quota fisheries be limited to 1 year.

[2] The proposed trawl allocation is based on allocating 5 percent of the combined Eastern Regulatory Area (West Yakutat and Southeast Outside districts combined) sablefish TAC to trawl gear in the West Yakutat district.

Proposed Apportionments to the Rockfish Program

These proposed 2015 and 2016 harvest specifications for the GOA include the fishery cooperative allocations and sideboard limitations established by the Rockfish Program. Program participants are primarily trawl catcher vessels and trawl catcher/processors, with limited participation by vessels using longline gear. The Rockfish Program assigns quota share and cooperative quota to participants for primary and secondary species, allows a participant holding a license limitation program (LLP) license with rockfish quota share to form a rockfish cooperative with other persons, and allows holders of C/P LLP licenses to opt-out of the fishery. The Rockfish Program also has an entry level fishery for rockfish primary species for vessels using longline gear.

Under the Rockfish Program, rockfish primary species (Pacific ocean perch, northern rockfish, and dusky rockfish) in the Central GOA are allocated to participants after deducting for incidental catch needs in other directed groundfish fisheries. Participants in the Rockfish Program also receive a portion of the Central GOA TAC of specific secondary species (Pacific cod, rougheye rockfish, sablefish, shortraker rockfish, and thornyhead rockfish).

Additionally, the Rockfish Program establishes sideboard limits to restrict the ability of harvesters operating under the Rockfish Program to increase their participation in other, non-Rockfish Program fisheries. Besides groundfish species, the Rockfish Program allocates a portion of the halibut PSC limit from the third season deep-water species fishery allowance for the GOA trawl fisheries to Rockfish Program participants. (Rockfish Program

sideboards and halibut PSC limits are discussed below.)

Section 679.81(a)(2)(ii) requires allocations of 5 mt of Pacific ocean perch, 5 mt of northern rockfish, and 30 mt of dusky rockfish to the entry level longline fishery in 2015 and 2016. The allocation for the entry level longline fishery would increase incrementally each year if the catch exceeds 90 percent of the allocation of a species. The incremental increase in the allocation would continue each year until it is the maximum percent of the TAC for that species. In 2014, the catch did not exceed 90 percent of any allocated rockfish species. Therefore, NMFS is not proposing an increase to the entry level longline fishery 2015 and 2016 allocations in the Central GOA. The remainder of the TACs for the rockfish primary species would be allocated to the CV and C/P cooperatives. Table 6 lists the allocations of the proposed 2015 and 2016 TACs for each rockfish primary species to the entry level longline fishery, the incremental increase for future years, and the maximum percent of the TAC for the entry level longline fishery.

TABLE 6—PROPOSED 2015 AND 2016 ALLOCATIONS OF ROCKFISH PRIMARY SPECIES TO THE ENTRY LEVEL LONGLINE FISHERY IN THE CENTRAL GULF OF ALASKA

Rockfish primary species	Allocations of the proposed 2015 and 2016 TAC	Incremental increase per year if catch exceeds 90 percent of the allocation of:	Up to maximum percent of each TAC of:
Pacific ocean perch	5 metric tons	5 metric tons	1
Northern rockfish	5 metric tons	5 metric tons	2
Dusky rockfish	30 metric tons	20 metric tons	5

Section 679.81(a)(2)(iii) requires allocations of rockfish primary species among various components of the Rockfish Program. Table 7 lists the proposed 2015 and 2016 allocations of rockfish in the Central GOA to the entry level longline fishery and other participants in the Rockfish Program, which include CV and C/P cooperatives. NMFS also proposes setting aside incidental catch amounts (ICAs) for other directed fisheries in the Central GOA of 2,000 mt of Pacific ocean perch, 200 mt of northern rockfish, and 250 mt of dusky rockfish. These amounts are based on recent average incidental catches in the Central GOA by other groundfish fisheries.

Allocations between vessels belonging to CV or C/P cooperatives are not included in these proposed harvest specifications. Rockfish Program applications for CV cooperatives and C/P cooperatives are not due to NMFS until March 1 of each calendar year; therefore, NMFS cannot calculate 2015 and 2016 allocations in conjunction with these proposed harvest specifications. NMFS will post these allocations on the Alaska Region Web site at (*http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm*) when they become available after March 1.

TABLE 7—PROPOSED 2015 AND 2016 ALLOCATIONS OF ROCKFISH PRIMARY SPECIES IN THE CENTRAL GULF OF ALASKA TO THE ENTRY LEVEL LONGLINE FISHERY AND OTHER PARTICIPANTS IN THE ROCKFISH PROGRAM

[Values are rounded to the nearest metric ton]

Rockfish primary species	TAC	Incidental catch allowance (ICA)	TAC minus ICA	Allocation to the entry level longline [1] fishery	Allocation to other participants in Rockfish Program [2]
Pacific ocean perch	13,158	2,000	11,158	5	11,153
Northern rockfish	3,781	200	3,581	5	3,576
Dusky rockfish	3,318	250	3,068	30	3,038
Total	20,257	2,450	17,807	40	17,767

[1] Longline gear includes hook-and-line, jig, troll, and handline gear.
[2] Other participants in the Rockfish Program include vessels in CV and C/P cooperatives.

Section 679.81(c) requires allocations of rockfish secondary species to CV and C/P cooperatives in the GOA. CV cooperatives receive allocations of Pacific cod, sablefish from the trawl gear allocation, and thornyhead rockfish. C/P cooperatives receive allocations of sablefish from the trawl allocation, rougheye rockfish, shortraker rockfish, and thornyhead rockfish. Table 8 lists the apportionments of the proposed 2015 and 2016 TACs of rockfish secondary species in the Central GOA to CV and C/P cooperatives.

TABLE 8—PROPOSED 2015 AND 2016 APPORTIONMENTS OF ROCKFISH SECONDARY SPECIES IN THE CENTRAL GOA TO CATCHER VESSEL AND CATCHER/PROCESSOR COOPERATIVES

[Values are in metric tons]

Rockfish secondary species	Central GOA annual TAC	Catcher vessel cooperatives		Catcher/processor cooperatives	
		Percentage of TAC	Apportionment (mt)	Percentage of TAC	Apportionment (mt)
Pacific cod	37,845	3.81	1,442	N/A	N/A
Sablefish	4,230	6.78	287	3.51	148
Shortraker rockfish	397	N/A	N/A	40.00	159
Rougheye rockfish	877	N/A	N/A	58.87	516
Thornyhead rockfish	875	7.84	69	26.50	232

Proposed Halibut PSC Limits

Section 679.21(d) establishes annual halibut PSC limit apportionments to trawl and hook-and-line gear, and authorizes the establishment of apportionments for pot gear. Amendment 95 to the FMP (79 FR 9625, February 20, 2014) implemented measures establishing GOA halibut PSC limits in Federal regulations and reducing the halibut PSC limits in the GOA trawl and hook-and-line groundfish fisheries. These reductions are incorporated into the halibut PSC limits that are proposed by this action. For most gear and operational types, the halibut PSC limit reductions are phased-in over 3 years, beginning in 2014 and ending in 2016.

In 2014, the trawl halibut PSC limit was reduced by 7 percent from the 2013 limit. Under Amendment 95 and regulations at § 679.21(d)(3)(i), the initial trawl halibut PSC limit is proposed to be reduced another 5 percent in 2015, and an additional 3 percent in 2016. This results in a total reduction of 15 percent in 2016 as compared to the 2013 halibut PSC limit. The reduced PSC limit will remain in effect each year thereafter. In addition, under Amendment 95 and regulations at § 679.21(d)(2)(iv), the initial hook-and-line PSC for the other hook and-line catcher vessel sector was reduced 7 percent in 2014, and this action proposes another 5-percent reduction in 2015 and an additional 3-percent reduction in 2016. The PSC limit for the hook-and-line catcher/processor sector was reduced by 7 percent in 2014 and thereafter.

In October 2014, the Council recommended proposed halibut PSC limits that reflect the reductions implemented under Amendment 95 of 1,759 mt for trawl gear, 261 mt for hook-and-line gear, and 9 mt for the demersal shelf rockfish (DSR) fishery in the SEO District for the 2015 groundfish fisheries. The Council also recommended 1,706 mt for trawl gear, 256 mt for hook-and-line gear, and 9 mt for the DSR fishery for the 2016 groundfish fisheries.

The DSR fishery in the SEO District is defined at § 679.21(d)(2)(ii)(A). This fishery is apportioned 9 mt of the halibut PSC limit in recognition of its small-scale harvests of groundfish. NMFS estimates low halibut bycatch in the DSR fishery because (1) the duration of the DSR fisheries and the gear soak times are short, (2) the DSR fishery occurs in the winter when less overlap occurs in the distribution of DSR and halibut, and (3) the directed commercial DSR fishery has a low DSR TAC. The Alaska Department of Fish and Game sets the commercial GHL for the DSR fishery after deducting (1) estimates of DSR incidental catch in all fisheries (including halibut and subsistence) and (2) the allocation to the DSR sport fish fishery. Of the 274 mt TAC for DSR in 2014, 224 mt were available for the DSR commercial directed fishery, of which 56 mt were harvested.

The FMP authorizes the Council to exempt specific gear from the halibut PSC limits. NMFS, after consultation with the Council, proposes to exempt pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from the non-trawl halibut PSC limit for 2015 and 2016. The Council recommended, and NMFS is proposing, these exemptions because (1) pot gear fisheries have low annual halibut bycatch mortality, (2) IFQ program regulations prohibit discard of halibut if any halibut IFQ permit holder on board a CV holds unused halibut IFQ (§ 679.7(f)(11)), (3) sablefish IFQ fishermen typically hold halibut IFQ permits and are therefore required to retain the halibut they catch while fishing sablefish IFQ, and (4) NMFS estimates negligible halibut mortality for the jig gear fisheries. NMFS estimates halibut mortality is negligible in the jig gear fisheries given the small amount of groundfish harvested by jig gear, the selective nature of jig gear, and the high survival rates of halibut caught and released with jig gear.

The best available information on estimated halibut bycatch consists of data collected by fisheries observers during 2014. The calculated halibut bycatch mortality through October 25, 2014, is 1,303 mt for trawl gear and 142 mt for hook-and-line gear for a total halibut mortality of 1,445 mt. This halibut mortality was calculated using groundfish and halibut catch data from the NMFS Alaska Region's catch accounting system. This account system contains historical and recent catch information compiled from each Alaska groundfish fishery.

Section 679.21(d)(4) authorizes NMFS to seasonally apportion the halibut PSC limits after consultation with the Council. The FMP and regulations require that the Council and NMFS consider the following information in seasonally apportioning halibut PSC limits: (1) Seasonal distribution of halibut, (2) seasonal distribution of target groundfish species relative to halibut distribution, (3) expected halibut bycatch needs on a seasonal basis relative to changes in halibut biomass and expected catch of target groundfish species, (4) expected bycatch rates on a seasonal basis, (5) expected changes in directed groundfish fishing seasons, (6) expected actual start of fishing effort, and (7) economic effects of establishing seasonal halibut allocations on segments of the target groundfish industry. Based on public comment and the information presented in the final 2014 SAFE report, the Council may recommend or NMFS may make changes to the seasonal, gear-type, or fishery category apportionments of halibut PSC limits for the final 2015 and 2016 harvest specifications.

The final 2014 and 2015 harvest specifications (79 FR 12890, March 6, 2014) summarized the Council's and NMFS' findings with respect to halibut PSC for each of these FMP considerations. The Council's and

NMFS' findings for 2015 are unchanged from 2014. Table 9 lists the proposed 2015 Pacific halibut PSC limits, allowances, and apportionments. Table 10 lists the proposed 2016 Pacific halibut PSC limits, allowances, and apportionments. The halibut PSC limits in these tables reflect the halibut PSC reductions implemented in accordance with Amendment 95 (79 FR 9625, February 20, 2014) and § 679.21(d)(3)(i). Sections 679.21(d)(4)(iii) and (iv) specify that any underages or overages of a seasonal apportionment of a PSC limit will be deducted from or added to the next respective seasonal apportionment within the fishing year.

TABLE 9—PROPOSED 2015 PACIFIC HALIBUT PSC LIMITS, ALLOWANCES, AND APPORTIONMENTS

[Values are in metric tons]

Trawl gear			Hook-and-line gear [1]				
			Other than DSR			DSR	
Season	Percent	Amount	Season	Percent	Amount	Season	Amount
January 20–April 1	27.5	484	January 1–June 10	86	225	January 1–December 31	9
April 1–July 1	20	352	June 10–September 1	2	5		
July 1–September 1	30	528	September 1–December 31.	12	31		
September 1–October 1	7.5	132					
October 1–December 31	15	263					
Total		1,759			261		9

[1] The Pacific halibut PSC limit for hook-and-line gear is allocated to the demersal shelf rockfish (DSR) fishery and fisheries other than DSR. The hook-and-line IFQ sablefish fishery is exempt from halibut PSC limits, as are pot and jig gear for all groundfish fisheries.

TABLE 10—PROPOSED 2016 PACIFIC HALIBUT PSC LIMITS, ALLOWANCES, AND APPORTIONMENTS

[Values are in metric tons]

Trawl gear			Hook-and-line gear [1]				
			Other than DSR			DSR	
Season	Percent	Amount	Season	Percent	Amount	Season	Amount
January 20–April 1	27.5	469	January 1–June 10	86	220	January 1–December 31	9
April 1–July 1	20	341	June 10–September 1	2	5		
July 1–September 1	30	512	September 1–December 31.	12	31		
September 1–October 1	7.5	128					
October 1–December 31	15	256					
Total		1,706			256		9

[1] The Pacific halibut PSC limit for hook-and-line gear is allocated to the demersal shelf rockfish (DSR) fishery and fisheries other than DSR. The hook-and-line IFQ sablefish fishery is exempt from halibut PSC limits, as are pot and jig gear for all groundfish fisheries.

Section 679.21(d)(3)(ii) authorizes further apportionment of the trawl halibut PSC limit as bycatch allowances to trawl fishery categories. The annual apportionments are based on each category's proportional share of the anticipated halibut bycatch mortality during a fishing year and optimization of the total amount of groundfish harvest under the halibut PSC limit. The fishery categories for the trawl halibut PSC limits are (1) a deep-water species fishery, composed of sablefish, rockfish, deep-water flatfish, rex sole, and arrowtooth flounder; and (2) a shallow-water species fishery, composed of pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, skates and "other species" (sculpins, sharks, squids, and octopuses) (§ 679.21(d)(3)(iii)).

Tables 11 and 12 list, respectively, the proposed 2015 and 2016 seasonal apportionments of trawl halibut PSC limits between the trawl gear deep-water and the shallow-water species fisheries. These limits proportionately incorporate the halibut PSC limit reductions implemented in accordance with Amendment 95 (79 FR 9625, February 20, 2014) and § 679.21(d)(3).

TABLE 11—PROPOSED 2015 SEASONAL APPORTIONMENTS OF THE PACIFIC HALIBUT PSC LIMIT APPORTIONED BETWEEN THE TRAWL GEAR SHALLOW-WATER AND DEEP-WATER SPECIES FISHERIES

[Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
January 20–April 1	396	88	484
April 1–July 1	88	264	352
July 1–September 1	176	352	528
September 1–October 1	132	[3]	132

TABLE 11—PROPOSED 2015 SEASONAL APPORTIONMENTS OF THE PACIFIC HALIBUT PSC LIMIT APPORTIONED BETWEEN THE TRAWL GEAR SHALLOW-WATER AND DEEP-WATER SPECIES FISHERIES—Continued

[Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
Subtotal, January 20–October 1	792	704	1,496
October 1–December 31 [2]			264
Total			1,760

[1] Vessels participating in cooperatives in the Rockfish Program will receive 191 mt of the third season (July 1 through September 1) deep-water species fishery halibut PSC apportionment.
[2] There is no apportionment between trawl shallow-water and deep-water species fisheries during the fifth season (October 1 through December 31).

TABLE 12—PROPOSED 2016 SEASONAL APPORTIONMENTS OF THE PACIFIC HALIBUT PSC LIMIT APPORTIONED BETWEEN THE TRAWL GEAR SHALLOW-WATER AND DEEP-WATER SPECIES FISHERIES

[Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
January 20–April 1	384	85	469
April 1–July 1	85	256	341
July 1–September 1	171	341	512
September 1–October 1	128	([3])	128
Subtotal, January 20–October 1	768	682	1,450
October 1–December 31 [2]			256
Total			1,706

[1] Vessels participating in cooperatives in the Rockfish Program will receive 191 mt of the third season (July 1 through September 1) deep-water species fishery halibut PSC apportionment.
[2] There is no apportionment between trawl shallow-water and deep-water species fisheries during the fifth season (October 1 through December 31).
[3] Any remainder.

Section 679.21(d)(2) requires that the "other hook-and-line fishery" halibut PSC apportionment to vessels using hook-and-line gear must be divided between CVs and C/Ps. NMFS must calculate the halibut PSC limit apportionments for the entire GOA to hook-and-line CVs and C/Ps in accordance with § 679.21(d)(2)(iii) in conjunction with these harvest specifications. A comprehensive description and example of the calculations necessary to apportion the "other hook-and-line fishery" halibut PSC limit between the hook-and-line CV and C/P sectors were included in the proposed rule to implement Amendment 83 (76 FR 44700, July 26, 2011) and is not repeated here.

For 2015, NMFS proposes annual halibut PSC limit allocations of 146 mt and 115 mt to the hook-and-line CV and hook-and-line C/P sectors, respectively. In addition, NMFS proposes 2016 annual halibut PSC limit allocations of 141 mt and 115 mt to the hook-and-line CV and hook-and-line C/P sectors, respectively. The 2015 and 2016 annual halibut PSC limits are divided into three seasonal apportionments, using seasonal percentages of 86 percent, 2 percent, and 12 percent. Tables 13 and 14 list the proposed 2015 and 2016 annual halibut PSC limits and seasonal apportionments between the hook-and-line sectors in the GOA.

No later than November 1 of each year, NMFS calculates the projected unused amount of halibut PSC limit by either of the hook-and-line sectors for the remainder of the year. The projected unused amount of halibut PSC limit is made available to the other hook-and-line sector for the remainder of that fishing year if NMFS determines that an additional amount of halibut PSC limit is necessary for that sector to continue its directed fishing operations (§ 679.21(d)(2)(iii)(C)).

TABLE 13—PROPOSED 2015 APPORTIONMENTS OF THE "OTHER HOOK-AND-LINE FISHERIES" HALIBUT PSC ALLOWANCE BETWEEN THE HOOK-AND-LINE GEAR CATCHER VESSEL AND CATCHER/PROCESSOR SECTORS

[Values are in metric tons]

"Other than DSR" allowance	Hook-and-line sector	Sector annual amount	Season	Seasonal percentage	Sector seasonal amount
261	Catcher Vessel	146	January 1–June 10	86	126
			June 10–September 1	2	3
			September 1–December 31	12	18

TABLE 13—PROPOSED 2015 APPORTIONMENTS OF THE "OTHER HOOK-AND-LINE FISHERIES" HALIBUT PSC ALLOWANCE BETWEEN THE HOOK-AND-LINE GEAR CATCHER VESSEL AND CATCHER/PROCESSOR SECTORS—Continued

[Values are in metric tons]

"Other than DSR" allowance	Hook-and-line sector	Sector annual amount	Season	Seasonal percentage	Sector seasonal amount
	Catcher/Processor	115	January 1–June 10	86	99
			June 10–September 1	2	2
			September 1–December 31	12	14

TABLE 14—PROPOSED 2016 APPORTIONMENTS OF THE "OTHER HOOK-AND-LINE FISHERIES" HALIBUT PSC ALLOWANCE BETWEEN THE HOOK-AND-LINE GEAR CATCHER VESSEL AND CATCHER/PROCESSOR SECTORS

[Values are in metric tons]

"Other than DSR" allowance	Hook-and-line sector	Sector annual amount	Season	Seasonal percentage	Sector seasonal amount
256	Catcher Vessel	141	January 1–June 10	86	121
			June 10–September 1	2	3
			September 1–December 31	12	17
	Catcher/Processor	115	January 1–June 10	86	99
			June 10–September 1	2	2
			September 1–December 31	12	14

Halibut Discard Mortality Rates

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator uses observed halibut incidental catch rates, discard mortality rates (DMRs), and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. The DMRs are based on the best information available, including information contained in the annual SAFE report.

NMFS proposes the Council's recommendation that the halibut DMRs developed and recommended by the International Pacific Halibut Commission (IPHC) for the 2013 through 2015 GOA groundfish fisheries be used to monitor the proposed 2015 and 2016 halibut bycatch mortality allowances (see Tables 9 through 14). The IPHC developed the DMRs for the 2013 through 2015 GOA groundfish fisheries using the 10-year mean DMRs for those fisheries. Long-term average DMRs were not available for some fisheries, so rates from the most recent years were used. For the skate, sculpin, shark, squid, and octopus fisheries, where not enough mortality data are available, the mortality rate of halibut caught in the Pacific cod fishery for that gear type was recommended as a default rate. The IPHC will analyze observer data annually and recommend changes to the DMRs when a fishery DMR shows large variation from the mean. A discussion of the DMRs and how the IPHC establishes them is available from the Council (see **ADDRESSES**). Table 15 lists the proposed 2015 and 2016 DMRs.

TABLE 15—PROPOSED 2015 AND 2016 HALIBUT DISCARD MORTALITY RATES FOR VESSELS FISHING IN THE GULF OF ALASKA

[Values are percent of halibut assumed to be dead]

Gear	Target fishery	Mortality rate (%)
Hook-and-line	Other fisheries [1]	11
	Skates	11
	Pacific cod	11
	Rockfish	9
Trawl	Arrowtooth flounder	73
	Deep-water flatfish	43
	Flathead sole	65
	Non-pelagic pollock	60
	Other fisheries	62
	Pacific cod	62
	Pelagic pollock	71
	Rex sole	69
	Rockfish	66
	Sablefish	71
	Shallow-water flatfish	67
Pot	Other fisheries	17
	Pacific cod	17

[1] Other fisheries includes hook-and-line sablefish and all gear types for Atka mackerel, skates, sculpins, sharks, squids, and octopuses.

Chinook Salmon Prohibited Species Catch Limits

Amendment 93 to the FMP (77 FR 42629, July 20, 2012) established separate Chinook salmon PSC limits in the Western and Central GOA in the directed pollock fishery. These limits require NMFS to close the pollock directed fishery in the Western and Central regulatory areas of the GOA if the applicable limit is reached (§ 679.21(h)(6)). The annual Chinook salmon PSC limits in the pollock directed fishery of 6,684 salmon in the Western GOA and 18,316 salmon in the Central GOA are set in regulation at § 679.21(h)(2)(i) and (ii). In addition, all salmon (regardless of species), taken in the pollock directed fisheries in the Western and Central GOA must be retained until an observer at the processing facility that takes delivery of the catch is provided an opportunity to count the number of salmon and to collect any scientific data or biological samples from the salmon (§ 679.21(h)(4)).

American Fisheries Act (AFA) Catcher/Processor and Catcher Vessel Groundfish Sideboard Limits

Section 679.64 establishes groundfish harvesting and processing sideboard limits on AFA C/Ps and CVs in the GOA. These sideboard limits are necessary to protect the interests of fishermen and processors who do not directly benefit from the AFA from those fishermen and processors who receive exclusive harvesting and processing privileges under the AFA. Section 679.7(k)(1)(ii) prohibits listed AFA C/Ps from harvesting any species of fish in the GOA. Additionally, § 679.7(k)(1)(iv) prohibits listed AFA C/Ps from processing any pollock harvested in a directed pollock fishery in the GOA and any groundfish harvested in Statistical Area 630 of the GOA.

AFA CVs that are less than 125 ft (38.1 meters) length overall, have annual landings of pollock in the Bering Sea and Aleutian Islands of less than 5,100 mt, and have made at least 40 landings of GOA groundfish from 1995 through 1997 are exempt from GOA sideboard limits under § 679.64(b)(2)(ii). Sideboard limits for non-exempt AFA CVs operating in the GOA are based on their traditional harvest levels of TAC in groundfish fisheries covered by the FMP. Section 679.64(b)(3)(iii) establishes the groundfish sideboard limitations in the GOA based on the retained catch of non-exempt AFA CVs of each sideboard species from 1995 through 1997 divided by the TAC for that species over the same period.

Table 16 lists the proposed 2015 and 2016 groundfish sideboard limits for non-exempt AFA CVs. NMFS will deduct all targeted or incidental catch of sideboard species made by non-exempt AFA CVs from the sideboard limits listed in Table 16.

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Table 16. Proposed 2015 and 2016 GOA Non-Exempt American Fisheries Act Catcher Vessel (CV) Groundfish Harvest Sideboard Limits (Values are rounded to the nearest metric ton.)

Species	Apportionments by season/gear	Area/component	Ratio of 1995-1997 non-exempt AFA CV catch to 1995-1997 TAC	Proposed 2015 and 2016 TACs[3]	Proposed 2015 and 2016 non-exempt AFA CV sideboard limit
Pollock	A Season January 20 - March 10	Shumagin (610)	0.6047	5,357	3,239
		Chirikof (620)	0.1167	28,932	3,376
		Kodiak (630)	0.2028	9,687	1,965
	B Season March 10 - May 31	Shumagin (610)	0.6047	5,356	3,239
		Chirikof (620)	0.1167	34,556	4,033
		Kodiak (630)	0.2028	4,059	823
	C Season August 25 - October 1	Shumagin (610)	0.6047	14,771	8,932
		Chirikof (620)	0.1167	13,892	1,621
		Kodiak (630)	0.2028	15,310	3,105
	D Season October 1 - November 1	Shumagin (610)	0.6047	14,771	8,932
		Chirikof (620)	0.1167	13,892	1,621
		Kodiak (630)	0.2028	15,309	3,105
	Annual	WYK (640)	0.3495	5,291	1,849
		SEO (650)	0.3495	12,625	4,412
Pacific cod	A Season[1] January 1 - June 10	W	0.1331	13,069	1,740
		C	0.0692	22,707	1,571
	B Season[2] September 1 - December 31	W	0.1331	8,713	1,160
		C	0.0692	15,138	1,048
	Annual	E inshore	0.0079	1,703	13
		E offshore	0.0078	189	1
Sablefish	Annual, trawl gear	W	0.0000	268	0
		C	0.0642	846	54
		E	0.0433	199	9
Flatfish, shallow-water	Annual	W	0.0156	13,250	207
		C	0.0587	16,372	961
		E	0.0126	2,405	30
Flatfish, deep-water	Annual	W	0.0000	300	0
		C	0.0647	3,680	238
		E	0.0128	9,323	119
Rex sole	Annual	W	0.0007	1,245	1
		C	0.0384	6,106	234
		E	0.0029	1,804	5
Arrowtooth flounder	Annual	W	0.0021	14,500	30
		C	0.0280	75,000	2,100
		E	0.0002	13,800	3

Flathead sole	Annual	W	0.0036	8,650	31
		C	0.0213	15,400	328
		E	0.0009	3,676	3
Pacific ocean perch	Annual	W	0.0023	2,456	6
		C	0.0748	13,158	984
		E	0.0466	4,150	193
Northern rockfish	Annual	W	0.0003	1,229	0
		C	0.0277	3,781	105
Shortraker rockfish	Annual	W	0.0000	92	0
		C	0.0218	397	9
		E	0.0110	834	9
Dusky Rockfish	Annual	W	0.0001	295	0
		C	0.0000	3,318	0
		E	0.0067	1,468	10
Rougheye rockfish	Annual	W	0.0000	83	0
		C	0.0237	877	21
		E	0.0124	302	4
Demersal shelf rockfish	Annual	SEO	0.0020	274	1
Thornyhead rockfish	Annual	W	0.0280	235	7
		C	0.0280	875	25
		E	0.0280	731	20
Other Rockfish	Annual	W	0.0034	n/a	n/a
		C	0.1699	1,031	175
		E	0.0000	780	0
Atka mackerel	Annual	Gulfwide	0.0309	2,000	62
Big skates	Annual	W	0.0063	589	4
		C	0.0063	1,532	10
		E	0.0063	1,641	10
Longnose skates	Annual	W	0.0063	107	1
		C	0.0063	1,935	12
		E	0.0063	834	5
Other skates	Annual	Gulfwide	0.0063	1,989	13
Squids	Annual	Gulfwide	0.0063	5,569	35
Sharks	Annual	Gulfwide	0.0063	5,989	38
Octopuses	Annual	Gulfwide	0.0063	1,148	7
Sculpins	Annual	Gulfwide	0.0063	1,455	9

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.
[3] The Western and Central GOA area apportionments of pollock are considered ACLs.

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Non-Exempt AFA Catcher Vessel Halibut PSC Limits

The halibut PSC sideboard limits for non-exempt AFA CVs in the GOA are based on the aggregate retained groundfish catch by non-exempt AFA CVs in each PSC target category from 1995 through 1997 divided by the retained catch of all vessels in that fishery from 1995 through 1997 (§ 679.64(b)(4)). Tables 17 and 18 list the proposed 2015 and 2016, respectively, non-exempt AFA CV halibut PSC limits for vessels using trawl gear in the GOA.

The proposed 2015 and 2016 seasonal apportionments of trawl halibut PSC limits between the deep-water and shallow-water species fisheries categories proportionately incorporate reductions made to the annual trawl halibut PSC limits and associated seasonal apportionments (see Tables 9 and 10).

TABLE 17—PROPOSED 2015 NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL HALIBUT PROHIBITED SPECIES CATCH (PSC) LIMITS FOR VESSELS USING TRAWL GEAR IN THE GOA

[PSC limits are rounded to the nearest whole metric ton]

Season	Season dates	Target fishery	Ratio of 1995–1997 non-exempt AFA CV retained catch to total retained catch	Proposed 2015 PSC limit	Proposed 2015 non-exempt AFA CV PSC limit
1	January 20–April 1	shallow-water	0.340	396	135
		deep-water	0.070	88	6
2	April 1–July 1	shallow-water	0.340	88	30
		deep-water	0.070	264	18
3	July 1–September 1	shallow-water	0.340	176	60
		deep-water	0.070	352	25
4	September 1–October 1	shallow-water	0.340	132	45
		deep-water	0.070	0	0
5	October 1–December 31	all targets	0.205	264	54

TABLE 18—PROPOSED 2016 NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL HALIBUT PROHIBITED SPECIES CATCH (PSC) LIMITS FOR VESSELS USING TRAWL GEAR IN THE GOA

[PSC limits are rounded to the nearest whole metric ton]

Season	Season dates	Target fishery	Ratio of 1995–1997 non-exempt AFA CV retained catch to total retained catch	Proposed 2016 PSC limit	Proposed 2016 non-exempt AFA CV PSC limit
1	January 20–April 1	shallow-water	0.340	384	131
		deep-water	0.070	85	6
2	April 1–July 1	shallow-water	0.340	85	29
		deep-water	0.070	256	18
3	July 1–September 1	shallow-water	0.340	171	58
		deep-water	0.070	341	24
4	September 1–October 1	shallow-water	0.340	128	44
		deep-water	0.070	0	0
5	October 1–December 31	all targets	0.205	256	52

Non-AFA Crab Vessel Groundfish Sideboard Limits

Section 680.22 establishes groundfish catch limits for vessels with a history of participation in the Bering Sea snow crab fishery to prevent these vessels from using the increased flexibility provided by the Crab Rationalization Program to expand their level of participation in the GOA groundfish fisheries. Sideboard limits restrict these vessels' catch to their collective historical landings in each GOA groundfish fishery (except the fixed-gear sablefish fishery). Sideboard limits also apply to landings made using an LLP license derived from the history of a restricted vessel, even if that LLP license is used on another vessel.

The basis for these sideboard limits is described in detail in the final rules implementing the major provisions of the Crab Rationalization Program, including Amendments 18 and 19 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (Crab FMP) (70 FR 10174, March 2, 2005), Amendment 34 to the Crab FMP (76 FR 35772, June 20, 2011), and Amendment 83 to the GOA FMP (76 FR 74670, December 1, 2011).

Table 19 lists the proposed 2015 and 2016 groundfish sideboard limitations for non-AFA crab vessels. All targeted or incidental catch of sideboard species made by non-AFA crab vessels or associated LLP licenses will be deducted from these sideboard limits.

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Table 19. Proposed 2015 and 2016 GOA Non-American Fisheries Act Crab Vessel Groundfish Harvest Sideboard Limits (Values are rounded to the nearest metric ton.)

Species	Season/gear	Area/component/ gear	Ratio of 1996-2000 non-AFA crab vessel catch to 1996-2000 total harvest	Proposed 2015 and 2016 TACs	Proposed 2015 and 2016 non-AFA crab vessel sideboard limit
Pollock	A Season January 20 - March 10	Shumagin (610)	0.0098	5,357	52
		Chirikof (620)	0.0031	28,932	90
		Kodiak (630)	0.0002	9,687	2
	B Season March 10 - May 31	Shumagin (610)	0.0098	5,356	52
		Chirikof (620)	0.0031	34,556	107
		Kodiak (630)	0.0002	4,059	1
	C Season August 25 - October 1	Shumagin (610)	0.0098	14,771	145
		Chirikof (620)	0.0031	13,892	43
		Kodiak (630)	0.0002	15,310	3
	D Season October 1 - November 1	Shumagin (610)	0.0098	14,771	145
		Chirikof (620)	0.0031	13,892	43
		Kodiak (630)	0.0002	15,309	3
	Annual	WYK (640)	0.0000	5,291	0
		SEO (650)	0.0000	12,625	0
Pacific cod	A Season[1] January 1 - June 10	W Jig CV	0.0000	13,069	0
		W Hook-and-line CV	0.0004	13,069	5
		W Hook-and-line C/P	0.0018	13,069	24
		W Pot CV	0.0997	13,069	1,303
		W Pot C/P	0.0078	13,069	102
		W Trawl CV	0.0007	13,069	9
		C Jig CV	0.0000	22,707	0
		C Hook-and-line CV	0.0001	22,707	2
		C Hook-and-line C/P	0.0012	22,707	27
		C Pot CV	0.0474	22,707	1,076
		C Pot C/P	0.0136	22,707	309
		C Trawl CV	0.0012	22,707	27
	B Season[2] September 1 - December 31	W Jig CV	0.0000	8,713	0
		W Hook-and-line CV	0.0004	8,713	3
		W Hook-and-line C/P	0.0018	8,713	16
		W Pot CV	0.0997	8,713	869
		W Pot C/P	0.0078	8,713	68

		W Trawl CV	0.0007	8,713	6
		C Jig CV	0.0000	15,138	0
		C Hook-and-line CV	0.0001	15,138	2
		C Hook-and-line C/P	0.0012	15,138	18
		C Pot CV	0.0474	15,138	718
		C Pot C/P	0.0136	15,138	206
		C Trawl CV	0.0012	15,138	18
	Annual	E inshore	0.0110	1,703	19
		E offshore	0.0000	189	0
Sablefish	Annual, trawl gear	W	0.0000	268	0
		C	0.0000	846	0
		E	0.0000	199	0
Flatfish, shallow-water	Annual	W	0.0059	13,250	78
		C	0.0001	16,372	2
		E	0.0000	2,405	0
Flatfish, deep-water	Annual	W	0.0035	300	1
		C	0.0000	3,680	0
		E	0.0000	9,323	0
Rex sole	Annual	W	0.0000	1,245	0
		C	0.0000	6,106	0
		E	0.0000	1,804	0
Arrowtooth flounder	Annual	W	0.0004	14,500	6
		C	0.0001	75,000	8
		E	0.0000	13,800	0
Flathead sole	Annual	W	0.0002	8,650	2
		C	0.0004	15,400	6
		E	0.0000	3,676	0
Pacific ocean perch	Annual	W	0.0000	2,456	0
		C	0.0000	13,158	0
		E	0.0000	4,150	0
Northern rockfish	Annual	W	0.0005	1,229	1
		C	0.0000	3,781	0
Shortraker rockfish	Annual	W	0.0013	92	0
		C	0.0012	397	0
		E	0.0009	834	1
Dusky rockfish	Annual	W	0.0017	295	1
		C	0.0000	3,318	0
		E	0.0000	1,468	0
Rougheye rockfish	Annual	W	0.0067	83	1
		C	0.0047	877	4

		E	0.0008	302	0
Demersal shelf rockfish	Annual	SEO	0.0000	274	0
Thornyhead rockfish	Annual	W	0.0047	235	1
		C	0.0066	875	6
		E	0.0045	731	3
Other rockfish	Annual	W	0.0035	0	0
		C	0.0033	1,031	3
		E	0.0000	780	0
Atka mackerel	Annual	Gulfwide	0.0000	2,000	0
Big skate	Annual	W	0.0392	589	23
		C	0.0159	1,532	24
		E	0.0000	1,641	0
Longnose skate	Annual	W	0.0392	107	4
		C	0.0159	1,935	31
		E	0.0000	834	0
Other skates	Annual	Gulfwide	0.0176	1,989	35
Sculpins	Annual	Gulfwide	0.0176	5,569	98
Sharks	Annual	Gulfwide	0.0176	5,989	105
Squids	Annual	Gulfwide	0.0176	1,148	20
Octopuses	Annual	Gulfwide	0.0176	1,507	27

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

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Rockfish Program Groundfish Sideboard and Halibut PSC Limitations

The Rockfish Program establishes three classes of sideboard provisions: CV groundfish sideboard restrictions, C/P rockfish sideboard restrictions, and C/P opt-out vessel sideboard restrictions. These sideboards are intended to limit the ability of rockfish harvesters to expand into other fisheries.

CVs participating in the Rockfish Program may not participate in directed fishing for dusky rockfish, northern rockfish, and Pacific ocean perch in the Western GOA and West Yakutat Districts from July 1 through July 31. Also, CVs may not participate in directed fishing for arrowtooth flounder, deep-water flatfish, and rex sole in the GOA from July 1 through July 31 (§ 679.82(d)).

Catcher/processors participating in Rockfish Program cooperatives are restricted by rockfish and halibut PSC sideboard limits. These C/Ps are prohibited from directed fishing for northern rockfish, Pacific ocean perch, and dusky rockfish in the Western GOA and West Yakutat District from July 1 through July 31. Holders of C/P-designated LLP licenses that opt-out of participating in a rockfish cooperative will receive the portion of each sideboard limit that is not assigned to rockfish cooperatives. Table 20 lists the proposed 2015 and 2016 Rockfish Program C/P rockfish sideboard limits in the Western GOA and West Yakutat District. Due to confidentiality requirements associated with fisheries data, the sideboard limits for the West Yakutat District are not displayed.

TABLE 20—PROPOSED 2015 AND 2016 ROCKFISH PROGRAM HARVEST LIMITS FOR THE WESTERN GOA AND WEST YAKUTAT DISTRICT BY FISHERY FOR THE CATCHER/PROCESSOR (C/P) SECTOR

[Values are rounded to the nearest metric ton]

Area	Fishery	C/P sector (% of TAC)	Proposed 2015 and 2016 TACs	Proposed 2015 and 2016 C/P limit
Western GOA	Dusky rockfish	72.3	295	213
	Pacific ocean perch	50.6	2,456	1,243
	Northern rockfish	74.3	1,229	913
West Yakutat District	Dusky rockfish	(1)	1,277	N/A
	Pacific ocean perch	(1)	1,976	N/A

[1] Not released due to confidentiality requirements associated with fish ticket data, as established by NMFS and the State of Alaska.

Under the Rockfish Program, the C/P sector is subject to halibut PSC sideboard limits for the trawl deep-water and shallow-water species fisheries from July 1 through July 31. No halibut PSC sideboard limits apply to the CV sector as vessels participating in a rockfish cooperative receive a portion of the annual halibut PSC limit. C/Ps that opt-out of the Rockfish Program would be able to access that portion of the deep-water and shallow-water halibut PSC sideboard limit not assigned to C/P rockfish cooperatives. The sideboard provisions for C/Ps that elect to opt-out of participating in a rockfish cooperative are described in § 679.82(c), (e), and (f). Sideboard limits are linked to the catch history of specific vessels that may choose to opt-out. After March 1, NMFS will determine which C/Ps have opted-out of the Rockfish Program in 2015, and will know the ratios and amounts used to calculate opt-out sideboard ratios. NMFS will then calculate any applicable opt-out sideboard limits and post these limits on the Alaska Region Web site at *http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm).* Tables 21 and 22 list the 2015 and 2016, proposed Rockfish Program halibut PSC limits for the C/P sector, respectively. These proposed 2015 and 2016 halibut PSC limits proportionately incorporate reductions made to the annual trawl halibut PSC limits and associated seasonal apportionments (see Tables 9 and 10).

TABLE 21—PROPOSED 2015 ROCKFISH PROGRAM HALIBUT MORTALITY LIMITS FOR THE CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Sector	Shallow-water species fishery halibut PSC sideboard ratio (percent)	Deep-water species fishery halibut PSC sideboard ratio (percent)	Annual halibut mortality limit (mt)	Annual shallow-water species fishery halibut PSC sideboard limit (mt)	Annual deep-water species fishery halibut PSC sideboard limit (mt)
Catcher/processor	0.10	2.50	1,759	2	44

TABLE 22—PROPOSED 2016 ROCKFISH PROGRAM HALIBUT MORTALITY LIMITS FOR THE CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Sector	Shallow-water species fishery halibut PSC sideboard ratio (percent)	Deep-water species fishery halibut PSC sideboard ratio (percent)	Annual halibut mortality limit (mt)	Annual shallow-water species fishery halibut PSC sideboard limit (mt)	Annual deep-water species fishery halibut PSC sideboard limit (mt)
Catcher/processor	0.10	2.50	1,706	2	43

Amendment 80 Program Groundfish Sideboard and PSC Limits

Amendment 80 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (Amendment 80 Program) established a limited access privilege program for the non-AFA trawl C/P sector. The Amendment 80 Program established groundfish and halibut PSC limits for Amendment 80 Program participants to limit the ability of participants eligible for the Amendment 80 Program to expand their harvest efforts in the GOA.

Section 679.92 establishes groundfish harvesting sideboard limits on all Amendment 80 Program vessels, other than the F/V *Golden Fleece,* to amounts no greater than the limits shown in Table 37 to part 679. Under regulations at § 679.92(d), the F/V *Golden Fleece* is prohibited from directed fishing for pollock, Pacific cod, Pacific ocean perch, dusky rockfish, and northern rockfish in the GOA.

Groundfish sideboard limits for Amendment 80 Program vessels operating in the GOA are based on their average aggregate harvests from 1998 through 2004. Table 23 lists the proposed 2015 and 2016 sideboard limits for Amendment 80 Program vessels. NMFS will deduct all targeted or incidental catch of sideboard species made by Amendment 80 Program vessels from the sideboard limits in Table 23.

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Table 23. Proposed 2015 and 2016 GOA Groundfish Sideboard Limits for Amendment 80 Program Vessels (Values are rounded to the nearest metric ton.)

Species	Season	Area	Ratio of Amendment 80 sector vessels 1998 - 2004 catch to TAC	Proposed 2015 and 2016 TAC (mt)	Proposed 2015 and 2016 Amendment 80 vessel sideboard limits (mt)
Pollock	A Season January 20 - February 25	Shumagin (610)	0.003	5,357	16
		Chirikof (620)	0.002	28,932	58
		Kodiak (630)	0.002	9,687	19
	B Season March 10 - May 31	Shumagin (610)	0.003	5,356	16
		Chirikof (620)	0.002	34,556	69
		Kodiak (630)	0.002	4,059	8
	C Season August 25 - September 15	Shumagin (610)	0.003	14,771	44
		Chirikof (620)	0.002	13,892	28
		Kodiak (630)	0.002	15,310	31
	D Season October 1 - November 1	Shumagin (610)	0.003	14,771	44
		Chirikof (620)	0.002	13,892	28
		Kodiak (630)	0.002	15,309	31
	Annual	WYK (640)	0.002	5,291	11
Pacific cod	A Season[1] January 1 - June 10	W	0.020	13,069	261
		C	0.044	22,707	999
	B Season[2] September 1 - December 31	W	0.020	8,713	174
		C	0.044	15,138	666
	Annual	WYK	0.034	1,892	64
Pacific ocean perch	Annual	W	0.994	2,456	2,441
		WYK	0.961	1,976	1,899
Northern rockfish	Annual	W	1.000	1,229	1,229
Dusky rockfish	Annual	W	0.764	295	225
		WYK	0.896	1,277	1,144

[1] The Pacific cod A season for trawl gear does not open until January 20.

[2] The Pacific cod B season for trawl gear closes November 1.

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The halibut PSC sideboard limits for Amendment 80 Program vessels in the GOA are based on the historic use of halibut PSC by Amendment 80 Program vessels in each PSC target category from 1998 through 2004. These values are slightly lower than the average historic use to accommodate two factors: Allocation of halibut PSC cooperative quota under the Rockfish Program and the exemption of the F/V *Golden Fleece* from this restriction (§ 679.92(b)(2)).

Tables 24 and 25 list the proposed 2015 and 2016 halibut PSC sideboard limits for Amendment 80 Program vessels, respectively. These tables incorporate the maximum percentages of the halibut PSC sideboard limits that may be used

by Amendment 80 Program vessels, as contained in Table 38 to 50 CFR part 679. These proposed 2015 and 2016 PSC sideboard limits proportionately incorporate the reductions made to the annual trawl halibut PSC limits and associated seasonal apportionments (see Tables 9 and 10).

TABLE 24—PROPOSED 2015 HALIBUT PSC SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS IN THE GOA

[Values are rounded to the nearest metric ton]

Season	Season dates	Fishery category	Historic Amendment 80 use of the annual halibut PSC limit (ratio)	Proposed 2016 annual PSC limit (mt)	Proposed 2016 Amendment 80 vessel PSC sideboard limit (mt)
1	January 20–April 1	shallow-water	0.0048	1,759	8
		deep-water	0.0115	1,759	20
2	April 1–July 1	shallow-water	0.0189	1,759	33
		deep-water	0.1072	1,759	189
3	July 1–September 1	shallow-water	0.0146	1,759	26
		deep-water	0.0521	1,759	92
4	September 1–October 1	shallow-water	0.0074	1,759	13
		deep-water	0.0014	1,759	2
5	October 1–December 31	shallow-water	0.0227	1,759	40
		deep-water	0.0371	1,759	65

TABLE 25—PROPOSED 2016 HALIBUT PSC SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS IN THE GOA

[Values are rounded to the nearest metric ton]

Season	Season dates	Fishery category	Historic Amendment 80 use of the annual halibut PSC limit (ratio)	Proposed 2016 annual PSC limit (mt)	Proposed 2016 Amendment 80 vessel PSC sideboard limit (mt)
1	January 20–April 1	shallow-water	0.0048	1,706	8
		deep-water	0.0115	1,706	20
2	April 1–July 1	shallow-water	0.0189	1,706	32
		deep-water	0.1072	1,706	183
3	July 1–September 1	shallow-water	0.0146	1,706	25
		deep-water	0.0521	1,706	89
4	September 1–October 1	shallow-water	0.0074	1,706	13
		deep-water	0.0014	1,706	2
5	October 1–December 31	shallow-water	0.0227	1,706	39
		deep-water	0.0371	1,706	63

Classification

NMFS has determined that the proposed harvest specifications are consistent with the FMP and preliminarily determined that the proposed harvest specifications are consistent with the Magnuson-Stevens Act and other applicable laws.

This action is authorized under 50 CFR 679.20 and is exempt from review under Executive Orders 12866 and 13563.

NMFS prepared an EIS for this action and made it available to the public on January 12, 2007 (72 FR 1512). On February 13, 2007, NMFS issued the Record of Decision (ROD) for the Final EIS. A Supplemental Information Report (SIR) that assesses the need to prepare a Supplemental EIS is being prepared for the final action. Copies of the Final EIS, ROD, and SIR for this action are available from NMFS (see **ADDRESSES**). The Final EIS analyzes the environmental consequences of the proposed groundfish harvest specifications and alternative harvest strategies on resources in the action area. The Final EIS found no significant environmental consequences from the proposed action or its alternatives.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act (RFA), analyzing the methodology for establishing the relevant TACs. The IRFA evaluated the impacts on small entities of alternative harvest strategies for the groundfish fisheries in the EEZ off Alaska. As set forth in the methodology, TACs are set to a level that fall within the range of ABCs recommended by the SSC; the sum of the TACs must achieve the OY specified in the FMP. While the specific numbers that the methodology produces may vary from year to year, the methodology itself remains constant.

A description of the proposed action, why it is being considered, and the legal basis for this proposed action are contained in the preamble above. A copy of the analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The action under consideration is a harvest strategy to govern the catch of groundfish in the GOA. The preferred alternative is the existing harvest strategy in which TACs fall within the range of ABCs recommended by the SSC. This action is taken in accordance with the FMP prepared by the Council pursuant to the Magnuson-Stevens Act.

The entities directly regulated by this action are those that harvest groundfish in the EEZ of the GOA and in parallel fisheries within State of Alaska waters. These include entities operating CVs and C/Ps within the action area and entities receiving direct allocations of groundfish. On June 12, 2014, the Small Business Administration issued an

interim final rule revising the small business size standards for several industries effective July 14, 2014 (79 FR 33647, June 12, 2014). The rule increased the size standard for Finfish Fishing from $19.0 million to $20.5 million, Shellfish Fishing from $5.0 million to $5.5 million, and Other Marine Fishing from $7.0 million to $7.5 million. The new size standards were used to prepare the IRFA for this action. Fishing vessels are considered small entities if their total annual gross receipts, from all their activities combined, are less than $25.0 million. The IRFA estimates the number of harvesting vessels that are considered small entities, but these estimates may overstate the number of small entities because (1) some vessels may also be active as tender vessels in the salmon fishery, fish in areas other than Alaska and the West Coast, or generate revenue from other non-fishing sources; and (2) all affiliations are not taken into account, especially if the vessel has affiliations not tracked in available data (*i.e.*, ownership of multiple vessels or affiliation with processors) and may be misclassified as a small entity.

The IRFA shows that, in 2013, there were 1,153 individual catcher vessels with gross revenues less than or equal to $20.5 million. This estimate accounts for corporate affiliations among vessels, and for cooperative affiliations among fishing entities, since some of the fishing vessels operating in the GOA are members of AFA inshore pollock cooperatives, GOA rockfish cooperatives, or BSAI crab rationalization cooperatives. Therefore, under the RFA, it is the aggregate gross receipts of all participating members of the cooperative that must meet the "under $20.5 million" threshold. Vessels that participate in these cooperatives are considered to be large entities within the meaning of the RFA. After accounting for membership in these cooperatives, there are an estimated 1,153 small catcher vessel entities remaining in the GOA groundfish sector. This latter group of vessels had average gross revenues that varied by gear type. Average gross revenues for hook-and-line catcher vessels, pot gear vessels, and trawl gear vessels are estimated to be $380,000, $960,000, and $2.8 million, respectively. Revenue data for the three catcher/processors considered to be small entities are confidential.

The preferred alternative (Alternative 2) was compared to four other alternatives. Alternative 1 would have set TACs to generate fishing rates equal to the maximum permissible ABC (if the full TAC were harvested), unless the sum of TACs exceeded the GOA OY, in which case harvests would be limited to the OY. Alternative 3 would have set TACs to produce fishing rates equal to the most recent 5-year average fishing rate. Alternative 4 would have set TACs to equal the lower limit of the GOA OY range. Alternative 5, the "no action alternative," would have set TACs equal to zero.

The TACs associated with the preferred harvest strategy are those adopted by the Council in October 2014, as per Alternative 2. OFLs and ABCs for the species were based on recommendations prepared by the Council's GOA Plan Team in September 2014, and reviewed by the Council's SSC in October 2014. The Council based its TAC recommendations on those of its AP, which were consistent with the SSC's OFL and ABC recommendations.

Alternative 1 selects harvest rates that would allow fishermen to harvest stocks at the level of ABCs, unless total harvests were constrained by the upper bound of the GOA OY of 800,000 mt. As shown in Table 1 of the preamble, the sum of ABCs in 2015 and 2016 would be 644,165 mt, which falls below the upper bound of the OY range. The sum of TACs is 511,599 mt, which is less than the sum of ABCs. In this instance, Alternative 1 is consistent with the preferred alternative (Alternative 2), meets the objectives of that action, and has small entity impacts that are equivalent to the preferred alternative. In some instances, the selection of Alternative 1 would not reflect the practical implications that increased TACs (where the sum of TACs equals the sum of ABCs) for some species probably would not be fully harvested. This could be due to a lack of commercial or market interest in such species. Additionally, an underharvest of some TACs could result due to constraints such as the fixed, and therefore constraining, PSC limits associated with the harvest of the GOA groundfish species.

Alternative 3 selects harvest rates based on the most recent 5 years of harvest rates (for species in Tiers 1 through 3) or for the most recent 5 years of harvests (for species in Tiers 4 through 6). This alternative is inconsistent with the objectives of this action, the Council's preferred harvest strategy, because it does not take account of the most recent biological information for this fishery. NMFS annually conducts at-sea stock surveys for different species, as well as statistical modeling, to estimate stock sizes and permissible harvest levels. Actual harvest rates or harvest amounts are a component of these estimates, but in and of themselves may not accurately portray stock sizes and conditions. Harvest rates are listed for each species category for each year in the SAFE report (see **ADDRESSES**).

Alternative 4 would lead to significantly lower harvests of all species and reduce the TACs from the upper end of the OY range in the GOA, to its lower end of 116,000 mt. Overall, this would reduce 2015 TACs by about 73 percent and would lead to significant reductions in harvests of species harvested by small entities. While reductions of this size would be associated with offsetting price increases, the size of these increases is very uncertain. There are close substitutes for GOA groundfish species available in significant quantities from the Bering Sea and Aleutian Islands management area. While production declines in the GOA would undoubtedly be associated with significant price increases in the GOA, these increases would still be constrained by production of substitutes, and are very unlikely to offset revenue declines from smaller production. Thus, this alternative would have a detrimental impact on small entities.

Alternative 5, which sets all harvests equal to zero, would have a significant adverse economic impact on small entities and would be contrary to obligations to achieve OY on a continuing basis, as mandated by the Magnuson-Stevens Act. Under Alternative 5, all 1,153 individual catcher vessels impacted by this rule would have gross revenues of $0. Additionally, the three small catcher/processor impacted by this rule also would have gross revenues of $0.

The proposed harvest specifications (Alternative 2) extend the current 2015 OFLs, ABCs, and TACs to 2015 and 2016. As noted in the IRFA, the Council may modify these OFLs, ABCs, and TACs in December 2014, when it reviews the November 2014 SAFE report from its Groundfish Plan Team, and the December 2014 Council meeting reports of its SSC and AP. Because 2015 TACs in the proposed 2015 and 2016 harvest specifications are unchanged from the 2015 TACs, NMFS does not expect adverse impacts on small entities. Also, NMFS does not expect any changes made by the Council in December 2014 to have significant adverse impacts on small entities.

This action does not modify recordkeeping or reporting requirements, or duplicate, overlap, or conflict with any Federal rules.

Adverse impacts on marine mammals or endangered species resulting from

fishing activities conducted under this rule are discussed in the EIS and its accompanying annual SIRs (see **ADDRESSES**).

Authority: 16 U.S.C. 773 *et seq.;* 16 U.S.C. 1540(f); 16 U.S.C. 1801 *et seq.;* 16 U.S.C. 3631 *et seq.;* Pub. L. 105–277; Pub. L. 106–31; Pub. L. 106–554; Pub. L. 108–199; Pub. L. 108–447; Pub. L. 109–241; Pub. L. 109–479.

Dated: November 25, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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Notices

Federal Register
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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

Natural Resources Conservation Service

[Docket No. NRCS–2014–0014]

Notice of Intent for the East Locust Creek Watershed Revised Plan, Sullivan County, Missouri

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of Intent to Prepare a Supplemental Environmental Impact Statement.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA); as amended (42 U.S.C. 4321 *et seq.*), the Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture, as lead federal agency, will prepare a Supplemental Environmental Impact Statement (SEIS) for the East Locust Creek Watershed Revised Plan (ELCWRP), Sullivan County, Missouri, involving the proposed construction of a multi-purpose reservoir. The purpose of this supplement is to address changes which have occurred since the NRCS prepared the East Locust Creek Watershed Revised Plan and Environmental Impact Statement in 2006. The SEIS will update the original EIS with more recent relevant environmental information and expand the alternatives analysis beyond those previously considered. The SEIS will evaluate reasonable and practicable alternatives and their expected environmental impacts.

ADDRESSES: To be included on the mailing list for review of the SEIS, all requests should be submitted to Mr. Harold Deckerd, USDA-Natural Resources Conservation Service, Parkade Center, Suite 250, 601 Business Loop 70 West, Columbia, Missouri 65203–2585.

FOR FURTHER INFORMATION CONTACT: Mr. Harold Deckerd, NRCS Missouri State Office, by email: *harold.deckerd@mo.usda.gov*, by regular mail (see **ADDRESSES**), or by telephone: 573–876–0912.

SUPPLEMENTARY INFORMATION: The NRCS in cooperation with the North Central Missouri Regional Water Commission (NCMRWC) and the U.S. Army Corps of Engineers (Corps) will prepare a SEIS for the East Locust Creek Watershed Revised Plan in Sullivan County, Missouri authorized pursuant to the Watershed Protection and Flood Prevention Act, Public Law 83–566, (16 U.S.C. 1001–1008). The NRCS has determined that additional analysis is required and that the purposes of the National Environmental Policy Act would be furthered through the preparation of the SEIS. The Corps will be a cooperating agency in the preparation of the SEIS. The SEIS will consider all reasonable and practicable alternatives to meet the purpose and need for the federal action. The SEIS will assess the potential social, economic, and environmental impacts of the project, and will address federal, state, and local regulatory requirements along with pertinent environmental and socio-economic issues. The SEIS will analyze the direct, indirect, and cumulative effects of the proposed action. The Federal SEIS process begins with the publication of this Notice of Intent.

1. Background: The 79,490-acre East Locust Creek Watershed is located in north-central Missouri approximately 30 miles west of Kirksville in Sullivan County with small portions of the watershed in neighboring Putnam and Linn Counties. East Locust Creek is a tributary to Locust Creek which drains to the Grand River and the Missouri River.

The Sullivan and Putnam County Commissions and the Sullivan and Putnam County Soil and Water Conservation Districts initially applied for federal watershed planning assistance in the East Locust Creek Watershed in 1974. Missouri governor Christopher Bond approved their application that same year. The U.S. Soil Conservation Service (later renamed and hereafter referred to as NRCS) collected pre-authorization planning data and analyzed the East Locust Creek Watershed as part of the larger *Northern Missouri River Tributaries Study*. East Locust Creek Watershed planning was authorized in March 1984 and NRCS began planning activities under the authority of the Watershed Protection and Flood Prevention Act of 1954, Public Law 83–566, as amended (16 U.S.C. 1001–1008). NRCS completed the East Locust Creek Watershed Plan-Environmental Assessment in 1986. The plan recommended one large and 120 small dams to reduce soil erosion and flood damages. A Finding of No Significant Impact (FONSI) was published in the **Federal Register** on July 17, 1986. Local sponsors signed the Watershed Agreement in November 1986 and assistance for installation was authorized in August 1987.

The *Missouri Drought Plan* (Missouri Dept. of Natural Resources, 2002) places Sullivan County and surrounding counties in a region classified as having "severe surface and groundwater supply drought vulnerability." Underlying bedrock geology severely limits groundwater quality and availability. Recognizing the regional need for a dependable water supply, the Locust Creek Watershed Board in November 2000 requested NRCS study a potential supplement to the 1986 East Locust Creek Watershed Plan-Environmental Assessment to include a public water supply reservoir. The NCMRWC was formed in 2001 with assistance from the Missouri Department of Natural Resources "to provide an abundant source of low-cost, pure, quality water for the residents of North Central Missouri." The NCMRWC immediately became a local sponsor of the planning effort. NRCS began planning activities following authorization in July 2003. NRCS issued a Notice of Intent to prepare an Environmental Impact Statement in September of 2004. NRCS completed the East Locust Creek Watershed Revised Plan and Environmental Impact Statement (ELCWRP) in March 2006 and announced a Record of Decision to proceed with installation in September 2006. The ELCWRP found the present water supply systems for the neighboring ten-county region are inadequate and experience pressures from drought conditions. In addition, the ELCWRP documented annual flood damages to crop and pasture land, fences, roads and bridges. The ELCWRP

also identified the need for additional water-based recreational opportunities in the surrounding area. The project has not been installed because sufficient funding has not been available. Installation of the proposed action will result in temporary and permanent impacts to jurisdictional waters of the United States requiring a Clean Water Act (CWA) Section 404 permit. The Corps has not issued a Section 404 permit for this project. Potential impacts of all reasonable and practicable alternatives will be updated and analyzed in the SEIS in compliance with Section 404(b)(1) of the CWA.

2. Proposed Action: The proposed federal action as presented in the 2006 EIS includes one approximately 2,235-acre multiple-purpose reservoir on East Locust Creek, a water intake structure, a raw water line, fish and wildlife habitat enhancement and water-based recreational facilities. The purpose of the proposed federal action is to: Provide approximately 7.0 million gallons per day of raw water supply to meet the projected 50-year usage demand for the ten counties served by the NCMRWC; provide approximately 72,000 annual water-based recreational user-days and provide an approximate 22% reduction in annual flood damages in the 16.3 miles of East Locust Creek floodplain between the reservoir and the confluence with Locust Creek.

3. Alternatives: The SEIS will evaluate environmental impacts of the following alternatives and any other action alternatives identified that may be reasonable and practicable: (1) Creation of a multi-purpose reservoir; (2) a range of reasonable alternatives to meet the overall project purposes and needs; and (3) the no-action alternative. The SEIS will identify the National Economic Development (NED) alternative, which is the alternative with the greatest net economic benefit consistent with protecting the Nation's environment and document the estimated direct, indirect and cumulative impacts of the proposed action and alternatives on the environment.

4. Scoping: In developing the 2006 ELCWRP, numerous scoping meetings were held to gather public input and keep the community informed on the status of project planning activities. Several community surveys and interviews were conducted to gather information, and periodic news articles were published to update local citizens. Problems identified through the scoping process include:

- Inadequate rural water supply in the 10-county Green Hills Region
- Annual flood damages to crops, pastures, fences and infrastructure
- Unmet demand for water-based recreational facilities.

NEPA procedures do not require additional public scoping meetings for the development of a SEIS and none are planned at this time. Comments received from Federal, State or local agencies, Native American Tribes, non-governmental organizations, and interested citizens will be used to assist in the development of the Draft and Final SEIS (See **ADDRESSES** above to submit comments).

5. Public Involvement: The NRCS invites full public participation to promote open communication and better decision-making. All persons and organizations with an interest in the ELCWRP are urged to comment. Public comments are welcomed and opportunities for public participation include submitting comments to the NRCS: (1) During the development of the Draft SEIS, (2) during the review and comment period upon publishing the Draft SEIS; and (3) for 30 days after publication of the Final SEIS. Distribution of the comments received will be included in the Administrative Record without change and may include any personal information provided unless the commenter indicates that the comment includes information claimed to be confidential business information.

6. Other Environmental Review and Coordination Requirements: The Corps will be a cooperating agency in the preparation of the SEIS. The NRCS as the lead federal agency will continue to coordinate with other agencies and entities throughout the NEPA process including: The NCMRWC, Missouri Department of Natural Resources (Section 401, Historic Preservation and Dam Safety), Missouri Department of Conservation, U.S. Fish and Wildlife Service and USEPA. The Draft SEIS will address project compliance with applicable laws and regulations, including NEPA, CWA, Endangered Species Act, and the National Historic Preservation Act.

7. Permits or Licenses Required: The proposed federal action would require a CWA Section 404 permit from the Corps. The project would also require certification by the State of Missouri, Department of Natural Resources, under Section 401 of the CWA, that the project would not violate state water quality standards. A land disturbance permit issued by the Missouri Department of Natural Resources under Section 402 of the CWA (National Pollutant Discharge Elimination System Permit) would be required. Construction and Safety Permits issued by the Missouri Dam and Reservoir Safety Program would also be required.

8. Availability of Draft SEIS: The draft SEIS is estimated to be complete and available for public review in 2016.

(This activity is listed in the Catalog of Federal Domestic Assistance under NO. 10.904, Watershed Protection and Flood Prevention, and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.)

Dated: November 25, 2014.

J.R. Flores,

State Conservationist, Natural Resources Conservation Service.

[FR Doc. 2014–28673 Filed 12–5–14; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCIES: Rural Housing Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service (RHS), intention to request an extension for a currently approved information collection in support of compliance with Civil Rights laws.

DATES: Comments on this notice must be received by February 6, 2015 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Angilla Denton, Equal Opportunity Specialist, Rural Development, Civil Rights Staff, U.S. Department of Agriculture, STOP 0703, 1400 Independence Ave. SW., Washington, DC 20250–0703, Telephone (202) 692–4109 (voice).

SUPPLEMENTARY INFORMATION:

Title: 7 CFR 1901–E, Civil Rights Compliance Requirements.

OMB Number: 0575–0018.

Expiration Date of Approval: February 28, 2015.

Type of Request: Extension of a Currently Approved Information Collection.

Abstract: The information collection under OMB Number 0575–0018 enables the RHS, Rural Business-Cooperative Service (RBS), and Rural Utilities Service (RHS), to effectively monitor a recipient's compliance with the civil rights laws, and to determine whether or not service and benefits are being provided to beneficiaries on an equal opportunity basis.

The RBS, RHS, and RUS are required to provide Federal financial assistance through its housing and community and business programs on an equal opportunity basis. The laws implemented in 7 CFR part 1901, subpart E, require the recipients of RBS, RHS, and RUS Federal financial assistance to collect various types of information, including information on participants in certain of these agencies' programs, by race, color, and national origin.

The information collected and maintained by the recipients of certain programs from RBS, RHS, and RUS is used internally by these agencies for monitoring compliance with the civil rights laws and regulations. This information is made available to USDA officials, officials of other Federal agencies, and to Congress for reporting purposes. Without the required information, RBS, RHS, RUS and its recipients will lack the necessary documentation to demonstrate that their programs are being administered in a nondiscriminatory manner, and in full compliance with the civil rights laws. In addition, the RBS, RHS, RUS and their recipients would be vulnerable in lawsuits alleging discrimination in the affected programs of these agencies, and would be without appropriate data and documentation to defend themselves by demonstrating that services and benefits are being provided to beneficiaries on an equal opportunity basis.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 7.5 hours per response.

Respondents: Recipients of RBS, RHS, and RUS Federal financial assistance, loan, and loan guarantee programs.

Estimated Number of Respondents: 27,000.

Estimated Number of Responses per Respondent: 2.72.

Estimated Number of Responses: 73,559.

Estimated Total Annual Burden on Respondents: 550,276.

Copies of this information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, Support Services Division, at (202) 692–0040.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Rural Development, including whether the information will have practical utility; (b) 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) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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. Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, Support Services Division, Rural Development, U.S. Department of Agriculture, STOP 0742, Washington, DC 20250–0742. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: November 24, 2014.

Tony Hernandez,

Administrator, Rural Housing Service.

[FR Doc. 2014–28596 Filed 12–5–14; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

[Docket No.: 140826721–4999–02]

Privacy Act New System of Records

AGENCY: Department of Commerce.

ACTION: Notice; Commerce/Department–10, Executive Correspondence Files.

SUMMARY: The Department of Commerce (Commerce) publishes this notice to announce the effective date of a Privacy Act System of Records entitled Commerce/Department–10, Executive Correspondence Files.

The notice of proposed amendment to this system of records was published in the **Federal Register** on October 14, 2014.

DATES: The system of records becomes effective on December 8, 2014.

ADDRESSES: For a copy of the system of records please mail requests to Brenda Dolan, Office of Privacy and Open Government, U.S. Department of Commerce, Suite A300, Room A326, 1401 Constitution Avenue NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Brenda Dolan, Office of Privacy and Open Government, 202–482–3258.

SUPPLEMENTAL INFORMATION: On October 14, 2014, the Department of Commerce published and requested comments on a proposed Privacy Act System of Records entitled Commerce/Department–10, Executive Correspondence Files (79 FR 61599). That notice informed the public that the Department of Commerce is updating: The categories of records in the system to include databases and electronic files; the system location(s); the routine uses to include the breach notification routine use; the safeguards and storage to include electronic records; the system manager(s) and addresses; the notification procedure; and the record source categories to include interaction with correspondent/Department contact. No comments were received in response to the request for comments. By this notice, the Department is adopting the proposed system as final without changes effective December 8, 2014.

Dated: December 2, 2014.

Brenda Dolan,

Freedom of Information and Privacy Act Officer, U.S. Department of Commerce.

[FR Doc. 2014–28712 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–17–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE
[11/19/2014 through 12/2/2014]

Firm name	Firm address	Date accepted for investigation	Product(s)
KRL Bantry Components, Inc	160 Bouchard Street, Manchester, NH 03103.	11/19/2014	The firm manufactures standard and custom precision wire-wound resistors.
Skyline Exhibits & Graphics, Inc	362 Industrial Park Road, 6 Great River Center, Middletown, CT 06457.	11/19/2014	The firm manufactures trade show exhibits and graphics.
L&H Industrial, Inc	913 L&J Court, Gillette, WY 82718	11/19/2014	The firm manufactures parts for mining equipment.
Bay Motor Products, Inc	3100 Cass Road, Traverse City, MI 49684.	11/19/2014	The firm small electric motors for moving air.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: December 2, 2014.

Michael S. DeVillo,

Eligibility Examiner.

[FR Doc. 2014–28710 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–803]

Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates; Preliminary Results of Antidumping Duty Administrative Review; 2012–2013

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

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from the United Arab Emirates (UAE). The period of review (POR) is November 1, 2012, through October 31, 2013. The review covers one producer/exporter of the subject merchandise, JBF RAK LLC (JBF). The Department preliminarily determines that sales of subject merchandise have been made below normal value by JBF. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* December 8, 2014.

FOR FURTHER INFORMATION CONTACT: Andrew Huston, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4261.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The products covered by the order are all gauges of raw, pre-treated, or primed polyethylene terephthalate film, whether extruded or co-extruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Also excluded is roller transport cleaning film which has at least one of its surfaces modified by application of 0.5 micrometers of SBR latex. Tracing and drafting film is also excluded. Polyethylene terephthalate film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Methodology

The Department is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum, which is hereby adopted by this notice.[1] The Preliminary Decision Memorandum is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System ("ACCESS").[2] ACCESS is available to registered users at *http://access.trade.gov* and in the Central Records Unit in Room 7046 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/*. The signed Preliminary Decision Memorandum and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margins exist for the period November 1, 2012, through October 31, 2013:

Manufacturer/ Exporter	Weighted-average margin (percent)
JBF RAK LLC	9.02

Disclosure and Public Comment

The Department intends to disclose the calculations used in our analysis to

[1] *See* the Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates" (Preliminary Decision Memorandum), dated concurrently with this notice.

[2] On November 24, 2014, Enforcement and Compliance changed the name of Enforcement and Compliance's AD and CVD Centralized Electronic Service System ("IA ACCESS") to AD and CVD Centralized Electronic Service System ("ACCESS"). The Web site location was changed from *http://iaaccess.trade.gov* to *http://access.trade.gov*. The Final Rule changing the references to the Regulations can be found at 79 FR 69046 (November 20, 2014).

parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties are invited to comment on the preliminary results of this review. Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may not be filed later than five days after the time limit for filing case briefs.[3] Parties who submit case briefs or rebuttal briefs in this review are requested to submit with each brief: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.[4] Executive summaries should be limited to five pages total, including footnotes.[5]

Pursuant to 19 CFR 351.310(c), any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. If a hearing is requested, the Department will notify interested parties of the hearing schedule. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs.

We intend to issue the final results of this administrative review, including the results of our analysis of issues raised by the parties in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**, unless otherwise extended.[6]

Assessment Rates

Upon issuing the final results of the review, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

For any individually examined respondents whose weighted-average dumping margin is above *de minimis*, we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[7] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis*. Where either the respondent's weighted-average dumping margin is zero or *de minimis*, or an importer-specific assessment rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of PET Film from the UAE entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies under review will be the rate established in the final results of this review (except, if the rate is zero or *de minimis*, no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.05 percent, the all-others rate established in the investigation.[8] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 1, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

1. Summary
2. Background
3. Scope of the Order
4. Date of Sale
5. Discussion of Methodology
6. Product Comparisons
7. Export Price and Constructed Export Price
8. Normal Value
9. Cost of Production Analysis
10. Currency Conversion

[FR Doc. 2014–28691 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Preliminary Results of the Nineteenth Antidumping Duty Administrative Review; 2012–2013

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

SUMMARY: The Department of Commerce (Department) is conducting the nineteenth administrative review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period of review (POR) November 1, 2012, through October 31, 2013.[1] We preliminary determine that the two mandatory respondents in this review, Hebei Golden Bird Trading Co., Ltd. (Golden Bird) and Jinxiang Hejia Co., Ltd.

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[3] *See* 19 CFR 351.309(d)(1).

[4] *See* 19 CFR 351.309(c)(2), (d)(2).

[5] *See id.*

[6] *See* section 751(a)(3)(A) of the Act.

[7] In these preliminary results, the Department applied the assessment rate calculation methodology adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012).

[8] *See Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China and the United Arab Emirates: Antidumping Duty Orders and Amended Final Determination of Sales at Less Than Fair Value for the United Arab Emirates*, 73 FR 66595, 66597 (November 10, 2008).

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 FR 79392 (December 30, 2013) (*Initiation Notice*).

(Hejia), each failed to establish that it is separate from the PRC-wide entity. As a result, the PRC-wide entity is now under review.[2] We are preliminarily applying adverse facts available (AFA) to the PRC-wide entity because elements of the entity, Golden Bird and Hejia, failed to cooperate by not acting to the best of their ability to comply with the Department's requests for information. The Department is preliminarily determining that seven companies are entitled to a separate rate. Finally, the Department is also preliminarily determining that 16 companies made no shipments during the POR. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of subject merchandise during the POR. We invite interested parties to comment on these preliminary results.

DATES: *Effective Date:* December 8, 2014.

FOR FURTHER INFORMATION CONTACT: Jacqueline Arrowsmith, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5255.

Scope of the Order

The merchandise covered by the order includes all grades of garlic, whole or separated into constituent cloves. Fresh garlic that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description remains dispositive.[3]

Methodology

The Department conducted this review in accordance with section 751(a)(1)(B) of the Act. For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum, dated concurrently with these results and hereby adopted by this notice.[4] The Preliminary Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).[5] ACCESS is available to registered users at *http://access.trade.gov* and to all parties in the Central Records Unit (CRU), Room 7046 of the main Department of Commerce building. In addition, parties can obtain a complete version of the Preliminary Decision Memorandum on the Internet at *http://trade.gov/enforcement/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

PRC-Wide Entity

The two mandatory respondents, Golden Bird and Hejia, each failed to respond to the Department's requests for information and/or declined to participate in this review and therefore, each failed to establish eligibility for separate rate status. Accordingly, the Department preliminarily finds that the PRC-wide entity includes these companies. Elements of the entity failed to provide necessary information for the Department to conduct a review. Accordingly, the Department has relied on facts available.[6] Further, the Department finds that the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with a request for information. Therefore, pursuant to section 776(b) of the Act, the Department used an adverse inference when selecting from among the facts otherwise available.[7] Thus, the Department relied on AFA in order to determine a margin for the PRC-wide entity, pursuant to sections 776(a)(1), 776(a)(2)(A), (B), (C) and 776(b) of the Act.[8]

On May 29, 2014, the Department rescinded this review for companies for whom requests for review were withdrawn and which had a separate rate from a prior segment of this proceeding.[9] The Department finds that 92 of the companies whose review requests were withdrawn had not been assigned a separate rate from a prior segment of the proceeding, and thus are considered part of the PRC-wide entity. Further, an additional 30 companies for which a review was requested, and not withdrawn, did not file a separate rate application or certification, nor did they file a no shipments certification.[10] Accordingly, because these companies did not demonstrate their eligibility for a separate rate, the Department preliminarily determines that they are also part of the PRC-wide entity. A full list of companies preliminarily determined to be part of the PRC-wide entity can be found in Appendix II.

Preliminary Determination of Separate Rates for Non-Selected Companies

In accordance with section 777A(c)(2)(B) of the Act, the Department employed a limited examination methodology, as it determined that it would not be practicable to examine individually all companies for which a review request was made. There were seven exporters of subject merchandise from the PRC that have demonstrated their eligibility for a separate rate but which were not selected for individual examination in this review. These seven exporters of subject merchandise that have demonstrated their eligibility for a separate rate, but which were not selected for an individual examination in this review are: Chengwu County Yuanxiang Industry & Commerce Co, Ltd.; Jinxiang Richfar Fruits and Vegetables Co., Ltd.; Qingdao Lianghe International Trade Co., Ltd., Shandong Chenhe International Trading Co., Ltd.; Shenzhen Xinboda Industrial Trading Co., Ltd.; Weifang Hongqiao International Logistics Co., Ltd.; and XuZhou Simple Garlic Industry Co., Ltd.

Neither the Act nor the Department's regulations address the establishment of the rate applied to individual

[2] On November 4, 2013, the Department announced a change in practice with respect to the condition review of the NME entity. *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Proceedings,* 78 FR 65963 (Nov. 4, 2013). The change in practice is not applicable in this administrative review.

[3] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance regarding "Decision Memorandum for the Preliminary Results and Preliminary Rescission of the 2012–2013 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China," dated concurrently with these results and hereby adopted by this notice ("Preliminary Decision Memorandum"), for a complete description of the Scope of the Order.

[4] *See* Preliminary Decision Memorandum.

[5] On November 24, 2014, Enforcement and Compliance changed the name of Enforcement and Compliance's AD and CVD Centralized Electronic Service System ("IA ACCESS") to AD and CVD Centralized Electronic Service System ("ACCESS"). The Web site location was changed from *http://iaaccess.trade.gov* to *http://access.trade.gov.* The Final Rule changing the references to the Regulations can be found at 79 FR 69046 (November 20, 2014).

[6] *See* sections 776(a)(1) and (2)(A)–(C) of the Act.

[7] *See* section 776(b) of the Act.

[8] *See* Preliminary Decision Memorandum at the sections pertaining to "PRC-Wide Entity" and "Selection of Adverse Facts Available (AFA) Rate" for a discussion of the AFA rate.

[9] *See Fresh Garlic From the People's Republic of China: Partial Rescission of the 19th Antidumping Duty Administrative Review; 2012–2013,* 79 FR 30819 (May 29, 2014).

[10] *See* the Preliminary Decision Memorandum at the sections pertaining to "PRC-Wide Entity."

companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation. Section 735(c)(5)(A) of the Act instructs the Department to use rates established for individually investigated producers and exporters, excluding any rates that are zero, *de minimis*, or based entirely on facts available in investigations. Section 735(c)(5)(B) of the Act provides that, where all rates are zero, *de minimis*, or based entirely on facts available, the Department may use "any reasonable method" for assigning a rate to non-examined respondents. The weighted-average margin preliminarily determined for the individually-examined respondents in this review is based entirely on facts available. For the preliminary results, the Department has preliminarily determined to assign a rate of 1.82 U.S. dollars per kilogram, which is the rate for separate rate companies for the most recently completed (18th) administrative review.[11]

Preliminary Determination of No Shipments

The companies listed in Appendix I timely filed "no shipment" certifications stating that they had no entries of subject merchandise during the POR.[12] Consistent with its practice, the Department asked CBP to conduct a query of potential shipments made by these companies. CBP did not provide evidence that contradicted the parties' no shipment claims. Based on the certifications by these companies and our analysis of CBP information, we preliminarily determine that the companies listed in Appendix I did not have any reviewable transactions during the POR. In addition, the Department finds that consistent with its refinement to its assessment practice in non-market economy (NME) cases, further discussed below, it is appropriate not to rescind the review in part in these circumstances but to complete the review with respect to these 16 companies and issue appropriate instructions to CBP based on the final results of the review.[13]

Preliminary Results of Review

Regarding the administrative review, the Department preliminarily determines that the following weighted-average dumping margins exist for the period November 1, 2012, through October 31, 2013:

Exporter	Weighted-average margin (dollars per kilogram)
Chengwu County Yuanxiang Industry & Commerce Co., Ltd	1.82
Jinxiang Richfar Fruits & Vegetables Co., Ltd	1.82
Qingdao Lianghe International Trade Co., Ltd	1.82
Shandong Chenhe International Trading Co., Ltd	1.82
Shenzhen Xinboda Industrial Co., Ltd	1.82
Weifang Hongqiao International Logistics Co., Ltd	1.82
XuZhou Simple Garlic Industry Co., Ltd	1.82
PRC-Wide Rate	4.71

Public Comment & Opportunity To Request a Hearing

Unless otherwise notified by the Department, interested parties may submit written comments (case briefs) no later than 30 days after the date of publication of these preliminary results of review and rebuttal comments (rebuttal briefs) within five days after the time limit for filing case briefs.[14] Pursuant to 19 CFR 351.309(d)(2), rebuttal briefs must be limited to issues raised in the case briefs. Parties who submit arguments are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and, (3) a table of authorities.[15]

Any interested party may request a hearing within 30 days of publication of this notice.[16] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the case and rebuttal briefs.[17] If a party requests a hearing, the Department will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined. Parties should confirm by telephone the date, time, and location of the hearing.

The Department intends to issue the final results of this review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[18] The Department will direct CBP to assess rates based on the per-unit (*i.e.*, per kilogram) amount on each entry of the subject merchandise during the POR. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of review.

Also, the Department announced a refinement to its assessment practice in NME cases. Pursuant to this refinement in practice, for merchandise that was not reported in the U.S. sales databases submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.*, at the individually-examined exporter's cash deposit rate), the Department will instruct CBP to liquidate such entries at the NME-wide rate. In addition, if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.*, at that exporter's rate) will be liquidated at the PRC-wide rate.[19]

Cash Deposit Requirements

The following cash deposit requirements, when imposed, will apply to all shipments of subject merchandise

[11] *See Fresh Garlic From the People's Republic of China: Preliminary Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 FR 36721 (June 30, 2014) (*2011–2012 Garlic Final*).

See also Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011).

[12] The Department notes that Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd., companies who participated in the November 1, 2012, to April 30, 2013 new shipper review (*see, e.g., Fresh Garlic From the People's Republic of China: Final Results of the Semiannual Antidumping Duty New Shipper Review of Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.; 2012–2013*, 79 FR 62103 (October 16, 2014)) certified that it had not shipments between May 1, 2013 and October 31, 2013.

[13] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694, 65694–95 (October 24, 2011); *see also* "Assessment Rates" section below.

[14] *See* 19 CFR 351.309(c)(1)(ii) and (d)(1).

[15] *See* 19 CFR 351.309(c)(2), (d)(2).

[16] *See* 19 CFR 351.310(c).

[17] *Id.*

[18] *See* 19 CFR 351.212(b).

[19] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011).

entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) For the companies listed above, the cash deposit rate will be the rate established in these final results of review (except, if the rate is zero or *de minimis*, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 4.71 U.S. dollars per kilogram; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h) and 351.221(b)(4).

Dated: December 1, 2014.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Companies That Have Certified No Shipments

1. Cangshan Qingshui Vegetable Foods Co., Ltd.
2. Chengwu County Yuanxiang Industry & Commerce Co., Ltd.
3. Jinan Farmlady Trading Co., Ltd.
4. Jining Yifa Garlic Produce Co., Ltd.
5. Jining Yongjia Trade Co., Ltd.
6. Jinxiang Chengda Import & Export Co., Ltd.
7. Jinxiang Merry Vegetable Co., Ltd.
8. Jinxiang Yuanxin Import & Export Co., Ltd.
9. Shenzhen Bainong Co., Ltd.
10. Shijazhuang Goodman Trading Co., Ltd.
11. Qingdao Maycarrier Import & Export Co., Ltd.
12. Qingdao Sea-line International Trading Co.
13. Qingdao Tiantaixing Foods Co., Ltd.
14. Qingdao Xiangtiangfeng Foods Co., Ltd. or Xi Tian Feng
15. Xuzhou Simple Garlic Industry Co., Ltd.
16. Yantai Jinyan Trading Inc.

Appendix II—List of Companies Subject to the PRC-Wide Rate

1. American Pioneer Shipping
2. Anhui Dongqian Foods Ltd.
3. Anqiu Friend Food Co., Ltd.
4. Anqiu Haoshun Trade Co., Ltd.
5. APM Global Logistics (Shanghai) Co., Ltd.
6. APS Qingdao
7. Chiping Shengkang Foodstuff Co., Ltd.
8. CMEC Engineering Machinery Import & Export Co., Ltd.
9. Dalian New Century Food Co., Ltd.
10. Dongying Shunyifa Chemical Co., Ltd.
11. Dynalink Systems Logistics (Qingdao) Inc.
12. Eimskip Logistics Inc.
13. Feicheng Acid Chemicals Co., Ltd.
14. Foshan Fuyi Food Co, Ltd.
15. Frog World Co., Ltd.
16. Golden Bridge International, Inc.
17. Goodwave Technology Development Ltd.
18. Guangxi Lin Si Fu Bang Trade Co., Ltd
19. Hangzhou Guanyu Foods Co., Ltd.
20. Hebei Golden Bird Trading Co., Ltd.
21. Hejiahuan (Zhongshan) Electrical AP
22. Henan Weite Industrial Co., Ltd.
23. Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company)
24. Hongkong Golden Eagle Group Ltd.
25. Hongqiao International Logistics Co.
26. Intecs Logistics Service Co., Ltd.
27. IT Logistics Qingdao Branch
28. Jinan Solar Summit International Co., Ltd.
29. Jinan Yipin Corporation Ltd.
30. Jining De-Rain Trading Co., Ltd.
31. Jining Highton Trading Co., Ltd.
32. Jining Jiulong International Trading Co., Ltd.
33. Jining Tiankuang Trade Co., Ltd.
34. Jining Trans-High Trading Co., Ltd.
35. Jinxiang County Huaguang Food Import & Export Co., Ltd.
36. Jinxiang Dacheng Food Co., Ltd.
37. Jinxiang Dongyun Freezing Storage Co., Ltd. (a/k/a Jinxiang Eastward Shipping Import and Export Limited Company)
38. Jinxiang Dongyun Import & Export Co., Ltd.
39. Jinxiang Fengsheng Import & Export Co., Ltd.
40. Jinxiang Grand Agricultural Co., Ltd.
41. Jinxiang Hejia Co., Ltd.
42. Jinxiang Infarm Fruits & Vegetables Co., Ltd.
43. Jinxiang Meihua Garlic Produce Co., Ltd.
44. Jinxiang Shanyang Freezing Storage Co., Ltd.
45. Jinxiang Shenglong Trade Co., Ltd.
46. Jinxiang Tianheng Trade Co., Ltd.
47. Jinxiang Tianma Freezing Storage Co., Ltd.
48. Jinxiang Xian Baishite Trade Co., Ltd. (a/k/a Jinxiang Best Trade Co., Ltd.)
49. Juye Homestead Fruits and Vegetables Co., Ltd.
50. Kingwin Industrial Co., Ltd.
51. Laiwu Fukai Foodstuff Co., Ltd.
52. Laiwu Jiahe Fruit and Vegatable Co., Ltd.
53. Laizhou Xubin Fruits and Vegetables
54. Linshu Dading Private Agricultural Products Co., Ltd.
55. Linyi City Hedong District Jiuli Foodstuff Co.
56. Linyi City Kangfa Foodstuff Drinkable Co., Ltd.
57. Linyi Katayama Foodstuffs Co., Ltd.
58. Linyi Tianqin Foodstuff Co., Ltd.
59. Ningjin Ruifeng Foodstuff Co., Ltd.
60. Qingdao Apex Shipping Co., Ltd.
61. Qingdao BNP Co., Ltd.
62. Qingdao Cherry Leather Garment Co., Ltd.
63. Qingdao Chongzhi International Transportation Co., Ltd.
64. Qingdao Everfresh Trading Co., Ltd.
65. Qingdao Liang He International Trade Co., Ltd.
66. Qingdao Lianghe International Trade Co., Ltd.
67. Qingdao Saturn International Trade Co., Ltd.
68. Qingdao Sino-World International Trading Co., Ltd.
69. Qingdao Winner Foods Co., Ltd.
70. Qingdao XinTian Feng Food Co., Ltd.
71. Qingdao Yuankang International
72. Qufu Dongbao Import & Export Trade Co., Ltd.
73. Rizhao Huasai Foodstuff Co., Ltd.
74. Samyoung America (Shanghai) Inc.
75. Shandong Chengshun Farm Produce Trading Co., Ltd.
76. Shandong Chenhe Intl Trading Co., Ltd.
77. Shandong China Bridge Imports
78. Shandong Dongsheng Eastsun Foods Co., Ltd.
79. Shandong Garlic Company
80. Shandong Longtai Fruits and Vegetables Co., Ltd.
81. Shandong Sanxing Food Co., Ltd.
82. Shandong Wonderland Organic Food Co., Ltd.
83. Shandong Xingda Foodstuffs Group Co., Ltd.
84. Shandong Yipin Agro (Group) Co., Ltd.
85. Shanghai Ever Rich Trade Company
86. Shanghai Goldenbridge International Co., Ltd.
87. Shanghai Great Harvest International Co., Ltd.
88. Shanghai LJ International Trading Co., Ltd.
89. Shanghai Medicines & Health Products Import/Export Co., Ltd.
90. Shanghai Yijia International Transportation Co., Ltd.
91. Shenzhen Fanhui Import & Export Co., Ltd.
92. Shenzhen Greening Trading Co., Ltd.
93. Shenzhen Xunong Trade Co., Ltd.
94. Sunny Import & Export Limited
95. Tangerine International Trading Co.
96. T&S International, LLC.
97. Taian Eastsun Foods Co., Ltd.
98. Taian Fook Huat Tong Kee Pte. Ltd.
99. Taian Solar Summit Food Co., Ltd.
100. Taiyan Ziyang Food Co., Ltd.
101. Tianjin Spiceshi Co., Ltd.
102. U.S. United Logistics (Ningbo) Inc.
103. V.T. Impex (Shandong) Limited
104. Weifang Chenglong Import & Export Co., Ltd.

105. Weifang He Lu Food Import & Export Co., Ltd.
106. Weifang Hong Qiao International Logistics Co., Ltd.
107. Weifang Jinbao Agricultural Equipment Co., Ltd.
108. Weifang Naike Foodstuffs Co., Ltd.
109. Weifang Shennong Foodstuff Co., Ltd.
110. Weihai Textile Group Import & Export Co., Ltd.
111. WSSF Corporation (Weifang)
112. Xiamen Huamin Import Export Company
113. Xiamen Keep Top Imp. and Exp. Co., Ltd.
114. Xinjiang Top Agricultural Products Co., Ltd.
115. XuZhou Heiners Agricultural Co., Ltd.
116. Yishui Hengshun Food Co., Ltd.
117. You Shi Li International Trading Co., Ltd.
118. Zhangzhou Xiangcheng Rainbow Greenland Food Co., Ltd.
119. Zhengzhou Dadi Garlic Industry Co., Ltd.
120. Zhengzhou Huachao Industrial Co., Ltd.
121. Zhengzhou Xiwannian Food Co., Ltd.
122. Zhengzhou Xuri Import & Export Co., Ltd.
123. Zhengzhou Yuanli Trading Co., Ltd.
124. Zhong Lian Farming Product (Qingdao) Co., Ltd.

Appendix III—List of Topics Discussed in the Preliminary Decision Memorandum

Preliminary Rescission of Review
Separate Rate Determination
Separate Rate for Non-Selected Companies
Preliminary Determination of No Shipments
PRC-Wide Entity

[FR Doc. 2014–28688 Filed 12–5–14; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Advisory Committee on Earthquake Hazards Reduction Meeting

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Earthquake Hazards Reduction (ACEHR or Committee), will meet on Thursday, April 9, 2015 from 8:30 a.m. to 5:00 p.m. Eastern Time and Friday, April 10, 2015, from 8:30 a.m. to 2:30 p.m. Eastern Time. The primary purpose of this meeting is to develop the Committee's 2015 Report on the Effectiveness of the National Earthquake Hazards Reduction Program (NEHRP) and to review the NEHRP agency updates on their latest activities. The agenda may change to accommodate Committee business. The final agenda will be posted on the NEHRP Web site at *http://nehrp.gov/*.

DATES: The ACEHR will meet on Thursday, April 9, 2015, from 8:30 a.m. until 5:00 p.m. Eastern Time. The meeting will continue on Friday, April 10, 2015, from 8:30 a.m. until 2:30 p.m. Eastern Time. The meeting will be open to the public.

ADDRESSES: The meeting will be held in the Portrait Room, Administration Building, National Institute of Standards and Technology (NIST), 100 Bureau Drive, Gaithersburg, Maryland 20899. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Tina Faecke, Management and Program Analyst, National Earthquake Hazards Reduction Program, Engineering Laboratory, NIST, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, Maryland 20899–8604. Ms. Faecke's email address is *tina.faecke@nist.gov* and her phone number is (301) 975–5911.

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the requirements of Section 103 of the NEHRP Reauthorization Act of 2004 (Public Law 108–360). The Committee is composed of 13 members appointed by the Director of NIST, who were selected for their established records of distinguished service in their professional community, their knowledge of issues affecting NEHRP, and to reflect the wide diversity of technical disciplines, competencies, and communities involved in earthquake hazards reduction. In addition, the Chairperson of the U.S. Geological Survey (USGS) Scientific Earthquake Studies Advisory Committee (SESAC) serves as an ex-officio member of the Committee. The Committee assesses:

- Trends and developments in the science and engineering of earthquake hazards reduction;
- the effectiveness of NEHRP in performing its statutory activities;
- any need to revise NEHRP; and
- the management, coordination, implementation, and activities of NEHRP.

Background information on NEHRP and the Advisory Committee is available at *http://nehrp.gov/*.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the ACEHR will hold an open meeting on Thursday, April 9, 2015 from 8:30 a.m. to 5:00 p.m. Eastern Time and Friday, April 10, 2015, from 8:30 a.m. to 2:30 p.m. Eastern Time. The meeting will be held in the Portrait Room, Administration Building, NIST, 100 Bureau Drive, Gaithersburg, Maryland 20899. The primary purpose of this meeting is to develop the Committee's 2015 Report on the Effectiveness of the NEHRP and to review the NEHRP agency updates on their latest activities. The agenda may change to accommodate Committee business. The final agenda will be posted on the NEHRP Web site at *http://nehrp.gov/*.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee's affairs are invited to request a place on the agenda. On April 10, 2015, approximately one-half hour will be reserved near the conclusion of the meeting for public comments, and speaking times will be assigned on a first-come, first-serve basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about three minutes each. Questions from the public will not be considered during this period. All those wishing to speak must submit their request by email to the attention of Ms. Tina Faecke, *tina.faecke@nist.gov,* by 5:00 p.m. Eastern time, Thursday, April 2, 2015.

Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to ACEHR, National Institute of Standards and Technology, 100 Bureau Drive, MS 8604, Gaithersburg, Maryland 20899–8604, via fax at (301) 975–4032, or electronically by email to *tina.faecke@nist.gov.*

All visitors to the NIST site are required to pre-register to be admitted. Anyone wishing to attend this meeting must register by 5:00 p.m. Eastern Time, Thursday, April 2, 2015, in order to attend. Please submit your full name, email address, and phone number to Felicia Johnson. Non-U.S. citizens must submit additional information; please contact Ms. Johnson. Ms. Johnson's email address is *felicia.johnson@nist.gov* and her phone number is (301) 975–5324. Also, please note that under the REAL ID Act of 2005 (P.L. 109–13), federal agencies, including NIST, can only accept a state-issued driver's license or identification card for access to federal facilities if issued by states that are REAL ID compliant or have an extension. NIST also currently accepts other forms of federal-issued identification in lieu of a state-issued driver's license. For detailed information please contact Ms. Johnson or visit: *http://www.nist.gov/public_affairs/visitor/*.

Dated: December 2, 2014.

Richard Cavanagh,

Acting Associate Director for Laboratory Programs.

[FR Doc. 2014–28686 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD527

Marine Mammals; File No.18727; Correction

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

ACTION: Notice of receipt of application; Correction.

SUMMARY: On October 30, 2014, a notice was published in the **Federal Register** announcing that the University of Alaska Museum of the North, 907 Yukon Drive, Fairbanks, AK 99775–6960 (Aren Gunderson, Responsible Party), had applied in due form for a permit to collect, import and export specimens of marine mammals for scientific research. That document inadvertently provided incorrect requested take numbers. This document corrects that oversight.

DATES: Written, telefaxed, or email comments must be received on or before January 7, 2015.

FOR FURTHER INFORMATION CONTACT: Brendan Hurley or Jennifer Skidmore, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The notice for File No. 18727 (79 FR 64571; October 30, 2014) contained incorrect take numbers associated with the collection, receipt, import, and export of samples under the proposed action. Accordingly, the **SUPPLEMENTARY INFORMATION** section is corrected to read as follows:

The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361, *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531, *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151, *et seq.*).

File No. 18727: The University of Alaska Museum of the North functions as an archive for scientific specimens of marine mammals under the jurisdiction of the National Marine Fisheries and is a major repository of marine mammal material from the Arctic and North Pacific oceans. Under the proposed permit, the applicant would (1) import/export marine mammal parts (bones and organ tissue samples) from dead beach-cast carcasses, (2) receive/archive and export samples of marine mammals taken by Alaskan Native subsistence hunters, and (3) receive, import/export specimens from scientists in academic, federal, and state institutions involved in marine mammal research under their own permits. Unlimited samples from up to 2000 pinnipeds (excluding walrus) and 600 cetaceans would be collected, received, imported, or exported annually. Import/export activities would occur world-wide. No live animals would be harassed or taken, lethally or otherwise, under the requested permit. The permit is requested for a five-year period.

All other information contained in the document is unchanged.

Dated: December 2, 2014.

Julia Harrison,

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

[FR Doc. 2014–28637 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA341

Marine Mammals; File No. 15324

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

ACTION: Notice of issuance of permit amendment.

SUMMARY: Notice is hereby given that a major amendment to Permit No. 15324 has been issued to the Alaska Department of Fish and Game (ADF&G), Division of Wildlife Conservation, Juneau, AK (Responsible Party: Robert Small, Ph.D.).

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

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Courtney Smith, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On April 4, 2014, notice was published in the **Federal Register** (79 FR 18890) that a request for an amendment Permit No. 15324 to conduct research on pinniped species in Alaska had been submitted by the above-named applicant. The requested permit amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 15324–01 authorizes the permit holder to take spotted (*Phoca largha*), ringed (*Phoca hispida*), bearded (*Erignathus barbatus*), and ribbon seals (*Histriophoca fasciata*) in the Bering, Chukchi, and Beaufort seas of Alaska to monitor the status and health of each species by analyzing biological samples from the subsistence harvest and live captured seals, and by documenting movements and habitat use by tracking animals with satellite transmitters. The permit authorizes harassment of non-target seals of each species and a limited number of research-related mortalities. Samples may be imported from Russia, Canada, Svalbard (Norway) and exported to Canada for analyses. The permit was amended to include: (1) Takes by harassment during aerial and vessel surveys to monitor seal distribution relative to changes in sea ice; (2) increased takes by incidental harassment; (3) the use of additional sedative drugs during capture activities; and (4) the use of remote dart-delivery as a method for capturing bearded seals. The amended permit is valid through December 31, 2016.

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

As required by the ESA, issuance of this permit was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 2, 2014.

Julia Harrison,

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

[FR Doc. 2014–28638 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD340

Marine Mammals; File No. 18523

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to Heather Liwanag, Ph.D., Adelphi University, Biology Department, 1 South Avenue, Garden City, NY 11530, to receive, import, and export marine mammal specimens for scientific research purposes.

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

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Jennifer Skidmore, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On July 2, 2014, notice was published in the **Federal Register** (79 FR 37719) that a request for a permit to receive, import, and export marine mammal specimens for scientific research had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

Permit No. 18523–00 authorizes the holder to receive, import, and export unlimited samples from up to 1,500 individuals of each species of cetacean, and from up to 1,500 individuals of each species of pinniped (excluding walrus), annually. Marine mammal samples may be obtained from the following sources: (1) Animals killed during legal subsistence harvests; (2) animals that died incidental to legal commercial fishing operations; (3) animals stranded in foreign countries; (4) samples collected from captive animals; and (5) samples from other authorized researchers and collections. Samples collected from stranded animals in the U.S. and received under separate authorization may be exported and re-imported. The permit expires on October 31, 2019.

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

As required by the ESA, issuance of this permit was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 2, 2014.

Julia Harrison,

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

[FR Doc. 2014–28676 Filed 12–5–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD593

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the U.S. Air Force Conducting Maritime Weapon Systems Evaluation Program Operational Testing Within the Eglin Gulf Test and Training Range

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS received an application from the U.S. Department of the Air Force, Headquarters 96th Air Base Wing (Air Force), Eglin Air Force Base (Eglin AFB), requesting an Incidental Harassment Authorization (Authorization) to take marine mammals, by harassment, incidental to a Maritime Weapon Systems Evaluation Program (Maritime WSEP) within the Eglin Gulf Test and Training Range in the Gulf of Mexico.

Eglin AFB's activities are military readiness activities per the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2004. Per the MMPA, NMFS requests comments on its proposal to issue an Authorization to Eglin AFB to take, by harassment, two species of marine mammals during the specified activity for a period of one year.

DATES: NMFS must receive comments and information no later than January 7, 2015.

ADDRESSES: Address comments on the application to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Cody@noaa.gov*. Please include 0648–XD593 in the subject line. Comments sent via email to *ITP.Cody@noaa.gov*, including all attachments, must not exceed a 25-megabyte file size. NMFS is not responsible for email comments sent to addresses other than the one provided here.

Instructions: All submitted comments are a part of the public record and NMFS will post them to *http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

To obtain an electronic copy of the application, a list of the references used in this document, and Eglin AFB's Draft Environmental Assessment (DEA) titled, "Maritime Weapons System Evaluation Program," visit the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm*.

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

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small

numbers of marine mammals of a species or population stock, by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if, after NMFS provides a notice of a proposed authorization to the public for review and comment: (1) NMFS makes certain findings; and (2) the taking is limited to harassment.

Through the authority delegated by the Secretary, NMFS shall grant an Authorization for the incidental taking of small numbers of marine mammals if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant).

The Authorization must also prescribe, where applicable, the permissible methods of taking by harassment pursuant to the activity; other means of effecting the least practicable adverse impact on the species or stock and its habitat, and on the availability of such species or stock for taking for subsistence uses (where applicable); the measures that NMFS determines are necessary to ensure no unmitigable adverse impact on the availability for the species or stock for taking for subsistence purposes (where applicable); and requirements pertaining to the mitigation, monitoring and reporting of such taking. NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

The National Defense Authorization Act of 2004 (NDAA; Public Law 108–136) removed the "small numbers" and "specified geographical region" limitations indicated earlier and amended the definition of harassment as it applies to a "military readiness activity" to read as follows: (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

NMFS received an application on August 5, 2014, from Eglin AFB for the taking, by harassment, of marine mammals, incidental to Maritime WESP operational testing in the spring of 2015 within the Eglin Gulf Test and Training Range (EGTTR). Eglin AFB submitted a revised application to NMFS on October 20, 2014, which provided updated take estimates for marine mammals based on updated acoustic thresholds for acoustic sources. Eglin AFB submitted a second revised application to NMFS on December 1, 2014, which provided updated mitigation zones to ensure adequacy and completeness of their MMPA application. NMFS determined the application adequate and complete on December 2, 2014.

Eglin AFB proposes to conduct Maritime WESP missions within the EGTTR airspace over the Gulf of Mexico, specifically within Warning Area 151 (W–151). The proposed testing activities would occur during the daytime over a three-week period between February and April, 2015. Eglin AFB proposes to use multiple types of live munitions (*e.g.,* gunnery rounds, rockets, missiles, and bombs) against small boat targets in the EGTTR. These activities qualify as a military readiness activities under the MMPA and NDAA.

The following specific aspect of the proposed activity has the potential to take marine mammals: increased underwater sound and pressure generated during the WSEP testing missions. Take, by Level B harassment of individuals of common bottlenose dolphin (*Tursiops truncatus*) or Atlantic spotted dolphin (*Stenella frontalis*) could potentially result from the specified activity. Additionally, although NMFS does not expect it to occur, Eglin AFB has also requested authorization for Level A Harassment of up to 40 individuals of either common bottlenose dolphins or Atlantic spotted dolphins. Therefore, Eglin AFB has requested authorization to take individuals of two cetacean species by Level A and Level B harassment.

Eglin AFB's Maritime WSEP operations may potentially impact marine mammals at or near the water surface. Marine mammals could potentially be harassed, injured, or killed by exploding and non-exploding projectiles, and falling debris. However, based on analyses provided in Eglin AFB's Draft Environmental Assessment (DEA); their Authorization application, including proposed mitigation and monitoring measures; and, for reasons discussed later in this document, NMFS does not anticipate that Eglin AFB's Maritime WSEP activities would result in any serious injury or mortality to marine mammals.

Description of the Specified Activity

Overview

Eglin AFB proposes to conduct live ordnance testing and training in the Gulf of Mexico as part of the Maritime WSEP operational testing. The Maritime WSEP test objectives are to evaluate maritime deployment data, evaluate tactics, techniques and procedures, and to determine the impact of techniques and procedures on combat Air Force training. The need to conduct this type of testing has arisen in response to increasing threats at sea posed by operations conducted from small boats which can carry a variety of weapons; can form in large or small numbers; and may be difficult to locate, track, and engage in the marine environment. Because of limited Air Force aircraft and munitions testing on engaging and defeating small boat threats, the Air Force proposes to employ live munitions against boat targets in the EGTTR in order to continue development of techniques and procedures to train Air Force strike aircraft to counter small maneuvering surface vessels. Thus, the Department of Defense considers the Maritime WSEP activities as high priority for national security.

The proposed Maritime WSEP missions are similar to Eglin AFB's Maritime Strike Operations where NMFS issued an Incidental Harassment Authorization to Eglin AFB related to training exercises around small boat threats (78 FR 52135, August 22, 2013).

Dates and Duration

Eglin AFB proposes to schedule the Maritime WSEP missions over an approximate two- to three-week period that would begin February 6, 2015 and end by March 31, 2015. The proposed missions would occur on weekdays, during daytime hours only, with one or two missions occurring per day. Some minor deviation from Eglin AFB's requested dates is possible and the proposed Authorization, if issued, would be effective from February 5, 2015 through March 30, 2015.

Specified Geographic Region

The specific planned mission location is approximately 17 miles (mi) (27.3 kilometers [km]) offshore from Santa Rosa Island, Florida, in nearshore waters of the continental shelf in the Gulf of Mexico. All activities would take place within the EGTTR, defined as the airspace over the Gulf of Mexico controlled by Eglin AFB, beginning at a point three nautical miles (nmi) (3.5 miles [mi]; 5.5 kilometers [km]) from shore. The EGTTR consists of

subdivided blocks including Warning Area 151 (W–151) where the proposed activities would occur, specifically in sub-area W–151A shown (Figure 1).

W–151: The inshore and offshore boundaries of W–151 are roughly parallel to the shoreline contour. The shoreward boundary is three nmi (3.5 mi; 5.5 km) from shore, while the seaward boundary extends approximately 85 to 100 nmi (97.8 mi; 157.4 km to 115 mi; 185.2 km) offshore, depending on the specific location. W–151 covers a surface area of approximately 10,247 square nmi [nmi²] (13,570 square mi [mi²]; 35,145 square km [km²]), and includes water depths ranging from about 20 to 700 meters (m) (65.6 to 2296.6 feet [ft]). This range of depth includes continental shelf and slope waters. Approximately half of W–151 lies over the shelf.

W–151A: W–151A extends approximately 60 nmi (69.0 mi; 111.1 km) offshore and has a surface area of 2,565 nmi² (3,396.8 mi²; 8,797 km²). Water depths range from about 30 to 350 m (98.4 to 1148.2 ft) and include continental shelf and slope zones. However, most of W–151A occurs over the continental shelf, in water depths less than 250 m (820.2 ft). Maritime WSEP missions will occur in the shallower, northern inshore portion of the sub-area, in a water depth of about 35 meters (114.8 ft).

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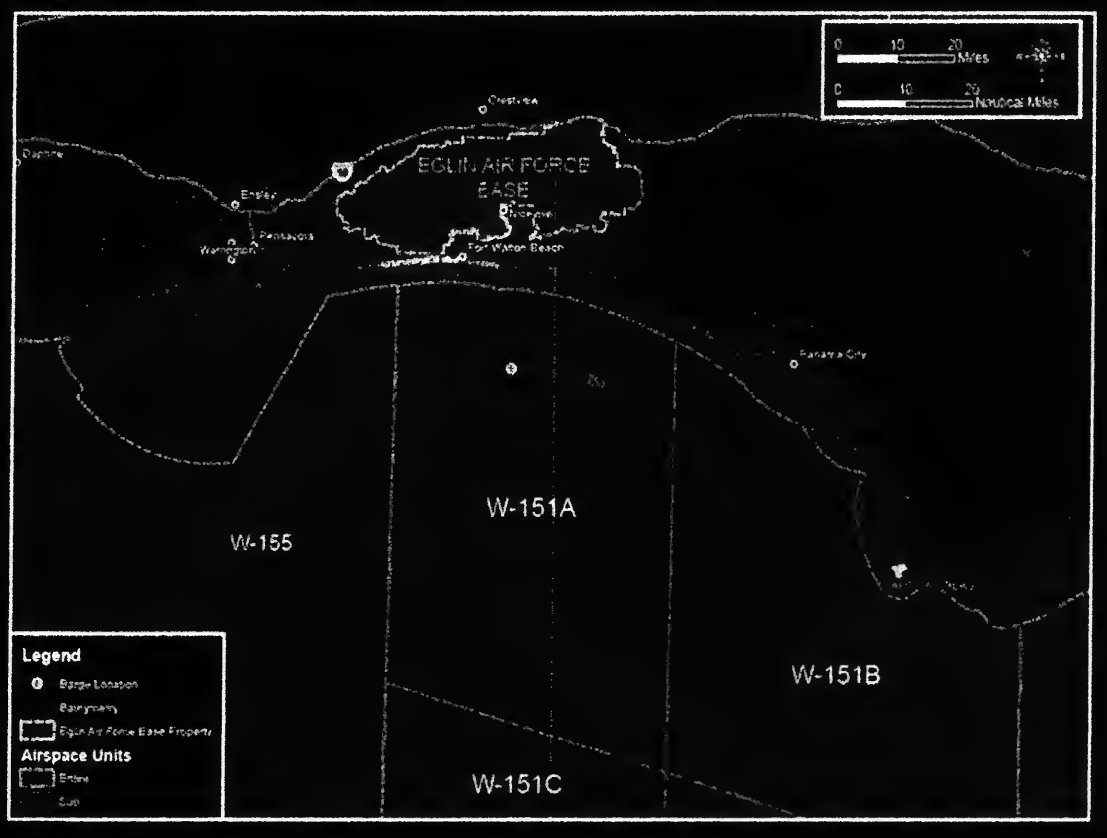

Figure 1 – Proposed Maritime WSEP operational testing location in block W-151A in the EGTRR.

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Detailed Description of Activities

The Maritime WSEP operational testing missions, classified as military readiness activities, include the release of multiple types of inert and live munitions from fighter and bomber aircraft, unmanned aerial vehicles, and gunships against small, static, towed, and remotely-controlled boat targets. Munition types include bombs, missiles, rockets, and gunnery rounds (Table 1).

TABLE 1—LIVE MUNITIONS AND AIRCRAFT

Munitions	Aircraft (not associated with specific munitions)
GBU–10 laser-guided Mk–84 bomb	F–16C fighter aircraft.
GBU–24 laser-guided Mk–84 bomb	F–16C+ fighter aircraft.
GBU–12 laser-guided Mk–82 bomb	F–15E fighter aircraft.
GBU–54 Laser Joint Direct Attack Munition (LJDAM), laser-guided Mk–82 bomb	A–10 fighter aircraft.
CBU–105 (WCMD)	B–1B bomber aircraft.
AGM–65 Maverick air-to-surface missile	B–52H bomber aircraft.
GBU–38 Small Diameter Bomb II (Laser SDB)	MQ–1/9 unmanned aerial vehicle.

TABLE 1—LIVE MUNITIONS AND AIRCRAFT—Continued

Munitions	Aircraft (not associated with specific munitions)
AGM–114 Hellfire air-to-surface missile AGM–175 Griffin air-to-surface missile. 2.75 Rockets. PGU–13/B high explosive incendiary 30 mm rounds. 7.62 mm/.50 Cal.	AC–130 gunship.

Key: AGM = air-to-ground missile; CBU = Cluster Bomb Unit; GBU = Guided Bomb Unit; LJDAM = Laser Joint Direct Attack Munition; Laser SDB = Laser Small Diameter Bomb; mm = millimeters; PGU = Projectile Gun Unit; WCMD = wind corrected munition dispenser.

The proposed activities involve detonations above the water, near the water surface, and under water within the EGTTR. However, because the tests will focus on weapon/target interaction, Eglin AFB will not specify a particular aircraft for a given test as long as it meets the delivery parameters.

Eglin AFB would deploy the munitions against static, towed, and remotely-controlled boat targets within W–151A. Eglin AFB would operate the remote-controlled boats from an instrumentation barge (Gulf Range Armament Test Vessel; GRATV) anchored on site within the test area. The GRATV would provide a platform for cameras and weapons-tracking equipment and Eglin AFB would position the target boats approximately 182.8 m (600 ft) from the GRATV, depending on the munition type.

Table 2 provides the number, height, or depth of detonation, explosive material, and net explosive weight (NEW) in pounds (lbs) of each munition proposed for use during the Maritime WSEP activities.

TABLE 2—MARITIME WSEP MUNITIONS PROPOSED FOR USE IN THE W–151A TEST AREA

Type of munition	Total # of live munitions	Detonation type	Warhead—explosive material	Net explosive weight per munition
GBU–10 or GBU–24	2	Surface	MK–84—Tritonal	945 lbs.
GBU–12 or GBU–54 (LJDAM)	6	Surface	MK–82—Tritonal	192 lbs.
AGM–65 (Maverick)	6	Surface	WDU–24/B penetrating blast-fragmentation warhead.	86 lbs.
CBU–105 (WCMD)	4	Airburst	10 BLU–108 sub-munitions each containing 4 projectiles parachute, rocket motor and altimeter.	83 lbs.
GBU–38 (Laser Small Diameter Bomb).	4	Surface	AFX–757 (Insensitive munition)	37 lbs.
AGM–114 (Hellfire)	15	Subsurface (10 msec delay).	High Explosive Anti-Tank (HEAT) tandem anti-armor metal augmented charge.	20 lbs.
AGM–176 (Griffin)	10	Surface	Blast fragmentation	13 lbs.
2.75 Rockets	100	Surface	Comp B–4 HEI	Up to 12 lbs.
PGU–12 HEI 30 mm	1,000	Surface	30 × 173 mm caliber with aluminized RDX explosive. Designed for GAU–8/A Gun System.	0.1 lbs.
7.62 mm/.50 cal	5,000	Surface	N/A	N/A.

Key: AGL = above ground level; AGM = air-to-ground missile; CBU = Cluster Bomb Unit; GBU = Guided Bomb Unit; JDAM = Joint Direct Attack Munition; LJDAM = Laser Joint Direct Attack Munition; mm = millimeters; msec = millisecond; lbs = pounds; PGU = Projectile Gun Unit; HEI = high explosive incendiary.

At least two ordnance delivery aircraft will participate in each live weapon release mission. Before delivering the ordnance, mission aircraft would make a dry run over the target area to ensure that it is clear of commercial and recreational boats. Jets will fly at a minimum speed of 300 knots indicated air speed (approximately 345 miles per hour, depending on atmospheric conditions) and at a minimum altitude of 305 m (1,000 ft). Due to the limited flyover duration and potentially high speed and altitude, observation for marine species would probably be only marginally effective at best, and pilots would, therefore, not participate in species surveys. Eglin AFB's application and DEA, which is available upon request (see **ADDRESSES**), contain additional detailed information on the Maritime WSEP training operations.

Description of Marine Mammals in the Area of the Specified Activity

Table 3 provides the following: marine mammal species with possible or confirmed occurrence in the proposed activity area (Garrison *et al.*, 2008; Navy, 2007; Davis *et al.*, 2000); information on those species' status under the MMPA and the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*); and abundance and likelihood of occurrence within the proposed activity area.

TABLE 3—MARINE MAMMALS MOST LIKELY TO BE HARASSED INCIDENTAL TO EGLIN AFB'S ACTIVITIES IN W–151A

Species	Stock name	Regulatory status [1] [2]	Estimated abundance	Relative occurrence in W–151
Common bottlenose dolphin	Choctawatchee Bay	MMPA—S, ESA—NL	232 ..... CV = 0.06 [3]	Uncommon
	Pensacola/East Bay	MMPA—S, ESA—NL	33 ..... CV = 0.88 [4]	Uncommon
	St. Andrew Bay	MMPA—S, ESA—NL	124, CV = 0.18 [4]	Uncommon
	Gulf of Mexico Northern Coastal	MMPA—S, ESA—NL	2,473, CV = 0.25 [5]	Common
	Northern Gulf of Mexico Continental Shelf.	MMPA—NC, ESA—NL ..	17,777, CV = 0.32 [6]	Uncommon
	Northern Gulf of Mexico Oceanic	MMPA—NC, ESA—NL ..	5,806, CV = 0.39 [7]	Uncommon
Atlantic spotted dolphin	Northern Gulf of Mexico	MMPA—NC, ESA—NL ..	37,611, [8] CV = 0.28	Common

[1] MMPA: D = Depleted, S = Strategic, NC = Not Classified.
[2] ESA: EN = Endangered, T = Threatened, DL = Delisted, NL = Not listed.
[3] Conn *et al.* 201; 2012 NMFS Stock Assessment Report (Waring *et al.*, 2013)
[4] Blaylock and Hoggard, 1994; 2012 NMFS Stock Assessment Report (Waring *et al.*, 2013)
[5] 2007 Aerial surveys reported in the 2013 NMFS Stock Assessment Report (Waring *et al.*, 2014)
[6] 2000–2001 Aerial surveys reported in the 2013 NMFS Stock Assessment Report (Waring *et al.*, 2014)
[7] 2009 Line transect surveys reported in the 2013 NMFS Stock Assessment Report (Waring *et al.*, 2014)
[8] 2000–2001 Aerial surveys reported in the 2013 NMFS Stock Assessment Report (Waring *et al.*, 2014)

An additional 19 cetacean species have confirmed occurrence within the northeastern Gulf of Mexico, mainly occurring at or beyond the shelf break (*i.e.*, water depth of approximately 200 m (656.2 ft)) located beyond the W–151A test area. NMFS and Eglin AFB consider the 19 species to be rare or extralimital in the W–151A test location area. These species are the Bryde's whale (*Balaenoptera edeni*), sperm whale (*Physeter macrocephalus*), dwarf sperm whale (*Kogia sima*), pygmy sperm whale (*K. breviceps*), pantropical spotted dolphin (*Stenella atenuarta*), Blainville's beaked whale (*Mesoplodon densirostris*), Cuvier's beaked whale (*Ziphius cavirostris*), Gervais' beaked whale (*M. europaeus*), Clymene dolphin (*S. clymene*), spinner dolphin (*S. longirostris*), striped dolphin (*S. coeruleoalba*), killer whale (*Orcinus orca*), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuata*), Risso's dolphin (*Grampus griseus*), Fraser's dolphin (*Lagenodelphis hosei*), melon-headed whale (*Peponocephala electra*), rough-toothed dolphin (*Steno bredanensis*), and short-finned pilot whale (*Globicephala macrorhynchus*).

Of these species, only the sperm whale is listed as endangered under the ESA and as depleted throughout its range under the MMPA. Sperm whale occurrence within W–151A is unlikely because almost all reported sightings have occurred in water depths greater than 200 m m (656.2 ft).

Because these species are unlikely to occur within the W–151A area, Eglin AFB has not requested and NMFS has not proposed the issuance of take authorizations for them. Thus, NMFS does not consider these species further in this notice.

NMFS has reviewed Eglin AFB's detailed species descriptions, including life history information, distribution, regional distribution, diving behavior, and acoustics and hearing, for accuracy and completeness. NMFS refers the reader to Sections 3 and 4 of the Authorization application and to Chapter 3 in Eglin AFB's DEA rather than reprinting the information here.

Other Marine Mammals in the Proposed Action Area

The endangered West Indian manatee (*Trichechus manatus*) rarely occurs in the area (USAF, 2014). The U.S. Fish and Wildlife Service has jurisdiction over the manatee; therefore, NMFS would not include a proposed authorization to harass manatees and does not discuss this species further in this notice.

Potential Effects of the Specified Activity on Marine Mammals

This section includes a summary and discussion of the ways that the types of stressors associated with the specified activity (*e.g.*, ordnance detonation and vessel movement) could impact marine mammals (via observations or scientific studies). This discussion may also include reactions that NMFS considers to rise to the level of a take and those that NMFS does not consider to rise to the level of a take (for example, with acoustics, we may include a discussion of studies that showed animals not reacting at all to sound or exhibiting barely measurable avoidance).

NMFS will provide an overview of potential effects of Eglin AFB's activities in this section and describe the effects of similar activities that have occurred in the past. This section does not consider the specific manner in which Eglin AFB would carry out the proposed activity, what mitigation measures they would implement, and how either of those would shape the anticipated impacts from this specific activity. The "Estimated Take by Incidental Harassment" section later in this document will include a quantitative analysis of the number of individuals that NMFS expects Eglin AFB to take during this activity. The "Negligible Impact Analysis" section will include the analysis of how this specific activity would impact marine mammals. NMFS will consider the content of the following sections: (1) Estimated Take by Incidental Harassment; (2) Proposed Mitigation; and (3) Anticipated Effects on Marine Mammal Habitat, to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals—and from that consideration—the likely impacts of this activity on the affected marine mammal populations or stocks.

The Maritime WSEP training exercises proposed for taking of marine mammals under an Authorization have the potential to take marine mammals by exposing them to impulsive noise and pressure waves generated by live ordnance detonation at or near the surface of the water. Exposure to energy or pressure resulting from these detonations could result in non-lethal injury (Level A harassment) and disturbance (Level B harassment). In addition, NMFS also considered the potential for harassment from vessel operations. NMFS outlines the analysis of potential impacts from these factors, including consideration of Eglin AFB's

analysis in its MMPA application for an authorization, in the following sections. The potential effects of impulsive sound sources (underwater detonations) from the proposed training activities may include one or more of the following: tolerance, masking, disturbance, hearing threshold shift, stress response, and lethal responses.

Brief Background on Sound

An understanding of the basic properties of underwater sound is necessary to comprehend many of the concepts and analyses presented in this document. NMFS presents a summary in this section.

Sound is a wave of pressure variations propagating through a medium (*e.g.*, water). Pressure variations occur by compressing and relaxing the medium. Sound measurements exist in two forms: Intensity and pressure. Acoustic intensity is the average rate of energy transmitted through a unit area in a specified direction (expressed in watts per square meter (W/m^2)). Acoustic intensity is rarely measured directly, but rather from ratios of pressures; the standard reference pressure for underwater sound is 1 microPascal (µPa); for airborne sound, the standard reference pressure is 20 µPa (Richardson *et al.*, 1995).

Acousticians have adopted a logarithmic scale for sound intensities, denoted in decibels (dB). Decibel measurements represent the ratio between a measured pressure value and a reference pressure value (in this case 1 µPa or, for airborne sound, 20 µPa). The logarithmic nature of the scale means that each 10-dB increase is a ten-fold increase in acoustic power (and a 20-dB increase is then a 100-fold increase in power; and a 30-dB increase is a 1,000-fold increase in power). A ten-fold increase in acoustic power does not mean that the listener perceives sound as being ten times louder, however. Humans perceive a 10-dB increase in sound level as a doubling of loudness, and a 10-dB decrease in sound level as a halving of loudness. The term "sound pressure level" implies a decibel measure and a reference pressure that is the denominator of the ratio. Throughout this document, NMFS uses 1 microPascal (denoted re: 1µPa) as a standard reference pressure unless noted otherwise.

It is important to note that decibel values underwater and decibel values in air are not the same (different reference pressures and densities/sound speeds between media) and one should not directly compare the two mediums. Because of the different densities of air and water and the different decibel standards (*i.e.*, reference pressures) in air and water, a sound with the same level in air and in water would be approximately 62 dB lower in air. Thus, a sound that measures 160 dB (re: 1 µPa) underwater would have the same approximate effective level as a sound that is 98 dB (re: 20 µPa) in air.

Sound frequency is measured in cycles per second, or Hertz (abbreviated Hz), and is analogous to musical pitch; high-pitched sounds contain high frequencies and low-pitched sounds contain low frequencies. Natural sounds in the ocean span a huge range of frequencies: from earthquake noise at 5 Hz to harbor porpoise clicks at 150,000 Hz (150 kHz). These sounds are so low or so high in pitch that humans cannot even hear them; acousticians call these infrasonic (typically below 20 Hz) and ultrasonic (typically above 20,000 Hz) sounds, respectively. A single sound may consist of many different frequencies together. Acousticians characterize sounds made up of only a small range of frequencies as "narrowband" and sounds with a broad range of frequencies as "broadband"; explosives are an example of a broadband sound source.

Acoustic Impacts

The effects of noise on marine mammals are highly variable. Categorization of these effects includes the following (based on Richardson *et al.*, 1995):

- The sound may be too weak to be heard at the location of the animal (*i.e.*, lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);
- The sound may be audible but not strong enough to elicit any overt behavioral response;
- The sound may elicit reactions of variable conspicuousness and variable relevance to the well-being of the marine mammal; these can range from temporary alert responses to active avoidance reactions, such as stampedes into the sea from terrestrial haul-out sites;
- Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence (as are vehicle launches), and associated with situations that a marine mammal perceives as a threat;
- Any anthropogenic sound that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;
- If marine mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be sound-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and
- Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, there is an inverse relation to the sound level necessary to cause TTS compared to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment (PTS). In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration, and other functions. This trauma may include minor to severe hemorrhage.

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Current data indicate that not all marine mammal species have equal hearing capabilities (Richardson *et al.*, 1995; Southall *et al.*, 1997; Wartzok and Ketten, 1999; Au and Hastings, 2008).

Southall *et al.* (2007) designated "functional hearing groups" for marine mammals based on available behavioral data; audiograms derived from auditory evoked potentials; anatomical modeling; and other data. Southall *et al.* (2007) also estimated the lower and upper frequencies of functional hearing for each group. However, animals are less sensitive to sounds at the outer edges of their functional hearing range and are more sensitive to a range of frequencies within the middle of their functional hearing range.

The functional groups and the associated frequencies are:

- Low frequency cetaceans (13 species of mysticetes): Functional hearing estimates occur between approximately 7 Hz and 30 kilohertz (kHz) (extended from 22 kHz based on data indicating that some mysticetes can hear above 22 kHz; Au *et al.*, 2006;

Lucifredi and Stein, 2007; Ketten and Mountain, 2009; Tubelli *et al.*, 2012);

- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing estimates occur between approximately 150 Hz and 160 kHz;
- High-frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing estimates occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in water: Phocid (true seals) functional hearing estimates occur between approximately 75 Hz and 100 kHz (Hemila *et al.*, 2006; Mulsow *et al.*, 2011; Reichmuth *et al.*, 2013) and otariid (seals and sea lions) functional hearing estimates occur between approximately 100 Hz to 40 kHz.

As mentioned previously in this document, two marine mammal species (of the odontocete group) are likely to occur in the proposed action area. NMFS considers a species' functional hearing group when analyzing the effects of exposure to sound on marine mammals.

Vocalization and Hearing

Bottlenose dolphins can typically hear within a broad frequency range of 0.04 to 160 kHz (Au, 1993; Turl, 1993). Electrophysiological experiments suggest that the bottlenose dolphin brain has a dual analysis system: one specialized for ultrasonic clicks and another for lower-frequency sounds, such as whistles (Ridgway, 2000). Scientists have reported a range of highest sensitivity between 25 and 70 kHz, with peaks in sensitivity at 25 and 50 kHz (Nachtigall *et al.*, 2000). Research on the same individuals indicates that auditory thresholds obtained by electrophysiological methods correlate well with those obtained in behavior studies, except at lower (10 kHz) and higher (80 and 100 kHz) frequencies (Finneran and Houser, 2006).

Sounds emitted by bottlenose dolphins fall into two broad categories: pulsed sounds (including clicks and burst-pulses) and narrow-band continuous sounds (whistles), which usually are frequency modulated. Clicks have a dominant frequency range of 110 to 130 kHz and a source level of 218 to 228 dB re: 1 μPa (peak-to-peak) (Au, 1993) and 3.4 to 14.5 kHz at 125 to 173 dB re 1 μPa (peak-to-peak) (Ketten, 1998). Whistles are primarily associated with communication and can serve to identify specific individuals (*i.e.*, signature whistles) (Caldwell and Caldwell, 1965; Janik *et al.*, 2006). Cook *et al.* (2004) classified up to 52 percent of whistles produced by bottlenose dolphin groups with mother-calf pairs as signature whistles. Sound production is also influenced by group type (single or multiple individuals), habitat, and behavior (Nowacek, 2005). Bray calls (low-frequency vocalizations; majority of energy below 4 kHz), for example, are used when capturing fish, specifically sea trout (*Salmo trutta*) and Atlantic salmon (*Salmo salar*), in some regions (*i.e.*, Moray Firth, Scotland) (Janik, 2000). Additionally, whistle production has been observed to increase while feeding (Acevedo-Gutiérrez and Stienessen, 2004; Cook *et al.*, 2004).

Researchers have recorded a variety of sounds including whistles, echolocation clicks, squawks, barks, growls, and chirps for the Atlantic spotted dolphin. Whistles have dominant frequencies below 20 kHz (range: 7.1 to 14.5 kHz) but multiple harmonics extend above 100 kHz, while burst pulses consist of frequencies above 20 kHz (dominant frequency of approximately 40 kHz) (Lammers *et al.*, 2003). Other sounds, such as squawks, barks, growls, and chirps, typically range in frequency from 0.1 to 8 kHz (Thomson and Richardson, 1995). Recorded echolocation clicks had two dominant frequency ranges at 40 to 50 kHz and 110 to 130 kHz, depending on source level (*i.e.*, lower source levels typically correspond to lower frequencies and higher frequencies to higher source levels (Au and Herzing, 2003). Echolocation click source levels as high as 210 dB re 1 μPa-m peak-to-peak have been recorded (Au and Herzing, 2003). Spotted dolphins in the Bahamas were frequently recorded during agonistic/aggressive interactions with bottlenose dolphins (and their own species) to produce squawks (0.2 to 12 kHz broad band burst pulses; males and females), screams (5.8 to 9.4 kHz whistles; males only), barks (0.2 to 20 kHz burst pulses; males only), and synchronized squawks (0.1–15 kHz burst pulses; males only in a coordinated group) (Herzing, 1996). The hearing ability for the Atlantic spotted dolphin is unknown. However, odontocetes are generally adapted to hear high-frequencies (Ketten, 1997).

Effects of Impulsive Sources

Marine mammals respond to various types of anthropogenic sounds introduced in the ocean environment. Responses are highly variable and depend on a suite of internal and external factors which in turn results in varying degrees of significance (NRC, 2003; Southall *et al.*, 2007). Internal factors include: (1) Individual hearing sensitivity, activity pattern, and motivational and behavioral state (*e.g.*, feeding, traveling) at the time it receives the stimulus; (2) past exposure of the animal to the noise, which may lead to habituation or sensitization; (3) individual noise tolerance; and (4) demographic factors such as age, sex, and presence of dependent offspring. External factors include: (1) Non-acoustic characteristics of the sound source (*e.g.*, if it is moving or stationary); (2) environmental variables (*e.g.*, substrate) which influence sound transmission; and (3) habitat characteristics and location (*e.g.*, open ocean vs. confined area).

Underwater explosive detonations send a shock wave and sound energy through the water and can release gaseous by-products, create an oscillating bubble, or cause a plume of water to shoot up from the water surface. The shock wave and accompanying noise are of most concern to marine animals. Depending on the intensity of the shock wave and size, location, and depth of the animal, an animal can be injured, killed, suffer non-lethal physical effects, experience hearing related effects with or without behavioral responses, or exhibit temporary behavioral responses or tolerance from hearing the blast sound. Generally, exposures to higher levels of impulse and pressure levels would result in greater impacts to an individual animal.

Tolerance

Numerous studies have shown that underwater sounds are often readily detectable by marine mammals in the water at distances of many kilometers. However, other studies have shown that marine mammals at distances more than a few kilometers away often show no apparent response to activities of various types (Miller *et al.*, 2005). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound from sources such as airgun pulses or vessels under some conditions, at other times, mammals of all three types have shown no overt reactions (*e.g.*, Malme *et al.*, 1986; Richardson *et al.*, 1995; Madsen and Mohl, 2000; Croll *et al.*, 2001; Jacobs and Terhune, 2002; Madsen *et al.*, 2002; Miller *et al.*, 2005).

Masking

Marine mammals use acoustic signals for a variety of purposes, which differ among species, but include communication between individuals, navigation, foraging, reproduction, and learning about their environment (Erbe and Farmer 2000, Tyack 2000). Masking, or auditory interference, generally occurs when sounds in the environment are louder than and of a similar frequency to, auditory signals an animal is trying to receive. Masking is a phenomenon that affects animals that are trying to receive acoustic information about their environment, including sounds from other members of their species, predators, prey, and sounds that allow them to orient in their environment. Masking these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations.

The extent of the masking interference depends on the spectral, temporal, and spatial relationships between the signals an animal is trying to receive and the masking noise, in addition to other factors. In humans, significant masking of tonal signals occurs as a result of exposure to noise in a narrow band of similar frequencies. As the sound level increases, though, the detection of frequencies above those of the masking stimulus decreases also. NMFS expects this principle to apply to marine mammals because of common biomechanical cochlear properties across taxa.

Richardson *et al.* (1995) argued that the maximum radius of influence of an industrial noise (including broadband low frequency sound transmission) on a marine mammal is the distance from the source to the point at which the animal can barely hear the noise. This range applies to either the hearing sensitivity of the animal or the background noise level present. Industrial masking is most likely to affect some species' ability to detect communication calls and natural sounds (*i.e.*, surf noise, prey noise, etc.; Richardson *et al.*, 1995).

The echolocation calls of toothed whales are subject to masking by high frequency sound. Human data indicate low-frequency sound can mask high-frequency sounds (*i.e.*, upward masking). Studies on captive odontocetes by Au *et al.* (1974, 1985, and 1993) indicate that some species may use various processes to reduce masking effects (*e.g.*, adjustments in echolocation call intensity or frequency as a function of background noise conditions). There is also evidence that the directional hearing abilities of odontocetes are useful in reducing masking at the high-frequencies these cetaceans use to echolocate, but not at the low-to-moderate frequencies they use to communicate (Zaitseva *et al.*, 1980). A study by Nachtigall and Supin (2008) showed that false killer whales adjust their hearing to compensate for ambient sounds and the intensity of returning echolocation signals.

Holt *et al.* (2009) measured killer whale call source levels and background noise levels in the one to 40 kHz band and reported that the whales increased their call source levels by one dB SPL for every one dB SPL increase in background noise level. Similarly, another study on St. Lawrence River belugas (*Delphinapterus leucas*) reported a similar rate of increase in vocalization activity in response to passing vessels (Scheifele *et al.*, 2005).

Although masking is a phenomenon which may occur naturally, the introduction of loud anthropogenic sounds into the marine environment at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. For example, baleen whales exposed to continuous low-frequency sound from an industrial source, would be present within a reduced acoustic area around where it could hear the calls of another whale. The components of background noise that are similar in frequency to the signal in question primarily determine the degree of masking of that signal. In general, there is little data about the degree to which marine mammals rely upon detection of sounds from conspecifics, predators, prey, or other natural sources. In the absence of specific information about the importance of detecting these natural sounds, it is not possible to predict the impact of masking on marine mammals (Richardson *et al.*, 1995). In general, masking effects are expected to be less severe when sounds are transient than when they are continuous.

While it may occur temporarily, NMFS does not expect auditory masking to result in detrimental impacts to an individual's or population's survival, fitness, or reproductive success. Dolphin movement is not restricted within the W–151 test area, allowing for movement out of the area to avoid masking impacts. Also, masking is typically of greater concern for those marine mammals that utilize low frequency communications, such as baleen whales and, as such, is not likely to occur for marine mammals in the W–151 test area.

Disturbance

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (in both nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways) (Southall *et al.*, 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching versus retreating), similarity of the sound to biologically relevant sounds in the animal's environment (*i.e.*, calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.*, 2007). Individuals (of different age, gender, reproductive status, etc.) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.*, proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Because the few available studies show wide variation in response to underwater sound, it is difficult to quantify exactly how sound from the Maritime WSEP operational testing would affect marine mammals. Exposure of marine mammals to sound sources can result in, but is not limited to, no response or any of the following observable responses: Increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; avoidance; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.*, 2007). Richardson first conducted a review of marine mammal responses to anthropogenic sound in 1995. A more recent review (Nowacek *et al.*, 2007) addresses studies conducted since 1995 and focuses on observations where researchers knew or could estimate the received sound level of the exposed marine mammal(s).

The following sub-sections provide examples of behavioral responses that

provide an idea of the variability in behavioral responses expected given the differential sensitivities of marine mammal species to sound and the wide range of potential acoustic sources to which a marine mammal may be exposed. Estimates of the types of behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species or extrapolated from closely related species when no information exists.

Flight Response: A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. Relatively little information on flight responses of marine mammals to anthropogenic signals exist, although observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996).

Response to Predators: Evidence suggests that at least some marine mammals have the ability to acoustically identify potential predators. For example, certain groups of killer whales, but not others, frequently target harbor seals residing in the coastal waters off British Columbia. The seals discriminate between the calls of threatening and non-threatening killer whales (Deecke *et al.*, 2002), a capability that should increase survivorship while reducing the energy required for attending to and responding to all killer whale calls. The occurrence of masking or hearing impairment may prevent marine mammals from responding to the acoustic cues produced by their predators. Whether or not this is a possibility depends on the duration of the masking/hearing impairment and the likelihood of encountering a predator during the time that the sound impedes predator cues. Predator evasion is typically of greater concern for coastal marine mammals. Because of the low likelihood of bottlenose dolphin predators, such as killer whales, occurring within the W–151 test area, NMFS does not consider predator evasion likely to occur.

Diving: Changes in dive behavior can vary widely. They may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive. Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.*, foraging) or they may be of little biological significance. Variations in dive behavior may also expose an animal to potentially harmful conditions (*e.g.*, increasing the chance of ship-strike) or may serve as an avoidance response that enhances survivorship. The impact of a variation in diving resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure and the type and magnitude of the response.

Nowacek *et al.* (2004) reported disruptions of dive behaviors in foraging North Atlantic right whales when exposed to an alerting stimulus, an action, they noted, that could lead to an increased likelihood of ship strike. However, the whales did not respond to playbacks of either right whale social sounds or vessel noise, highlighting the importance of the sound characteristics in producing a behavioral reaction. Conversely, studies have observed Indo-Pacific humpback dolphins (*Sousa chinensis*) to dive for longer periods of time in areas where vessels were present and/or approaching (Ng and Leung, 2003). In both of these studies, one cannot decouple the influence of the sound exposure from the physical presence of a surface vessel, thus complicating interpretations of the relative contribution of each stimulus to the response. Indeed, the presence of surface vessels, their approach and speed of approach, seemed to be significant factors in the response of the Indo-Pacific humpback dolphins (Ng and Leung, 2003). Researchers did not find that the low frequency signals of the Acoustic Thermometry of Ocean Climate (ATOC) sound source affected dive times of humpback whales (*Megaptera novaeangliae*) in Hawaiian waters (Frankel and Clark, 2000) or overtly affected elephant seal (*Mirounga angustirostris*) dives (Costa *et al.*, 2003). They did, however, produce subtle effects that varied in direction and degree among the individual seals, illustrating the equivocal nature of behavioral effects and consequent difficulty in defining and predicting them.

Foraging: Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.*, bubble nets or sediment plumes), or changes in dive behavior. Noise from seismic surveys was not found to impact the feeding behavior in western grey whales off the coast of Russia (Yazvenko *et al.*, 2007) and sperm whales engaged in foraging dives did not abandon dives when exposed to distant signatures of seismic airguns (Madsen *et al.*, 2006). Balaenopterid whales exposed to moderate low-frequency signals similar to the ATOC sound source demonstrated no variation in foraging activity (Croll *et al.*, 2001), whereas five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.*, 2004). Although the received sound pressure level at the animals was similar in the latter two studies, the frequency, duration, and temporal pattern of signal presentation were different. These factors, as well as differences in species sensitivity, are likely contributing factors to the differential response. A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the individuals and the relationship between prey availability, foraging effort, and success, and the life history stage of the animal.

Breathing: Variations in respiration occur naturally with different behaviors, and variations in respiration rate as a function of acoustic exposure could co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Mean exhalation rates of gray whales at rest and while diving were found to be unaffected by seismic surveys conducted adjacent to the whale feeding grounds (Gailey *et al.*, 2007). Studies with captive harbor porpoises (*Phocoena phocoena*) showed increased respiration rates upon introduction of acoustic alarms (Kastelein *et al.*, 2001; Kastelein *et al.*, 2006) and emissions for underwater data transmission (Kastelein *et al.*, 2005). However, exposure of the same acoustic alarm to a striped dolphin under the same conditions did not elicit a response (Kastelein *et al.*, 2006), again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure.

Social Relationships: Sound can affect social interactions between mammals via the disruption of communication signals or by the displacement of individuals. Disruption of social relationships therefore depends on the disruption of other behaviors (*e.g.*, caused avoidance, masking, etc.) and this notice's discussion does not provide a specific overview. However, one should consider social disruptions in the context of the relationships that are affected. Long-term disruptions of mother/calf pairs or mating displays have the potential to affect the growth and survival or reproductive effort/success of individuals, respectively.

Vocalizations (also see Masking Section): Vocal changes in response to anthropogenic noise can occur across

the repertoire of sound production modes used by marine mammals, such as whistling, echolocation click production, calling, and singing. Changes may result in response to a need to compete with an increase in background noise or may reflect an increased vigilance or startle response. For example, in the presence of low-frequency active sonar, humpback whales have been observed to increase the length of their "songs" (Miller *et al.*, 2000; Fristrup *et al.*, 2003), possibly due to the overlap in frequencies between the whale song and the low-frequency active sonar. Some have suggested a similar compensatory effect for the presence of low frequency vessel noise for right whales; as researchers have observed right whales shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.*, 2007). Killer whales off the northwestern coast of the United States have been observed to increase the duration of primary calls once a threshold in observing vessel density (*e.g.*, whale watching) was reached, which has been suggested as a response to increased masking noise produced by the vessels (Foote *et al.*, 2004). In contrast, both sperm and pilot whales potentially ceased sound production during the Heard Island feasibility test (Bowles *et al.*, 1994), although it cannot be absolutely determined whether the inability to acoustically detect the animals was due to the cessation of sound production or the displacement of animals from the area.

Avoidance: Avoidance is the displacement of an individual from an area as a result of the presence of a sound. Richardson *et al.*, (1995) noted that avoidance reactions are the most obvious manifestations of disturbance in marine mammals. It is qualitatively different from the flight response, but also differs in the magnitude of the response (*i.e.*, directed movement, rate of travel, etc.). Often, avoidance is temporary and animals return to the area once the noise has ceased. Longer term displacement is possible, however, which can lead to changes in abundance or distribution patterns of the species in the affected region if they do not become acclimated to the presence of the sound (Blackwell *et al.*, 2004; Bejder *et al.*, 2006; Teilmann *et al.*, 2006). Studies have observed acute avoidance responses in captive porpoises and pinnipeds exposed to a number of different sound sources (Kastelein *et al.*, 2001; Finneran *et al.*, 2003; Kastelein *et al.*, 2006a, b). Short term avoidance of seismic surveys, low frequency emissions, and acoustic deterrents has also been noted in wild populations of odontocetes (Bowles *et al.*, 1994; Goold, 1996; 1998; Stone *et al.*, 2000; Morton and Symonds, 2002) and to some extent in mysticetes (Gailey *et al.*, 2007), while longer term or repetitive/chronic displacement for some dolphin groups and for manatees has been suggested to be due to the presence of chronic vessel noise (Haviland-Howell *et al.*, 2007; Miksis-Olds *et al.*, 2007).

Haviland-Howell *et al.* (2007) compared sighting rates of bottlenose dolphins within the Wilmington, North Carolina stretch of the Atlantic Intracoastal Waterway (ICW) on weekends, when recreational vessel traffic was high, to weekdays, when vessel traffic was relatively minimal. The authors found that dolphins were less often sighted in the ICW during times of increased boat traffic (*i.e.*, on weekends) and theorized that because vessel noise falls within the frequencies of dolphin communication whistles and primary energy of most fish vocalizations, the continuous vessel traffic along that stretch of the ICW could result in social and foraging impacts. However, the extent to which these impacts affect individual health and population structure is unknown.

Orientation: A shift in an animal's resting state or an attentional change via an orienting response represent behaviors that would be considered mild disruptions if it occurred alone. As previously mentioned, the responses may co-occur with other behaviors; for instance, an animal may initially orient toward a sound source, and then move away from it. Thus, one should consider any orienting response in context of other reactions that may occur.

Vessel and Aircraft Presence: The marine mammals most vulnerable to vessel strikes are slow-moving and/or spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.*, North Atlantic right whales (*Eubalaena glacialis*), fin whales (*Balaenoptera physalus*), and sperm whales). Smaller marine mammals such as common bottlenose and Atlantic spotted dolphins are agile and move more quickly through the water, making them less susceptible to ship strikes. NMFS and Eglin AFB are not aware of any vessel strikes of common bottlenose and Atlantic spotted dolphins within in W–151 during training operations and both parties do not anticipate that Eglin AFB vessels engaged in the specified activity would strike any marine mammals.

Dolphins within the Gulf of Mexico are continually exposed to recreational, commercial, and military vessels. Behaviorally, marine mammals may or may not respond to the operation of vessels and associated noise. Responses to vessels vary widely among marine mammals in general, but also among different species of small cetaceans. Responses may include attraction to the vessel (Richardson *et al.*, 1995); altering travel patterns to avoid vessels (Constantine, 2001; Nowacek *et al.*, 2001; Lusseau, 2003, 2006); relocating to other areas (Allen and Read, 2000); cessation of feeding, resting, and social interaction (Baker *et al.*, 1983; Bauer and Herman, 1986; Hall, 1982; Krieger and Wing, 1984; Lusseau, 2003; Constantine *et al.*, 2004); abandoning feeding, resting, and nursing areas (Jurasz and Jurasz 1979; Dean *et al.*, 1985; Glockner-Ferrari and Ferrari, 1985, 1990; Lusseau, 2005; Norris *et al.*, 1985; Salden, 1988; Forest, 2001; Morton and Symonds, 2002; Courbis, 2004; Bejder, 2006); stress (Romano *et al.*, 2004); and changes in acoustic behavior (Van Parijs and Corkeron, 2001). However, in some studies marine mammals display no reaction to vessels (Watkins, 1986; Nowacek *et al.*, 2003) and many odontocetes show considerable tolerance to vessel traffic (Richardson *et al.*, 1995). Dolphins may actually reduce the energetic cost of traveling by riding the bow or stern waves of vessels (Williams *et al.*, 1992; Richardson *et al.*, 1995).

Aircraft produce noise at frequencies that are well within the frequency range of cetacean hearing and also produce visual signals such as the aircraft itself and its shadow (Richardson *et al.*, 1995, Richardson and Wursig, 1997). A major difference between aircraft noise and noise caused by other anthropogenic sources is that the sound is generated in the air, transmitted through the water surface and then propagates underwater to the receiver, diminishing the received levels significantly below what is heard above the water's surface. Sound transmission from air to water is greatest in a sound cone 26 degrees directly under the aircraft.

There are fewer reports of reactions of odontocetes to aircraft than those of pinnipeds. Responses to aircraft include diving, slapping the water with pectoral fins or tail fluke, or swimming away from the track of the aircraft (Richardson *et al.*, 1995). The nature and degree of the response, or the lack thereof, are dependent upon the nature of the flight (*e.g.*, type of aircraft, altitude, straight vs. circular flight pattern). Wursig *et al.* (1998) assessed the responses of cetaceans to aerial surveys in the north central and western Gulf of Mexico using a DeHavilland

Twin Otter fixed-wing airplane. The plane flew at an altitude of 229 m (751.3 ft) at 204 km/hr (126.7 mph) and maintained a minimum of 305 m (1,000 ft) straight line distance from the cetaceans. Water depth was 100 to 1,000 m (328 to 3,281 ft). Bottlenose dolphins most commonly responded by diving (48 percent), while 14 percent responded by moving away. Other species (*e.g.*, beluga (*Delphinapterus leucas*) and sperm whales) show considerable variation in reactions to aircraft but diving or swimming away from the aircraft are the most common reactions to low flights (less than 500 m; 1,640 ft).

Stress Response

An acoustic source is considered a potential stressor if, by its action on the animal, via auditory or non-auditory means, it may produce a stress response in the animal. Here, the stress response will refer to an increase in energetic expenditure that results from exposure to the stressor and which is predominantly characterized by either the stimulation of the sympathetic nervous system (SNS) or the hypothalamic-pituitary-adrenal (HPA) axis (Reeder and Kramer, 2005). The SNS response to a stressor is immediate and acute and occurs by the release of the catecholamine neurohormones norepinephrine and epinephrine (*i.e.*, adrenaline). These hormones produce elevations in the heart and respiration rate, increase awareness, and increase the availability of glucose and lipids for energy. The HPA response results in increases in the secretion of the glucocorticoid steroid hormones, predominantly cortisol in mammals. The presence and magnitude of a stress response in an animal depends on a number of factors. These include the animal's life history stage (*e.g.*, neonate, juvenile, adult), the environmental conditions, reproductive or developmental state, and experience with the stressor. Not only will these factors be subject to individual variation, but they will also vary within an individual over time. The stress response may or may not result in a behavioral change, depending on the characteristics of the exposed animal. However, provided that a stress response occurs, NMFS assumes that some contribution is made to the animal's allostatic load. One can assume that any immediate effect of exposure that produces an injury also produce a stress response and contribute to the allostatic load. Allostasis is the ability of an animal to maintain stability through change by adjusting its physiology in response to both predictable and unpredictable events (McEwen and Wingfield, 2003). If the animal does not perceive the sound, the acoustic source would not produce tissue effects and does not produce a stress response by any other means. Thus, NMFS assumes that the exposure does not contribute to the allostatic load.

Physiology-Hearing Threshold Shift

In mammals, high-intensity sound may rupture the eardrum, damage the small bones in the middle ear, or over stimulate the electromechanical hair cells that convert the fluid motions caused by sound into neural impulses sent to the brain. Lower level exposures may cause a loss of hearing sensitivity, termed a threshold shift (TS) (Miller, 1974). Incidence of TS may be either permanent, referred to as permanent threshold shift (PTS), or temporary, referred to as temporary threshold shift (TTS). The amplitude, duration, frequency, and temporal pattern, and energy distribution of sound exposure all affect the amount of associated TS and the frequency range in which it occurs. As amplitude and duration of sound exposure increase, generally, so does the amount of TS and recovery time. Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same SEL) producing equal amounts of hearing impairment regardless of how the sound energy distributes over time (NIOSH, 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.*, 2007). Three newer studies, two by Mooney *et al.* (2009a, 2009b) on a single bottlenose dolphin either exposed to playbacks of Navy mid-frequency active sonar or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2007) on a single California sea lion (*Zalophus californianus*) exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations the equal energy relationship may not be the best indicator to predict TTS onset levels. Generally, with sound exposures of equal energy, those that were quieter (lower SPL) with longer duration induced TTS onset more than louder (higher SPL) and shorter durations (more similar to noise from the Marine Corps' exercises at BT–9 and BT–11). For intermittent sounds, less threshold shift would occur than from a continuous exposure with the same energy (some recovery will occur between exposures) (Kryter *et al.*, 1966; Ward, 1997). Additionally, although TTS is temporary; very prolonged exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, at least in terrestrial mammals (Kryter, 1985). However, these studies highlight the inherent complexity of predicting TTS onset in marine mammals, as well as the importance of considering exposure duration when assessing potential impacts.

PTS consists of non-recoverable physical damage to the sound receptors in the ear, which can include total or partial deafness, or an impaired ability to hear sounds in specific frequency ranges; NMFS considers PTS as Level A harassment. TTS is recoverable, resulting from temporary, non-injurious impacts to hearing-related tissues. NMFS considers TTS as Level B harassment.

Permanent Threshold Shift

Auditory trauma represents direct mechanical injury to hearing related structures, including tympanic membrane rupture, disarticulation of the middle ear ossicles, and trauma to the inner ear structures such as the organ of Corti and the associated hair cells. Auditory trauma is irreversible and considered to be an injury that could result in PTS. PTS results from exposure to intense sounds that cause a permanent loss of inner or outer cochlear hair cells or exceed the elastic limits of certain tissues and membranes in the middle and inner ears and result in changes in the chemical composition of the inner ear fluids. In some cases, there can be total or partial deafness across all frequencies, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no empirical data for onset of PTS in any marine mammal for ethical reasons. Therefore, research must extrapolate PTS-onset based on hearing loss growth rates (*i.e.*, rate of how quickly threshold shifts grow in relation to increases in decibel level; expressed in dB of TTS/dB of noise) from limited marine mammal TTS studies and more numerous terrestrial mammal TTS/PTS experiments. Typically, the magnitude of a threshold shift increases with increasing duration or level of exposure, until it becomes asymptotic (growth rate begins to level or the upper limit of TTS; Mills *et al.*, 1979; Clark *et al.*, 1987; Laroche *et al.*, 1989; Yost, 2007). One presumes that PTS is likely if reduction to the hearing threshold occurs by greater than or equal to 40 dB (*i.e.*, 40 dB of TTS).

Temporary Threshold Shift

TTS is the mildest form of hearing impairment that can occur during

exposure to a loud sound (Kryter, 1985). Southall *et al.* (2007) indicate that although PTS is a tissue injury, TTS is not because the reduced hearing sensitivity following exposure to intense sound results primarily from fatigue, not loss, of cochlear hair cells and supporting structures and is reversible. Accordingly, NMFS classifies TTS as Level B Harassment, not Level A Harassment (injury); however, NMFS does not consider the onset of TTS to be the lowest level at which Level B Harassment may occur (see Behavior section).

Southall *et al.* (2007) considers a 6 dB TTS (*i.e.*, baseline hearing thresholds are elevated by 6 dB) sufficient to be recognized as an unequivocal deviation and thus a sufficient definition of TTS onset. Researchers testing hearing in marine mammals have experimentally induced TTS in bottlenose dolphins. For example, Finneran *et al.* (2002) exposed a trained captive bottlenose dolphin to a seismic watergun simulator with a single acoustic pulse. No TTS was observed in the dolphin at the highest exposure condition (peak: 207 kiloPascals (kPa; 30 pressure per square inch (psi)); peak-to-peak: 228 dB re: 1 µPa; SEL: 188 dB re: 1 µPa²-s). Schludt *et al.* (2000) demonstrated temporary shifts in masked hearing thresholds in five bottlenose dolphins occurring generally between 192 and 201 dB rms (192 and 201 dB SEL) after exposure to intense, non-pulse, 1-second tones at 3 kHz, 10 kHz, and 20 kHz. TTS onset occurred at mean sound exposure level of 195 dB rms (195 dB SEL). At 0.4 kHz, no subjects exhibited threshold shifts after SPL exposures of 193 dB re: 1 µPa (192 dB re: 1 microPa²-s). In the same study, at 75 kHz, one dolphin exhibited a TTS after exposure at 182 dB SPL re: 1 µPa but not at higher exposure levels. Another dolphin experienced no threshold shift after exposure to maximum SPL levels of 193 dB re: 1 µPa at the same frequency.

Preliminary research indicates that TTS and recovery after noise exposure are frequency dependent and that an inverse relationship exists between exposure time and sound pressure level associated with exposure (Mooney *et al.*, 2005; Mooney, 2006). For example, Nachtigall *et al.* (2003) measured TTS in a bottlenose dolphin and found an average 11-dB shift following a 30-minute net exposure to the octave-band noise (OBN) at a 7.5 kHz center frequency (maximum SPL of 179 dB re: 1 µPa; SEL: 212–214 dB re:1 µPa²-s). No TTS was observed after exposure to the same duration and frequency noise with maximum SPLs of 165 and 171 dB re:1 µPa. After 50 minutes of exposure to the same 7.5 kHz frequency OBN, Natchigall *et al.* (2004) measured a 4 -8 dB shift (max SPL: 160 dB re: 1 µPa; SEL: 193–195 dB re:1 µPa²-s). Finneran *et al.* (2005) concluded that a sound exposure level of 195 dB re 1 µPa2-s is a reasonable threshold for the onset of TTS in bottlenose dolphins exposed to mid-frequency tones.

Lethal Responses

Elgin AFB proposes to use several types of explosive sources during its training exercises. The underwater explosions from these weapons would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. In general, potential impacts from explosive detonations can range from brief effects (such as short term behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.*, 1973; O'Keeffe and Young, 1984; DoN, 2001).

The effects of an underwater explosion on a marine mammal depend on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. Physical damage of tissues resulting from a shock wave (from an explosive detonation) constitutes an injury. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000) and gas containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible to damage (Goertner, 1982; Hill 1978; Yelverton *et al.*, 1973). Nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Severe damage (from the shock wave) to the ears can include tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear.

Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN, 2001). Exposure to distance explosions could result only in behavioral changes. Researchers have measured masked underwater hearing thresholds in two bottlenose dolphins and one beluga whale before and after exposure to impulsive underwater sounds with waveforms resembling distant signatures of underwater explosions (Finneran *et al.*, 2000). The authors found no temporary shifts in masked-hearing thresholds, defined as a 6-dB or larger increase in threshold over pre-exposure levels, had been observed at the highest impulse level generated (500 kg at 1.7 km, peak pressure 70 kPa); however, disruptions of the animals' trained behaviors began to occur at exposures corresponding to 5 kg at 9.3 km and 5 kg at 1.5 km for the dolphins and 500 kg at 1.9 km for the beluga whale.

Anticipated Effects on Habitat

Detonations of live ordnance would result in temporary changes to the water environment. Munitions could hit the targets and not explode in the water. However, because the targets are located over the water, in water explosions could occur. An underwater explosion from these weapons could send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. However, these effects would be temporary and not expected to last more than a few seconds.

Similarly, Eglin AFB does not expect any long-term impacts with regard to hazardous constituents to occur. Eglin AFB considered the introduction of fuel, debris, ordnance, and chemical materials into the water column within its DEA. The potential effects of each were analyzed in the Draft Environmental Assessment and determined to be insignificant. The analyses are summarized in the following paragraphs (for a complete discussion of potential effects, please refer to section 3.3 in the DEA).

Metals typically used to construct bombs, missiles, and gunnery rounds include copper, aluminum, steel, and lead, among others. Aluminum is also present in some explosive materials. These materials would settle to the seafloor after munitions detonate. Metal ions would slowly leach into the substrate and the water column, causing elevated concentrations in a small area around the munitions fragments. Some of the metals, such as aluminum, occur naturally in the ocean at varying concentrations and would not necessarily impact the substrate or water column. Other metals, such as lead, could cause toxicity in microbial communities in the substrate. However,

such effects would be localized to a very small distance around munitions fragments and would not significantly affect the overall habitat quality of sediments in the northeastern Gulf of Mexico. In addition, metal fragments would corrode, degrade, and become encrusted over time.

Chemical materials include explosive byproducts and also fuel, oil, and other fluids associated with remotely controlled target boats. Explosive byproducts would be introduced into the water column through detonation of live munitions. Explosive materials would include 2,4,6-trinitrotoluene (TNT) and RDX, among others. Various byproducts are produced during and immediately after detonation of TNT and RDX. During the very brief time that a detonation is in progress, intermediate products may include carbon ions, nitrogen ions, oxygen ions, water, hydrogen cyanide, carbon monoxide, nitrogen gas, nitrous oxide, cyanic acid, and carbon dioxide (Becker, 1995). However, reactions quickly occur between the intermediates, and the final products consist mainly of water, carbon monoxide, carbon dioxide, and nitrogen gas, although small amounts of other compounds are typically produced as well.

Chemicals introduced into the water column would be quickly dispersed by waves, currents, and tidal action, and eventually become uniformly distributed. A portion of the carbon compounds such as carbon monoxide and carbon dioxide would likely become integrated into the carbonate system (alkalinity and pH buffering capacity of seawater). Some of the nitrogen and carbon compounds, including petroleum products, would be metabolized or assimilated by phytoplankton and bacteria. Most of the gas products that do not react with the water or become assimilated by organisms would be released into the atmosphere. Due to dilution, mixing, and transformation, none of these chemicals are expected to have significant impacts on the marine environment.

Explosive material that is not consumed in a detonation could sink to the substrate and bind to sediments. However, the quantity of such materials is expected to be inconsequential. Research has shown that if munitions function properly, nearly full combustion of the explosive materials will occur, and only extremely small amounts of raw material will remain. In addition, any remaining materials would be naturally degraded. TNT decomposes when exposed to sunlight (ultraviolet radiation), and is also degraded by microbial activity (Becker, 1995). Several types of microorganisms have been shown to metabolize TNT. Similarly, RDX decomposes by hydrolysis, ultraviolet radiation exposure, and biodegradation.

While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat and prey resources would be temporary and reversible. The main impact associated with the proposed activity would be temporarily elevated noise levels and the associated direct effects on marine mammals, previously discussed in this notice. Marine mammals are anticipated to temporarily vacate the area of live fire events. However, these events usually do not last more than 90 to 120 minutes at a time, and animals are anticipated to return to the activity area during periods of non-activity. Thus, based on the preceding discussion, NMFS does not anticipate that the proposed activity would have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations.

Proposed Mitigation

In order to issue an incidental take authorization under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses (where relevant).

The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the incidental take authorization process such that "least practicable adverse impact" shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

NMFS and Eglin AFB have worked to identify potential practicable and effective mitigation measures, which include a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the "military-readiness activity." NMFS refers the reader to Section 11 of their application for more detailed information on the proposed mitigation measures which include the following:

Visual Mitigation

Eglin AFB would require visual monitoring during Maritime WSEP missions from surface vessels and three high-definition video cameras. If the high-definition video cameras are not operational for any reason, Eglin AFB will not conduct Maritime WSEP missions.

In addition to the two types of visual monitoring discussed later, Eglin AFB personnel are present within the mission area (on boats and the GRATV) on each day of testing well in advance of weapon deployment, typically near sunrise. They will perform a variety of tasks including target preparation, equipment checks, etc., and will opportunistically observe for marine mammals and indicators as feasible throughout test preparation. However, such observations are considered incidental and would only occur as time and schedule permits. Any sightings would be relayed to the Lead Biologist, as described in the following mitigation sections.

Vessel-Based Monitoring: Eglin AFB would station a large number of range clearing boats (approximately 20 to 25) around the test site to prevent non-participating vessels from entering the human safety zone. Based on the composite footprint, range clearing boats will be located approximately 15.28 km (9.5 mi) from the detonation point (see Figure 11–1 in Eglin AFB's application). However, the actual distance will vary based on the size of the munition being deployed.

Trained marine species observers would be aboard five of these boats and will conduct protected species surveys before and after each test. The protected species survey vessels will be dedicated solely to observing for marine species during the pre-mission surveys while the remaining safety boats clear the area of non-authorized vessels. The protected species survey vessels will begin surveying the area at sunrise. The area to be surveyed will encompass the largest applicable zone of influence (ZOI), which is the Level A harassment range. Animals that may enter the area after the pre-mission surveys have been completed and prior to detonation would not reach the predicted smaller slight lung injury and/or mortality zones.

Because of human safety issues, observers will be required to leave the test area at least 30 minutes in advance of live weapon deployment and move to a position on the safety zone periphery, approximately 9.5 miles from the detonation point. Observers will continue to scan for marine mammals

from the periphery, but effectiveness will be limited as the boat will remain at a designated station.

Video Monitoring: In addition to vessel-based monitoring, three high-definition video cameras would be positioned on the GRATV anchored on-site, as described earlier, to allow for real-time monitoring for the duration of the mission. The camera configuration and actual number of cameras used would depend on specific mission requirements. In addition to monitoring the area for mission objective issues, the camera(s) would also monitor for the presence of protected species. A trained marine species observer from Eglin Natural Resources would be located in Eglin AFB's Central Control Facility, along with mission personnel, to view the video feed before and during test activities. The distance to which objects can be detected at the water surface by use of the cameras is considered generally comparable to that of the human eye.

The GRATV will be located about 183 m (600 ft) from the target. The larger mortality threshold ranges correspond to the modified Goertner model adjusted for the weight of an Atlantic spotted dolphin calf, and extend from 0 to 237 m (0 to 778 ft) from the target, depending on the ordnance, and the Level A ranges for both common bottlenose and Atlantic spotted dolphins extend from 7 to 965 m (23 to 3,166 ft) from the target, depending on the ordnance and harassment criterion. Given these distances, observers could reasonably be expected to view a substantial portion of the mortality zone in front of the camera, although a small portion would be behind or to the side of the camera view. Some portion of the Level A harassment zone could also be viewed, although it would be less than that of the mortality zone (a large percentage would be behind or to the side of the camera view).

Pre-Mission Monitoring

The purposes of pre-mission monitoring are to: (1) Evaluate the mission site for environmental suitability, and 2) verify that the ZOI is free of visually detectable marine mammals, as well as potential indicators of these species. On the morning of the mission, the Test Director and Safety Officer will confirm that there are no issues that would preclude mission execution and that weather is adequate to support mitigation measures.

Sunrise or Two Hours Prior to Mission: Eglin AFB range clearing vessels and protected species survey vessels will be on site at least two hours prior to the mission. The Lead Biologist on board one survey vessel will assess the overall suitability of the mission site based on environmental conditions (sea state) and presence/absence of marine mammal indicators. This information will be communicated to Tower Control and relayed to the Safety Officer in Central Control Facility.

One and One-Half Hours Prior to Mission: Vessel-based surveys will begin approximately one and one-half hours prior to live weapon deployment. Surface vessel observers will survey the ZOI and relay all marine species and indicator sightings, including the time of sighting, GPS location, and direction of travel, if known, to the Lead Biologist. The Lead Biologist will document all sighting information on report forms to be submitted to Eglin Natural Resources after each mission. Surveys would continue for approximately one hour. During this time, Eglin AFB personnel in the mission area will also observe for marine species as feasible. If marine mammals or indicators are observed within the ZOI, the range will be declared "fouled," a term that signifies to mission personnel that conditions are such that a live ordnance drop cannot occur (*e.g.,* protected species or civilian vessels are in the mission area). If no marine mammals or indicators are observed, Eglin AFB would declare the range clear of protected species.

One-Half Hour Prior to Mission: At approximately 30 minutes to one hour prior to live weapon deployment, marine species observers will be instructed to leave the mission site and remain outside the safety zone, which on average will be 9.5 miles from the detonation point. The actual size is determined by weapon NEW and method of delivery. The survey team will continue to monitor for protected species while leaving the area. As the survey vessels leave the area, marine species monitoring of the immediate target areas will continue at CCF through the live video feed received from the high definition cameras on the GRATV. Once the survey vessels have arrived at the perimeter of the safety zone (approximately 30 minutes after being instructed to leave, depending on actual travel time) the range will be declared "green" and mission will be allowed to proceed, assuming all non-participating vessels have left the safety zone as well.

Execution of Mission: Immediately prior to live weapon drop, the Test Director and Safety Officer will communicate to confirm the results of marine mammal surveys and the appropriateness of proceeding with the mission. The Safety Officer will have final authority to proceed with, postpone, or cancel the mission. The mission would be postponed if:

- Any of the high-definition video cameras are not operational for any reason.
- Any marine mammal is visually detected within the ZOI. Postponement would continue until the animal(s) that caused the postponement is: (1) Confirmed to be outside of the ZOI on a heading away from the targets; or (2) not seen again for 30 minutes and presumed to be outside the ZOI due to the animal swimming out of the range.
- Large schools of fish or large flocks of birds feeding at the surface are observed within the ZOI. Postponement would continue until these potential indicators are confirmed to be outside the ZOI.
- Any technical or mechanical issues related to the aircraft or target boats.
- Non-participating vessels enter the human safety zone prior to weapon release.

In the event of a postponement, protected species monitoring would continue from the Central Control Facility through the live video feed.

Post-Mission Monitoring

Post-mission monitoring is designed to determine the effectiveness of pre-mission mitigation by reporting sightings of any dead or injured marine mammals. Post-detonation monitoring surveys will commence once the mission has ended or, if required, as soon as personnel declare the mission area safe. Vessels will move into the survey area from outside the safety zone and monitor for at least 30 minutes, concentrating on the area down-current of the test site. This area is easily identifiable because of the floating debris in the water from impacted targets. Up to 10 Eglin AFB support vessels will be cleaning debris and collecting damaged targets from this area thus spending many hours in the area once the mission is completed. All vessels will be instructed to report any dead or injured marine mammals to the Lead Biologist. The protected species survey vessels will document any marine mammals that were killed or injured as a result of the mission and, if practicable, recover and examine any dead animals. The species, number, location, and behavior of any animals observed will be documented and reported to Eglin Natural Resources.

Mission Delays Due to Weather

Eglin AFB would delay or reschedule Maritime WSEP missions if the Beaufort sea state is greater than number 4 at the

time of the test. The Lead Biologist aboard one of the survey vessels will make the final determination of whether conditions are conducive for sighting protected species or not.

NMFS has carefully evaluated Eglin AFB's proposed mitigation measures in the context of ensuring that we prescribe the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. NMFS' evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed here:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).
2. A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to training exercises that we expect to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).
3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to training exercises that we expect to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).
4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to training exercises that we expect to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).
5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.
6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on the evaluation of Eglin AFB's proposed measures, as well as other measures considered, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance while also considering personnel safety, practicality of implementation, and the impact of effectiveness of the military readiness activity.

The public comment period will afford the public an opportunity to submit recommendations, views, and/or concerns regarding this action and the proposed mitigation measures. While NMFS has preliminarily determined that the proposed mitigation measures presented in this document will effect the least practicable adverse impact on the affected species or stocks and their habitat, NMFS will consider all public comments to help inform our final decision. Consequently, the proposed mitigation measures may be refined, modified, removed, or added to prior to the issuance of the final rule based on public comments received and, where appropriate, further analysis of any additional mitigation measures.

Proposed Monitoring and Reporting

In order to issue an Authorization for an activity, section 101(a)(5)(D) of the MMPA states that we must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for an authorization must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and our expectations of the level of taking or impacts on populations of marine mammals present in the action area.

Monitoring measures prescribed by us should accomplish one or more of the following general goals:

1. An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and during other times and locations, in order to generate more data to contribute to the analyses mentioned later;
2. An increase in our understanding of how many marine mammals would be affected by seismic airguns and other active acoustic sources and the likelihood of associating those exposures with specific adverse effects, such as behavioral harassment, temporary or permanent threshold shift;
3. An increase in our understanding of how marine mammals respond to stimuli that we expect to result in take and how those anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:
   a. Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (*i.e.*, we need to be able to accurately predict received level, distance from source, and other pertinent information);
   b. Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (*i.e.*, we need to be able to accurately predict received level, distance from source, and other pertinent information);
   c. Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;
4. An increased knowledge of the affected species; and
5. An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

NMFS proposes to include the following measures in the Maritime WSEP Authorization (if issued). They are:

(1) Eglin will track their use of the EGTTR for test firing missions and protected species observations, through the use of mission reporting forms.

(2) A summary annual report of marine mammal observations and Maritime WSEP activities will be submitted to the NMFS Southeast Regional Office (SERO) and the Office of Protected Resources either at the time of a request for renewal of an Authorization or 90 days after expiration of the current Authorization if a new Authorization is not requested. This annual report must include the following information: (i) Date and time of each Maritime WSEP exercise; (ii) a complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of Maritime WSEP exercises on marine mammal populations; and (iii) results of the Maritime WSEP exercise monitoring, including numbers by

species/stock of any marine mammals noted injured or killed as a result of the missions and number of marine mammals (by species if possible) that may have been harassed due to presence within the activity zone.

(3) If any dead or injured marine mammals are observed or detected prior to testing, or injured or killed during live fire, a report must be made to NMFS by the following business day.

(4) Any unauthorized takes of marine mammals (*i.e.*, injury or mortality) must be immediately reported to NMFS and to the respective stranding network representative.

Estimated Numbers of Marine Mammals Taken by Harassment, Injury, and Mortality

NMFS' analysis identified the physiological responses, and behavioral responses that could potentially result from exposure to underwater explosive detonations. In this section, we will relate the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B harassment. This section will also quantify the effects that might occur from the proposed military readiness activities in W–151.

Definition of Harassment

The NDAA removed the "small numbers" and "specified geographic region" limitations indicated earlier in this document and amended the definition of harassment as it applies to a "military readiness activity" to read as follows: (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Level B Harassment

Of the potential effects described earlier in this document, the following are the types of effects that fall into the Level B harassment category:

Behavioral Harassment—Behavioral disturbance that rises to the level described in the above definition, when resulting from exposures to non-impulsive or impulsive sound, is Level B harassment. Some of the lower level physiological stress responses discussed earlier would also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When predicting Level B harassment based on estimated behavioral responses, those takes may have a stress-related physiological component.

Acoustic Masking and Communication Impairment—NMFS considers acoustic masking to be Level B harassment, as it can disrupt natural behavioral patterns by interrupting or limiting the marine mammal's receipt or transmittal of important information or environmental cues.

Temporary Threshold Shift (TTS)—As discussed previously, TTS can affect how an animal behaves in response to the environment, including conspecifics, predators, and prey. NMFS classifies TTS (when resulting from exposure to explosives and other impulsive sources) as Level B harassment, not Level A harassment (injury).

Level A Harassment

Of the potential effects that were described earlier, the following are the types of effects that fall into the Level A Harassment category:

Permanent Threshold Shift (PTS)—PTS (resulting either from exposure to explosive detonations) is irreversible and NMFS considers this to be an injury.

Physical Disruption of Tissues Resulting from Explosive Shock Wave—NMFS classifies physical damage of tissues resulting from a shock wave (from an explosive detonation) as an injury.

Impulsive Sound Explosive Thresholds

For the purposes of this proposed regulation, NMFS has identified two levels of take for Eglin AFB's training exercises: Level B harassment and Level A harassment. NMFS presents the acoustic thresholds for impulse sounds in this section.

In the absence of mitigation, it is likely that the activities could kill or injure marine mammals as a result of an explosive detonation, due to the response of air cavities in the body (*e.g.*, lungs and intestines). These effects are likely to be most severe in near surface waters where the reflected shock wave creates a region of negative pressure called cavitation. Extensive lung hemorrhage is debilitating and potentially fatal. Suffocation caused by lung hemorrhage is likely to be the major cause of marine mammal death from underwater shock waves. The estimated range for the onset of extensive lung hemorrhage to marine mammals varies depending upon the animal's weight, with the smallest mammals having the greatest potential hazard range.

Table 4 summarizes the marine mammal impulsive sound explosive thresholds used for Eglin AFB's acoustic impact modeling for marine mammal take in its application. Several standard acoustic metrics (Urick, 1983) describe the thresholds for predicting potential physical impacts from underwater pressure waves. They are:

- Total energy flux density or Sound Exposure Level (SEL). For plane waves (as assumed here), SEL is the time integral of the instantaneous intensity, where the instantaneous intensity is defined as the squared acoustic pressure divided by the characteristic impedance of sea water. Thus, SEL is the instantaneous pressure amplitude squared, summed over the duration of the signal. Standard units are dB referenced to 1 re: μPa^2-s.
- ⅓-octave SEL. This is the SEL in a ⅓-octave frequency band. A ⅓-octave band has upper and lower frequency limits with a ratio of 21:3, creating bandwidth limits of about 23 percent of center frequency.
- Positive impulse. This is the time integral of the initial positive pressure pulse of an explosion or explosive-like wave form. Standard units are Pa-s or psi-ms.
- Peak pressure. This is the maximum positive amplitude of a pressure wave, dependent on charge mass and range. Standard units are psi, μPa, or Bar.

TABLE 4—IMPULSIVE SOUND EXPLOSIVE THRESHOLDS USED BY THE MARINE CORPS IN ITS PREVIOUS ACOUSTICS IMPACTS MODELING

Criterion	Criterion definition	Threshold
Mortality	Onset of severe lung injury (mass of dolphin calf: 12.2 kg) (1% probability of mortality).	31 psi-msec (positive impulse).

TABLE 4—IMPULSIVE SOUND EXPLOSIVE THRESHOLDS USED BY THE MARINE CORPS IN ITS PREVIOUS ACOUSTICS IMPACTS MODELING—Continued

Criterion	Criterion definition	Threshold
Level A harassment (injury)	50% animals would experience ear drum rupture 30% animals exposed sustain permanent threshold shift.	205 dB re 1 μPa^2-s EFD (full spectrum energy).
Level A harassment (injury)	Onset of slight lung injury (mass of dolphin calf: 12.2 kg)	13 psi-msec (positive impulse).
Level B harassment	TTS and associated behavioral disruption	23 psi peak pressure.
Level B harassment	TTS and associated behavioral disruption (dual criteria)	182 dB re: 1 μPa^2-s EFD,* 1/3 octave band.
Level B harassment	Sub-TTS behavioral disruption (for multiple/sequential detonations only).	177 dB re: 1 μPa^2-s EFD,* 1/3 octave band.

* Note: In greatest 1/3-octave band above 10 Hz or 100 Hz.

NMFS previously developed the explosive thresholds for assessing impacts of explosions on marine mammals shown in Table 4 for the shock trials of the USS Seawolf and USS Winston S. Churchill. However, at NMFS' recommendation, Eglin AFB has updated the thresholds used for onset of temporary threshold shift (TTS; Level B Harassment) and onset of permanent threshold shift (PTS; Level A Harassment) to be consistent with the thresholds outlined in the Navy's report titled, "Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis Technical Report," which the Navy coordinated with NMFS. NMFS believes that the thresholds outlined in the Navy's report represent the best available science. The report is available on the internet at: *http://aftteis.com/Portals/4/aftteis/Supporting%20Technical%20Documents/Criteria_and_Thresholds_for_US_Navy_Acoustic_and_Explosive_Effects_Analysis-Apr_2012.pdf.*

Table 5 in this document outlines the revised acoustic thresholds used by NMFS for this proposed Authorization when addressing noise impacts from explosives.

TABLE 5—IMPULSIVE SOUND EXPLOSIVE THRESHOLDS USED BY EGLIN AFB IN ITS CURRENT ACOUSTICS IMPACTS MODELING

Group	Behavior		Slight injury			Mortality
	Behavioral	TTS	PTS	Gastro-intestinal tract	Lung	
Mid-frequency Cetaceans.	167 dB SEL ..	172 dB SEL or 23 psi.	187 dB SEL or 45.86 psi.	104 psi	39.1 $M^{1/3}$ (1 + [D_{Rm}/10.081])$^{1/2}$ Pa-sec Where: M = mass of the animals in kg D_{Rm} = depth of the receiver (animal) in meters.	91.4 $M^{1/3}$ (1 + D_{Rm}/10.081])$^{1/2}$ Pa-sec Where: M = mass of the animals in kg D_{Rm} = depth of the receiver (animal) in meters

Eglin AFB conservatively modeled that all explosives would detonate at a 1.2 m (3.9 ft) water depth despite the training goal of hitting the target, resulting in an above water or on land explosion. For sources detonated at shallow depths, it is frequently the case that the explosion may breech the surface with some of the acoustic energy escaping the water column. Table 6 provides the estimated maximum range or radius, from the detonation point to the various thresholds described in Table 5. Eglin AFB uses the range information shown in Table 6 (Table 6.3 in Eglin's application) to calculate the total area of the ZOI and combine the calculated ZOIs with density estimates (adjusted for depth distribution) and the number of live munitions to provide an estimate of the number of marine mammals potentially exposed to the various impact thresholds.

TABLE 6—DISTANCES (m) TO HARASSMENT THRESHOLDS FROM EGLIN AFB'S EXPLOSIVE ORDNANCE

Munition	NEW (lbs)	Total number	Detonation scenario	Mortality	Level A harassment				Level B harassment		
					Slight lung injury	GI track injury	PTS		TTS		Behavioral
				Modified Goertner model 1	Modified Goertner model 2	237 dB SPL	187 dB SEL	230 dB peak SPL	172 dB SEL	224 dB peak SPL	167 dB SEL
Bottlenose Dolphin											
GBU–10 or GBU–24	945	2	Surface	199	350	340	965	698	1,582	1,280	2,549
GBU–12 or GBU–54	192	6	Surface	111	233	198	726	409	2,027	752	2,023
AGM–65 (Maverick)	86	6	Surface	82	177	150	610	312	1,414	575	1,874
GBU–39 (LSDB)	37	4	Surface	59	128	112	479	234	1,212	433	1,543
AGM–114 (Hellfire)	20	15	(10 ft depth)	110	229	95	378	193	2,070	354	3,096
AGM–175 (Griffin) ..	13	10	Surface	38	83	79	307	165	1,020	305	1,343
2.75 Rockets	12	100	Surface	36	81	77	281	161	1,010	296	1,339
PGU–13 HEI 30 mm.	0.1	1,000	Surface	0	7	16	24	33	247	60	492

TABLE 6—DISTANCES (m) TO HARASSMENT THRESHOLDS FROM EGLIN AFB'S EXPLOSIVE ORDNANCE—Continued

Munition	NEW (lbs)	Total number	Detonation scenario	Mortality	Level A harassment				Level B harassment		
					Slight lung injury	GI track injury	PTS		TTS		Behavioral
				Modified Goertner model 1	Modified Goertner model 2	237 dB SPL	187 dB SEL	230 dB peak SPL	172 dB SEL	224 dB peak SPL	167 dB SEL
Atlantic Spotted Dolphin and Unidentified Dolphin [1]											
GBU–10 or GBU–24	945	2	Surface	237	400	340	965	698	1,582	1,280	2,549
GBU–12 or GBU–54	192	6	Surface	138	274	198	726	409	2,027	752	2,023
AGM–65 (Maverick)	86	6	Surface	101	216	150	610	312	1,414	575	1,874
GBU–39 (LSDB)	37	4	Surface	73	158	112	479	234	1,212	433	1,543
AGM–114 (Hellfire)	20	15	(10 ft depth)	135	277	95	378	193	2,070	354	3,096
AGM–175 (Griffin)	13	10	Surface	47	104	79	307	165	1,020	305	1,343
2.75 Rockets	12	100	Surface	45	100	77	281	161	1,010	296	1,339
PGU–13 HEI 30 mm.	0.1	1,000	Surface	0	9	16	24	33	247	60	492

AGM = air-to-ground missile; cal = caliber; CBU = Cluster Bomb Unit; ft = feet; GBU = Guided Bomb Unit; HEI = high explosive incendiary; lbs = pounds; mm = millimeters; N/A = not applicable; NEW = net explosive weight; PGU = Projectile Gun Unit; SDB = small diameter bomb; PTS = permanent threshold shift; TTS = temporary threshold shift; WCMD = wind corrected munition dispenser

[1] Unidentified dolphin can be either bottlenose or Atlantic spotted dolphin. Eglin AFB based the mortality and slight lung injury criteria on the mass of a newborn Atlantic spotted dolphin.

Determination of the Mitigation Monitoring Zones

The ranges that are presented in Table 6 represent a radius of impact for a given threshold from a single detonation of each munition/detonation scenario. They do not consider accumulated energies from multiple detonation occurring within the same 24-hour time period. For calculating take estimates, the single detonation approach is more conservative because it multiplies the exposures from a single detonation by the number of munitions and assumes a fresh population of marine mammals is being impacted each time. Eglin AFB used this approach because of the uncertainty surrounding which munitions they would release on a given day. Multiple variables, such as weather, aircraft mechanical issues, munition malfunctions, and target availability may prevent planned munitions releases. By treating each detonation as a separate event and summing those impacts accordingly, Eglin AFB would have maximum operational flexibility to conduct the missions without limitations on either the total number of munitions allowed to be dropped in a day, or on the specific combinations of munitions that could be released.

While this methodology overestimates the overall potential takes presented in the next section, the ranges do not accurately represent the actual area acoustically impacted for a given threshold from multiple detonations in a given mission day. The total acoustic impact area for two identical bombs detonating within a given timeframe is less than twice the impact area of a single bomb's detonation. This has to do with the accumulated energy from multiple detonations occurring sequentially. When one weapon is detonated, a certain level of transmission loss is required to be calculated to achieve each threshold level which can then be equated to a range. By releasing a second munition in the same event (same place and close in time), even though the total energy is increased, the incremental impact area from the second detonation is slightly less than that of the first; however the impact range for the two munitions is larger than the impact range for one. Since each additional detonation adds energy to the sound exposure level (SEL) metric, all the energy from all munitions released in a day is accumulated. By factoring in the transmission loss of the first detonation added with the incremental increases from the second, third, fourth, etc., the range of the cumulative energy that is below each threshold level can be determined. Unlike the energy component, peak pressure is not an additive factor, therefore Eglin AFB did not consider thresholds expressed as either acoustic impulse or peak SPL metrics (*i.e.*, mortality, slight lung injury, gastrointestinal tract injury) in their calculations.

Eglin AFB has created a sample day reflecting the maximum number of munitions that could be released and resulting in the greatest impact in a single mission day. However, this scenario is only a representation and may not accurately reflect how Eglin AFB may conduct actual operations. However, NMFS and Eglin AFB are considering this conservative assumption to calculate the impact range for mitigation monitoring measures. Thus, Eglin AFB has modeled, combined, and compared the sum of all energies from these detonations against thresholds with energy metric criteria to generate the accumulated energy ranges for this scenario. Table 7 displays these ranges which form the basis of the mitigation monitoring thresholds.

TABLE 7—DISTANCES (m) TO HARASSMENT THRESHOLDS FOR AN EXAMPLE MISSION DAY

Munition	NEW (lbs)	Total number per day	Detonation scenario	Level A harassment	Level B harassment	
					TTS	Behavioral
				PTS 187 dB SEL	172 dB SEL	167 dB SEL
GBU–10 or GBU–24	945	1	Surface	5,120	12,384	15,960
GBU–12 or GBU–54	192	1	Surface.			
AGM–65 (Maverick)	86	1	Surface.			

TABLE 7—DISTANCES (m) TO HARASSMENT THRESHOLDS FOR AN EXAMPLE MISSION DAY—Continued

Munition	NEW (lbs)	Total number per day	Detonation scenario	Level A harassment	Level B harassment	
					TTS	Behavioral
				PTS 187 dB SEL	172 dB SEL	167 dB SEL
GBU–39 (LSDB)	37	1	Surface.			
AGM–114 (Hellfire)	20	3	(10 ft depth).			
AGM–175 (Griffin)	13	2	Surface.			
2.75 Rockets	12	12	Surface.			
PGU–13 HEI 30 mm	0.1	125	Surface.			

AGM = air-to-ground missile; cal = caliber; CBU = Cluster Bomb Unit; ft = feet; GBU = Guided Bomb Unit; HEI = high explosive incendiary; lbs = pounds; mm = millimeters; N/A = not applicable; NEW = net explosive weight; PGU = Projectile Gun Unit; SDB = small diameter bomb; PTS = permanent threshold shift; TTS = temporary threshold shift; WCMD = wind corrected munition dispenser.

Based on the ranges presented in Table 7 and factoring operational limitations associated with survey-based vessel support for the missions, Eglin AFB estimates that during pre-mission surveys, the proposed monitoring area would be approximately 5 km (3.1 miles) from the target area, which corresponds to the Level A harassment threshold range. Eglin AFB proposes to survey the same-sized area for each mission day, regardless of the planned munition expenditures. By clearing the Level A harassment threshold range of protected species, animals that may enter the area after the completed pre-mission surveys but prior to detonation would not reach the smaller slight lung injury or mortality zones (presented in Table 6). Because of human safety issues, Eglin AFB would require observers to leave the test area at least 30 minutes in advance of live weapon deployment and move to a position on the safety zone periphery, approximately 9.5 miles (15 km) from the detonation point. Observers would continue to scan for marine mammals from the periphery, but effectiveness would be limited as the boat would remain at a designated station.

Density Estimation

Density estimates for bottlenose dolphin and spotted dolphin were derived from two sources (Table 8). Bottlenose dolphin density estimates were derived from a habitat modeling project conducted for portions of the EGTTR, including the Maritime WSEP project area (Garrison, 2008). NMFS developed habitat models using recent aerial survey line transect data collected during winter and summer. The surveys covered nearshore and continental shelf waters (to a maximum depth of 200 m), with the majority of effort concentrated in waters from the shoreline to 20 m depth. Marine species encounter rates during the surveys were corrected for sighting probability and the probability that animals were available on the surface to be seen. In combination with remotely sensed environmental data/habitat parameters (water depth, sea surface temperature (SST) and chlorophyll), these data were used to develop habitat models for cetaceans within the continental shelf and coastal waters of the eastern Gulf of Mexico. The technical approach, described as Generalized Regression and Spatial Prediction, spatially projects the species-habitat relationship based on distribution of environmental factors, resulting in predicted densities for unsampled locations and times. The spatial density model can therefore be used to predict density in unobserved areas and at different times of year based upon the monthly composite SST and chlorophyll datasets derived from satellite data. Similarly, the spatial density model can be used to predict relative density for any sub-region within the surveyed area.

Garrison (2008) produced bottlenose dolphin density estimates at various spatial scales within the EGTTR. At the largest scale, density data were aggregated into four principal strata categories: North-Inshore, North-Offshore, South-Inshore, and South-Offshore. Densities for these strata were provided in the published survey report. Unpublished densities were also provided for smaller blocks (sub-areas) corresponding to airspace units and a number of these sub-areas were combined to form larger zones. Densities in these smaller areas were provided to Eglin AFB in Excel© spreadsheets by the report author.

For both large areas and sub-areas, regions occurring entirely within waters deeper than 200 meters were excluded from predictions, and those straddling the 200 meter isobath were clipped to remove deep water areas. In addition, because of limited survey effort, density estimates beyond 150 meters water depth are considered invalid. The environmental conditions encountered during the survey periods (February and July/August) do not necessarily reflect the range of conditions potentially encountered throughout the year. In particular, the transition seasons of spring (April–May) and fall (October–November) have a very different range of water temperatures. Accordingly, for predictions outside of the survey period or spatial range, it is necessary to evaluate the statistical variance in predicted values when attempting to apply the model. The coefficient of variation (CV) of the predicted quantity is used to measure the validity of model predictions. According to Garrison (2008), the best predictions have CV values of approximately 0.2. When CVs approach 0.7, and particularly when they exceed 1.0, the resulting model predictions are extremely uncertain and are considered invalid.

Based upon the preceding discussion, the bottlenose dolphin density estimate used in this document is the median density corresponding to sub-area 137 (see Figure 3–1 in Eglin AFB's IHA application). The planned Maritime WSEP test location lies within this sub-area. Within this block, Garrison (2008) provided densities based upon one year (2007) and five-year monthly averages for SST and chlorophyll. The 5-year average is considered preferable. Only densities with a CV rounded to 0.7 or lower (*i.e.*, 0.64 and below) were considered. The CV for June in this particular block is 0.62.

Atlantic spotted dolphin density was derived from Fulling *et al.* (2003), which describes the results of mammal surveys conducted in association with fall ichthyoplankton surveys from 1998 to 2001. The surveys were conducted by NMFS personnel from the U.S.-Mexico border to southern Florida, in water depths of 20 to 200 meters. Using the software program DISTANCE©, density estimates were generated for East and West regions, with Mobile Bay as the

dividing point. The East region is used in this document. Densities were provided for Atlantic spotted dolphins and unidentified *T. truncatus/S. frontalis* (among other species). The unidentified *T. truncatus/S. frontalis* category is treated as a separate species group with a unique density. Density estimates from Fulling *et al.* (2003) were not adjusted for sighting probability (perception bias) or surface availability (availability bias) [g(0) = 1] in the original survey report, likely resulting in underestimation of true density. Perception bias refers to the failure of observers to detect animals, although they are present in the survey area and available to be seen. Availability bias refers to animals that are in the survey area, but are not able to be seen because they are submerged when observers are present. Perception bias and availability bias result in the underestimation of abundance and density numbers (negative bias).

Fulling *et al.* (2003) did not collect data to correct density for perception and availability bias. However, in order to address this negative bias, Eglin AFB has adjusted density estimates based on information provided in available literature. There are no published g(0) correction factors for Atlantic spotted dolphins. However, Barlow (2006) estimated g(0) for numerous marine mammal species near the Hawaiian Islands, including offshore pantropical spotted dolphins (*Stenella attenuata*). Separate estimates for this species were provided for group sizes of 1 to 20 animals [g(0) = 0.76], and greater than 20 animals [g(0) = 1.00]. Although Fulling *et al.* (2003) sighted some spotted dolphin groups of more than 20 individuals, the 0.76 value is used as a more conservative approach.

NMFS refers the reader to Section 3 of Eglin AFB's application for detailed information on additional equations used to calculate densities (*i.e.*, Barlow, 2006) for Atlantic spotted dolphins. Using the same method, Eglin AFB estimated the adjusted density for the unidentified *T. truncatus/S. frontalis* species group at 0.009 animals/km^2. There are no variances attached to either of these recalculated density values, so overall confidence in these values is unknown.

TABLE 8—MARINE MAMMAL DENSITY ESTIMATES WITHIN EGLIN AFB'S EGTTR

Species	Density (animals/km^2)
Bottlenose dolphin [1]	1.194
Atlantic spotted dolphin [2]	0.265
Unidentified bottlenose dolphin/Atlantic spotted dolphin [2]	0.009

[1] Source: Garrison, 2008; adjusted for observer and availability bias by the author.
[2] Source: Fulling *et al.*, 2003; adjusted for negative bias based on information provided by Barlow (2003; 2006).

Table 9 indicates the modeled potential for lethality, injury, and non-injurious harassment (including behavioral harassment) to marine mammals in the absence of mitigation measures. The numbers represent total impacts for all detonations combined. Mortality was calculated as approximately one-half an animal for bottlenose dolphins and about 0.1 animals for spotted dolphins. It is expected that, with implementation of the management practices described below, potential impacts would be mitigated to the point that there would be no mortality takes. Based on the low mortality exposure estimates calculated by the acoustic model combined with the implementation of mitigation measures, zero marine mammals are expected to be affected by pressure levels associated with mortality. Therefore, Eglin AFB has requested an Incidental Harassment Authorization, as opposed to regulations and a Letter of Authorization under section 101(a)(5)(A).

Table 9 provides Eglin AFB's annual number of marine mammals, by species, potentially taken by Level A harassment and Level B harassment, by Maritime WSEP operations. NMFS notes that Eglin AFB derived these estimates without consideration of the effectiveness of their proposed mitigation measures. As indicated in Table 9, Eglin AFB and NMFS estimate that approximately 40 marine mammals could potentially be exposed to injurious Level A harassment noise levels (187 dB SEL).

TABLE 9—MODELED NUMBER OF MARINE MAMMALS POTENTIALLY AFFECTED BY MARITIME STRIKE MISSIONS. PROPOSED AUTHORIZED TAKES FOR LEVEL A AND LEVEL B HARASSMENT ARE THE SAME AS THOSE MODELED. NMFS DOES NOT PROPOSE TO AUTHORIZE TAKES FOR MORTALITY

Species	Mortality	Level A harassment	Level B harassment (TTS)	Level B harassment (behavioral)
Bottlenose dolphin	0.47	33.10	405.32	862.53
Atlantic spotted dolphin	0.11	6.58	74.15	146.41
Unidentified bottlenose dolphin/Atlantic spotted dolphin	0.00	0.22	2.52	4.97
Total	0.58	39.90	481.99	1,013.91

Approximately 481.99 marine mammals would be exposed annually to non-injurious Level B behavioral harassment. TTS results from fatigue or damage to hair cells or supporting structures and may cause disruption in the processing of acoustic cues; however, hearing sensitivity is recovered within a relatively short time. Based on Eglin AFB and NMFS' estimates, up to 1,014 marine mammals may experience a behavioral response to these exercises associated with the 167 dB re: 1 μPa^2-s threshold. NMFS has preliminarily determined that this number will be significantly lower due to the expected effectiveness of the mitigation measures proposed for inclusion in the Authorization (if issued).

Negligible Impact Analysis and Preliminary Determinations

As explained previously, we have defined the term "negligible impact" to mean "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival" (50 CFR 216.103). The lack of likely

adverse effects on annual rates of recruitment or survival (*i.e.*, population level effects) forms the basis of a negligible impact finding. Thus, an estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, and the number of estimated mortalities, effects on habitat, and the status of the species.

In making a negligible impact determination, we consider:

- The number of anticipated injuries, serious injuries, or mortalities;
- The number, nature, and intensity, and duration of Level B harassment; and
- The context in which the takes occur (*e.g.*, impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);
- The status of stock or species of marine mammals (*i.e.*, depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);
- Impacts on habitat affecting rates of recruitment/survival; and
- The effectiveness of monitoring and mitigation measures to reduce the number or severity of incidental take.

For reasons stated previously in this document and based on the following factors, Eglin AFB's specified activities are not likely to cause long-term behavioral disturbance, permanent threshold shift, or other non-auditory injury, serious injury, or death.

The takes from Level B harassment will be due to potential behavioral disturbance and TTS. The takes from Level A harassment will be due to potential tympanic-membrane (TM) rupture. Activities would only occur over a timeframe of two to three weeks in beginning in February, 2015, with one or two missions occurring per day. It is possible that some individuals may be taken more than once if those individuals are located in the exercise area on two different days when exercises are occurring. However, multiple exposures are not anticipated to have effects beyond Level A and Level B harassment.

While animals may be impacted in the immediate vicinity of the activity, because of the small ZOIs (compared to the vast size of the Gulf of Mexico ecosystem where these species live) and the short duration of the Maritime WSEP operations, NMFS has preliminarily determined that there will not be a substantial impact on marine mammals or on the normal functioning of the nearshore or offshore Gulf of Mexico ecosystems. The proposed activity is not expected to impact rates of recruitment or survival of marine mammals since neither mortality (which would remove individuals from the population) nor serious injury are anticipated to occur. In addition, the proposed activity would not occur in areas (and/or times) of significance for the marine mammal populations potentially affected by the exercises (*e.g.*, feeding or resting areas, reproductive areas), and the activities would only occur in a small part of their overall range, so the impact of any potential temporary displacement would be negligible and animals would be expected to return to the area after the cessations of activities. Although the proposed activity could result in Level A (TM rupture) and Level B (behavioral disturbance and TTS) harassment of marine mammals, the level of harassment is not anticipated to impact rates of recruitment or survival of marine mammals because the number of exposed animals is expected to be low due to the short term and site specific nature of the activity, and the type of effect would not be detrimental to rates of recruitment and survival.

Additionally, the mitigation and monitoring measures proposed to be implemented (described earlier in this document) are expected to further minimize the potential for harassment. The protected species surveys would require Eglin AFB to search the area for marine mammals, and if any are found in the live fire area, then the exercise would be suspended until the animal(s) has left the area or relocated. Moreover, marine species observers located in the Eglin control tower would monitor the high-definition video feed from cameras located on the instrument barge anchored on-site for the presence of protected species. Furthermore, Maritime WSEP missions would be delayed or rescheduled if the sea state is greater than a 4 on the Beaufort Scale at the time of the test. In addition, Maritime WSEP missions would occur no earlier than two hours after sunrise and no later than two hours prior to sunset to ensure adequate daylight for pre- and post-mission monitoring.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that Eglin AFB's Maritime WSEP operations will result in the incidental take of marine mammals, by Level A and Level B harassment only, and that the taking from the Maritime WSEP exercises will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has preliminarily determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Eglin AFB initiated consultation with the Southeast Region, NMFS, under section 7 of the ESA regarding the effects of this action on ESA-listed species and critical habitat under the jurisdiction of NMFS. The consultation will be completed and a biological opinion issued prior to any final determinations on the Authorization. Due to the location of the activity, no ESA-listed marine mammal species are likely to be affected; therefore, NMFS has preliminarily determined that this proposed Authorization would have no effect on ESA-listed species. However, prior to the agency's decision on the issuance or denial of this Authorization, NMFS will make a final determination on whether additional consultation is necessary.

National Environmental Policy Act (NEPA)

Eglin AFB released a Draft Environmental Assessment (EA) on the Maritime WSEP Operations. NMFS has made this EA available on its Web site (See **ADDRESSES**). Eglin AFB will issue a Final EA and a Finding of No Significant Impact (FONSI) on the Maritime WSEP activities prior to NMFS' final determination on the Authorization.

In accordance with NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS will review the information contained in Eglin AFB's EA and determine whether the EA accurately and completely describes the preferred action alternative, a

reasonable range of alternatives, and the potential impacts on marine mammals, endangered species, and other marine life that could be impacted by the preferred and non-preferred alternatives. Based on this review and analysis, NMFS may adopt Eglin AFB's DEA under 40 CFR 1506.3, and issue its own FONSI statement on issuance of an annual authorization under section 101(a)(5) of the MMPA.

Proposed Authorization

As a result of these preliminary determinations, we propose to issue an Authorization to Eglin AFB for conducting Maritime WSEP activities, for a period of one year from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed Authorization language is provided in the next section. The wording contained in this section is proposed for inclusion in the Authorization (if issued).

1. This Authorization is valid for a period of one year from the date of issuance.

2. This Authorization is valid only for activities associated with the Maritme WSEP operations utilizing munitions identified in the Attachment.

3. The incidental taking, by Level A and Level B harassment, is limited to: Atlantic bottlenose dolphin (*Tursiops truncatus*); and Atlantic spotted dolphin (*Stenella frontalis*) as specified in the following table:

Species	Level A harassment	Level B harassment (TTS)	Level B harassment (behavioral)
Bottlenose dolphin	33	405	863
Atlantic spotted dolphin	7	74	146
Unidentified bottlenose dolphin/Atlantic spotted dolphin	1	3	5
Total	41	482	1,014

The taking by serious injury or death of these species, the taking of these species in violation of the conditions of this Incidental Harassment Authorization, or the taking by harassment, serious injury or death of any other species of marine mammal is prohibited and may result in the modification, suspension or revocation of this Authorization.

4. Mitigation

When conducting this activity, the following mitigation measures must be undertaken:

- If daytime weather and/or sea conditions preclude adequate monitoring for detecting marine mammals and other marine life, maritime strike operations must be delayed until adequate sea conditions exist for monitoring to be undertaken. Daytime maritime strike exercises will be conducted only when sea surface conditions do not exceed Beaufort sea state 4 (*i.e.*, wind speed 13–18 mph (11–16 knots); wave height 1 m (3.3 ft)), the visibility is 5.6 km (3 nm) or greater, and the ceiling is 305 m (1,000 ft) or greater.
- On the morning of the maritime strike mission, the test director and safety officer will confirm that there are no issues that would preclude mission execution and that the weather is adequate to support monitoring and mitigation measures.

Two Hours Prior to Mission

- Mission-related surface vessels will be stationed on site.
- Vessel-based observers on board at least one vessel will assess the overall suitability of the test site based on environmental conditions (*e.g.*, sea state) and presence/absence of marine mammal or marine mammal indicators (*e.g.*, large schools of fish, jellyfish, Sargassum rafts, and large flocks of birds feeding at the surface). Observers will relay this information to the safety officer.

One and One-Half Hours Prior to Mission

- Vessel-based surveys and video camera surveillance will commence. Vessel-based observers will survey the applicable Zone of Impact (ZOI) and relay all marine mammal and indicator sightings, including the time of sighting and direction of travel (if known) to the safety officer. Surveys will continue for approximately one hour.
- If marine mammals or marine mammal indicators are observed within the applicable ZOI, the test range will be declared "fouled," which will signify to mission personnel that conditions are such that a live ordnance drop cannot occur.
- If no marine mammals or marine mammal indicators are observed, the range will be declared "green," which will signify to mission personnel that conditions are such that a live ordnance drop may occur.

One-Half Hour Prior to Mission

- Approximately 30 minutes prior to live weapon deployment, vessel-based observers will be instructed to leave the test site and remain outside the safety zone, which will be 9.5 miles from the detonation point (actual size will be determined by weapon net explosive weight (NEW) and method of delivery) during the conduct of the mission.
- Monitoring for marine mammals will continue from the periphery of the safety zone while the mission is in progress. Other safety boat crews will be instructed to observe for marine mammals during this time.
- After survey vessels have left the test site, marine species monitoring will continue for the Eglin control tower through the video feed received from the high definition cameras on the instrument barge.

Execution of Mission

- Immediately prior to live weapons drop, the test director and safety officer will communicate to confirm the results of the marine mammal survey and the appropriateness of proceeding with the mission. The safety officer will have final authority to proceed with, postpone, move, or cancel the mission.
- The mission will be postponed or moved if: Any marine mammal is visually detected within the applicable ZOI. Postponement will continue until the animal(s) that caused the postponement is confirmed to be outside of the applicable ZOI due to swimming out of the range; or large schools of fish, jellyfish, Sargassum rafts, or large flocks of birds feeding at the surface are observed within the applicable ZOI. Postponement will continue until these potential indicators are confirmed to be outside the applicable ZOI.
- In the event of a postponement, pre-mission monitoring will continue as long as weather and daylight hours allow.

Post Mission

- Post-mission surveys will commence as soon as Explosive Ordnance Disposal (EOD) personnel declare the test area safe. These surveys will be conducted by the same vessel-based observers that conducted the pre-mission surveys.
- Survey vessels will move into the applicable ZOI from outside the safety zone and monitor for at least 30 minutes, concentrating on the area down-current of the test site. Any marine mammals killed or injured as a result of the test will be documented and immediately reported to the NMFS Southeast Region Marine Mammal Stranding Network at 877–433–8299 (*Blair.Mase@noaa.gov* and *Erin.Fougeres@noaa.gov*) and the Florida Marine Mammal Stranding Hotline at 888–404–3922. The species, number, location, and behavior of any animals observed will be documented and reported.
- If post-mission surveys determine that an injury or lethal take of a marine mammal has occurred, the next maritime strike mission will be suspended until the test procedure and the monitoring methods have been reviewed with NMFS and appropriate changes made.

5. Monitoring

The holder of this Authorization is required to cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

The holder of this Authorization will track their use of the EGTTR for the Maritime WSEP missions and marine mammal observations, through the use of mission reporting forms.

Maritime strike missions will coordinate with other activities conducted in the EGTTR (*e.g.*, Precision Strike Weapon and Air-to-Surface Gunnery missions) to provide supplemental post-mission observations of marine mammals in the operations area of the exercise.

Any dead or injured marine mammals observed or detected prior to testing or injured or killed during live drops, must be immediately reported to the NMFS Southeast Region Marine Mammal Stranding Network at 877–433–8299 (*Blair.Mase@noaa.gov* and *Erin.Fougeres@noaa.gov*) and the Florida Marine Mammal Stranding Hotline at 888–404–3922.

Any unauthorized impacts on marine mammals must be immediately reported to Dr. Roy E. Crabtree, the National Marine Fisheries Service's Southeast Regional Administrator, at 727–842–5312 or *Roy.Crabtree@noaa.gov*, and Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources at 301–427–8401 or *Jolie.Harrison@noaa.gov*.

The monitoring team will document any marine mammals that were killed or injured as a result of the test and, if practicable, coordinate with the local stranding network and NMFS to assist with recovery and examination of any dead animals, as needed.

Activities related to the monitoring described in this Authorization, including the retention of marine mammals, do not require a separate scientific research permit issued under section 104 of the Marine Mammal Protection Act.

6. Reporting

A draft report of marine mammal observations and Maritime WSEP mission activities must be submitted to the National Marine Fisheries Service's Southeast Regional Office, Protected Resources Division, 263 13th Ave. South, St. Petersburg, FL 33701 and NMFS's Office of Protected Resources, 1315 East West Highway, Silver Spring, MD 20910. This draft report must include the following information:

- Date and time of each maritime strike mission;
- A complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of maritime strike missions on marine mammal populations;
- Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the maritime strike mission and number of marine mammals (by species if possible) that may have been harassed due to presence within the applicable ZOI; and
- A detailed assessment of the effectiveness of sensor based monitoring in detecting marine mammals in the area of Maritime WSEP operations.

The draft report will be subject to review and comment by the National Marine Fisheries Service. Any recommendations made by the National Marine Fisheries Service must be addressed in the final report prior to acceptance by the National Marine Fisheries Service. The draft report will be considered the final report for this activity under this Authorization if the National Marine Fisheries Service has not provided comments and recommendations within 90 days of receipt of the draft report.

7. Additional Conditions

- The maritime strike mission monitoring team will participate in the marine mammal species observation training. Designated crew members will be selected to receive training as protected species observers. Observers will receive training in protected species survey and identification techniques through a National Marine Fisheries Service-approved training program.
- The holder of this Authorization must inform the Director, Office of Protected Resources, National Marine Fisheries Service, (301–427–8400) or designee (301–427–8401) prior to the initiation of any changes to the monitoring plan for a specified mission activity.
- A copy of this Authorization must be in the possession of the safety officer on duty each day that maritime strike missions are conducted.
- Failure to abide by the Terms and Conditions contained in this Incidental Harassment Authorization may result in a modification, suspension or revocation of the Authorization.

Request for Public Comments

We request comment on our analysis, the draft authorization, and any other aspect of this Notice of Proposed Authorization. Please include with your comments any supporting data or literature citations to help inform our final decision on Eglin AFB's request for an MMPA authorization.

Dated: December 3, 2014.

Perry F. Gayaldo,

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

[FR Doc. 2014–28678 Filed 12–3–14; 4:15 pm]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Friday, December 12, 2014, 9:00 a.m.–11:00 a.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, MD.

STATUS: Commission Meeting—Open to the Public.

MATTER TO BE CONSIDERED: Decisional Matter: Fiscal Year 2015 Operating Plan.

A live Webcast of the Meeting can be viewed at *www.cpsc.gov/live.*

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West

Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: December 4, 2014.

Alberta E. Mills,

Acting Secretary.

[FR Doc. 2014–28800 Filed 12–4–14; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2014–OS–0156]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel & Readiness, DoD.

ACTION: Notice.

In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel & Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 6, 2015.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Program Manager, Spouse Education & Career Opportunities Program, Office of Family Policy/Children and Youth, Military Community and Family Policy, 4800 Mark Center Drive Suite 03G15, Alexandria, VA 22350–2300 ATTN: Mr. Eddy Mentzer, or 571–372–0857.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Military Spouse Career Advancement Accounts Scholarship (MyCAA); OMB Control Number 0704–XXXX.

Needs and Uses: This information collection requirement is necessary to allow eligible spouses to submit information for approval of financial scholarships to pursue portable careers.

Affected Public: Military spouse users of MyCAA Portal.

Annual Burden Hours: 262,500.

Number of Respondents: 350,000.

Responses per Respondent: 1.

Average Burden per Response: 45 minutes.

Frequency: On occasion.

The Military Spouse Career Advancement Accounts Scholarship (MyCAA) is a career development and employment assistance program sponsored by the DoD to help military spouses and same-sex domestic partners pursue licenses, certificates, certifications or associate's degrees (excluding associate's degrees in general studies, liberal arts, and interdisciplinary studies that do not have a concentration) necessary for gainful employment in high demand, high growth portable career fields and occupations; to provide a record of educational endeavors and progress of military spouses and same-sex domestic partners participating in education services; and to manage the tuition assistance scholarship, track enrollments and funding and to facilitate communication with participants via email. Records may also be used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness and conducting research.

Dated: December 2, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–28624 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0227]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by January 7, 2015.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Personnel Security Investigation Projection for Industry Survey; OMB Control Number 0704–0417.

Type of Request: Reinstatement.

Number of Respondents: 13,137.

Responses per Respondent: 1.

Annual Responses: 13,137.

Average Burden per Response: 95 minutes total: 80 minutes (Industry Survey); 15 minutes (Contact Validation Test).

Annual Burden Hours: 20,800 hours

Needs and Uses: Executive order (E.O.) 12829, "National Industrial Security Program (NISP)," stipulates that the Secretary of Defense shall serve as the Executive Agent for inspecting and monitoring the contractors, licensees, and grantees who require or will require access to classified information; and for determining the eligibility for access to classified information of contractors, licensees, and grantees and their respective employees. The Under Secretary of Defense for Intelligence assigned Defense Security Service (DSS) the responsibility for central operational management of DoD personnel security investigation (PSI) workload projections, and for monitoring of PSI funding and investigation quality issues for DoD components. This responsibility includes managing workload projections, along with funding and quality oversight matters related to PSIs conducted for employees and consultants of contractors cleared under the NISP. Prior to 2001, DSS compared historical PSI data for budget formulation. Since 2001, DSS conducted an annual survey of cleared contractors to more accurately assess personnel security and trustworthiness investigation requirements. In this annual collection of information, DSS

asks the Facility Security Officers of cleared contractor entities to provide for each of three fiscal years (*e.g.*, 2015, 2016, 2017): Projections of the numbers and types of personnel security investigations (PSIs) required; a description of methodology used for the projections; and estimates of the numbers and types of cleared contractor's PSI projections that are separately attributable to DoD contracts and the contracts of non-DoD agencies. The data will be incorporated into DSS's budget submissions and will be used to track against cleared contractors' actual PSI submissions. The Office of Personnel Management (OPM) has responsibility for conducting PSIs and the subsequent periodic reinvestigations (PRs) in accordance with the Code of Federal Regulations, Title 5, Part 736. Cleared contractors, representatives of various industry associations, the National Industrial Security Program Policy Advisory Committee (NISPPAC), various components of the department of Defense (including the Military Departments) and other Federal Government agencies are familiar with the annual survey.

Affected Public: Business or other for-profit; Not-for-profit institutions under Department of Defense Security Cognizance.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: December 3, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–28657 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees

AGENCY: DoD.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The Department of Defense is publishing this notice to announce that it is renewing the charter for the Independent Review Panel on Military Medical Construction Standards ("the Panel").

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: This committee's charter is being renewed pursuant to Section 2852(b) of Public Law 111–383, and in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(a), established the Panel.

The Panel is a statutory Federal advisory committee that provides independent advice and recommendations to the Secretary of Defense regarding a unified construction standard for military medical centers that provides a single standard of care. The Panel shall perform the following tasks, as outlined in Section 2852(b)(1) of Public Law 111–383:

a. Review the unified military medical construction standards, established by the Secretary of Defense pursuant to Section 2852(a) of Public Law 111–382, to determine the standards consistency with industry practices and benchmarks for world class medical construction.

b. Review ongoing construction programs within the Department of Defense (DoD) to ensure medical construction standards are uniformly applied across applicable military medical centers.

c. Assess the approach of the DoD to planning and programming facility improvements with specific emphasis on (i) facility selection criteria and the proportional assessment system and (ii) facility programming responsibilities between the Assistant Secretary of Defense for Health Affairs and the Secretaries of the Military Departments.

d. Assess whether the Comprehensive Master Plan for the National Capital Region Medical ("the Master Plan"), dated April 2010, adequately fulfills statutory requirements, as required by Section 2714 of the Military Construction Authorization Act for Fiscal Year 2010 (division B of Public Law 111–84; 123 Stat. 2656), to ensure that the facilities and organizational structure described in the Master Plan result in world class military medical centers in the National Capital Region.

e. Make recommendations regarding any adjustments of the Master Plan that are needed to ensure the provision of world class military medical centers and delivery system in the National Capital Region.

The Panel, not later than 120 days after its first meeting, shall submit, to the Secretary of Defense, a written report containing an assessment of the adequacy of the Master Plan to address the above items relating to the purpose of the Panel and the recommendations of the Panel to improve the Master Plan.

Additional Reports—Each year, until the Panel terminates, it shall submit, no later than February 1, an annual report to the Secretary of Defense on the Panel's findings and recommendations to address any identified deficiencies.

The Panel or its members, with the Department's approval, may visit military health treatment centers and military headquarters in connection with the official duties of the Panel. Such visits shall be undertaken through the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and in coordination with the Secretaries of the Military Departments and the Chiefs of the Military Services, as appropriate. Visits to any U.S. military installations or headquarters under the operational control of a U.S. Combatant Commander will be done in consultation with the Director of the Joint Staff and the appropriate Combatant Commander.

The Panel is not established to provide advice on individual DoD procurements. No matter shall be assigned to the Panel for its consideration that would require any member of the Panel to participate personally and substantially in the conduct of any specific procurement or place him or her in the positions of acting as a contracting or procurement official.

The Panel reports to the Secretary of Defense. The USD(P&R), pursuant to DoD policy, may act upon the Panel's advice and recommendations.

The Panel shall be comprised of no more than 14 members, 10 of which shall be appointed by the Secretary of Defense or the Deputy Secretary of Defense. Those members shall include medical facility design experts; military healthcare professionals; representatives of premier health care centers in the United States; and former retired senior military officers with joint operational and budgetary experience.

The Chairmen and ranking members of the Committees on the Armed Services of the Senate and the House of Representatives may each designate one member of the Panel, for a total of four members. Individuals designated by the Chairman and ranking members of the Committees on the Armed Services of the Senate and the House of Representatives shall be appointed by the Secretary of Defense.

Panel members may be appointed by the Secretary of Defense for the duration of the Panel, with annual renewals of appointments. Members of the Panel, who are not full-time or permanent part-time Federal officers or employees, shall be appointed to serve as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee (SGE) members. Those individuals who are full-time or permanent part-time Federal officers or employees shall be appointed pursuant to 41 CFR 102–3.130(a) to serve as regular government employee (RGE) members. Each member of the Panel is appointed to provide advice on behalf of the Government on the basis of his or her best judgment without representing any particular point of view and in a manner that is free from conflict of interest. With the exception of reimbursement of official Panel-related travel and per diem, members of the Panel shall serve without compensation.

The Secretary of Defense may appoint additional experts and consultants, with relevant expertise, to assist the Panel on an ad-hoc basis as advisers. These non-member experts and consultants, who do not count toward the Panel's total membership, shall be appointed to serve as SGE members under the authority of 5 U.S.C. 3109; however, these experts and consultants have no voting rights on the Panel and are prohibited from engaging in any deliberations by members of the Panel. These advisers shall be reimbursed for necessary travel expenses. The Department, when necessary and consistent with the Panel's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or USD(P&R), as the Panel's sponsor.

Such subcommittees shall not work independently of the Panel and shall report all of their recommendations and advice solely to the Panel for full and open deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Panel, directly to the DoD or any Federal officers or employees.

The Secretary of Defense or the Deputy Secretary of Defense will appoint subcommittee members to a term of service of one-to-four years, with annual renewals, even if the member in question is already a member of the Panel.

Subcommittee members, if not full-time or permanent part-time Federal employees, will be appointed as experts or consultants pursuant to 5 U.S.C. 3109, to serve as SGE members. Those individuals who are full-time or permanent part-time Federal officers or employees shall be appointed, pursuant to 41 CFR 102–3.130(a), to serve as RGE members. With the exception of reimbursement of official Panel-related travel and per diem, subcommittee members shall serve without compensation.

All subcommittees operate under the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and governing DoD policies and procedures.

The Panel's Designated Federal Officer (DFO) shall be a full-time or permanent part-time DoD employee appointed in accordance with governing DoD policies and procedures.

The Panel's DFO is required to attendance at all meetings of the Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the Panel's DFO, a properly approved Alternate DFO, duly appointed to the Panel according to established DoD policies and procedures, shall attend the entire duration of all meetings of the Panel and its subcommittees.

The DFO, or the Alternate DFO, shall call all meetings of the Panel and its subcommittees; prepare and approve all meeting agendas; and adjourn any meeting when the DFO, or the Alternate DFO, determines adjournment to be in the public interest or required by governing regulations or DoD policies and procedures.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to Independent Review Panel on Military Medical Construction Standards membership about the Panel's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Independent Review Panel on Military Medical Construction Standards.

All written statements shall be submitted to the DFO for the Independent Review Panel on Military Medical Construction Standards, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Independent Review Panel on Military Medical Construction Standards DFO can be obtained from the GSA's FACA Database—*http://www.facadatabase.gov/*.

The DFO, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Independent Review Panel on Military Medical Construction Standards. The DFO, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: December 2, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–28639 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees

AGENCY: DoD.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The Department of Defense is publishing this notice to announce that it is renewing the charter for the Defense Health Board ("the Board").

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: This committee's charter is being renewed in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(d), established the Board.

The Board is a discretionary Federal advisory committee that provides the Secretary of Defense and/or the Deputy Secretary of Defense, through the Under Secretary of Defense for Personnel and

Readiness (USD(P&R)), and the Assistant Secretary of Defense for Health Affairs, independent advice and recommendations to maximize the health, safety, and effectiveness of Department of Defense (DoD) health care beneficiaries and:

a. DoD healthcare policy and program management;

b. Health research programs;

c. Requirements for how the DoD Treatment and preventions of disease and injury;

d. Promotion of health and wellness within DoD, and the delivery of efficient, effective high-quality health care services to DoD beneficiaries; and

e. Other health-related matters of special interest to DoD, as determined by the Secretary of Defense, the Deputy Secretary of Defense, or the USD(P&R).

The Board is not established to provide advice on individual DoD procurements. No matter will be assigned to the Board for its consideration that would require any Board member to participate personally and substantially in the conduct of any specific procurement or place him or her in the position of acting as a contracting or procurement official.

The Board reports to the Secretary of Defense and/or the Deputy Secretary of Defense, through the USD(P&R). The USD(P&R), pursuant to DoD policy, may act upon the Board's advice and recommendations.

The Board will be comprised of no more than 19 members who are appointed to serve a term of service of one-to-four years, with annual renewals, by the Secretary of Defense or the Deputy Secretary of Defense. The members are eminent authorities in one or more of the following disciplines: Clinical health care, disease and injury prevention, health care delivery and administration, or strategic decision making in government, industry, or academia. The USD(P&R) selects and appoints the Board's President from the total membership.

Each member, based upon his or her individual professional experience, provides his or her best judgment on the matters before the Board, and he or she does so in a manner that is free from conflict of interest. Board members who are not full-time or permanent part-time Federal officers or employees, will be appointed as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee (SGE) members.

Board members who are full-time or permanent part-time Federal officers or employees, will serve as regular government employee (RGE) members pursuant to 41 CFR 102–3.130(a). No member may serve more than two consecutive terms of service without Secretary of Defense or Deputy Secretary of Defense approval.

Board members are not compensated for service on the Board, but each member is reimbursed for travel and per diem as it pertains to official business of the Board.

Pursuant to DoD policies and procedures, the USD(P&R) may appoint experts or consultants with special expertise to assist, on an ad hoc intermittent basis, the Board or its subcommittees on specific issues. These experts or consultants have no voting rights whatsoever and will not engage or participate in any deliberations by the Board or its subcommittees. These experts or consultants, if not full-time or permanent part-time Government employees, will be appointed pursuant to 5 U.S.C. 3109, serve as a SGE.

The DoD, when necessary and consistent with the Board's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Board. Establishment of subcommittees is based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or USD(P&R), as the Board's Sponsor.

Such subcommittees will not work independently of the Board and will report all of their recommendations and advice solely to the Board for full and open deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Board. No subcommittee or any of its members can update or report, verbally or in writing, on behalf of the Board, directly to the DoD or any Federal officers or employees.

Each member, based upon his or her individual professional experience, provides his or her best judgment on the matters before the Board, and he or she does so in a manner that is free from conflict of interest. All subcommittee members will be appointed by the Secretary of Defense or the Deputy Secretary of Defense to a term of service of one-to-four years, with annual renewals, even if the individual in question is already a member of the Board. Subcommittee members will not serve more than two consecutive terms of service, unless authorized by the Secretary of Defense or the Deputy Secretary of Defense. Subcommittee members who are not full-time or permanent part-time Federal officers or employees will be appointed as an expert or consultant pursuant to 5 U.S.C. 3109, to serve as a SGE member. Subcommittee members who are full-time or permanent part-time Federal officers or employees will be appointed pursuant to 41 CFR 102–3.130(a), to serve as a RGE member. With the exception of reimbursement of official travel and per diem related to the Board or its subcommittees, subcommittee members will serve without compensation.

All subcommittees operate under the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

Currently, DoD has approved the following permanent subcommittees to the Board:

a. Public Health Subcommittee: This subcommittee will be comprised of not more than 10 members, who are eminent authorities in at least one of the following disciplines; infectious disease, occupational health/medicine, preventive medicine, public health, and toxicology. The subcommittee, when tasked according to DoD policy and procedures, provides advice on matters pertaining to improving the overall health of members of the Armed Forces and their families through the evaluation of DoD public health programs and initiatives, including education, health promotion, and prevention activities, as well as disease and injury prevention research.

b. Health Care Delivery Subcommittee: This subcommittee will be comprised of not more than nine members, who are eminent authorities in at least one of the following disciplines: Health care academia; health care finance/economics; health care policy/executive leadership; and patient care.

The subcommittee, when tasked according to DoD policies and procedures, provides advice on matters pertaining to health care delivery, to include DoD health care policy and program management, and research.

c. Neurological/Behavioral Health Subcommittee: This subcommittee will be comprised of not more than 10 members, who are eminent authorities in at least one of the following disciplines; neurology, post-traumatic stress disorder, psychiatry; psychology, and traumatic brain injury. The subcommittee, when tasked according to DoD policies and procedures, provides advice on matters pertaining to psychological/mental health issues and neurological symptoms or conditions among members of the Armed Forces and their families.

d. Medical Ethics Subcommittee: This subcommittee will be comprised of not

more than five members, who are eminent authorities in at least one of the following disciplines: Clergy, DoD leadership, human research protection, attorneys with expertise in medical ethics, and military health system beneficiaries. One member must have formal bioethics or medical ethics training or expertise.

The subcommittee, when tasked according to DoD policies and procedures, provides advice on matters pertaining to medical ethics.

e. Trauma and Injury Subcommittee: This subcommittee will be comprised of not more than 10 members, who are eminent authorities in at least one of the following disciplines: Civilian or military trauma medicine systems.

The subcommittee, when tasked according to DoD policies and procedures, provides advice on matters pertaining to trauma and injury, to include methods for prevention, recognition, clinical management, and treatment.

The Board's Designated Federal Officer (DFO) must be a full-time or permanent part-time DoD officer or employee, appointed in accordance with established DoD policies and procedures. The Board's DFO is required to attend at all meetings of the Board and its subcommittees for the entire duration of each and every meeting. However, in the absence of the Board's DFO, a properly approved Alternate DFO, duly appointed to the Board according to established DoD policies and procedures, must attend the entire duration of all meetings of the Board and its subcommittees.

The DFO or the Alternate DFO, calls all meetings of the Board and its subcommittees; prepares and approves all meeting agendas; and adjourn any meeting when the DFO, or the Alternate DFO, determines adjournment to be in the public interest or required by governing regulations or DoD policies and procedures.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to Defense Health Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Defense Health Board.

All written statements shall be submitted to the DFO for the Defense Health Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Defense Health Board DFO can be obtained from the GSA's FACA Database—*http://www.facadatabase.gov/*.

The DFO, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Defense Health Board. The DFO, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: December 2, 2014.

Aaron Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2014–28599 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Revision to Military Freight Traffic Unified Rules Publication (MFTURP) NO. 1, Section F, Air Transportation Service Provider Rules and Domestic Air Tender Freight Carrier Registration Program (FCRP)

AGENCY: Department of the Air Force, Department of Defense.

SUMMARY: On September 3, 2014, Air Mobility Command (AMC) published a 30-day public notice in the **Federal Register** (**Federal Register** Volume 79, Number 170, Docket No. 2014–20877) to invite public comment on the intent to change Domestic Air Tender Policy within MFTURP No.1 to restrict registration in the FCRP for Domestic Air Tenders to Civil Reserve Air Fleet (CRAF) Transportation Service Providers (TSP) only. At the end of the 30-day comment period, AMC received five responses from transportation industry professionals

ADDRESSEES: *AMC/A4TC, Commercial Services, email: org.amca4-67@us.af.mil.*

FOR FURTHER INFORMATION CONTACT: AMC/A4TC, Commercial Services Team, (618) 229–4684, THOMAS J. TRUMBULL II, Colonel, USAF, Chief Air Transportation Division

SUPPLEMENTARY INFORMATION: Detailed Comments and Responses.

1. Commenters asked for a definition of CRAF. CRAF is a voluntary program through which the nation's airlines provide stand-by commitments of aircraft and crews to support mobilization as a supplement to organic airlift capacity. As an incentive to participate in the CRAF program, air carriers that participate in the CRAF are entitled to participate in the award of DOD's peacetime airlift requirements. A series of presidential executive orders and memoranda of understanding, the first of which was signed December 15, 1951 formalized the CRAF program. The National Airlift Policy, released in July 1987, reinforced the need for and use of the CRAF program.

2. Commenters expressed concerns with decreased competition and performance, as well as increased cost. Currently, 24 airlines participate in the CRAF program. Competition will continue to exist among CRAF participants as CRAF carriers maintain a commercial network to support and regularly provide commercial less-than-planeload cargo service. Under the policy change, CRAF participants may associate with and use services provided by an agent to meet commercial less-than-planeload service requirements with no limitations placed on the number of agents per CRAF participant. The Government expects fair and reasonable costs under the policy change, since competition will exist within the group of CRAF participants and published rates are readily available.

3. Commenters expressed concern about a negative impact to small business. The Government understands the importance and appreciates the contributions of small businesses. CRAF carriers will have the opportunity to utilize agents, expected to comprise principally small businesses of the sort currently involved in domestic air tender performance, and are encouraged to develop relationships with small business transportation service providers.

4. A commenter expressed agreement with the proposed policy because it promotes continued carrier participation in CRAF at a time when other DOD program business is expected to significantly decline. The Government agrees the change will promote continued CRAF participation and supports keeping vital commercial airlift resources available as a mobilization base in the event of a national or military emergency.

5. A commenter stated that the other programs allocated to CRAF only are sufficient to ensure a healthy CRAF Program. Changes in operational areas and decreasing requirements cause significant decline in business segments across DOD airlift and directly impact programs allocated to CRAF only. The policy change will promote continued CRAF participation as losses are experienced across business segments. Additionally, it will align domestic air tender policy with the long-standing international air tender CRAF eligibility policy.

6. A commenter stated the DOD should develop policies promoting small business cooperation. The Government fully supports the development of small business and utilizes small business throughout the DOD; however, the Government must also support the National Airlift Policy. National Airlift Policy provides that where appropriate, US policies shall be designed to enhance the mobilization base of the US commercial air carrier industry. During peacetime, DOD requirements for passenger and cargo airlift augmentation shall be satisfied by the procurement of airlift from commercial air carriers participating in the CRAF program, to the extent that DOD determines such airlift is suitable and responsive to military requirements.

7. A commenter recommended an impact study to determine effects of the intended change. The Government accomplished a business segment analysis, identified risks and opportunities, discussed policy options in a joint agency environment, and supports the intended effects the change will have on promoting CRAF participation.

8. Commenters presented stand-alone comments on other DOD programs and support they have provided to specific locations. The Government appreciates the support provided in other programs, but notes that the proposed policy is limited to the DOD domestic air tender program and will result in consistent eligibility requirements across all DOD air cargo programs.

Henry Williams,

Acting Air Force Federal Register Liaison Officer, Civ, DAF.

[FR Doc. 2014–28656 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2014–0043]

Proposed Collection; Comment Request

AGENCY: Army & Air Force Exchange Service (Exchange), DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Exchange announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 6, 2015.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Army and Air Force Exchange Service, Office of the General Counsel, Compliance Division, Attn: Teresa Schreurs, 3911 South Walton Walker Blvd., Dallas, TX 75236–1598 or call the Exchange Compliance Division at 800–967–6067.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Exchange Catalog System; Exchange Form 4150–120 ("Exchange Catalog On-Line"), Exchange Form 6800–018(M) ("Exchange Catalog Sales"), Exchange Form 6450–002 ("Military Star Card Application"); OMB Control Number 0702–XXXX.

Needs and Uses: The information collection requirement is necessary to record customer transactions/payments for layaways and catalog orders; to determine payment status before finalizing transactions; and to verify shipping and receipt of merchandise ordered through the Exchange catalog. The system may also work hand in hand with other Exchange Customer databases and on-line customer experiences for improvement in the efficiency and effectiveness of the Exchange's marketing programs, to settle customer complaints, and to fulfill the Exchange's mission and enhance the military community by providing world-wide merchandise and household goods to Exchange eligible patrons.

Affected Public: Individuals or Households.

Annual Burden Hours: 419,866.

Number of Respondents: 12,595,968.

Responses per Respondent: 1.

Average Burden per Response: 2 minutes.

Frequency: On Occasion.

Authorized customers of the Army and Air Force Exchange Service information, who provide information relative to any Exchange order or inquiry through an Exchange Catalog or On-Line shopping experience. The Exchange collects information electronically or provided by customers via paper forms completed by the customer or by phone, which allows the Exchange to contact the customer for special events, sales, address customer complaints as well as provide information about shopping at the Exchange. The information provides valuable data to the Exchange, which is used to enhance operations and improve efficiencies of the Exchange marketing program, and to generally enrich the customers' experience. If the Exchange does not receive the data, the Exchange efforts to improve the shopping experience would not be as effective, efficient or useful. Customer information is vital to the efficient and effective maintenance and improvement of Exchange operations.

Dated: December 3, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–28659 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2014–0044]

Proposed Collection; Comment Request

AGENCY: Army & Air Force Exchange Service (Exchange), DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Army & Air Force Exchange Service announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 6, 2015.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Army and Air Force Exchange Service, Office of the General Counsel, Compliance Division, Attn: Teresa Schreurs, 3911 South Walton Walker Blvd., Dallas, TX 75236–1598 or call the Exchange Compliance Division at 800–967–6067.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Exchange Accounts Receivable Files; Exchange Form 6450–002 Military Star Card Application, Exchange Form 6450–005 "Exchange Credit Program", Exchange Form 6450–020 "Take It Home Today", Exchange Form 6450–023 "Take It Home Today Account Update"; OMB Control Number 0702–XXXX.

Needs and Uses: The information collection requirement is necessary to process, monitor, and post audit accounts receivables to the Army and Air Force Exchange Service; to administer the Federal Claims Collection act and to answer inquiries pertaining thereto as well as collection of indebtedness and determination of customer's eligibility to cash checks at Exchange facilities.

Affected Public: Individuals or Households.

Annual Burden Hours: 658,367.

Number of Respondents: 6,583,668.

Responses per Respondent: 1.

Average Burden per Response: 6 minutes.

Frequency: On Occasion.

Respondents are Exchange patrons, potential patrons or past patrons who are indebted to the Exchange. This may include dishonored checks, deferred payment plans, home layaway, pecuniary liability claims and credit cards.

Dated: December 3, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–28670 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2014–0045]

Proposed Collection; Comment Request

AGENCY: U.S. Army Combat Readiness/Safety Center, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the U.S. Army Combat Readiness/Safety Center, Fort Rucker, AL announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 6, 2015.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the U.S. Army Combat Readiness/Safety Center, Building 4905 Ruf Avenue, Fort Rucker, AL 36362, ATTN: MAJ Jennifer Farmer, Fort Rucker, AL at 334–255–2924.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Army Safety Management Information System (ASMIS); OMB Number 0702–XXXX.

Needs and Uses: The information collection requirement is necessary to monitor and facilitate the U.S. Army's safety programs; to analyze accident experience and exposure information; to analyze and correlate relationships between planned actions and resultant accidents; and to support the Army's accident prevention efforts.

Affected Public: Individuals or Households.

Annual Burden Hours: 338.

Number of Respondents: 450.

Responses per Respondent: 1.

Average Burden per Response: 45 minutes.

Frequency: On occasion.

U.S. Army Safety Center personnel retrieve data from accident prevention studies by name, Social Security Number (SSN), age, or gender. Accident and incident case records are retrieved by date of incident, location of incident, or type of equipment involved. Paper records are maintained in locked file cabinets and information is accessible only by authorized personnel with appropriate clearance/access in the performance of their duty. Remote terminal access is only authorized by authorized personnel. Maintaining this accident data is critical in maintaining the integrity of the accident prevention process.

Dated: December 3, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–28671 Filed 12–5–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2014–ICCD–0130]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Third Party Servicer Data Collection

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before January 7, 2015.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2014–ICCD–0130 or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov*. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted; ED will only accept comments during the comment period in this mailbox when the regulations.gov site is not available. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Mailstop L–OM–2–2E319, Room 2E103, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Third Party Servicer Data Collection.

OMB Control Number: 1845—NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Individuals or households, private sector, State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 600.

Total Estimated Number of Annual Burden Hours: 750.

Abstract: The Department of Education (ED) is seeking approval of a Third Party Servicer Data Collection form to be used to validate the information reported to ED by higher education institutions regarding third party servicers that administer one or more aspects of the administration of the Title IV, Higher Education Act of 1965, as amended, programs on an institution's behalf and to collect additional information required for effective oversight of these entities.

Dated: December 3, 2014.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2014–28680 Filed 12–5–14; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Excess Uranium Management: Effects of DOE Transfers of Excess Uranium on Domestic Uranium Mining, Conversion, and Enrichment Industries; Request for Information

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Request for information (RFI).

SUMMARY: The U.S. Department of Energy (DOE) is planning to issue a new Secretarial Determination covering continued transfers of uranium for cleanup services at the Portsmouth Gaseous Diffusion Plant and for down-blending of highly-enriched uranium to low-enriched uranium (LEU). This RFI solicits information from the public about the effects of the proposed transfers in the uranium markets and possible consequences for the domestic uranium mining, conversion and enrichment industries. The RFI also solicits recommendations about factors that the Department should consider and/or the methodology it should use in assessing the possible impacts of transfers. DOE will then consider this information as part of its analysis to determine whether its transfers would have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry.

DATES: DOE will accept comments, data, and information responding to this RFI submitted on or before January 7, 2015.

ADDRESSES: Interested persons may submit comments by any of the following methods.

1. *Email: RFI-UraniumTransfers@hq.doe.gov.* Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

2. *Postal Mail:* Mr. David Henderson, U.S. Department of Energy, Office of

Nuclear Energy, Mailstop NE–52, 19901 Germantown Rd., Germantown, MD 20874–1290. If possible, please submit all items on a compact disk (CD), in which case it is not necessary to include printed copies.

3. *Hand Delivery/Courier:* Mr. David Henderson, U.S. Department of Energy, Office of Nuclear Energy, Mailstop NE–52, 19901 Germantown Rd., Germantown, MD 20874–1290. Phone: (301) 903–2590. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Instructions: All submissions received must include the agency name for this request for information. No facsimiles (faxes) will be accepted.

FOR FURTHER INFORMATION CONTACT: Requests for additional information may be sent to: Mr. David Henderson, U.S. Department of Energy, Office of Nuclear Energy, Mailstop NE–52, 19901 Germantown Rd., Germantown, MD 20874–1290. Phone: (301) 903–2590. Email: *David.Henderson@Nuclear.Energy.Gov.*

For further information on how to submit a comment, contact Mr. David Henderson at (301) 903–2590 or by email: *David.Henderson@Nuclear.Energy.Gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background

Title I, Chapters 6–7, 14, of the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*, "AEA") authorizes the Department of Energy to transfer special nuclear material and source material. Enriched uranium and natural uranium are types of special nuclear material and source material, respectively. In 1996, Congress enacted the USEC Privatization Act (Pub. L. 104–134, 42 U.S.C. 2297h *et seq.*), which places certain limitations on DOE's authority to transfer uranium from its excess uranium inventory. Specifically, under section 3112(d)(2)(B) of the USEC Privatization Act (42 U.S.C. 2297h–10(d)(2)(B)), DOE may make certain transfers of natural or low-enriched uranium if the Secretary determines that the transfers "will not have an adverse material impact on the domestic uranium mining, conversion or enrichment industry, taking into account the sales of uranium under the Russian Highly Enriched Uranium Agreement and the Suspension Agreement." Section 306(a) of Division D, Title III of the Consolidated Appropriations Act, 2014 (Pub. L. 113–76), limits the validity of any determination by the Secretary under Section 3112(d)(2)(B) of the USEC Privatization Act to no more than two calendar years subsequent to the determination.

In recent years, DOE has transferred uranium for cleanup services at the Portsmouth Gaseous Diffusion Plant and for down-blending of highly-enriched uranium to low-enriched uranium (LEU). In May 2012, the Secretary determined that transfers of up to 2,400 metric tons of natural uranium equivalent (MTU) per year for cleanup services and up to 400 MTU (contained in LEU) for down-blending would not have an adverse material impact on domestic uranium industries. In May 2014, the Secretary determined that transfers of up to a total of 2,705 MTU per calendar year for these programs will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry (the "2014 Secretarial Determination").[1] The 2014 determination covers up to 2,055 MTU per year of natural uranium hexafluoride and off-specification non-uranium hexafluoride for cleanup services and up to 650 MTU per year (contained in LEU) for down-blending of highly-enriched uranium.

DOE is planning to issue a new Secretarial Determination that would cover the continued transfer of uranium for cleanup services at the Portsmouth Gaseous Diffusion Plant and for down-blending of highly-enriched uranium to LEU. DOE anticipates that a new Secretarial Determination would be finalized in Spring 2015. DOE is initiating this process by publishing this RFI. DOE will evaluate comments received in response to this RFI along with other information and analysis.

II. Issues on Which DOE Seeks Comment and Information

This RFI seeks information from interested parties regarding the effects of DOE's planned transfers on the uranium markets and possible consequences for domestic uranium industries. DOE will then use that information to help determine whether its planned transfers would have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry. For all comments, DOE requests that interested parties fully explain any assumptions that underlie their reasoning. DOE also requests that commenters provide underlying data or other information sufficient to allow DOE to review and verify any of the assumptions, calculations or views expressed by the commenters.

DOE specifically invites public comment on the following questions:

(1) What factors should DOE consider in assessing whether transfers will have adverse material impacts?

(2) With respect to transfers from DOE's excess uranium inventory in calendar years 2012, 2013, and 2014, what have been the effects of transfers in uranium markets and the consequences for the domestic uranium mining, conversion, and enrichment industries relative to other market factors?

(3) What market effects and industry consequences could DOE expect from continued transfers at annual rates comparable to the transfers described in the 2014 Secretarial Determination?

(4) Would transfers at a lower annual rate significantly change these effects, and if so, how?

(5) Are there actions DOE could take other than altering the annual rate of transfers that would mitigate any negative effects on these industries?

(6) Are there actions DOE could take with respect to the transfers that would have positive effects on these industries?

(7) Are there any anticipated changes in these markets that may significantly change how DOE transfers affect the domestic uranium industries?

Although comment is particularly welcome on the issues discussed above, DOE also requests comments on other topics that commenters consider significant for a new Secretarial Determination.

III. Submission of Comments

DOE invites all interested parties to submit, in writing by January 7, 2015, comments and information on matters addressed in this notice. Any information that may be confidential and exempt by law from public disclosure should be submitted as described below. After the close of the comment period, DOE will continue collecting data, conducting analyses, and reviewing the public comments, as needed.

IV. Confidential Business Information

Pursuant to 10 CFR 1004.11, any person submitting information he or she believes to be confidential and exempt by law from public disclosure should

[1] The 2014 Secretarial Determination and a market analysis the Department used in developing the Determination, are available at *http://www.energy.gov/articles/energy-department-announces-secretarial-determination-no-adverse-material-impact-uranium.*

submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination. Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

Issued in Washington, DC, on December 2, 2014.

Peter B. Lyons,

Assistant Secretary for Nuclear Energy, Office of Nuclear Energy.

[FR Doc. 2014–28695 Filed 12–5–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Loveland Area Projects—Rate Order No. WAPA–167

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Order Concerning Firm Electric Rates.

SUMMARY: The Deputy Secretary of Energy confirmed and approved Rate Order No. WAPA–167 and Rate Schedule L–F10, placing firm electric service rates for the Western Area Power Administration (Western) Loveland Area Projects (LAP) into effect on an interim basis.

DATES: Rate Schedule L–F10 will be placed into effect on an interim basis on the first day of the first full billing period beginning on or after January 1, 2015, and will remain in effect until the Federal Energy Regulatory Commission (FERC) confirms, approves, and places the rate schedule into effect on a final basis ending December 31, 2019, or until the rate schedule is superseded.

FOR FURTHER INFORMATION CONTACT: Mr. Bradley S. Warren, Regional Manager, Rocky Mountain Region, Western Area Power Administration, 5555 East Crossroads Boulevard, Loveland, CO 80538–8986, telephone (970) 461–7201, or Mrs. Sheila D. Cook, Rates Manager, Rocky Mountain Region, Western Area Power Administration, 5555 East Crossroads Boulevard, Loveland, CO 80538–8986, telephone (970) 461–7211, email *scook@wapa.gov.*

SUPPLEMENTARY INFORMATION: The existing Rate Schedule L–F9 was approved under Rate Order No. WAPA–146 for the period beginning January 1, 2010, and ending December 31, 2014.[1] Under the current rate methodology, rates for LAP firm electric service are designed to recover an annual revenue requirement that includes investment repayment, interest, purchase power, operation and maintenance, and other expenses within the allowable period. The total annual revenue requirement for LAP remains $84.5 million for firm electric service. In addition, the overall capacity and energy charges are not changing, as the existing charges in the current rate schedules for firm electric service continue to provide sufficient revenue to meet LAP's repayment obligations. The Rate Schedule continues to be formula based. An incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the Power Repayment Study (PRS) Composite Rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formula without a public process.

Rate Schedule L–F9 is being superseded by Rate Schedule L–F10. Under Rate Schedule L–F10, the firm capacity charge will remain $5.43/kWmonth and the firm energy charge will remain 20.71 mills/kWh. The Base and Drought Adder components associated with these charges are shown in Table 1 below:

TABLE 1—SUMMARY OF LAP CHARGE COMPONENTS

	Existing charges under Rate Schedule L–F9 effective January 1, 2010			Provisional charges under Rate Schedule L–F10 effective January 1, 2015		
	Base component	Drought adder component	Total charge	Base component	Drought adder component	Total charge
Firm Capacity ($/kWmonth)	$3.29	$2.14	$5.43	$3.92	$1.51	$5.43
Firm Energy (mills/kWh)	12.54	8.17	20.71	14.95	5.76	20.71

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand or to disapprove such rates to FERC. Existing Department of Energy procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Under Delegation Order Nos. 00–037.00A and 00–001.00E and in compliance with 10 CFR part 903 and 18 CFR part 300, I hereby confirm, approve, and place Rate Order No. WAPA–167, LAP firm electric service rates, into effect on an interim basis (Provisional Rates).

The new Rate Schedule L–F10 will be promptly submitted to FERC for confirmation and approval on a final basis.

Dated: December 2, 2014.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

[1] WAPA–146 was approved by the Deputy Secretary of Energy on December 14, 2009 (74 FR 67191 (Dec 18, 2009)), and confirmed and approved by FERC on a final basis on June 18, 2010, in Docket No. EF10–1–000. See *United States Department of Energy, Western Area Power Administration (Loveland Area Projects),* 131 FERC ¶ 62,247.

Order Confirming, Approving, and Placing the Loveland Area Projects Firm Electric Service Rates Into Effect on an Interim Basis

These firm electric service rates for the Loveland Area Projects (LAP) were established in accordance with section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152). This Act transferred to and vested in the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) and section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), and other acts that specifically apply to the project involved.

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to the Administrator of Western Area Power Administration (Western); (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to the Federal Energy Regulatory Commission (FERC). Existing DOE procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Acronyms and Definitions

As used in this Rate Order, the following acronyms and definitions apply:

Base	A fixed revenue requirement that includes operation and maintenance expenses, investments and replacements, interest on investments and replacements, normal timing purchase power (purchases due to operational constraints, not associated with drought), and transmission costs.
Capacity	The electric capability of a generator, transformer, transmission circuit, or other equipment. It is expressed in kilowatts.
Capacity Charge	The charge under the rate schedule for capacity. It is expressed in dollars per kilowattmonth.
Composite Rate	The Power Repayment Study (PRS) rate for commercial firm power which is the total annual revenue requirement for capacity and energy divided by the total annual energy sales. It is expressed in mills per kilowatthour and used for comparison purposes.
CROD	Contract Rate of Delivery. The maximum amount of capacity and energy allocated to a Preference Customer for a period specified under a contract.
Deficits	Deferred or unrecovered annual and/or interest expenses.
DOE Order RA 6120.2	An order outlining power marketing administration financial reporting and rate-making procedures.
Drought Adder	A formula-based revenue requirement that includes future purchase power above timing purchases, previous purchase power drought deficits, and interest on the purchase power drought deficits.
Energy	Measured in terms of the work it is capable of doing over a period of time. Energy is expressed in kilowatthours.
Energy Charge	The charge under the rate schedule for energy. It is expressed in mills per kilowatthour and applied to each kilowatthour delivered to each customer.
Firm	A type of product and/or service available at the time requested by the customer.
FY	Fiscal year—October 1 to September 30.
kW	Kilowatt—the electrical unit of capacity that equals 1,000 watts.
kWh	Kilowatthour—the electrical unit of energy that equals 1,000 watts in 1 hour.
kWmonth	Kilowattmonth—the electrical unit of the monthly amount of capacity.
mills/kWh	Mills per kilowatthour—the unit of charge for energy (equal to one tenth of a cent or one thousandth of a dollar).
MW	Megawatt—the electrical unit of capacity that equals 1 million watts or 1,000 kilowatts.
Non-Timing Power Purchases	Power purchases that are not related to operational constraints such as management of endangered species, species habitat, water quality, navigation, control area purposes, etc.
O&M	Operation and Maintenance.
P–SMBP	The Pick-Sloan Missouri Basin Program.
P–SMBP—ED	Pick-Sloan Missouri Basin Program—Eastern Division.
P–SMBP—WD	Pick-Sloan Missouri Basin Program—Western Division.
Power	Capacity and energy.
Power Factor	The ratio of real to apparent power at any given point and time in an electrical circuit. Generally, it is expressed as a percentage.
Preference	The provisions of Reclamation Law that require Western to first make Federal power available to certain entities. For example, section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) states that preference in the sale of Federal power shall be given to municipalities and other public corporations or agencies and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made under the Rural Electrification Act of 1936.
Provisional Rate	A rate that has been confirmed, approved, and placed into effect on an interim basis by the Deputy Secretary of Energy.
Revenue Requirement	The revenue required by PRS to recover annual expenses (such as O&M, purchase power, transmission service expenses, interest, and deferred expenses) and repay Federal investments and other assigned costs.

Effective Date

The Provisional Rates will take effect on the first day of the first full billing period beginning on or after January 1, 2015, and will remain in effect until December 31, 2019, pending approval by FERC on a final basis.

Public Notice and Comment

Western followed the Procedures for Public Participation in Power and

Transmission Rate Adjustments and Extensions, 10 CFR part 903, in developing these rates. The steps Western took to involve interested parties in the minor rate process were:

1. On April 17, 2014, Western mailed a notice announcing an informal public meeting would be held via webinar on May 2, 2014, to discuss the rate process for the expiring firm electric service rates for LAP. The focus of the webinar was to provide an update on the FY 2013 PRS, discuss the Base and Drought Adder component true-up, and plan for the upcoming rate adjustment process.

2. A **Federal Register** notice (FRN), published on August 8, 2014 (79 FR 46430), announced the proposed rates for LAP and began the 30-day public consultation and comment period.

3. On August 11, 2014, Western mailed letters to all LAP Preference Customers and interested parties transmitting the FRN published on August 8, 2014.

4. Western provided a Web page that contains all dates, customer letters, presentations, the FRN, and all other information about this rate process. The Web page is located at *https://www.wapa.gov/rm/ratesRM/2015/default.htm*.

5. During the consultation and comment period, which ended September 8, 2014, Western received one comment letter. The formally submitted comment has been considered in the preparation of this Rate Order.

Comment

Written Comment Received by the Following Organization

Mid-West Electric Consumers Association

Project Description

Loveland Area Projects

The Post-1989 General Power Marketing and Allocation Criteria, published in the **Federal Register** on January 31, 1986 (51 FR 4012), integrated the resources of the P–SMBP—WD and Fryingpan-Arkansas Project (Fry-Ark). This operational and contractual integration, known as LAP, allowed an increase in marketable resource, simplified contract administration, and established a blended rate for LAP power sales. The Rocky Mountain Region markets LAP power in northeastern Colorado, east of the Continental Divide in Wyoming, west of the 101st meridian in Nebraska, and most of Kansas.

The P–SMBP—WD and Fry-Ark retain separate financial status. For this reason, separate PRSs are prepared annually for each project. These PRSs are used to determine the sufficiency of the firm electric service rate to generate adequate revenue to repay project investment and costs during each project's prescribed repayment period. The revenue requirement of the Fry-Ark PRS is combined with the P–SMBP—WD revenue requirement, derived from the P–SMBP PRS, to develop one rate for LAP firm electric sales.

Pick-Sloan Missouri Basin Program

The P–SMBP was authorized by Congress in Section 9 of the Flood Control Act of December 22, 1944, commonly referred to as the Flood Control Act of 1944. This multipurpose program provides flood control, irrigation, navigation, recreation, preservation and enhancement of fish and wildlife, and power generation. Multipurpose projects have been developed on the Missouri River and its tributaries in Colorado, Montana, Nebraska, North Dakota, South Dakota, and Wyoming.

In addition to the multipurpose water projects authorized by Section 9 of the Flood Control Act of 1944, certain other existing projects have been integrated with the P–SMBP for power marketing, operation, and repayment purposes. The Colorado-Big Thompson, Kendrick, and Shoshone Projects were combined with the P–SMBP in 1954, followed by the North Platte Project in 1959. These projects are referred to as the "Integrated Projects" of the P–SMBP.

The Flood Control Act of 1944 also authorized the inclusion of the Fort Peck Project with the P–SMBP for operation and repayment purposes. The Riverton Extension Unit of the Flood Control Act of 1944 Project was reauthorized to include the original Riverton Project in 1970.

The P–SMBP is marketed by two regions. The Rocky Mountain Region, with a regional office in Loveland, Colorado, markets the Western Division power of P–SMBP through LAP. Western Division power is marketed in Colorado, Kansas, Nebraska, and Wyoming. The Upper Great Plains Region, with a regional office in Billings, Montana, markets power from the Eastern Division of P–SMBP. P–SMBP power is marketed to approximately 53 firm power customers by the Rocky Mountain Region and approximately 360 firm power customers by the Upper Great Plains Region.

Fryingpan-Arkansas Project

Fry-Ark is a trans-mountain diversion development in southeastern Colorado authorized by the Act of Congress on August 16, 1962 (Pub. L. 87–590, 76 Stat. 389, as amended by Title XI of the Act of Congress on October 27, 1974 (Pub. L. 93–493, 88 Stat. 1486, 1497)). The Fry-Ark diverts water from the Fryingpan River and other tributaries of the Roaring Fork River in the Colorado River Basin on the West Slope of the Rocky Mountains to the Arkansas River on the East Slope. The water diverted from the West Slope, together with regulated Arkansas River water, provides supplemental irrigation and M&I water supplies, and produces hydroelectric power. Flood control, fish and wildlife enhancement, and recreation are other important purposes of Fry-Ark. The only generating facility in Fry-Ark is the Mt. Elbert Pumped-Storage powerplant on the East Slope.

Power Repayment Study—Firm Electric Service Rate

Western prepares a PRS each FY to determine if revenues will be sufficient to repay, within the required time, all costs assigned to LAP. Repayment criteria are based on Western's applicable laws and legislation, as well as policies including DOE Order RA 6120.2. To meet Cost Recovery Criteria outlined in DOE Order RA 6120.2, revised studies and rate adjustments have been developed to demonstrate that sufficient revenues will be collected under Provisional Rates to meet future obligations. The PRS revenue requirement and Composite Rate remain unchanged, as indicated in Table 1.

TABLE 1—COMPARISON OF LAP REVENUE REQUIREMENT AND COMPOSITE RATE

	Existing requirements (January 1, 2010)	Provisional requirements (January 1, 2015)	Percent change
LAP Revenue Requirement (millions $)	$84.5	$84.5	0
LAP Composite (mills/kWh)	41.42	41.42	0

Existing and Provisional Rates

Under Rate Schedule L–F10, the firm capacity charge remains $5.43/kWmonth, and the firm energy charge remains 20.71 mills/kWh. This Rate Schedule is formula-based to provide for an annual adjustment to the Drought Adder component. An incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the PRS Composite Rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formula without a public process. The overall capacity and energy charges are not changing, as indicated in the following Table 2:

TABLE 2—COMPARISON OF EXISTING AND PROVISIONAL LAP FIRM ELECTRIC SERVICE RATES

Firm electric service	Existing charges under Rate Shedule L–F9 effective January 1, 2010	Provisional charges under Rate Schedule L–F10 effective January 1, 2015	Percent change
Firm Capacity ($/kWmonth)	$5.43	$5.43	0
Firm Energy (mills/kWh)	20.71	20.71	0

Under the current rate methodology, rates for LAP firm electric service are designed to recover an annual revenue requirement that includes investment repayment, interest, purchase power, O&M, and other expenses within the allowable period.

Western is truing up the Base and Drought Adder components included in the rate schedule and placing a new rate schedule into effect for the 5-year period, beginning January 1, 2015, through December 31, 2019. The true-up updates the Base components to represent present costs and lowers the Drought Adder components to represent present drought costs. Over the past 5-year rate period, the P–SMBP costs included in the LAP Drought Adder have decreased as the actual deficits were less than the projected deficits. Additionally, P–SMBP drought costs were repaid ahead of schedule, which decreased the drought deficit interest expense. The portion of the LAP Drought Adder component coming from Fry-Ark ($200,000) is now going to $0, as Fry-Ark did not actually incur any deficits and Fry-Ark is not projecting any future Non-timing Power Purchases at this time. All historical drought-related costs for Fry-Ark have been repaid. In addition, Base costs increased during that same period due to a new 5-year cost evaluation period, new investments and replacements, and inflationary costs.

Certification of Rates

Western's Administrator certified that the firm electric service rates under Rate Schedule L–F10 are the lowest possible rates consistent with sound business principles. The rates were developed following administrative policies and applicable laws.

LAP Firm Electric Service Rate Discussion

Western must establish power rates sufficient to recover O&M, purchased power and interest expenses, and repay power investment and irrigation aid.

The Criteria, published in the **Federal Register** on January 31, 1986 (51 FR 4012), operationally and contractually integrated the resources of the P–SMBP—WD and Fry-Ark (thereafter referred to as LAP). A blended rate was established for the sale of LAP firm electric service. The P–SMBP—WD portion of the revenue requirement for LAP firm electric service rates was developed from the revenue requirement calculated in the P–SMBP Ratesetting PRS. The P–SMBP—WD revenue requirement remains the same from the previous rate process revenue requirement. The revenue requirements for P–SMBP—WD are as follows:

TABLE 3—SUMMARY OF P–SMBP—WD REVENUE REQUIREMENTS

[$000]

Current Revenue Requirement (Jan 2010):	
(34.80 mills/kWh × 1,988,000,000 kWh)	$69,182
Provisional Change (Jan 2015):	
Base: 4.84 mills/kWh × 1,988,000,000 kWh	9,622
Drought Adder: −4.84 mills/kWh × 1,988,000,000 kWh	−9,622
Provisional Revenue Requirement:	0

TABLE 3—SUMMARY OF P–SMBP—WD REVENUE REQUIREMENTS—Continued

[$000]

(34.80+0.00 = 34.80 mills/kWh × 1,988,000,000 kWh)	69,182

The adjustment to the P–SMBP—ED revenue requirement is a separate formal rate process, which is documented in Rate Order No. WAPA–166. Rate Order No. WAPA–166 is also scheduled to go into effect on the first day of the first full billing period on or after January 1, 2015.

Fry-Ark

The Fry-Ark portion of the revenue requirement for LAP firm electric service rates was developed from the revenue requirement calculated in the Fry-Ark Ratesetting PRS. The Fry-Ark revenue requirement remains the same as the previous rate process revenue requirement. The revenue requirements for Fry-Ark are as follows:

TABLE 4—SUMMARY OF FRY-ARK REVENUE REQUIREMENTS

[$000]

Current Revenue Requirement (Jan 2010)	$15,328
Provisional Change (Jan 2015):	
Base	200,000
Drought Adder	−200,000
	0
Provisional Revenue Requirement	15,328

The following table compares LAP existing revenue requirements to the proposed revenue requirements:

TABLE 5—SUMMARY OF LAP REVENUE REQUIREMENTS
[$000]

	Existing (January 2010)	Provisional (January 2015)
P–SMBP—WD	$69,182	$69,182
Fry-Ark	15,328	15,328
Total LAP	84,510	84,510

Under Rate Schedule L–F10, Western will continue to identify its firm electric service revenue requirement using Base and Drought Adder components. The Base component is a fixed revenue requirement for each project that includes annual O&M expenses, investment repayment and associated interest, normal timing power purchases, and transmission costs. Western's normal timing power purchases are purchases due to operational constraints (*e.g.*, management of endangered species habitat, water quality, navigation, control area purposes, etc.) and are not associated with drought conditions in the Regions. The Base component cannot be adjusted by Western without a public process. The Drought Adder component is a formula-based revenue requirement that includes costs attributable to drought conditions within LAP. The Drought Adder component includes costs associated with future Non-timing Power Purchases to meet firm power contractual obligations not covered with available system generation due to a drought, previously incurred deficits due to purchased power debt that resulted from Non-timing Power Purchases made during a drought, and the interest associated with drought debt. The Drought Adder component is designed to repay Western's drought debt within 10 years from the time the debt was incurred, using balloon-payment methodology. For example, the drought debt incurred by Western in FY 2009 will be repaid by FY 2019.

The annual revenue requirement calculation will continue to be summarized by the following formula: Annual Revenue Requirement = Base Revenue Requirement + Drought Adder Revenue Requirement. Under this Provisional Rate, the LAP annual revenue requirement equals $84.5 million and is comprised of a Base revenue requirement of $69.2 million plus a Drought Adder revenue requirement of $15.3 million.

A comparison of the existing and provisional charge components is listed in Table 6.

TABLE 6—SUMMARY OF LAP CHARGE COMPONENTS

Firm electric service	Existing charges under Rate Schedule L–F9 effective (January 1, 2010)			Provisional charges under Rate Schedule L–F10 effective (January 1, 2015)		
	Base component	Drought Adder component	Total charge	Base component	Drought Adder component	Total charge
Firm Capacity ($/kWmonth)	$3.29	$2.14	$5.43	$3.92	$1.51	$5.43
Firm Energy (mills/kWh)	12.54	8.17	20.71	14.95	5.76	20.71

Continuing to identify the firm electric service revenue requirement using Base and Drought Adder components will assist Western in presenting the effects of the drought within LAP, demonstrating repayment of the drought-related costs, and allow Western to be more responsive to changes in drought-related expenses. Western will continue to charge and bill customers firm electric service charges for energy and capacity, which are the sum of the Base and Drought Adder components.

Western reviews its firm electric service rates annually. Western will review the Base component after the annual PRS is completed, generally in the first quarter of the calendar year. If an adjustment to the Base component is necessary, Western will initiate a public process pursuant to 10 CFR part 903 prior to making an adjustment.

In accordance with the original implementation of the Drought Adder component, Western will review the Drought Adder component each September to determine if drought costs differ from those projected in the PRSs. If drought costs differ, Western will determine if an adjustment to the Drought Adder component is necessary. Western will notify customers by letter each October of the planned incremental or decremental adjustment and implement the adjustment in the January billing cycle. Although decremental adjustments to the Drought Adder component will occur as drought costs are repaid, the adjustments cannot result in a negative Drought Adder component. To give customers advance notice, Western will conduct a preliminary review of the Drought Adder component in early summer and notify customers by letter of the estimated change to the Drought Adder component for the following January. Western will verify the final Drought Adder component adjustment and notify customers by letter each October of any planned increase or decrease in this component. Implementing the Drought Adder component adjustment on January 1 of each year will help keep the drought deficits from escalating, will lower the interest expense due to drought deficits, will demonstrate responsible deficit management, and will provide prompt drought deficit repayments.

Western's current and provisional rate schedule is formula-based to provide for an annual adjustment to the Drought Adder component. An incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the PRS Composite Rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formula without a public process.

Statement of Revenue and Related Expenses

The following Table 7 provides a summary of projected revenue and expense data for the Fry-Ark firm electric service revenue requirement through the 5-year rate approval period.

TABLE 7—FRY-ARK COMPARISON OF 5-YEAR RATE PERIOD (FY 2015–2019)

[Total revenues and expenses]

	Existing rate ($000)	Provisional rate ($000)	Difference ($000)
Total Revenues	$84,897	$89,012	$4,115
Revenue Distribution			
Expenses:			
O&M [1]	25,307	32,322	7,015
Purchased Power	1,077	691	(386)
Interest [2]	20,243	16,080	(4,163)
Transmission [3]	20,671	12,663	(8,008)
Total Expenses	67,298	61,756	(5,542)
Principal Payments:			
Capitalized Expenses (Deficits)	0	0	0
Original Project and Additions [4]	14,214	21,757	7,543
Replacements [4]	3,385	5,499	2,114
Total Principal Payments	17,599	27,256	9,657
Total Revenue Distribution	84,897	89,012	4,115

[1] The increase in O&M expense is due to changes reflected in both Western's and Reclamation's FY15 work plans.
[2] The decrease in interest expense is primarily due to increased repayment over the 5-year period.
[3] The decrease in Transmission Expenses is due to the negotiation of a new contract.
[4] The difference in principal payments is due to increased revenue being available for repayment during the 5-year period.

The summary of P–SMBP—WD revenues and expenses for the 5-year Provisional Rate approval period is included in the P–SMBP Statement of Revenue and Related Expenses that is part of Rate Order No. WAPA–166.

Basis for Rate Development

The existing charges for firm electric service in Rate Schedule L–F9, which expires December 31, 2014, continue to provide sufficient revenue to meet the LAP repayment obligations. The total annual revenue requirement for LAP remains $84.5 million for firm electric service, and the overall capacity and energy charges are not changing. The Provisional Rates, under Rate Schedule L–F10, will take effect on the first full billing period on or after January 1, 2015, and will remain in effect on an interim basis, pending FERC's confirmation and approval of the rate schedule or substitute rates on a final basis, through December 31, 2019.

Comment

Western received one comment letter during the public consultation and comment period. The comment expressed in this letter has been paraphrased, where appropriate, without compromising the meaning of the comments.

Comment: One customer representative supported the rate modifications as proposed, and emphasized the need for continued cost control regarding the Base component. They stated the Base costs cannot grow unabated and replace the shrinking Drought Adder. The customer stressed that cost control is of paramount importance.

Response: Western agrees with the above comment. Western is committed to keeping the power rates at the lowest possible rates while maintaining sound business principles. All budgeted O&M and capital improvements are vetted annually through customer work plan meetings to assess the impacts to the rates.

Availability of Information

All documents related to this action are available for inspection and copying at the Rocky Mountain Regional Office, located at 5555 East Crossroads Boulevard, Loveland, Colorado. These documents are also available on Western's Web page located at *http://www.wapa.gov/rm/ratesRM/2015/2015RateAdjustment.htm*.

Ratemaking Procedure Requirements

Environmental Compliance

In compliance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347), the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508), and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Submission to the Federal Energy Regulatory Commission

The Provisional Rates herein confirmed, approved, and placed into effect on an interim basis, together with supporting documents, will be submitted to FERC for confirmation and final approval.

Order

In view of the foregoing and under the authority delegated to me, I confirm and approve on an interim basis, effective on the first full billing period on or after January 1, 2015, Rate Schedule L–F10 for the Loveland Area Projects of the Western Area Power Administration. This rate schedule shall remain in effect on an interim basis, pending the Federal Energy Regulatory Commission's

confirmation and approval of the rate schedule or substitute rates on a final basis through December 31, 2019.

Dated: December 2, 2014.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

Rate Schedule L–F10
(Supersedes Rate Schedule L–F9)
Effective January 1, 2015

United States Department of Energy
Western Area Power Administration

Loveland Area Projects Colorado, Kansas, Nebraska, Wyoming

SCHEDULE OF RATE FOR FIRM ELECTRIC SERVICE

(Approved Under Rate Order No. WAPA–167)

Effective:

The first day of the first full billing period beginning on or after January 1, 2015, through December 31, 2019, or until superseded by another rate schedule.

Available:

Within the marketing area served by the Loveland Area Projects.

Applicable:

To the wholesale power customers for firm electric service supplied through one meter at one point of delivery, or as otherwise established by contract.

Character:

Alternating current, 60 hertz, three phase, delivered and metered at the voltages and points established by contract.

Formula Rate and Charge Components:

Rate = Base component + Drought Adder component

Monthly Charge as of January 1, 2015, Under the Rate:

CAPACITY CHARGE: $5.43 per kilowatt of billing capacity.

ENERGY CHARGE: 20.71 mills per kilowatthour (kWh) of monthly entitlement.

BILLING CAPACITY: Unless otherwise specified by contract, the billing capacity will be the seasonal contract rate of delivery.

Base: A fixed revenue requirement that includes operation and maintenance expense, investment repayment and associated interest, normal timing power purchases (purchases due to operational constraints, not associated with drought), and transmission costs. The Base revenue requirement is $69.2 million.

$$\text{Base Capacity} = \frac{\text{50\% X Base Revenue Requirement}}{\text{Firm Billing Capacity}} = \$3.92/\text{kWmonth}$$

$$\text{Base Energy} = \frac{\text{50\% X Base Revenue Requirement}}{\text{Annual Energy}} = 14.95 \text{ mills/kWh}$$

Drought Adder: A formula-based revenue requirement that includes future purchase power expense in excess of timing purchases, previous purchase power drought deficits, and interest on the purchase power drought deficits. For the period beginning on or after the first day of the first full billing period beginning on or after January 1, 2015, the Drought Adder revenue requirement is $15.3. million.

$$\text{Drought Adder Capacity} = \frac{\text{50\% X Drought Adder Revenue Requirement}}{\text{Firm Billing Capacity}} = \$1.51/\text{kWmonth}$$

$$\text{Drought Adder Energy} = \frac{\text{50\% X Drought Adder Revenue Requirement}}{\text{Annual Energy}} = 5.76 \text{ mills/kWh}$$

Process:

Any proposed change to the Base component will require a public process. The Drought Adder component may be adjusted annually using the above formulas for any costs attributed to drought of less than or equal to the equivalent of 2 mills/kWh to the LAP Composite Rate. Any planned incremental adjustment to the Drought Adder component greater than the equivalent of 2 mills/kWh to the LAP Composite Rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formulas without a public process. A revised Drought Adder charge may go into effect January 1 of each year based on the formula above. Western will notify the customer annually in October of the revised monthly charges. Any change to the Drought Adder component will be identified in a revision to charges under this rate schedule.

Adjustments:

For Transformer Losses: If delivery is made at transmission voltage but metered on the low-voltage side of the substation, the meter readings will be increased to compensate for transformer losses as provided for in the contract.

For Power Factor: None. The customer will be required to maintain a power factor at all points of measurement

between 95-percent lagging and 95-percent leading.

[FR Doc. 2014–28715 Filed 12–5–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Pick-Sloan Missouri Basin Program—Eastern Division-Rate Order No. WAPA–166

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Order Concerning Firm Power Rates.

SUMMARY: The Deputy Secretary of Energy confirmed and approved Rate Order No. WAPA–166 and Rate Schedules P–SED–F12 and P–SED–FP12, placing firm power and firm peaking power rates for the Western Area Power Administration (Western) Pick-Sloan Missouri Basin Program—Eastern Division (P–SMBP—ED) into effect on an interim basis.

DATES: Rate Schedules P–SED–F12 and P–SED–FP12 will be placed into effect on an interim basis on the first day of the first full billing period beginning on or after January 1, 2015, and will remain in effect until the Federal Energy Regulatory Commission (FERC) confirms, approves, and places the rate schedules or substitute rates in effect on a final basis through December 31, 2019, or until the rate schedules are superseded.

FOR FURTHER INFORMATION CONTACT: Mr. Robert J. Harris, Regional Manager, Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266, telephone (406) 255–2800, email *rharris@wapa.gov,* or Ms. Linda Cady-Hoffman, Rates Manager, Upper Great Plains Region, Western Area Power Administration, 2900 4th Avenue North, Billings, MT 59101–1266, telephone (406) 255–2920, email *cady@wapa.gov.*

SUPPLEMENTARY INFORMATION: Rate Schedules P–SED–F11 and P–SED–FP11 were approved under Rate Order No. WAPA–147 for the period beginning January 1, 2010, and ending December 31, 2014.[1] Under the current rate methodology, rates for P–SMBP—ED firm power and firm peaking power service are designed to recover an annual revenue requirement that includes investment repayment, interest, purchase power, operation and maintenance, and other expenses within the allowable period. The total annual revenue requirement for P–SMBP—ED remains $320.2 million for firm power and firm peaking power service. In addition, the overall capacity and energy charges are not changing, as the existing charges in the current rate schedules for firm power and firm peaking power continue to provide sufficient revenue to meet the P–SMBP—ED repayment obligations. The Rate Schedules continue to be formula based. An incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the Power Repayment Study (PRS) composite rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formula without a public process.

Rate Schedules P–SED–F11 and P–SED–FP11 are being superseded by Rate Schedules P–SED–F12 and P–SED–FP12, respectively. Under Rate Schedule P–SED–F12, the firm capacity charge will remain $7.65/kilowattmonth (kWmonth), and the firm energy charge will remain 19.05 mills/kilowatthour (kWh). Under Rate Schedule P–SED–FP12, the firm peaking power services capacity charge will remain $6.90/kWmonth, and the energy charge will remain 19.05 mills/kWh as of January 1, 2015. Firm Peaking Energy is normally returned. A Firm Peaking Energy charge of 19.05 mills/kWh will be assessed in the event energy is not returned. The Base and Drought Adder components associated with these charges are shown in Table 1 below:

TABLE 1—SUMMARY OF P–SMBP—ED CHARGE COMPONENTS

	Existing charges under Rate Schedules effective (January 1, 2010) P–SED–F11/P–SED–FP11			Provisional charges under Rate Schedules effective (January 1, 2015) P–SED–F12/P–SED–FP12		
	Base component	Drought Adder component	Total charge	Base component	Drought Adder component	Total charge
Firm Capacity ($/kWmonth)	$3.80	$3.85	$7.65	$4.90	$2.75	$7.65
Firm Energy (mills/kWh)	9.53	9.52	19.05	12.33	6.72	19.05
Firm Peaking Capacity ($/kWmonth)	$3.45	$3.45	$6.90	$4.45	$2.45	$6.90
Firm Peaking Energy (mills/kWh)[1]	9.53	9.52	19.05	12.26	6.79	19.05

[1] Firm Peaking Energy is normally returned. This charge will be assessed in the event firm peaking energy is not returned.

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand or to disapprove such rates to FERC. Existing DOE procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Under Delegation Order Nos. 00–037.00A and 00–001.00E and in compliance with 10 CFR part 903 and 18 CFR part 300, I hereby confirm, approve, and place Rate Order No. WAPA–166, P–SMBP—ED firm power and firm peaking power rates, into effect on an interim basis

(Provisional Rates). The new Rate Schedules P–SED–F12 and P–SED–FP12 will be promptly submitted to FERC for confirmation and approval on a final basis.

Dated: December 2, 2014.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

DEPARTMENT OF ENERGY

DEPUTY SECRETARY

In the matter of:

Western Area Power Administration

Rate Adjustment for the Pick-Sloan Missouri Basin Program—Eastern Division

Rate Order No. WAPA–166

[1] WAPA–147 was approved by the Deputy Secretary of Energy on December 14, 2009 (74 FR 67197 (Dec 18, 2009)), and confirmed and approved by FERC on a final basis on September 10, 2010, in Docket No. EF10–2–000. See *United States Department of Energy, Western Area Power Administration (Pick-Sloan Missouri Basin Program—Eastern Division),* 132 FERC ¶ 62,159.

ORDER CONFIRMING, APPROVING, AND PLACING THE PICK-SLOAN MISSOURI BASIN PROGRAM—EASTERN DIVISION FIRM POWER AND FIRM PEAKING POWER SERVICE RATES INTO EFFECT ON AN INTERIM BASIS

These firm and firm peaking power service rates for the Pick-Sloan Missouri Basin Program—Eastern Division (P–SMBP—ED) are established in accordance with section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152). This Act transferred to and vested in the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) and section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), and other acts that specifically apply to the project involved.

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) the authority to develop power and transmission rates to the Administrator of Western Area Power Administration (Western); (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to the Federal Energy Regulatory Commission (FERC). Existing DOE procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Acronyms and Definitions

As used in this Rate Order, the following acronyms and definitions apply:

Base	A fixed revenue requirement that includes operation and maintenance expense, investments and replacements, interest on investments and replacements, normal timing purchase power (purchases due to operational constraints, not associated with drought), and transmission costs.
Capacity	The electric capability of a generator, transformer, transmission circuit, or other equipment. It is expressed in kilowatts.
Capacity Charge	The charge under the rate schedule for capacity. It is expressed in dollars per kilowattmonth.
Composite Rate	The Power Repayment Study (PRS) rate for commercial firm power, which is the total annual revenue requirement for capacity and energy divided by the total annual energy sales. It is expressed in mills per kilowatthour and used for comparison purposes.
CROD	Contract Rate of Delivery. The maximum amount of capacity and energy allocated to a Preference Customer for a period specified under a contract.
Deficits	Deferred or unrecovered annual and/or interest expenses.
DOE Order RA 6120.2	An order outlining power marketing administration financial reporting and rate-making procedures.
Drought Adder	A formula-based revenue requirement that includes future purchase power above timing purchases, previous purchase power drought deficits, and interest on the purchase power drought deficits.
Energy	Measured in terms of the work it is capable of doing over a period of time. Energy is expressed in kilowatthours.
Energy Charge	The charge under the rate schedule for energy. It is expressed in mills per kilowatthour and applied to each kilowatthour delivered to each customer.
Firm	A type of product and/or service available at the time requested by the customer.
FY	Fiscal year; October 1 to September 30.
kW	Kilowatt—the electrical unit of capacity that equals 1,000 watts.
kWh	Kilowatthour—the electrical unit of energy that equals 1,000 watts in 1 hour.
kWmonth	Kilowattmonth—the electrical unit of the monthly amount of capacity.
mills/kWh	Mills per kilowatthour—the unit of charge for energy (equal to one tenth of a cent or one thousandth of a dollar).
MW	Megawatt—the electrical unit of capacity that equals 1 million watts or 1,000 kilowatts.
Non-timing Power Purchases	Power purchases that are not related to operational constraints such as management of endangered species, species habitat, water quality, navigation, control area purposes, etc.
O&M	Operation and Maintenance.
Power	Capacity and energy.
Power Factor	The ratio of real to apparent power at any given point and time in an electrical circuit. Generally, it is expressed as a percentage.
Preference	The provisions of Reclamation Law that require Western to first make Federal power available to certain entities. For example, section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) states that preference in the sale of Federal power shall be given to municipalities and other public corporations or agencies and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made under the Rural Electrification Act of 1936.
Provisional Rate	A rate that has been confirmed, approved, and placed into effect on an interim basis by the Deputy Secretary of Energy.
Revenue Requirement	The revenue required by PRS to recover annual expenses (such as O&M, purchase power, transmission service expenses, interest, and deferred expenses) and repay Federal investments and other assigned costs.

Effective Date

The Provisional Rates will take effect on the first day of the first full billing period beginning on or after January 1, 2015, and will remain in effect until December 31, 2019, pending approval by FERC on a final basis.

Public Notice and Comment

Western followed the Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions, 10 CFR part 903, in developing these rates. The steps Western took to involve interested parties in the minor rate process were:

1. On April 17, 2014, Western mailed a notice announcing an informal public meeting would be held via webinar on May 2, 2014, to discuss the rate process for the expiring firm power rates for the P–SMBP—ED. The focus of the webinar was to provide an update on the FY 2013 PRS, discuss the Base and Drought

Adder component true up, and plan for the upcoming rate adjustment process.

2. A **Federal Register** notice (FRN), published on August 8, 2014 (79 FR 46434), announced the proposed rates for P–SMBP—ED and began the 30-day public consultation and comment period.

3. On August 8, 2014, Western mailed letters to all P–SMBP—ED Preference Customers and interested parties transmitting the FRN published on August 8, 2014.

4. Western provided a Web page that contains all dates, customer letters, presentations, the FRN, and all other information about this rate process. The Web page is located at *http://www.wapa.gov/ugp/rates/2015FirmRateAdjust.*

5. During the consultation and comment period, which ended September 8, 2014, Western received three comment letters. All formally submitted comments have been considered in the preparation of this Rate Order.

Comments

Written comments were received from the following interested parties:

Mid-West Electric Consumers Association

Missouri River Energy Services

Rodger Otstot

Project Description

The Pick-Sloan Missouri Basin Program (P–SMBP), originally the Missouri River Basin Project, was authorized by Congress in the Flood Control Act of 1944. The multipurpose program provides authorization for construction of certain public works and improvements on rivers and harbors for flood control, generation of hydropower, resources for water supply and irrigation, aids to navigation, preservation of water quality, enhancement of fish and wildlife, and creation of recreation opportunities.

In addition to the multipurpose water projects authorized by Section 9 of the Flood Control Act of 1944, certain other existing projects have been integrated with the P–SMBP for power marketing, operation, and repayment purposes. The Colorado-Big Thompson, Kendrick, and Shoshone Projects were combined with the P–SMBP in 1954, followed by the North Platte Project in 1959. These projects were referred to as the "Integrated Projects" of the P–SMBP. The Flood Control Act of 1944 also authorized the inclusion of the Fort Peck Project with the P–SMBP for operation and repayment purposes.

P–SMBP power is marketed by two Western regions. The Upper Great Plains Region (UGPR) markets the Eastern Division (P–SMBP—ED) and the Rocky Mountain Region (RMR) markets the Western Division (P–SMBP—WD) through the Loveland Area Projects (LAP). The P–SMBP power is marketed to approximately 360 firm power customers by UGPR and approximately 53 firm power customers by RMR.

Power Repayment Study—Firm Power Rate

Western prepares a PRS each FY to determine if revenues will be sufficient to repay, within the required time, all costs assigned to the P–SMBP. Repayment criteria are based on Western's applicable laws and legislation, as well as policies including DOE Order RA 6120.2. To meet Cost Recovery Criteria outlined in DOE Order RA 6120.2, a revised study and rate adjustment has been developed to demonstrate that sufficient revenues will be collected under Provisional Rates to meet future obligations. The PRS revenue requirement and Composite Rate remains unchanged, as indicated in Table 1:

TABLE 1—COMPARISON OF P–SMBP—ED REVENUE REQUIREMENT AND COMPOSITE RATE

	Existing Requirements (January 1, 2010)	Provisional Requirements (January 1, 2015)	Percent Change
P–SMBP—ED Revenue Requirement ($ in millions)	$320.2	$320.2	0
P–SMBP—ED Composite Rate (mills/kWh)	33.25	33.25	0

The P–SMBP—ED annual revenue requirement equals $332.8 million and is comprised of a Base revenue requirement, less a 5 percent discount for facility credits, resulting in a total revenue requirement of $320.2 million.

Existing and Provisional Rates

P–SMBP—ED

Under Rate Schedule P–SED–F12, the firm capacity charge remains $7.65/kWmonth and the firm energy charge remains 19.05 mills/kWh. Under Rate Schedule P–SED–FP12, the firm peaking capacity charge remains $6.90/kWmonth. Firm Peaking Energy is normally returned. A Firm Peaking Energy charge of 19.05 mills/kWh will be assessed in the event energy is not returned. These Rate Schedules are formula based to provide for an annual adjustment to the Drought Adder component. An incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the PRS Composite Rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formula without a public process. The overall capacity and energy charges are not changing, as indicated in the following Table 2:

TABLE 2—COMPARISON OF EXISTING AND PROVISIONAL P–SMBP—ED FIRM POWER RATES

Firm power service	Existing Charges Under Rate Schedules Effective (January 1, 2010) P–SED–F11/ P–SED–FP11	Provisional Charges Under Rate Schedules Effective (January 1, 2015) P–SED–F12/ P–SED–FP12	Percent Change
Firm Capacity ($/kWmonth)	$7.65	$7.65	0
Firm Energy (mills/kWh)	19.05	19.05	0
Firm Peaking Capacity ($/kWmonth)	$6.90	$6.90	0

TABLE 2—COMPARISON OF EXISTING AND PROVISIONAL P–SMBP—ED FIRM POWER RATES—Continued

Firm power service	Existing Charges Under Rate Schedules Effective (January 1, 2010) P–SED–F11/ P–SED–FP11	Provisional Charges Under Rate Schedules Effective (January 1, 2015) P–SED–F12/ P–SED–FP12	Percent Change
Firm Peaking Energy (mills/kWh) [1]	19.05	19.05	0

[1] Firm Peaking Energy is normally returned. This charge will be assessed in the event Firm Peaking Energy is not returned.

Under the current rate methodology, rates for P–SMBP—ED firm power and firm peaking power service are designed to recover an annual revenue requirement that includes investment repayment, interest, purchase power, O&M, and other expenses within the allowable period.

Western is trueing up the Base and Drought Adder components of the rate schedules and placing new rate schedules into effect for the 5-year period, beginning January 1, 2015, through December 31, 2019. The true-up updates the Base components to represent present costs and lowers the Drought Adder components to represent present drought costs. Over the past 5-year rate period, the P–SMBP costs included in the Drought Adder have decreased as the actual deficits were less than the projected deficits. Additionally, there have been drought costs repaid ahead of schedule, which decreased the drought deficit interest expense. Base costs increased during that same period due to a new 5-year cost evaluation period, new investments and replacements, and inflationary costs.

P–SMBP—WD

The P–SMBP—WD revenue requirement is incorporated into the LAP rate, along with the revenue requirement for the Fryingpan-Arkansas Project. The adjustment to the LAP rate is a separate formal rate process, which is documented in Rate Order No. WAPA–167. Rate Order No. WAPA–167 is also scheduled to go into effect on the first day of the first full billing period on or after January 1, 2015.

Certification of Rates

Western's Administrator certified that the firm power and firm peaking power rates under Rate Schedules P–SED–F12 and P–SED–FP12 are the lowest possible rates consistent with sound business principles. The rates were developed following administrative policies and applicable laws.

P–SMBP—ED Firm Power Rate Discussion

Western is required to establish power rates sufficient to recover O&M, purchased power and interest expenses, and repay power investment and irrigation aid. The P–SMBP—ED firm power and firm peaking power Base and Drought Adder components are updated to represent present costs. Under Rate Schedule P–SED–F12, Western will continue identifying its firm power service revenue requirement using Base and Drought Adder components. The Base component is a fixed revenue requirement that includes annual O&M expenses, investment repayment and associated interest, normal timing power purchases, and transmission costs. Western's normal timing power purchases are due to operational constraints (*e.g.*, management of endangered species habitat, water quality, navigation, etc.) and are not associated with drought. The Base component cannot be adjusted by Western without a public process.

The Drought Adder component is a formula-based revenue requirement that includes costs attributable to drought conditions within P–SMBP. The Drought Adder component includes costs associated with future Non-timing Power Purchases to meet firm power contractual obligations not covered with available system generation due to a drought, previously incurred deficits due to purchased power debt that resulted from Non-timing Power Purchases made during a drought, and the interest associated with drought debt. The Drought Adder component is designed to repay Western's drought debt within 10 years from the time the debt was incurred, using balloon-payment methodology. For example, the drought debt incurred by Western in FY 2009 will be repaid by FY 2019.

The annual revenue requirement calculation will continue to be summarized by the following formula: Annual Revenue Requirement = Base Revenue Requirement + Drought Adder Revenue Requirement. Both the Base and Drought Adder components recover portions of the firm power revenue requirement, firm peaking power, and associated 5 percent discount revenue necessary to equal the P–SMBP—ED revenue requirement. A comparison of the existing and provisional charge components is listed in Table 3.

TABLE 3—SUMMARY OF P–SMBP—ED RATE COMPONENTS

Firm Power Service	Existing Charges Under Rate Schedules Effective (January 1, 2010) P–SED–F11/ P–SED–FP11			Provisional Charges Under Rate Schedules Effective (January 1, 2015) P–SED–F12/ P–SED–FP12		
	Base Component	Drought Adder Component	Total Charge	Base Component	Drought Adder Component	Total Charge
Firm Capacity ($/kWmonth)	$3.80	$3.85	$7.65	$4.90	$2.75	$7.65
Firm Energy (mills/kWh)	9.53	9.52	19.05	12.33	6.72	19.05
Firm Peaking Capacity ($/kWmonth)	$3.45	$3.45	$6.90	$4.45	$2.45	$6.90
Firm Peaking Energy (mills/kWh) [1]	9.53	9.52	19.05	12.26	6.79	19.05

[1] Firm Peaking Energy is normally returned. This charge will be assessed in the event Firm Peaking Energy is not returned.

Continuing to identify the firm electric service revenue requirement using Base and Drought Adder components will assist Western in presenting the effects of the drought within P–SMBP, demonstrating repayment of the drought-related costs, and allow Western to be more responsive to changes in drought-related expenses. Western will continue to charge and bill Customers firm power service charges for energy and capacity, which are the sum of the Base and Drought Adder components.

Western reviews its firm electric service rates annually. Western will review the Base component after the annual PRS is completed, generally in the first quarter of the calendar year. If an adjustment to the Base component is necessary, Western will initiate a public process following 10 CFR part 903 before making an adjustment.

In accordance with the original implementation of the Drought Adder component, Western will review the Drought Adder component each September to determine if drought costs differ from those projected in the PRS. If drought costs differ, Western will determine if an adjustment to the Drought Adder component is necessary. Western will notify customers by letter each October of the planned incremental or decremental adjustment and implement the adjustment in the January billing cycle. Although decremental adjustments to the Drought Adder component will occur as drought costs are repaid, the adjustments cannot result in a negative Drought Adder component. To give customers advance notice, Western will conduct a preliminary review of the Drought Adder component in early summer and notify customers by letter of the estimated change to the Drought Adder component for the following January. Western will verify the final Drought Adder component adjustment and notify customers by letter each October of any planned increase or decrease in this component. Implementing the Drought Adder component adjustment on January 1 of each year will help keep the drought deficits from escalating as quickly, will lower the interest expense due to drought deficits, will demonstrate responsible deficit management, and will provide prompt drought deficit repayments.

Western's current and provisional rate schedules are formula based to provide for an annual adjustment to the Drought Adder component. An incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the PRS Composite Rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formula without a public process.

Statement of Revenue and Related Expenses

The following Table 4 provides a summary of projected revenue and expense data for the total P–SMBP, including both the Eastern and Western Division's firm electric service revenue requirements through the 5-year rate approval period. The firm power rates for both divisions have been developed with the following revenues and expenses for the P–SMBP:

TABLE 4—TOTAL P–SMBP FIRM POWER COMPARISON OF 5-YEAR RATE PERIOD (FY 2015–2019) TOTAL REVENUES AND EXPENSES

	Existing Rate ($000)	Provisional Rate ($000)	Difference ($000)
Total Revenues	$2,625,336	$2,679,973	$54,637
Revenue Distribution			
Expenses:			
O&M	$904,884	$1,082,969	$178,085
Purchased Power	440,038	164,049	(275,989)
Interest	650,671	561,528	(89,143)
Transmission	65,853	64,072	(1,781)
Total Expenses	$2,061,446	$1,872,618	$(188,828)
Principal Payments:			
Capitalized Expenses (Deficits) [1]	$483,252	$345,006	$(138,246)
Original Project and Additions [1]	10,414	401,193	390,779
Replacements [1]	4,825	61,156	56,331
Irrigation Aid	65,399	0	(65,399)
Total Principal Payments	$563,890	$807,355	$243,465
Total Revenue Distribution	$2,625,336	$2,679,973	$54,637

[1] Due to deficit conditions between 2001 and 2009, revenues generated in the cost evaluation period are applied toward repayment of deficits rather than repayment of project additions and replacements. All deficits are projected to be repaid by 2018.

Basis for Rate Development

The existing charges for firm power and firm peaking power under Rate Schedules F11 and FP11, which expire December 31, 2014, continue to provide sufficient revenue to meet the P–SMBP—ED repayment obligations. The total annual revenue requirement for P–SMBP—ED remains $320.2 million for firm power and firm peaking power service, and the overall capacity and energy charges are not changing. The Provisional Rates, under Rate Schedules F12 and FP12, will take effect on the first full billing period on or after January 1, 2015, and will remain in effect on an interim basis, pending FERC's confirmation and approval of the rate schedules or substitute rates on a final basis, through December 31, 2019, or until the rate schedules are superseded.

Comments

Western received three comment letters during the public consultation and comment period. The comments expressed in these letters have been paraphrased, where appropriate, without compromising the meaning of the comments.

A. *Comment:* Two customer representatives recognized the need for true up of the Base and Drought Adder

charge components of the composite rate.

Response: Western agrees with the above comment. Rather than extend rates with out-of-date charge components, Western choose to do a minor rate adjustment to address trueing up the charge components.

B. *Comment:* One customer representative supported the rate modifications as proposed, and emphasized the need for continued cost control regarding the Base component. They stated the Base costs cannot grow unabated and replace the shrinking Drought Adder. The customer stressed that cost control is of paramount importance.

Response: Western agrees with the above comment. Western is committed to keeping the power rates at the lowest possible rates while maintain sound business principles. All budgeted O&M and capital improvements are vetted annually through customer work plan meetings to access the impacts to the rates.

C. *Comment:* One interested party expressed concern over the suballocation of the power allocation for the Pick-Sloan Missouri Basin Program. The customer feels the allocation is not being calculated in agreement with the ultimate development concept or in accordance with the repayment rules set forth in the Report of Financial Position, Missouri River Basin Project, dated December 1963.

Response: Compliance with applicable authority regarding suballocations for the Pick-Sloan Missouri Basin Program is beyond the scope of this minor rate adjustment process and public process. Western is in compliance with applicable authority. Moreover, any change in the cost allocations would require Congressional approval pursuant to the DOE Organization Act of 1977 (42 U.S.C. 7152(a)(3)).

Availability of Information

All documents related to this action are available for inspection and copying at the Upper Great Plains Regional Office, located at 2900 4th Avenue North, Billings, Montana. These documents are also available on Western's Web site located at *http://www.wapa.gov/ugp/rates/2015firmrateadjust.*

Ratemaking Procedure Requirements:

Environmental Compliance

In compliance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347), the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508), and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Submission to the Federal Energy Regulatory Commission

The Provisional Rates herein confirmed, approved, and placed into effect on an interim basis, together with supporting documents, will be submitted to FERC for confirmation and final approval.

ORDER

In view of the foregoing and under the authority delegated to me, I confirm and approve on an interim basis, effective on the first full billing period on or after January 1, 2015, Rate Schedules P–SED–F12 and P–SED–FP12 for the Pick-Sloan Missouri Basin Program—Eastern Division Project of the Western Area Power Administration. These rate schedules shall remain in effect on an interim basis, pending FERC's confirmation and approval of the rate schedules or substitute rates on a final basis through December 31, 2019, or until the rate schedules are superseded.

Dated: December 2, 2014.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

Rate Schedule P–SED–F12
(Supersedes Schedule P–SED–F11)
January 1, 2015

United States Department of Energy

Western Area Power Administration

Pick–Sloan Missouri Basin Program—Eastern Division

Montana, North Dakota, South Dakota, Minnesota, Iowa, Nebraska

SCHEDULE OF RATES FOR FIRM POWER SERVICE

(Approved Under Rate Order No. WAPA–166)

Effective:

The first day of the first full billing period beginning on or after January 1, 2015, through December 31, 2019, or until superseded by another rate schedule.

Available:

Within the marketing area served by the Eastern Division of the Pick-Sloan Missouri Basin Program.

Applicable:

To the power and energy delivered to customers as firm power service.

Character:

Alternating current, 60 hertz, three phase, delivered and metered at the voltages and points established by contract.

Formula Rate and Charge Components:

Rate = Base component + Drought Adder component

Monthly Charge as of January 1, 2015, under the Rate:

CAPACITY CHARGE:

$7.65 for each kilowatt per month (kWmonth) of billing capacity.

ENERGY CHARGE:

19.05 mills for each kilowatthour (kWh) for all energy delivered as firm power service.

BILLING CAPACITY: The billing capacity will be as defined by the power sales contract.

Base: A fixed revenue requirement that includes operation and maintenance expense, investments and replacements, interest on investments and replacements, normal timing purchase power (purchases due to operational constraints, not associated with drought), and transmission costs. The Base component charges are fixed amounts under this Rate Schedule, determined as follows:

$$\text{Base Capacity} = \frac{50\% \text{ X Base Revenue Requirement}}{\text{Firm Metered Billing Units}} = \$4.90/\text{kWmonth}$$

$$\text{Base Energy} = \frac{50\% \text{ X Base Revenue Requirement}}{\text{Annual Energy}} = 12.33 \text{ mills/kWh}$$

Drought Adder: A formula-based revenue requirement that includes future purchase power above timing purchases, previous purchase power drought deficits, and interest on the purchase power drought deficits. The formulas, along with the charges under the formulas as of January 1, 2015, are:

$$\text{Drought Adder Capacity} = \frac{50\% \text{ X Drought Adder Revenue Requirement}}{\text{Firm Metered Billing Units}} = \$2.75/\text{kWmonth}$$

$$\text{Drought Adder Energy} = \frac{50\% \text{ X Drought Adder Revenue Requirement}}{\text{Annual Energy}} = 6.72 \text{ mills/kWh}$$

Process:

Any proposed change to the Base component will require a public process.

The Drought Adder may be adjusted annually using the above formulas for any costs attributed to drought of less than or equal to the equivalent of 2 mills/kWh to the Power Repayment Study (PRS) composite rate. Any planned incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the PRS composite rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formulas without a public process.

A revised Drought Adder charge may go into effect January 1 of each year based on the formula above. Western will notify customers annually in October of the revised monthly charges. Any change to the Drought Adder component will be identified in a revision to charges under this rate schedule.

Adjustments:

For Character and Conditions of Service:

Customers who receive deliveries at transmission voltage may, in some instances, be eligible to receive a 5 percent discount on capacity and energy charges when facilities are provided by the customer that results in a sufficient savings to Western to justify the discount. The determination of eligibility for receipt of the voltage discount shall be exclusively vested in Western.

For Billing of Unauthorized Overruns:

For each billing period in which there is a contract violation involving an unauthorized overrun of the contractual firm power and/or energy obligations, such overrun shall be billed at 10 times the formula rate.

For Power Factor:

None. Customers will be required to maintain a power factor at the point of delivery between 95-percent lagging and 95-percent leading.

Rate Schedule P–SED–FP12
(Supersedes Schedule P–SED–FP11)
January 1, 2015

United States Department of Energy

Western Area Power Administration

Pick-Sloan Missouri Basin Program—Eastern Division Montana, North Dakota, South Dakota, Minnesota, Iowa, Nebraska

SCHEDULE OF RATES FOR FIRM PEAKING POWER SERVICE

(Approved Under Rate Order No. WAPA–166)

Effective:

The first day of the first full billing period beginning on or after January 1, 2015, through December 31, 2019, or until superseded by another rate schedule.

Available:

Within the marketing area served by the Eastern Division of the Pick-Sloan Missouri Basin Program, to customers with generating resources, enabling them to use firm peaking power service.

Applicable:

To the power sold to customers as firm peaking power service.

Character:

Alternating current, 60 hertz, three phase, delivered and metered at the voltages and points established by contract.

Formula Rate and Charge Components:

Rate = Base component + Drought Adder component

Monthly Charge as of January 1, 2015, under the Rate:

CAPACITY CHARGE:

$6.90 for each kilowatt per month (kWmonth) of the effective contract rate of delivery for peaking power or the maximum amount scheduled, whichever is greater.

ENERGY CHARGE:

19.05 mills for each kilowatthour (kWh) for all energy scheduled for delivery without return.

Base: A fixed revenue requirement that includes operation and maintenance expense, investments and replacements, interest on investments and replacements, normal timing purchase power (purchases due to operational constraints, not associated with drought), and transmission costs. The Base component charges are fixed amounts under this Rate Schedule, determined as follows:

$$\text{Base Capacity} = \frac{\text{Base Peaking Capacity Revenue Requirement}}{\text{Peaking CROD Billing Units}} = \$4.45/\text{kWmonth}$$

Drought Adder: A formula-based revenue requirement that includes future purchase power above timing purchases, previous purchase power drought deficits, and interest on the purchase power drought deficits. The formulas, along with the charges under the formulas as of January 1, 2015, are:

$$\text{Drought Adder Capacity} = \frac{\text{Drought Adder Peaking Capacity Revenue Requirement}}{\text{Peaking CROD Billing Units}} = \$2.45/\text{kWmonth}$$

Process:

Any proposed change to the Base component will require a public process.

The Drought Adder may be adjusted annually using the above formulas for any costs attributed to drought of less than or equal to the equivalent of 2 mills/kWh to the Power Repayment Study (PRS) composite rate. Any planned incremental upward adjustment to the Drought Adder greater than the equivalent of 2 mills/kWh to the PRS composite rate will require a public process. The Drought Adder may be adjusted downward pursuant to the formulas without a public process.

A revised Drought Adder charge may go into effect January 1 of each year based on the formula above. Western will notify customers annually in October of the revised monthly charges. Any change to the Drought Adder component will be identified in a revision to charges under this rate schedule.

BILLING CAPACITY:

The billing capacity will be the greater of (1) the highest 30-minute integrated capacity measured during the month up to, but not in excess of, the delivery obligation under the power sales contract, or (2) the contract rate of delivery.

Adjustments:

Billing for Unauthorized Overruns:

For each billing period in which there is a contract violation involving an unauthorized overrun of the contractual obligation for peaking capacity and/or energy, such overrun shall be billed at 10 times the formula rate.

[FR Doc. 2014–28677 Filed 12–5–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Antelope Valley Station to Neset Transmission Project Record of Decision (DOE/EIS–0478)

AGENCY: Western Area Power Administration, DOE.

ACTION: Record of Decision.

SUMMARY: Western Area Power Administration (Western), an agency within the U.S. Department of Energy (DOE), received a request from Basin Electric Power Cooperative (Basin Electric) to interconnect its proposed Antelope Valley Station (AVS) to Neset Transmission Project (Project) to Western's Williston Substation and Williston to Charlie Creek 230-kilovolt (kV) transmission line. The Project would be located in northwest North Dakota including parts of Mercer, Dunn, McKenzie, Williams, and Mountrail counties. On May 30, 2014, the Notice of Availability (NOA) of the Final Environmental Impact Statement (EIS) for the Project was published in the **Federal Register** (79 FR 31085). The U.S. Department of Agriculture (USDA), Rural Utilities Service (RUS) was the lead Federal agency for the EIS. Western was a cooperating agency in preparation of the EIS. After considering the environmental impacts, Western has decided to allow Basin Electric's request for interconnection.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Mr. Rod O'Sullivan, Corporate Services Office, Western Area Power Administration, A7400, P.O. Box 281213, Lakewood, CO 80228–8213, telephone (720) 962–7260 or email: *OSullivan@wapa.gov*. For general information on DOE's National Environmental Policy Act of 1969 (NEPA) review process, please contact Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, Washington, DC 20585, telephone (202) 586–4600 or (800) 472–2756.

SUPPLEMENTARY INFORMATION: Western is a Federal agency under the DOE that markets and transmits wholesale electrical power through an integrated 17,000-circuit mile, high-voltage transmission system across 15 western states. Basin Electric's request for interconnection was processed in accordance with Western's General Requirements for Interconnection, which sets forth the procedures and requirements for certain types of interconnection to Western's transmission system that are not provided for in Western's Open Access Transmission Tariff (*e.g.*, system-to-system interconnections not associated with transmission or generator interconnection service).

Interested parties were notified of the proposed Project and the public scoping comment opportunity through a Notice of Intent published in the **Federal Register** on November 2, 2011 (76 FR 67670). The RUS published an NOA of the Draft EIS in the **Federal Register** on December 7, 2012 (77 FR 73029). On December 20, 2013, the U.S. Environmental Protection Agency (EPA) published an NOA of the Supplemental Draft EIS for the Project in the **Federal Register** (78 FR 77121). On May 30, 2014, RUS published an NOA of the Final EIS for the Project in the **Federal Register** (79 FR 31085).[1] The RUS published its NOA for its Record of Decision (ROD) on September 22, 2014, in the **Federal Register** (79 FR 56557). With the issuance of its ROD, RUS selected Alternative C as the transmission line route.

The RUS was the lead Federal agency for the EIS. Western and the USDA, Forest Service (USFS) participated as cooperating agencies on the EIS. After an independent review of the Final EIS, Western has concluded that its needs

[1] The Final EIS can be found on the RUS Web site at: *http://www.rurdev.usda.gov/UWP-AVS-Neset.html.*

are satisfied and has adopted the Final EIS.

Proposed Federal Action

Western's proposed Federal action is to allow Basin Electric's Project to interconnect to Western's Williston Substation and Williston to Charlie Creek 230-kV transmission line.

Basin Electric Proposed Project

Basin Electric is proposing to construct, own and operate a new 345-kV transmission line and associated supporting infrastructure. The Project will consist of approximately 278 miles of transmission line, including 265 miles of new 345-kV transmission line and 13 miles of new 230-kV transmission line, five new substations and equipment additions, but no expansion to four existing substations. The proposed Project would connect to the Integrated System, the high-voltage transmission grid in the upper Great Plains managed by Western, at several locations, including Western's Williston Substation and a point along its Williston to Charlie Creek 230-kV transmission line. This Project is referred to as Alternative C in the Final EIS. Alternative C combines Alternative A, McKenzie County portions of Alternative B from the Draft EIS, and three new substations (Red, White, and Blue substations).

The new 345-kV transmission line would start at the AVS Electric Generation Station located near Beulah, North Dakota, and extend west where it would connect with Basin Electric's existing Charlie Creek 345-kV Substation located near Grassy Butte. The line would then extend north where it would connect with Basin Electric's proposed Judson Substation near Williston and terminate at Basin Electric's newly proposed Tande Substation. Additional 230-kV transmission lines would be constructed between the new Judson 345-kV Substation and Western's existing Williston Substation, between a new 345/230/115-kV substation referred to as the Blue Substation and Western's existing 230-kV transmission line, and also between the Tande 345-kV Substation and Basin Electric's existing Neset 230-kV Substation located near Tioga, North Dakota. Additionally, the White Substation would be constructed along with the Red Substation to the Blue Substation transmission line segment to interconnect with the local 115-kV system for load-serving purposes.

Description of Alternatives

Three transmission line alternatives, two transmission line variations in the Little Missouri National Grasslands (LMNG), and the No Action alternative were evaluated. Alternative C is described above; Alternative D is similar to Alternative C with the primary difference being the construction of a double-circuit 345-kV line north of Killdeer for 63 miles to the Blue Substation. Alternative E is similar to Alternative D with the primary difference being the construction of two parallel 345-kV transmission lines north of Killdeer rather than a double-circuit line. The variations across the LMNG include double-circuiting the 345-kV line with Western's existing 230-kV transmission Line. RUS has identified Alternative C as its preferred alternative because it best meets the purpose and need and minimizes or mitigates potential impacts.

Mitigation Measures

For the transmission facility component of the proposed Project, Basin Electric has committed to best management practices and mitigation measures as outlined in Appendix A of the Final EIS. Western will abide by the Biological Assessment as it pertains to the interconnection at Western's existing Williston Substation and Williston to Charlie Creek 230-kV transmission line.

In compliance with the National Historic Preservation Act, RUS/Western/USFS has executed a Programmatic Agreement with the North Dakota State Historic Preservation Office along with Basin Electric (as an invited signatory). Western has reviewed the October 17, 2014, letter to RUS from the Advisory Council on Historic Preservation (ACHP) concerning the Killdeer Mountain Battlefield (KMB) core and study areas; and has also reviewed the October 24, 2014, response letter from RUS to the Advisory Council, including the ACHP's ability to participate in consultation meetings, and that the more limited area was determined to be National Register of Historic Places (NRHP) eligible. Of significance to the ROD is that neither interconnection to the Williston Substation nor to the Williston to Charlie Creek 230-kV transmission line are in or close to the limited NRHP core area, nor the even larger KMB study area, and will have no effect on any of these areas.

Western requires its construction contractors to implement standard environmental protection provisions. These provisions are provided in Western's Construction Standard 13 and will be applied to the proposed interconnection.

The best management practices and mitigation measures in the Final EIS reflect all practicable means to avoid or minimize environmental harm from the proposed Project and Western's proposed action.

Decision

Western's decision is to allow Basin Electric's request for interconnection to Western's Williston Substation and its Williston to Charlie Creek 230-kV transmission line.[2] Western's decision to grant this interconnection request satisfies the agency's statutory mission and Basin Electric's objectives while minimizing harm to the environment. Full implementation of this decision is contingent upon Basin Electric obtaining all other applicable permits and approvals as well as executing an interconnection agreement in accordance with Western's General Requirements for Interconnection.

This decision is based on the information contained in the Antelope Valley Station to Neset Transmission Project Final EIS. This ROD was prepared pursuant to the requirements of the Council on Environmental Quality Regulations for Implementing NEPA (40 CFR parts 1500–1508) and DOE's Procedures for Implementing NEPA (10 CFR part 1021).

Dated: November 21, 2014.

Mark A. Gabriel,

Administrator.

[FR Doc. 2014–28721 Filed 12–5–14; 8:45 am]

BILLING CODE 6450–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Proposed Collection; Submission for OMB Review

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Notice of Submission for OMB Review—Extension Without Change: Employer Information Report (EEO–1).

SUMMARY: In accordance with the Paperwork Reduction Act (PRA), the Equal Employment Opportunity Commission (EEOC or Commission) hereby gives notice that it has submitted to the Office of Management and Budget

[2] On November 16, 2011, DOE's Acting General Counsel delegated to Western's Administrator all the authorities of the General Counsel respecting environmental impact statements.

(OMB) a request for a three-year extension without change of the Employer Information Report (EEO–1).

DATES: Written comments on this notice must be submitted on or before January 7, 2015.

ADDRESSES: A copy of this ICR and applicable supporting documentation submitted to OMB for this review may be obtained from: Ronald Edwards, Director, Program Research and Surveys Division, Equal Employment Opportunity Commission, 131 M Street NE., Room 4SW30F, Washington, DC 20507. Comments on this final notice must be submitted to Chad A. Lallemand, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Room 10235, New Executive Office Building, Washington, DC 20503 or electronically mailed to *Chad_A._Lallemand@omb.eop.gov.* Copies of comments should be sent to Bernadette Wilson, Acting Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile ("FAX") machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number). Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTY). (These are not toll-free telephone numbers.) Instead of sending written comments to EEOC, you may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. All comments received through this portal will be posted without change, including any personal information you provide. Copies of comments submitted by the public to EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9:00 a.m. and 5:00 p.m. Eastern Time or can be reviewed at *http://www.regulations.gov.* To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, Equal Employment Opportunity Commission, 131 M Street NE., Room 4SW30F, Washington, DC 20507; (202) 663–4949 (voice) or (202) 663–7063 (TTY). Requests for this notice in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663–4191 (voice) or (202) 663–4494 (TTY).

SUPPLEMENTARY INFORMATION: A notice that EEOC would be submitting this request was published in the **Federal Register** on June 30, 2014 (79 FR 36802), allowing for a 60 day public comment period. One comment was received. This comment was in favor of the continued use of the EEO–1, and also suggested making a change to the reporting procedures that currently prevent parent companies from electronically submitting EEO–1 reports for different subsidiary companies operating at the same physical location within the same industry classification. EEOC has contacted the organization that made the comment and is in the process of setting up a meeting to determine how this suggestion can be implemented by the next reporting cycle.

Overview of Information Collection

Collection Title: Employer Information Report (EEO–1).

OMB Number: 3046–0007.

Frequency of Report: Annual.

Type of Respondent: Private employers with 100 or more employees and certain federal government contractors and first-tier subcontractors with 50 or more employees.

Description of Affected Public: Private employers with 100 or more employees and certain federal government contractors and first-tier subcontractors with 50 or more employees.

Number of Responses: 307,103.

Reporting Hours: 1,044,150.

Respondent Cost: $19.83 million.

Federal Cost: $650,000.[1]

Number of Forms: 1.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have been or are being committed, to preserve such records, and to produce such reports as the Commission prescribes by regulation or order. Accordingly, the EEOC issued regulations prescribing the EEO–1 reporting requirement. Employers in the private sector with 100 or more employees and some federal contractors with 50 or more employees have been required to submit EEO–1 reports annually since 1966. The individual reports are confidential. EEO–1 data is used by EEOC to investigate charges of employment discrimination against employers in private industry and to provide information about the employment status of minorities and women. The data is shared with the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, and several other federal agencies. Pursuant to § 709(d) of Title VII of the Civil Rights Act of 1964, as amended, EEO–1 data is also shared with state and local Fair Employment Practices Agencies (FEPAs).

Burden Statement: The estimated number of respondents required to submit the annual EEO–1 survey is 70,070 private employers. The annual number of responses is approximately 307,103. The form is estimated to impose 1,044,150 burden hours annually or 3.4 hours per response. In order to help reduce survey burden, respondents are encouraged to report data electronically whenever possible.

Dated: November 25, 2014.

For the Commission.

Jenny R. Yang,

Chair.

[FR Doc. 2014–28667 Filed 12–5–14; 8:45 am]

BILLING CODE 6570–01–P

[1] The burden and cost estimates in this notice represent the most current figures through the 2013 EEO–1 filing period. The above estimates differ from those published in the **Federal Register** on June 30, 2014 (79 FR 36802); that notice was inadvertently submitted for publication with inaccurate cost and burden estimates included. This was in error and the above numbers reflect the estimates that should have been included in the June 30, 2014 **Federal Register** notice.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Recordkeeping and Reporting Requirements Under Title VII

AGENCY: Equal Employment Opportunity Commission.

ACTION: State and Local Government Information Report (EEO–4): Cancellation of hearing.

SUMMARY: Notice is hereby given that the Commission is cancelling the public hearing on the above proposed information collection—extension with change: The State and Local Government Information Report (EEO–4). (79 FR 51155, August 27, 2014). No requests to present oral testimony at a hearing concerning the information collection were received from the public. Therefore, it will not be necessary to hold the hearing.

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, Equal Employment Opportunity Commission, 131 M Street NE., Room 4SW30F, Washington, DC 20507; (202) 663–4949 (voice) or (202) 663–7063 (TTY).

Dated: November 25, 2014.

For the Commission.

Jenny R. Yang,

Chair.

[FR Doc. 2014–28669 Filed 12–5–14; 8:45 am]

BILLING CODE 6570–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Recordkeeping and Reporting Requirements Under Title VII

AGENCY: Equal Employment Opportunity Commission.

ACTION: *Local Union Report (EEO–3)*: Cancellation of hearing.

SUMMARY: Notice is hereby given that the Commission is cancelling the public hearing on the above proposed information collection—extension with change: the *Local Union Report (EEO–3)*. (79 FR 51161, August 27, 2014). No requests to present oral testimony at a hearing concerning the information collection were received from the public. Therefore, it will not be necessary to hold the hearing.

FOR FURTHER INFORMATION CONTACT: Ronald Edwards, Director, Program Research and Surveys Division, Equal Employment Opportunity Commission, 131 M Street NE., Room 4SW30F, Washington, DC 20507; (202) 663–4949 (voice) or (202) 663–7063 (TTY).

Dated: November 25, 2014.

For the Commission.

Jenny R. Yang,

Chair.

[FR Doc. 2014–28668 Filed 12–5–14; 8:45 am]

BILLING CODE 6570–01–P

FARM CREDIT SYSTEM INSURANCE CORPORATION

Regular Meeting

AGENCY: Farm Credit System Insurance Corporation Board.

SUMMARY: Notice is hereby given of the regular meeting of the Farm Credit System Insurance Corporation Board (Board).

DATE AND TIME: The meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on December 11, 2014, from 1:00 p.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit System Insurance Corporation Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102. Submit attendance requests via email to *VisitorRequest@FCA.gov*. See **SUPPLEMENTARY INFORMATION** for further information about attendance requests.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. Please send an email to *VisitorRequest@FCA.gov* at least 24 hours before the meeting. In your email include: Name, postal address, entity you are representing (if applicable), and telephone number. You will receive an email confirmation from us. Please be prepared to show a photo identification when you arrive. If you need assistance for accessibility reasons, or if you have any questions, contact Dale L. Aultman, Secretary to the Farm Credit System Insurance Corporation Board, at (703) 883–4009. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- September 11, 2014

B. Business Reports

- September 30, 2014 Financial Reports
- Report on Insured and Other Obligations
- Quarterly Report on Annual Performance Plan

Closed Session

New Business

- Confidential Report on System Performance
- Audit Plan for the Year Ended December 31, 2014

Executive Session

- Executive Session of the Audit Committee with the Auditor

Dated: December 2, 2014.

Dale L. Aultman,

Secretary, Farm Credit System Insurance Corporation Board.

[FR Doc. 2014–28653 Filed 12–5–14; 8:45 am]

BILLING CODE 6710–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0329]

Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before January 7, 2015. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Benish Shah, Federal Communications Commission, via the Internet at *Benish.Shah@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Benish Shah, Office of Managing Director, (202) 418–7866.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0329.

Title: Section 2.955, Equipment Authorization—Verification (Retention of Records).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 8,000 respondents; 8,000 responses.

Estimated Time per Response: 18 hours (average).

Frequency of Response: One time and on occasion reporting requirements, recordkeeping requirement; and Third party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 154(i), 302 and 303(r).

Total Annual Burden: 144,000 hours.

Total Annual Cost: $1,600,000.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: Commission rules require equipment testing to determine performance and compliance with FCC standards. This testing is typically done by independent testing laboratories whose measurement facility has been reviewed by the Commission, or by an accrediting organization recognized by the Commission.

Needs and Uses: This collection will be submitted as an extension (no change in reporting requirements), after this 60 day comment period to the Office of Management and Budget (OMB) in order to obtain the full three year clearance.

Section 2.955 describes for each equipment device subject to verification, the responsible party, as shown in 47 CFR 2.909 shall maintain the records listed as follows:

(1) A record of the original design drawings and specifications and all changes that have been made that may affect compliance with the requirements of § 2.953.

(2) A record of the procedures used for production inspection and testing (if tests were performed) to insure the conformance required by § 2.953. (Statistical production line emission testing is not required.)

(3) A record of the measurements made on an appropriate test site that demonstrates compliance with the applicable regulations in this chapter. The record shall:

(i) Indicate the actual date all testing was performed;

(ii) State the name of the test laboratory, company, or individual performing the verification testing. The Commission may request additional information regarding the test site, the test equipment or the qualifications of the company or individual performing the verification tests;

(iii) Contain a description of how the device was actually tested, identifying the measurement procedure and test equipment that was used;

(iv) Contain a description of the equipment under test (EUT) and support equipment connected to, or installed within, the EUT;

(v) Identify the EUT and support equipment by trade name and model number and, if appropriate, by FCC Identifier and serial number;

(vi) Indicate the types and lengths of connecting cables used and how they were arranged or moved during testing;

(vii) Contain at least two drawings or photographs showing the test set-up for the highest line conducted emission and showing the test set-up for the highest radiated emission. These drawings or photographs must show enough detail to confirm other information contained in the test report. Any photographs used must be focused originals without glare or dark spots and must clearly show the test configuration used;

(viii) List all modifications, if any, made to the EUT by the testing company or individual to achieve compliance with the regulations in this chapter;

(ix) Include all of the data required to show compliance with the appropriate regulations in this chapter; and

(x) Contain, on the test report, the signature of the individual responsible for testing the product along with the name and signature of an official of the responsible party, as designated in § 2.909.

(4) For equipment subject to the provisions in part 15 of this chapter, the records shall indicate if the equipment was verified pursuant to the transition provisions contained in § 15.37 of this chapter.

(b) The records listed in paragraph (a) of this section shall be retained for two years after the manufacture of said equipment item has been permanently discontinued, or until the conclusion of an investigation or a proceeding if the manufacturer or importer is officially notified that an investigation or any other administrative proceeding involving his equipment has been instituted.

The Commission needs and requires the information under FCC Rules at 47 CFR parts 15 and 18, that RF equipment manufacturers (respondents) "self determine" their responsibility for adherence to these rules, as guided by the following criteria:

(a) Whether the RF equipment device that is being marketed complies with the applicable Commission Rules; and

(b) If the operation of the equipment is consistent with the initially documented test results, as reported to the Commission.

The information collection is essential to controlling potential interference to radio communications.

(a) Companies that manufacture RF equipment are the anticipated respondents to this information collection.

(b) This respondent "public" generally remains the same, although the types of equipment devices that they manufacture may change in response to changing technologies and to new spectrum allocations made by the Commission.

(c) In addition, the Commission may establish new technical operating standards in response to these changing technologies and in allocation spectrum, which these RF equipment manufacturers must meet to receive their equipment authorization from the FCC.

(d) However, the process that RF equipment manufacturers must follow to verify their compliance, as mandated by 47 CFR 2.955 of FCC Rules, will not change despite new technical standards established for specific equipment.

This information collection, therefore, applies to a variety of equipment, which is currently manufactured in the future, and that operates under varying technical standards.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2014–28692 Filed 12–5–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1204]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or the Commission)

invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before February 6, 2015. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Benish Shah, Federal Communications Commission, via the Internet at *Benish.Shah@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Benish Shah, Office of Managing Director, (202) 418–7866.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1204.

Title: Deployment of Text-to-911.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for profit; not-for-profit institutions; and state, local or tribal governments.

Number of Respondents: 3,370 respondents; 58,012 responses.

Estimated Time per Response: 1 to 8 hours.

Frequency of Response: One-time reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for these collections are contained in 47 U.S.C. 151, 152, 154(i), 154(j), 154(o), 251(e), 303(b), 303(g), 303(r), 316, and 403.

Total Annual Burden: 76,237 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On August 13, 2014, the Commission released the Order, FCC 14–118, published at 79 FR 55367, September 16, 2014, adopting final rules—containing information collection requirements—to enable the Commission to implement text-to-911 service pursuant to the Second Report and Order, FCC 14–118, released August 13, 2014. The Second Report and Order adopts new rules to commence the implementation of text-to-911 service with an initial deadline of December 31, 2014 for all covered text providers to be capable of supporting text-to-911 service. The Second Report and Order also provides that covered text providers then have a six-month implementation period—they must begin routing all 911 text messages to a Public Safety Answering Point (PSAP) by June 30, 2015 or within six months of a valid PSAP request for text-to-911 service, whichever is later. To implement these requirements, the Commission seeks to collect information primarily for a database in which PSAPs will voluntarily register that they are technically ready to receive text messages to 911. As PSAPs become text-ready, they may either register in the PSAP database (or, if the database is not yet available, submit a notification to PS Docket Nos. 10–255 and 11–153), or provide other written notification reasonably acceptable to a covered text messaging provider. Either measure taken by the PSAP shall constitute sufficient notification pursuant to the adopted rules in the Second Report and Order. PSAPs and covered text providers may mutually agree to an alternative implementation timeframe (other than six months). Covered text providers must notify the FCC of the dates and terms of the alternate timeframe that they have mutually agreed on with PSAPs within 30 days of the parties' agreement.

Additionally, the rules adopted by the Second Report and Order also include other information collections for third party notifications that need to be effective in order to implement text-to-911, including necessary notifications to consumers, covered text providers, and the Commission. These notifications are essential to ensure that all of the affected parties are aware of the limitations, capabilities, and status of text-to-911 services. These information collections will enable the Commission to meet objectives to commence the implementation of text-to-911 service as of December 31, 2014 in furtherance of its core mission to ensure the public's safety.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of the Managing Director.

[FR Doc. 2014–28693 Filed 12–5–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 2, 2015.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *S&T Bancorp, Inc.*, Indiana, Pennsylvania; to acquire 100 percent of the voting shares of Integrity Bancshares, Inc., and thereby indirectly acquire voting shares of Integrity Bank, both in Camp Hill, Pennsylvania.

Board of Governors of the Federal Reserve System, December 3, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–28665 Filed 12–5–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: 10:00 a.m. (Eastern Time) December 15, 2014 (Telephonic).

PLACE: 10th Floor Board Meeting Room, 77 K Street NE., Washington, DC 20002.

STATUS: Parts will be open to the public and parts will be closed to the public.

MATTERS TO BE CONSIDERED:

Open to the Public

1. Approval of the Minutes of the November 17, 2014 Board Member Meeting
2. Thrift Savings Plan Monthly Reports
   a. Monthly Participant Activity Report
   b. Monthly Investment Policy Report
   c. Legislative Report
3. Office of the General Counsel Update

Closed to the Public

4. Personnel

CONTACT PERSON FOR MORE INFORMATION: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

Dated: December 4, 2014.

James Petrick,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2014–28844 Filed 12–4–14; 4:15 pm]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Request for Comments on Ethical Considerations and Implications of Public Health Emergency Response With a Focus on the Current Ebola Virus Disease Epidemic

AGENCY: Office of the Secretary, Presidential Commission for the Study of Bioethical Issues, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Presidential Commission for the Study of Bioethical Issues is requesting public comment on ethical considerations and implications of public health emergency response with a focus on the current Ebola virus disease epidemic.

DATES: To ensure consideration, comments must be received by 5:00 p.m. EST on February 6, 2015. Comments received after this date will be considered only as time permits.

ADDRESSES: Individuals, groups, and organizations interested in commenting on this topic may submit comments by email to *info@bioethics.gov* or by mail to the following address: Public Commentary, Presidential Commission for the Study of Bioethical Issues, 1425 New York Ave. NW., Suite C–100, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Hillary Wicai Viers, Communications Director, Presidential Commission for the Study of Bioethical Issues. Telephone: 202–233–3960. E-Mail: *hillary.viers@bioethics.gov*. Additional information may be obtained at *http://www.bioethics.gov*.

SUPPLEMENTARY INFORMATION: On November 24, 2009, the President established the Presidential Commission for the Study of Bioethical Issues (the Commission) to advise him on bioethical issues generated by novel and emerging research in biomedicine and related areas of science and technology. The Commission is charged with identifying and promoting policies and practices that ensure ethically responsible conduct of scientific research and health care delivery. Undertaking these duties, the Commission seeks to identify and examine specific bioethical, legal, and social issues related to potential scientific and technological advances; examine diverse perspectives and possibilities for international collaboration on these issues; and recommend legal, regulatory, or policy actions as appropriate.

The Commission is considering three areas of ethical concern raised by public health emergency response with a focus on the current Ebola virus disease (EVD) epidemic. The first area concerns U.S. public policies that restrict association or movement (such as quarantine), which have recently been proposed and/or employed for health care workers and military personnel returning from countries affected by EVD in western Africa. The second area concerns the ethics of placebo-controlled trials in the context of public health emergencies, and the EVD epidemic specifically, where the drug undergoing testing might be effective against the disease causing the emergency. The third area of concern is the ethical considerations relevant to collecting and storing biospecimens during a public health emergency, such as the EVD epidemic, and sharing these specimens and associated data internationally for future research. At its meeting on November 6, 2014, the Commission heard from legal and medical experts in public health and infectious disease, and began its consideration of the complex ethical landscape of U.S. public health emergency response to the EVD epidemic.

The Commission is interested in receiving comments from individuals, groups, and professional communities regarding the three areas of ethical concern outlined above. The Commission is particularly interested in receiving public commentary regarding the following issues in the context of public health emergency response generally and the EVD epidemic specifically:

- Ethical and scientific standards for public health emergency response;
- Ethical and scientific standards that guide the use of quarantine or other movement restrictions during public health emergencies;
- The impact of quarantine or other movement restrictions on the availability or willingness of health workers to volunteer to contain the epidemic in disease-affected areas;
- The impact of quarantine or other movement restrictions on public fear and anxiety about potential threats to public health;
- How U.S. public policy and public health response to the current EVD epidemic might or should affect public attitudes to, and further U.S. policy and public health response to, other current and future public health issues and emergencies;
- Ethical and scientific standards for placebo-controlled trials during public health emergencies;
- Ethical and scientific standards for collection, storage, and international sharing of biospecimens and associated data during public health emergencies.

To this end, the Commission is inviting interested parties to provide input and advice through written comments.

Comments will be publicly available, including any personally identifiable or confidential business information that they contain. Trade secrets should not be submitted.

Dated: November 20, 2014.

Lisa M. Lee,

Executive Director, Presidential Commission for the Study of Bioethical Issues.

[FR Doc. 2014–28617 Filed 12–5–14; 8:45 am]

BILLING CODE 4154–06–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Preparedness and Response Science Board

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that the National Preparedness and Response Science Board (NPRSB), also known as the National Biodefense Science Board will be holding a public meeting on January 30, 2015.

DATES: The January 30, 2015, NPRSB public meeting is scheduled from 9:00 a.m. to 11:00 a.m. EST. The agenda is subject to change as priorities dictate. Please check the NPRSB Web site, located at *WWW.PHE.GOV/NPRSB*, for the most up-to-date information on the meeting.

ADDRESSES: Thomas P. O'Neil Federal Office Building, 200 C Street SW., Washington, DC 20024. To attend via teleconference, call toll-free 888–946–7304, international dial-in 1–212–547–0362, pass-code 7491964. Please call 15 minutes prior to the beginning of the conference call to facilitate attendance. Pre-registration is required for public attendance. Individuals who wish to attend the meeting in person should submit an inquiry via the NPRSB Contact Form located at *www.phe.gov/NPRSBComments*.

FOR FURTHER INFORMATION CONTACT: Please submit an inquiry via the NPRSB Contact Form located at *www.phe.gov/NPRSBComments*.

SUPPLEMENTARY INFORMATION: Pursuant to section 319M of the Public Health Service Act (42 U.S.C. 247d–7f) and section 222 of the Public Health Service Act (42 U.S.C. 217a), HHS established the NPRSB. The Board shall provide expert advice and guidance to the Secretary on scientific, technical, and other matters of special interest to HHS regarding current and future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate. The Board may also provide advice and guidance to the Secretary and/or the Assistant Secretary for Preparedness and Response on other matters related to public health emergency preparedness and response.

Background: This public meeting will be dedicated to swearing in the six new voting members who will replace the members whose 3-year terms will expire on December 31, 2014, and the re-appointment of two current members. Subsequent agenda topics will be added as priorities dictate.

Availability of Materials: The meeting agenda and materials will be posted on the NPRSB Web site at *www.phe.gov/nprsb* prior to the meeting.

Procedures for Providing Public Input: All written comments must be received prior to January 30, 2015. Please submit comments via the NPRSB Contact Form located at *www.phe.gov/NPRSBComments*. Individuals who plan to attend in-person and need special assistance, such as sign language interpretation or other reasonable accommodations, should submit a request via the NPRSB Contact Form located at *www.phe.gov/NPRSBcomments*.

Dated: December 1, 2014.

Nicole Lurie,

Assistant Secretary for Preparedness and Response.

[FR Doc. 2014–28722 Filed 12–5–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

Advisory Board on Radiation and Worker Health (ABRWH or the Advisory Board), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention announces the following committee meeting:

Time and Date: 11:00 a.m.–2:00 p.m. EDT, Tuesday, January 6, 2015

Place: Audio Conference Call via FTS Conferencing. The USA toll-free, dial-in number is 1–866–659–0537 and the pass code is 9933701.

Status: Open to the public. The public is welcome to submit written comments in advance of the meeting, to the contact person below. Written comments received in advance of the meeting will be included in the official record of the meeting. The public is also welcome to listen to the meeting by joining the teleconference at the USA toll-free, dial-in number, 1–866–659–0537 and the passcode is 9933701.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines, which have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction, which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, most recently, August 3, 2013, and will expire on August 3, 2015.

Purpose: This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters For Discussion: The agenda for the conference call includes: Work Group and Subcommittee Reports; SEC Petitions Update for the March 2014 Advisory Board Meeting; Plans for the March 2015 Advisory Board Meeting; and Advisory Board Correspondence.

Contact Person for More Information: Theodore M. Katz, M.P.A., Designated Federal Officer, NIOSH, CDC, 1600 Clifton Road NE., Mailstop: E–20, Atlanta, Georgia 30333, Telephone (513) 533–6800, Toll Free 1–800–CDC–INFO, Email *ocas@cdc.gov*.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2014–28636 Filed 12–5–14; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10535]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by February 6, 2015:

ADDRESSES: When commenting, please reference the document identifier or OMB control number (OCN). To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____ Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of the following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10535 Employer Notification to HHS of Its Objection to Providing Coverage for Contraceptive Services

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Employer Notification to HHS of its Objection to Providing Coverage for Contraceptive Services; *Use:* The proposed rules titled "Coverage of Certain Preventive Services Under the Affordable Care Act" (79 FR 51118) would continue to require each closely-held, for-profit corporation seeking to be treated as an eligible organization to provide notification that it will not act as the plan administrator or claims administrator with respect to, or contribute to the funding of, coverage of all or a subset of contraceptive services. Issuers and third party administrators providing payments for contraceptive services for participants and beneficiaries in plans of eligible organizations would be required to meet the notice requirements as set forth in the 2013 final regulations.

The interim final regulations titled "Coverage of Certain Preventive Services Under the Affordable Care Act" (79 FR 51092) continue to allow eligible organizations that have religious objections to providing contraceptive coverage to notify an issuer or third party administrator using EBSA Form 700, as set forth in the July 2013 final regulations. In addition, the interim final regulations permit an alternative process under which an eligible organization could notify the Secretary of HHS that it will not act as the plan administrator or claims administrator with respect to, or contribute to the funding of, coverage of all or a subset of contraceptive services. *Form Number:* CMS–10535 (OMB control number: 0938–1248); *Frequency:* Once; *Affected Public:* Private Sector—For-profit and Not-for-profit institutions; *Number of Respondents:* 61; *Number of Responses:* 61; *Total Annual Hours:* 51. (For policy questions regarding this collection, contact Usree Bandyopadhyay at 410–786–6650.)

Dated: December 2, 2014.

Martique Jones

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2014–28632 Filed 12–5–14; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0987]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the

Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 7, 2015.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910—New and title "Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Generic Clearance for the Collection of Qualitative Data on Tobacco Products and Communications—(OMB Control Number 0910—New)

Under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393(d)(2)(D)), FDA is authorized to conduct educational and public information programs.

In conducting studies relating to the regulation and communications related to tobacco products, FDA will need to employ formative qualitative research including focus groups and/or in-depth interviews (IDIs) to assess knowledge and perceptions about tobacco-related topics with specific target audiences. The information collected will serve two major purposes. First, formative research will provide critical knowledge about target audiences. FDA must first understand people's knowledge and perceptions about tobacco related topics prior to developing survey/research questions as well as stimuli for experimental studies. Second, initial testing will allow FDA to assess consumer understanding of survey/research questions and study stimuli. Focus groups and/or IDIs with a sample of the target audience will allow FDA to refine the survey/research questions and study stimuli while they are still in the developmental stage. FDA will collect, analyze, and interpret information gathered through this generic clearance in order to: (1) Better understand characteristics of the target audience—its perceptions, knowledge, attitudes, beliefs, and behaviors—and use these in the development of appropriate survey/research questions, study stimuli, or communications; (2) more efficiently and effectively design survey/research questions and study stimuli; and (3) more efficiently and effectively design experimental studies.

FDA is requesting approval of this new generic clearance for collecting information through the use of qualitative methods (*i.e.*, individual interviews, small group discussions, and focus groups) for studies involving all tobacco products regulated by FDA. This information will be used as a first step to explore concepts of interest and assist in the development of quantitative study proposals, complementing other important research efforts in the Agency. This information may also be used to help identify and develop communication messages, which may be used in education campaigns. Focus groups play an important role in gathering information because they allow for an in-depth understanding of individuals' attitudes, beliefs, motivations, and feelings. Focus group research serves the narrowly defined need for direct and informal public opinion on a specific topic.

In the **Federal Register** of August 1, 2014 (79 FR 44779), FDA published a 60-day notice requesting public comment on the proposed collection of information. Two comments were received. However, only one comment was PRA-related.

(Comment) One comment was supportive of the information collection, stating that such "collections are, in fact, essential." The comment also made suggestions about what the specific goals of messages tested in information collections included under this generic collection should focus on, and suggested that those collections be made available for further public comments.

(Response) FDA agrees that the request in this collection of information is essential to the mission of the FDA as a science-based Agency in its implementation of the Tobacco Control Act. Although we appreciate suggestions for the content of future submissions submitted under this generic clearance, ultimately such decisions will be driven by needs determined by the Agency in consultation with other HHS agencies, FDA advisory committees, and/or the public when appropriate.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Hours per response	Total hours
In Person Individual In-Depth Interviews	350	1	350	1	350
General Public Focus Group Interviews	18,850	1	18,850	1.5	28,275
Telephone Screening Interviews	4,800	1	4,800	.08 (5 minutes)	384
Telephone Individual In-Depth Interviews	50	1	50	1	50
Total	24,050				29,059

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The number of respondents to be included in each new pretest may vary depending on the nature of the material or message being tested and the target audience. Table 1 provides examples of the types of studies that may be administered and estimated burden levels during the 3-year period. Time to read, view, or listen to the message being tested is built into the "Hours per Response" figures.

Dated: December 1, 2014.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2014–28635 Filed 12–5–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1697]

Privacy Act of 1974; Report of a New System of Records; Food and Drug Administration Commissioning of State and Local Officials

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of a Privacy Act system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974 (the Privacy Act) and the Food and Drug Administration's (FDA or the Agency) regulations for the protection of privacy, FDA is publishing notice of a Privacy Act system of records entitled, "FDA Commissioning of State and Local Officials, HHS/FDA/ORA" System No. 09–10–0022. FDA is deleting the System of Records Notice (SORN) for "FDA Credential Holder File, HHS/FDA/OC" System No. 09–10–0003, because the records covered by that SORN are now covered by this new SORN and by existing personnel records SORNs. The new system of records will contain information about State and local officials who have applied for an FDA commission that would allow them to assist FDA with its regulatory compliance and enforcement efforts. FDA will use the records in this system to assess qualifications of commissioning candidates, initiate background investigations, record the status of applications, and track the status of commissioned officials.

DATES: *Effective Date:* The new system of records will be effective on December 8, 2014 with the exception of the routine uses. The routine uses will be effective on January 22, 2015. Submit either electronic or written comments by January 22, 2015.

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

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

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

Instructions: All submissions received must include the Docket No. FDA–2014–N–1697 for this notice. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

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

FOR FURTHER INFORMATION CONTACT: Ryan Cates, Office of Partnerships, Food and Drug Administration, Element Building, 12420 Parklawn Dr., Rockville, MD 20857, 301–796–5390, FAX: 301–827–3588, *OP–ORA@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the New System and the Deleted System

The FDA is establishing a new system of records referred to as the Commissioning of State and Local Officials (COSLO) system, to maintain records regarding State and local officials who apply to be commissioned by FDA. Under section 702(a)(1)(A) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 372(a)(1)(A)), FDA can commission a health, food, or drug officer or employee of any State, territory, or political subdivision thereof (hereafter State and local officials) to conduct examinations and investigations for the purposes of the FD&C Act.

In addition, FDA is deleting the SORN entitled "FDA Credential Holder File, HHS/FDA/OC" (System No. 09–10–0003). The records covered by that SORN (credential records for FDA employees and commissioned officials) will now be covered by this SORN for the COSLO system which contains records pertaining to commissioned officials, and by other existing personnel SORNs for records pertaining to FDA employees.

Issued in Homeland Security Presidential Directive 12, "Policy for a Common Identification Standard for Federal Employees and Contractors," FDA has completed the process of issuing Personal Identity Verification (PIV) badges to current employees and contractors, and will do the same for all new employees and contractors hired in the future. Records pertaining to those badges and background investigations are covered under HHS department-wide SORN No. 09–90–0777 entitled "Facility and Resource Access Control Records System." Any additional records maintained to identify or manage FDA personnel designated to conduct examinations and inspections under the FD&C Act would be covered by HHS department-wide SORN No. 09–90–0018 entitled "Personnel Records in Operating Offices" or another personnel SORN.

State and local officials who assist with FD&C Act examinations and inspections are issued one or two types of credentials that differ in scope. All commissioned individuals receive Certificates of Commission and are permitted to receive and review FDA documents. A subset of commissioned individuals also receive personal "pocket credentials" identifying them as FDA commissioned officers and authorizing them to perform additional activities such as conducting inspections, collecting samples, and verifying records. To obtain pocket credentials, State and local officials undergo an Office of Personnel Management level 5 background investigation. FDA commission credentials are different from the PIV badges issued to FDA employees and contractors, and are manufactured and issued by FDA's Office of Security Operations, and are not within the scope of HHS department-wide SORN No. 09–90–0777.

II. The Privacy Act

The Privacy Act of 1974 (Pub. L. 93–579) (5 U.S.C. 552a), as amended, governs the means by which the U.S. Government collects, maintains, and uses information about individuals in a system of records. A "system of records" is a group of any records under the control of a Federal Agency from which information about an individual is retrieved by the individual's name or other personal identifier. The Privacy Act requires each Agency to publish in the **Federal Register** a SORN identifying and describing each system of records the Agency maintains, including the purposes for which the Agency uses information about individuals in the system, the routine uses for which the Agency discloses such information outside the Agency, and how individual record subjects can exercise their rights under the Privacy Act (for example, to determine if the system contains information about them).

A. System Number

09–10–0022

B. SYSTEM NAME

FDA Commissioning of State and Local Officials, HHS/FDA/ORA.

C. SECURITY CLASSIFICATION

Unclassified.

D. SYSTEM LOCATION

Records are maintained at several FDA Headquarters locations and in component offices of the FDA, in both Montgomery County, MD and field locations across the United States.

E. CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM

The records in this system will contain data collected from the FDA commissioning applications of individuals who are State and local officials who wish to be commissioned under section 702(a)(1)(A) of the FD&C Act. This information is gathered for the purpose of processing and validating each individual's qualifications for commissioning, to initiate the mandatory background investigation, and to track the status of commissioned officials.

Privacy Act notification, access, and amendment rights relative to the records maintained in this system are available only to individuals who are the subject of records in this system. The individuals who are the subjects of the records stored in this system are the State or local officials who are currently commissioned, have applied for a commission, and/or were commissioned or rejected in the past. Although records in the system may contain personally identifiable information related to other individuals, only the specified commissioned or commission-seeking individuals are considered subjects of records in this system.

F. CATEGORIES OF RECORDS IN THE SYSTEM

The records in this system will include: Full name, aliases, date of birth, home address, work address, telephone number, work or personal email address, photograph, educational history, job title, agency, division, area of expertise, employment history, supervisor's name, signature, and the outcome of the background investigation of individuals who apply for a commission. Should a commissioned individual with pocket credentials lose their credentials, he or she will typically file a police report and provide a copy of the report to FDA where it is kept in the individual's commissioning file. In addition, the records in the system will describe the nature of the authority granted to a commissioned individual, the relevant regulatory program area, the date the commission was issued, and date of expiration.

G. AUTHORITY FOR MAINTENANCE OF THE SYSTEM

The authorities for maintaining this system are: Section 702(a) of the FD&C Act, 44 U.S.C. 3101, and 5 U.S.C. 301.

H. PURPOSE(S) OF THE SYSTEM

Relevant Agency personnel will use records from this system on a need-to-know basis to:

- Centrally gather data enabling FDA to determine the suitability, eligibility, and qualifications of State and local officials to whom FDA might offer commissions;
- enable FDA to securely commission and credential State and local officials who are particularly qualified to assist FDA in a special manner for which FDA credentials are required;
- ensure the safety and security of FDA facilities, systems, information, and of facility occupants and users;
- provide appropriate access to FDA information systems, networks, and resources;
- enhance FDA's ability to ensure the safety of FDA-regulated products through a secure commissioning process; and
- centrally gather data on commissioned officials, thereby enabling FDA to efficiently maintain the commissioning program and to support activities, such as quickly ascertaining which officials are particularly qualified to carry out official responsibilities and providing this information as necessary to our State and local counterparts.

I. ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES

These routine uses specify circumstances, in addition to those provided by the Privacy Act at 5 U.S.C. 552a(b), under which records may be disclosed to recipients outside HHS, without the individual record subject's prior written consent:

- Public disclosures may be made (for example, on FDA's Web site) of the names of commissioned officials, and other basic information, including the identification of their State or local agency, their job titles, the type of commission, any specific commissioned areas, and the date of their commission, to the extent disclosure is not an unwarranted invasion of personal privacy.
- Disclosure may be made to appropriate Federal Agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, provided the information disclosed is relevant and necessary for that assistance.
- Disclosure may be made to a Federal, State, local, territorial, tribal, foreign, or other public authority, on request, in connection with the hiring or retention of an employee, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit, to the extent that the information is relevant and necessary to the requesting Agency's decision. No disclosure will be made unless the information has been determined to be sufficiently reliable to support a referral to another office within the Agency or to another Federal Agency for criminal, civil, administrative, personnel, or regulatory action.
- Disclosure of system information may be made to a State, local, territorial, and tribal agencies or governments to provide copies of records that were originally provided to the Agency by that entity.
- Disclosure may be made to Federal Agencies, contractors, and other individuals or entities who perform services for the Agency related to this system of records and who need access to the records to perform those services. Recipients shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.
- When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, disclosure may be made to the appropriate public authority, whether Federal, foreign, State, local, or tribal, or otherwise, responsible for enforcing, investigating, or prosecuting such violation, if the information disclosed is relevant to the responsibilities of the Agency or public authority.
- Disclosure may be made to a court or other tribunal or adjudicative body in a proceeding, when:
  - The Agency or any component thereof; or
  - any employee of the Agency in his or her official capacity; or
  - any employee of the Agency in his or her individual capacity where the Department of Justice (DOJ) has agreed to represent the employee; or
  - the U.S. Government, is a party to the proceeding or has an interest in such proceeding and, by careful review, the Agency determines that the records are

both relevant and necessary to the proceeding and the use of such records is therefore deemed by the Agency to be for a purpose that is compatible with the purpose for which the Agency collected the records.

- Disclosure may be made to the National Archives and Records Administration (NARA) and/or the General Services Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.
- Disclosure may be made to the DOJ when:
  - The Agency or any component thereof; or
  - any employee of the Agency in his or her official capacity; or
  - any employee of the Agency in his or her individual capacity where the Agency or the DOJ has agreed to represent the employee; or
  - the U.S. Government, is a party to litigation or has an interest in such litigation and, by careful review, the Agency determines that the records are both relevant and necessary to the litigation and the use of such records by the DOJ is therefore deemed by the Agency to be for a purpose that is compatible with the purpose for which the Agency collected the records.
- In the event HHS/FDA deems it desirable or necessary, in determining whether particular records are required to be disclosed under the Freedom of Information Act, disclosure may be made to the DOJ for the purpose of obtaining its advice.

J. POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM

1. STORAGE

Records are maintained in hard copy files, image files, electronic hard drive, file servers, and other electronic data storage devices.

2. RETRIEVABILITY

To retrieve information, the system database is typically queried using any of the internal data fields. The data fields encompass any data criterion that is entered into the system including, but not limited to, name, FDA region, credential number (if issued pocket credentials), certificate expiration date, State, program area, or authority.

3. SAFEGUARDS

a. *Authorized users.* Access is restricted to FDA employees and contractors with a Level 5 or higher clearance who have a need for the records in the performance of their duties.

b. *Procedural and technical safeguards.* Technical controls include identification and authentication of the authorized user, access control, audit and accountability, system and communication protection, timely account disablement/deletion, configuration management, maintenance, system and information integrity, media protection, and incident response. These controls extend to remote users as well.

c. *Physical safeguards.* Physical safeguards include controlled-access buildings where all records (such as diskettes, computer listings, and paper documents) are maintained in secured areas, locked buildings, locked rooms, and locked cabinets.

K. RETENTION AND DISPOSAL

Commissioning records are maintained in accordance with FDA's Records Control Schedule and the applicable General Records Schedule and disposition schedules approved by NARA. Commissioning records fall under NARA approved citation N1–088–09–02 for Commissioning Documents, the Nationwide List of FDA Commissions, and Summary Reports of FDA Commissions. Commissioning documents are deleted/destroyed 5 years after the end of the fiscal year in which a commission is revoked or expires. Records within the nationwide list of FDA commissions are deleted/destroyed 5 years after the fiscal year when they become obsolete or are superseded. Summary reports of FDA commissions are deleted/destroyed after the nationwide list of FDA Commissions has been updated.

L. SYSTEM MANAGER(S) AND ADDRESS

Ryan Cates, Food and Drug Administration, Office of Partnerships, Element Building, 12420 Parklawn Dr., Rockville, MD 20857, 301–796–5390, FAX: 301–827–3588, *OP-ORA@fda.hhs.gov.*

M. NOTIFICATION PROCEDURE

In accordance with 21 CFR part 21 Subpart D, an individual may submit a request to the FDA Privacy Act Coordinator, with a notarized signature, to confirm whether records exist about him or her. Requests should be directed to the FDA Privacy Act Coordinator, Division of Freedom of Information, 12420 Parklawn Dr., ELEM–1029, Rockville, MD 20857. An individual requesting notification via mail should certify in his or her request that he or she is the individual who he or she claims to be and that he or she understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Privacy Act subject to a $5,000 fine, and indicate on the envelope and in a prominent manner in the request letter that he or she is making a "Privacy Act Request." Additional details regarding notification request procedures appear in 21 CFR part 21, subpart D. A commission holder may also request an opportunity to review his or her own file by contacting the appropriate Regional Food and Drug Director.

N. RECORD ACCESS PROCEDURES

Procedures are the same as above, in the Notification Procedure section. Requesters should also reasonably specify the record contents being sought. Some records may be exempt from access under 5 U.S.C. 552a(d)(5), if they are "compiled in reasonable anticipation of a civil action or proceeding." If access to requested records is denied, the requester may appeal the denial to the FDA Commissioner. Additional details regarding record access procedures and identity verification requirements appear in 21 CFR part 21, subpart D.

O. CONTESTING RECORD PROCEDURES

In addition to the procedures described above, requesters should reasonably identify the record, specify the information they are contesting, state the corrective action sought and the reasons for the correction, and provide information justifying why the record is not accurate, complete, timely, or relevant to an FDA purpose. Rules and procedures regarding amendment of Privacy Act records appear in 21 CFR part 21, subpart E.

P. RECORD SOURCE CATEGORIES

Information in this system is obtained from the following sources: Directly from a commissioned individual or individual under consideration for commissioning; FDA employee; FDA contractor; sponsoring State, local or Federal agency; former sponsoring, employing or commissioning agency; other State, local or Federal agencies; contract employer; and the subject individual's former employer.

Q. RECORDS EXEMPTED FROM CERTAIN PROVISIONS OF THE PRIVACY ACT

None.

III. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the

heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: December 1, 2014.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2014–28634 Filed 12–5–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–2031]

Request for Nominations on the Food Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of a nonvoting industry representative to serve on the Food Advisory Committee for the Center for Food Safety and Applied Nutrition (CFSAN) notify FDA in writing. FDA is also requesting nominations for a nonvoting industry representative(s) to serve on the Food Advisory Committee. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current vacancies effective with this notice.

DATES: Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating that interest to the FDA by *January 7, 2015* (see sections I and II of this document for further details). Concurrently, nomination materials for prospective candidates should be sent to FDA by January 7, 2015.

ADDRESSES: All statements of interest from industry organizations interested in participating in the selection process of nonvoting industry representative nomination should be sent to Karen Strambler (see **FOR FURTHER INFORMATION CONTACT**). All nominations for nonvoting industry representatives may be submitted electronically by accessing the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm* or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002. Information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: Karen Strambler, Office of Policy, Regulations, and Social Science, Center for Food Safety and Applied Nutrition, 5100 Paint Branch Pkwy., Rm. 1C–016, College Park, MD 20740, 2400–402–2589, *karen.strambler@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency intends to add a nonvoting industry representative(s) to the following advisory committee:

I. CFSAN Advisory Committee, Food Advisory Committee

The Committee reviews and evaluates emerging food safety, nutrition and other food- or cosmetic-related health issues that FDA considers of primary importance for its food and cosmetics programs. The Committee may be charged with reviewing and evaluating available data and making recommendations on matters such as those relating to: (1) Broad scientific and technical food- or cosmetic-related issues; (2) the safety of food ingredients and new foods; (3) labeling of foods and cosmetics; (4) nutrient needs and nutritional adequacy; and (5) safe exposure limits for food contaminants. The Committee may also be asked to provide advice and make recommendations on ways of communicating to the public the potential risks associated with these issues and on approaches that might be considered for addressing the issues.

II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current résumés. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

III. Application Procedure

Individuals may self-nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Contact information, a current curriculum vitae, and the name of the committee of interest should be sent to the FDA Advisory Committee Membership Nomination Portal (see **ADDRESSES**) within 30 days of publication of this document (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA seeks to include the views of women, and men, members of all racial and ethnic groups and individuals with and without disabilities on its advisory committees and, therefore encourages nominations of appropriately qualified candidates from these groups.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: December 1, 2014.

Jill Hartzler Warner,

Associate Commissioner for Special Medical Programs.

[FR Doc. 2014–28652 Filed 12–5–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described

below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this Information Collection Request must be received no later than February 6, 2015.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 10C–03, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Information Collection Clearance Officer at (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information request collection title for reference.

Information Collection Request Title: National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners—45 CFR part 60 Regulations and Forms OMB No. 0915–0126—Revision

Abstract: This is a request for a revision of OMB approval of the information collection contained in regulations found at 45 CFR part 60 governing the National Practitioner Data Bank (NPDB) and the forms to be used in registering with, reporting information to, and requesting information from the NPDB. Administrative forms are also included to aid in monitoring compliance with federal reporting and querying requirements. Responsibility for NPDB implementation and operation resides in the Bureau of Health Workforce, Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

The intent of the NPDB is to improve the quality of health care by encouraging hospitals, state licensing boards, professional societies, and other entities providing health care services to identify and discipline those who engage in unprofessional behavior, and to restrict the ability of incompetent health care practitioners, providers, or suppliers to move from state to state without disclosure of previous damaging or incompetent performance. It also serves as a fraud and abuse clearinghouse for the reporting and disclosing of certain final adverse actions (excluding settlements in which no findings of liability have been made) taken against health care practitioners, providers, or suppliers by health plans, federal agencies, and state agencies.

The reporting forms, request for information forms (query forms), and administrative forms (used to monitor compliance) are accessed, completed, and submitted to the NPDB electronically through the NPDB Web site at *http://www.npdb.hrsa.gov/*. All reporting and querying is performed through this secure Web site.

Need and Proposed Use of the Information: The NPDB acts primarily as a flagging system; its principal purpose is to facilitate comprehensive review of practitioners' professional credentials and background. Information is collected from, and disseminated to, eligible entities (entities that are entitled to query and/or report to the NPDB as authorized in Title 45 part 60 of the Code of Federal Regulations) on the following: (1) Medical malpractice payments, (2) licensure actions taken by Boards of Medical Examiners, (3) state licensure and certification actions, (4) federal licensure and certification actions, (5) negative actions or findings taken by peer review organizations or private accreditation entities, (6) adverse actions taken against clinical privileges, (7) federal or state criminal convictions related to the delivery of a health care item or service, (8) civil judgments related to the delivery of a health care item or service, (9) exclusions from participation in federal or state health care programs, and (10) other adjudicated actions or decisions. It is intended that NPDB information should be considered with other relevant information in evaluating credentials of health care practitioners, providers, and suppliers.

Likely Respondents: Eligible entities that are entitled to query and/or report to the NPDB as authorized in regulations found at 45 CFR part 60.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Regulation citation	Form name	Number of respondents	Responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
§ 60.6: Reporting errors, omissions, revisions or whether an action is on appeal.	Correction, Revision to Action, Correction of Revision to Action, Void, Notice of Appeal (manual).	20,482	1	20,482	.25	5,121
	Correction, Revision to Action, Correction of Revision to Action, Void, Notice of Appeal (automated).	17,185	1	17,185	.0003	5
§ 60.7: Reporting medical malpractice payments.	Medical Malpractice Payment (manual).	12,613	1	12,613	.75	9,460
	Medical Malpractice Payment (automated).	250	1	250	.0003	.1
§ 60.8: Reporting licensure actions taken by Boards of Medical Examiners & § 60.9: Reporting licensure and certification actions taken by States.	State Licensure (manual)	16,770	1	16,770	.75	12,578
	State Licensure (automated)	17,422	1	17,422	.0003	5
§ 60.10: Reporting Federal licensure and certification actions.	DEA/Federal Licensure	114	1	114	.75	86

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Regulation citation	Form name	Number of respondents	Responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
§ 60.11: Reporting negative actions or findings taken by peer review organizations or private accreditation entities.	Peer Review Organization	10	1	10	.75	8
	Accreditation	12	1	12	.75	9
§ 60.12: Reporting adverse actions taken against clinical privileges.	Title IV Clinical Privileges Actions	671	1	671	.75	503
	Professional Society	50	1	50	.75	38
§ 60.13: Reporting Federal or State criminal convictions related to the delivery of a health care item or service.	Criminal Conviction (Guilty Plea or Trial) (manual).	1,308	1	1,308	.75	981
	Criminal Conviction (Guilty Plea or Trial) (automated).	937	1	937	.0003	.3
	Deferred Conviction or Pre-Trial Diversion.	50	1	50	.75	38
	Nolo Contendere (No Contest) Plea	80	1	80	.75	60
	Injunction	10	1	10	.75	8
§ 60.14: Reporting civil judgments related to the delivery of a health care item or service.	Civil Judgment	14	1	14	.75	11
§ 60.15: Reporting exclusions from participation in Federal or State health care programs.	Exclusion/Debarment (manual)	1,185	1	1,185	.75	889
	Exclusion/Debarment (automated)	5,094	1	5,094	.0003	2
§ 60.16: Reporting other adjudicated actions or decisions.	Government Administrative	2,233	1	2,233	.75	1,675
	Health Plan Action	524	1	524	.75	393
§ 60.18 Requesting Information from the NPDB.	One Time Query for an Individual (manual).	1,980,825	1	1,980,825	.08	158,466
	One Time Query for an Individual (automated).	2,163,208	1	2,163,208	.0003	649
	One Time Query for an Organization (manual).	39,920	1	39,920	.08	3,194
	One Time Query for an Organization (automated).	2,266	1	2,266	.0003	1
	Self-Query on an Individual	77,318	1	77,318	.42	30,201
	Self-Query on an Organization	427	1	427	.42	167
	Continuous Query (manual)	508,203	1	508,203	.08	40,656
	Continuous Query (automated)	121,718	1	121,718	.0003	37
§ 60.21: How to dispute the accuracy of NPDB information.	Subject Statement and Dispute	3,501	1	3,501	.75	2,626
	Request for Dispute Resolution	94	1	94	8	752
Administrative	Non-Hospital Entity Registration (Initial).	524	1	524	1	524
	Non-Hospital Entity Registration (Renewal & Update).	6,383	1	6,383	.25	1,596
	Hospital Registration (Initial)	37	1	37	1	37
	Hospital Registration (Renewal & Update).	3,198	1	3,198	.25	800
	Licensing Board Data Request	140	1	140	10.5	1,470
	Reporting Entity Discrepancy Letter	389	1	389	4	1556
	Licensing Board Attestation	354	1	354	1	354
	Corrective Action Plan	10	1	10	.08	1
	Reconciling Missing Actions	2,176	1	2,176	.08	174
	Agent Registration (Initial)	30	1	30	1	30
	Agent Registration (Renewal & Update).	194	1	194	.08	16
	Electronic Transfer of Funds (EFT) Authorization.	566	1	566	.08	45
	Authorized Agent Designation	788	1	788	.25	197
	Account Discrepancy	41	1	41	.25	10
Total		5,009,324		5,009,324		275,429

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Jackie Painter,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2014–28650 Filed 12–5–14; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Expert Panel Meeting on Identifying Research Needs for Assessing Safe Use of High Intakes of Folic Acid; Notice of Public Meeting and Registration Information

SUMMARY: The National Toxicology Program (NTP) and the Office of Dietary Supplements (ODS) announce a public expert panel meeting on May 11–12,

2015, to identify research needs based on the state of the science related to the safe use of high intakes of folic acid. The expert panel meeting is open to the public. Registration is requested for public attendance, in-person or via the webcast, and for oral comment. Information about the meeting and registration are available at *http://ntp.niehs.nih.gov/go/730864.*

DATES:

Meeting: May 11–12, 2015, 8:30 a.m. Eastern Daylight Time to approximately 5 p.m. on May 11 and approximately 12:00 p.m. on May 12.

Document Availability: The literature review document should be available by April 6, 2015, and will be posted to *http://ntp.niehs.nih.gov/go/730864* when available.

Written Public Comment Submission and Registration for Oral Comments: Deadline is May 4, 2015.

Registration for Accommodation: Deadline is May 4, 2015, for individuals with disabilities who need accommodation to participate.

ADDRESSES:

Meeting Location: Natcher Conference Center (Building 45), National Institutes of Health, Bethesda, MD 20892.

Meeting Web page: The preliminary agenda, registration, roster, literature review document, and other meeting materials will be posted to *http://ntp.niehs.nih.gov/go/730864* when available.

Webcast: The URL for viewing the webcast will be provided to those who register.

FOR FURTHER INFORMATION CONTACT: Dr. Yun Xie, NTP Designated Federal Official, Office of Liaison, Policy and Review, DNTP, NIEHS, P.O. Box 12233, MD K2–03, Research Triangle Park, NC 27709. Phone: (919) 541–3436, Fax: (301) 451–5455, Email: *yun.xie@nih.gov.* Hand Delivery/Courier: 530 Davis Drive, Room 2161, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Meeting and Registration: The meeting is open to the public with time set aside for oral public comment; attendance at NIH is limited only by the space available. Registration is recommended for in-person attendance to ensure space and to view the webcast; the URL for the webcast will be provided in the email confirming registration. Individuals who plan to provide oral comments (see below) are encouraged to register online by May 4, 2015, at *http://ntp.niehs.nih.gov/go/730864.* Individuals interested in this meeting are encouraged to access the Web site to stay abreast of the most current information regarding the meeting. Visitor and security information for those attending in-person is available at *http://www.nih.gov/about/visitor/.* Individuals with disabilities who need accommodation to participate in this event should contact Dr. Yun Xie at phone: (919) 541–3436 or email: *yun.xie@nih.gov.* TTY users should contact the Federal TTY Relay Service at (800) 877–8339. Requests should be made at least five business days in advance of the event.

Background Information on Folic Acid and Reason for the Evaluation: Humans require folate, a water-soluble B-complex vitamin, for everyday growth and cell division and for critical periods of rapid growth and cell division such as embryonic development. Thus, folate is necessary for all individuals, but is especially important for women who may become pregnant. At the same time, there is interest in understanding potential adverse health impacts from high intakes of folic acid, the form of folate commonly added to foods and dietary supplements.

Folate is present in the diet through its natural occurrence in food, as a food additive, and as an ingredient in dietary supplements. Naturally occurring folate is unlikely to be associated with potential adverse effects because it has lower bioavailability than folic acid and its consumption is also limited by the bulk and caloric content of foods. Therefore, the primary substance of interest for considering the safety of high intake is folic acid.

Evaluating the potential for adverse health effects associated with high folic acid intakes has been challenging because of the lack of systematic studies and other sources of evidence on this topic. In 1998, the Food and Nutrition Board of the Institute of Medicine set Dietary Reference Intakes that included the Recommended Dietary Allowances (RDAs) and tolerable upper intake levels (ULs)—the highest level of daily intake likely to pose no risk of adverse health effects to almost all of the population—for folic acid and other B vitamins. The folic acid UL (1000 μg) was established with the paucity of data available to the committee at the time; *i.e.,* limited, suggestive evidence that excessive folate intake may precipitate or exacerbate neuropathy in vitamin B12-deficient individuals. Since this 1998 publication that set the UL for folic acid, many publications have reported on health effects over a range of folic acid intakes. Some studies have raised concerns that high intake of folic acid may be associated with potential adverse health effects.

Expert Panel Meeting: The NTP and ODS are convening an expert panel to identify research needs related to the safe use of high intakes of folic acid based on consideration of the state of the science. The expert panel meeting will bring together experts from multiple disciplines including, but not limited to, epidemiology, nutrition, medicine, and toxicology. In preparation for this evaluation, screening of the literature was undertaken to identify potential adverse health effects for which further research might be warranted. A literature review document is being prepared on four health outcome areas using systematic review methodology: (1) Cancer, (2) cognition in conjunction with vitamin B12, (3) hypersensitivity-related outcomes, and (4) endocrine and metabolic outcomes. The literature review document should be available by April 6, 2015, and will be posted to *http://ntp.niehs.nih.gov/go/730864.* A document describing the approach for conducting the literature evaluation has also been prepared and is posted on the NTP Web site (*http://ntp.niehs.nih.gov/ntp/ohat/folicacid/ntpfolicacid_approach_508.pdf*). This document describing the approach includes information on the dose levels of folic acid being considered for the evaluation.

Request for Comments: The deadline for submission of written comments is May 4, 2015, to enable review by the expert panel and NTP and ODS staff prior to the meeting. Registration to provide oral comments is by May 4, 2015, at *http://ntp.niehs.nih.gov/go/730864.* Public comments and any other correspondence should be sent to the **FOR FURTHER INFORMATION CONTACT.** Persons submitting written comments should include their name, affiliation, mailing address, phone, email, and sponsoring organization (if any) with the document. Written comments received in response to this notice will be posted on the NTP Web site, and the submitter will be identified by name, affiliation, and/or sponsoring organization.

Public comment at this meeting is welcome, with time set aside for the presentation of oral comments on the agenda topics. In addition to in-person oral comments at the NIH, public comments can be presented by teleconference line. There will be 50 lines for this call; availability is on a first-come, first-served basis. Oral comments will be received only during the formal public comment periods indicated on the preliminary agenda. The access number for the teleconference line will be provided to registrants by email prior to the meeting. Each affiliation or sponsoring

organization is allowed one time slot. At least 7 minutes will be allotted to each time slot, and if time permits, may be extended to 10 minutes at the discretion of the chair.

Persons wishing to make an oral presentation are asked to register online at *http://ntp.niehs.nih.gov/go/730864* by May 4, 2015, and indicate whether they will present comments in-person or via the teleconference line. If possible, oral public commenters should send a copy of their slides and/or statement or talking points at that time. Written statements can supplement and may expand the oral presentation. Registration for in-person oral comments will also be available at the meeting, although time allowed for presentation by on-site registrants may be less than that for registered speakers and will be determined by the number of speakers who register on-site.

Background Information on NTP and ODS: The NTP is an interagency program, established in 1978 (43 FR 53060) and headquartered at the National Institute of Environmental Health Sciences (NIEHS) of the National Institutes of Health (NIH). The mission of NTP is to evaluate agents of public health concern by developing and applying tools of modern toxicology and molecular biology. The NTP carries out literature analysis activities in the Office of Health Assessment and Translation and the Office of the Reports on Carcinogens. The NTP also designs and conducts laboratory studies and testing programs and analyzes its findings to assess potential hazards to human health from exposure to environmental substances, including dietary supplements (see *http://ntp.niehs.nih.gov/*).

The mission of the ODS of the NIH is to strengthen knowledge and understanding of dietary supplements by evaluating scientific information, stimulating and supporting research, disseminating research results, and educating the public to foster an enhanced quality of life and health for the population of the United States. The purpose and responsibilities of the ODS are to explore more fully the potential role of dietary supplements as a significant part of the efforts of the United States to improve health care; to promote scientific study of the benefits of dietary supplements in maintaining health and preventing chronic disease and other health-related conditions; to conduct and coordinate scientific research within NIH relating to dietary supplements; to collect and compile the results of scientific research relating to dietary supplements, including scientific data from foreign sources; and to serve as the principal advisor to the Secretary of the Department of Health and Human Services and the Assistant Secretary for Health and to provide advice on issues relating to dietary supplements to the Director of NIH, the Director of the Centers for Disease Control and Prevention, and the Commissioner of the Food and Drug Administration (see *http://ods.od.nih.gov/*). The Dietary Supplement Health and Education Act of 1994 (Pub. L. 103–417, DSHEA) authorized the establishment of the ODS at the NIH in 1995.

Background Information on NTP Expert Panels: NTP panels are technical, scientific advisory bodies established on an "as needed" basis to provide independent scientific peer review and advise the NTP on agents of public health concern, new/revised toxicological test methods, or other issues. These panels help ensure transparent, unbiased, and scientifically rigorous input to the program for its use in making credible decisions about human hazard, setting research and testing priorities, and providing information to regulatory agencies about alternative methods for toxicity screening. The NTP welcomes nominations of scientific experts for upcoming panels. Scientists interested in serving on an NTP panel should provide current *curriculum vitae* to the **FOR FURTHER INFORMATION CONTACT.** The authority for NTP panels is provided by 42 U.S.C. 217a; section 222 of the Public Health Service (PHS) Act, as amended. The panel is governed by the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

Dated: December 2, 2014.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2014–28681 Filed 12–5–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: January 30, 2015.

Closed: 8:30 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Open: 10:00 a.m. to 2:00 p.m.

Agenda: Staff reports on divisional, programmatic, and special activities.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, Ph.D., Director, Division of Extramural Activities, NIDCD, NIH, Room 8345, MSC 9670, 6001 Executive Blvd., Bethesda, MD 20892–9670, 301–496–8693, *jordanc@nidcd.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/Pages/Advisory-Groups-and-Review-Committees.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 2, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–28661 Filed 12–5–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5826–N–01]

Notice of HUD-Held Healthcare Loan Sale (HLS 2015–1)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of sale of a healthcare mortgage loan.

SUMMARY: This notice announces HUD's intention to sell an unsubsidized healthcare mortgage loan, without Federal Housing Administration (FHA) insurance, in a competitive auction (HLS 2015–1 or Loan Sale) on or about December 17, 2014. This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: A Bidder's Information Package (BIP) was made available on or about November 13, 2014. Bids for the loan must be submitted on the bid date of December 17, 2014 between certain specified hours. HUD anticipates that an award will be made on or before December 22, 2014. Closing is expected to take place between December 23, 2014 and December 31, 2014.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must complete, execute, and submit a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents will be available on the HUD Web site at *www.hud.gov/fhaloansales.* Please fax or email as well as mail executed original documents to JS Watkins Realty Partners, LLC: J.S. Watkins Realty Partners, LLC, c/o The Debt Exchange, 133 Federal Street, 10th Floor, Boston, MA 02111, Attention: HLS 2015–1 Sale Coordinator, Fax: 1–978–967–8607, Email: *hls2015–1@debtx.com.*

FOR FURTHER INFORMATION CONTACT: John Lucey, Director, Asset Sales Office, Room 3136, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–8000; telephone 202–708–2625, extension 3927. Hearing- or speech-impaired individuals may call 202–708–4594 (TTY). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell, in HLS 2015–1, an unsubsidized healthcare mortgage loan (Mortgage Loan) secured by a hospital (medical center) located in Texas. The Mortgage Loan is a non-performing mortgage loan. The listing of the Mortgage Loan is included in the BIP. The Mortgage Loan will be sold without FHA insurance and with HUD servicing released. HUD will offer qualified bidders an opportunity to bid competitively on the Mortgage Loan.

The Qualification Statement describes the entities/individuals that may be qualified to bid on the Mortgage Loan if they meet certain requirements as detailed in the Qualification Statement. Some entities/individuals must meet additional requirements in order to be qualified to bid, including but not limited to: (1) Any mortgagee/servicer who originated the Mortgage Loan; (2) a mortgagor, a healthcare operator, or member of the hospital Board of Directors with respect to any HUD insured or subsidized mortgage loan (excluding the Mortgage Loan being offered in the Loan Sale) who is currently in default, violation, or noncompliance with one or more of HUD's requirements or business agreements; (3) a limited partner, nonmanaging member, investor and/or shareholder who owns a 1% or less interest in the Mortgage Loan, or in the project securing the Mortgage Loan; (4) and any of the aforementioned entities'/individuals' principals, affiliates, and assigns. Interested entities/individuals who fall into one of these categories should review the Qualification Statement to determine whether they may be eligible to qualify to submit a bid on the Mortgage Loan. Other entities/individuals not described herein may also be restricted from bidding on the Mortgage Loan, as fully detailed in the Qualification Statement.

The Bidding Process

The BIP describes in detail the procedure for bidding in HLS 2015–1. The BIP also includes a standardized non-negotiable loan sale agreement (Loan Sale Agreement).

As part of its bid, each bidder must submit a minimum deposit of the greater of 10 percent of the total bid or $100,000. HUD will evaluate the bids submitted and determine the successful bid(s) in its sole and absolute discretion. If a bidder is successful, the bidder's deposit will be non-refundable and will be applied toward the purchase price, with any amount beyond the purchase price being returned to the bidder. Deposits will be returned to unsuccessful bidders. Closings are expected to take place between December 23, 2014 and December 31, 2014.

These are the essential terms of sale. The Loan Sale Agreement, which is included in the BIP, contains additional terms and details. To ensure a competitive bidding process, the terms of the bidding process and the Loan Sale Agreement are not subject to negotiation.

Due Diligence Review

The BIP describes the due diligence process for reviewing loan files in HLS 2015–1. Qualified bidders will be able to access loan information remotely via a high-speed Internet connection. Further information on performing due diligence review of the Mortgage Loans is provided in the BIP.

Mortgage Loan Sale Policy

HUD reserves the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include the Mortgage Loan in a later sale. The Mortgage Loan will not be withdrawn after the Award Date except as is specifically provided for in the Loan Sale Agreement.

This is a sale of an unsubsidized mortgage loan, pursuant to Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, (12 U.S.C. 1715z–11a(a)).

Mortgage Loan Sale Procedure

HUD selected a competitive sale as the method to sell the Mortgage Loan. This method of sale optimizes HUD's return on the sale of this Mortgage Loan, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loan, and provides the quickest and most efficient vehicle for HUD to dispose of the Mortgage Loan.

Bidder Eligibility

In order to bid in the sale, a prospective bidder must complete, execute and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities are among those ineligible to bid on the Mortgage Loan being sold in HLS 2015–1:

1. A mortgagor or a member of a hospital Board of Directors, with respect to the Mortgage Loan being offered in the Loan Sale, or an Active Shareholder with respect to the Mortgage Loan as defined by paragraph E of the Qualification Statement, including any and all of their principals, affiliates, assigns, and family member(s);

2. Any individual or entity, and any Related Party (as such term is defined in the Qualification Statement) of such individual or entity, that is a mortgagor, healthcare operator, or a member of a hospital Board of Directors with respect to any of HUD's multifamily and/or healthcare programs (excluding the Mortgage Loan being offered in the Loan Sale) and that has failed to file financial statements or is otherwise in default under such mortgage loan or is in violation or noncompliance of any regulatory or business agreements with HUD and fails to cure such default or violation by no later than December 3, 2014.

3. Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 24 of the Code of Federal Regulations, Part 24, and Title 2 of the Code of Federal Regulations, Part 2424;

4. Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for, or on behalf of, HUD in connection with HLS 2015–1;

5. An FHA-approved mortgagee, including any principals, affiliates, or assigns thereof, that has received FHA insurance benefits for the same Mortgage Loan being offered in the Loan Sale;

6. An FHA-approved mortgagee and/or loan servicer, including any principals, affiliates, or assigns thereof, that originated the Mortgage Loan being offered in the Loan Sale *if* the Mortgage Loan defaulted within two years of origination and resulted in the payment of an FHA insurance claim;

7. Any employee of HUD, a member of such employee's family, or an entity owned or controlled by any such employee or member of such an employee's family;

8. Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under provisions (1) through (7) above to assist in preparing its bid on the Mortgage Loan.10. Any affiliate, principal or employee of any person or entity that, within the two-year period prior to December 1, 2014, serviced the Mortgage Loan or performed other services for or on behalf of HUD;

9. Any contractor or subcontractor to HUD that otherwise had access to information concerning the Mortgage Loan on behalf of HUD or provided services to any person or entity which, within the two-year period prior to December 1, 2014, had access to information with respect to the Mortgage Loan on behalf of HUD;

10. Any employee, officer, director or any other person that provides or will provide services to the prospective bidder with respect to the Mortgage Loan during any warranty period established for the Loan Sale, that serviced the Mortgage Loan or performed other services for or on behalf of HUD within the two-year period prior to December 1, 2014, or provided services to any person or entity which serviced, performed services or otherwise had access to information with respect to the Mortgage Loan for or on behalf of HUD.

The Qualification Statement provides further details pertaining to eligibility requirements. Prospective bidders should carefully review the Qualification Statement to determine whether they are eligible to submit bids on the Mortgage Loan in HLS 2015–1.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding HLS 2015–1, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for the Mortgage Loan, upon the closing of the sale of the Mortgage Loan. Even if HUD elects not to publicly disclose any information relating to HLS 2015–1, HUD will have the right to disclose any information that HUD is obligated to disclose pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to HLS 2015–1 and does not establish HUD's policy for the sale of other mortgage loans.

Dated: November 26, 2014.

Biniam Gebre,

Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Laura M. Marin,

Associate General Deputy Assistant Secretary for Housing—Associate Deputy Federal Housing Commissioner.

[FR Doc. 2014–28701 Filed 12–5–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2014–N242; FXES11120800000–145–FF08E00000]

Final Environmental Impact Statement for the Proposed Maricopa Sun Solar Complex Multi-Species Habitat Conservation Plan, Kern County, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final environmental impact statement (EIS) for the Maricopa Sun Solar Complex Multi-Species Habitat Conservation Plan (HCP), in accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and its implementing regulations, as well as in compliance with the Endangered Species Act of 1973, as amended (Act). The final EIS was updated to address the comments received on the 2014 draft EIS and considers the environmental effects of issuing an incidental take permit for five animal species in response to the application from Maricopa Sun, LLC (Applicant). The Applicant has prepared the final Maricopa Sun Solar Complex Habitat Conservation Plan (HCP) to describe and implement a conservation plan that will minimize and mitigate environmental effects associated with the incidental take of five animal species ("Covered Species") associated with the construction, operation, maintenance, and decommissioning of an up to 700 megawatt photo-voltaic power generating facility and implementation of conservation actions associated with the HCP in Kern County, California.

DATES: A Record of Decision will be signed no sooner than 30 days after the publication date announcing this final EIS. We will accept comments received by January 7, 2015.

ADDRESSES: *Obtaining Documents:* You may download copies of the final EIS and final HCP from the Sacramento Fish and Wildlife Office Web site at *http://www.fws.gov/sacramento.* Alternatively you may use one of the methods below to request a CD–ROM of the documents. Please send your requests or comments by any one of the following methods.

Submitting Comments: You may submit comments or requests for copies or more information by one of the following methods.

- *U.S. Mail:* U.S. Fish and Wildlife Service; Sacramento Fish and Wildlife

Office; Attn: Mr. Mike Thomas, Chief, Conservation Planning Division; 2800 Cottage Way, W–2605, Sacramento, CA 95825.

• *In-Person Drop-off, Viewing, or Pickup:* Telephone 916–414–6600 to make an appointment during regular business hours to drop off comments or view received comments at the Sacramento Fish and Wildlife Office.

• *Fax:* Mr. Mike Thomas, Chief, Conservation Planning Division, 916–414–6713.

FOR FURTHER INFORMATION CONTACT: Mike Thomas, Chief, Conservation Planning Division, or Eric Tattersall, Deputy Assistant Field Supervisor, at the address in **ADDRESSES** or at (916) 414–6600 (telephone). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339 to contact the above individuals during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This notice announces the availability of the final EIS under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321–4347 *et seq.;* NEPA), and its implementing regulations in the Code of Federal Regulations (CFR) at 40 CFR 1500–1508, as well as in compliance with section 10(c) of the Endangered Species Act (16 U.S.C. 1531–1544 *et seq.;* Act).

Background Information

Section 9 of the Act (16 U.S.C. 1531–1544 *et seq.*) and Federal regulations at 50 CFR 17 prohibit the taking of fish and wildlife species listed as endangered or threatened under section 4 of the Act. Take of federally listed fish or wildlife is defined under the Act as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct" 16 U.S.C. 1532(19)). The term "harm" is defined in the regulations as "an act which actually kills or injures wildlife such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering" (50 CFR 17.3). However, under specified circumstances, the Service may issue permits that allow the take of federally listed fish or wildlife species, provided that the take that occurs is incidental to, but not the purpose of, an otherwise lawful activity.

Regulations governing permits for endangered and threatened species are at 50 CFR 17.22 and 17.32, respectively. Section 10(a)(1)(B) of the Act contains provisions for issuing such incidental take permits to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

(1) The taking will be incidental;

(2) The applicants will, to the maximum extent practicable, minimize and mitigate the impact of such taking;

(3) The applicants will develop a proposed HCP and ensure that adequate funding for the HCP will be provided;

(4) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(5) The applicants will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

The final HCP addresses, and the Applicant seeks incidental take authorization for, five animal species (three federally endangered and two federally non-listed). The proposed permit would provide take authorization for all species identified in the final HCP as Covered Species. Take authorized for listed Covered Species would be effective upon permit issuance. Take authorization for currently non-listed Covered Species would become effective concurrent with listing, should the species be listed under the Act during the proposed 35-year Permit Term.

The following three federally listed endangered species are included as Covered Species in the HCP: Blunt-nosed leopard lizard (*Gambelia sila*), Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*), and San Joaquin kit fox (*Vulpes macrotis mutica*). The following two federally non-listed species are included as Covered Species in the HCP: Western burrowing owl (*Athene cunicularia*) and Nelson's antelope squirrel (*Ammospermophilus nelsoni*).

Activities proposed for coverage under the incidental take permit ("Covered Activities") include, but are not limited to the following general categories: Construction and operation activities within Solar Sites; management and maintenance activities within Movement Corridors; management activities within the areas designated for conservation (Conservation Sites), including monitoring and reporting actions; activities associated with implementation of the conservation program specified in the final HCP; decommissioning; and implementation of the conservation program.

Construction-related activities could include grading and compaction, trenching, paving of access roads, installation of solar arrays, meteorological stations, transmission lines, septic leech fields, fencing, and landscaping. Construction of solar facilities on all sites is anticipated to be completed over an 8-to-10-year period from the commencement of the initial development; however, could it extend to a 10-to-15-year period. Construction of the project will occur in a series of approximately 1-megawatt blocks, generally consisting of 5 to 8.64 acres each. It is anticipated that construction of each section (640 acres) within the Maricopa Sun Solar Complex will take 12 to 18 months. Operation-related activities could include solar panel maintenance, on-site parking, operation of solar modules, inspection, and repair of equipment, and operation of lighting. Typical activities associated with decommissioning of the solar energy facility include removal of all solar electric systems, buildings, cabling, electrical components, breaking up of concrete pads and foundations, removal of access roads, additional grading, and replacement of soil disturbed from decommissioning. Preservation/enhancement and conservation plan management activities could include vegetation control (*i.e.,* grazing and mowing), fence installation, special status species monitoring (*i.e.,* surveys such as trapping, use of remote cameras and spotlighting), and habitat restoration and creation.

The proposed Covered Activities related to development and operations and maintenance of the solar sites would result in the permanent or temporary disturbance of up to 3,798 acres of existing land cover within the proposed 5,784-acre Permit Area. The proposed Covered Activities related to management of the Conservation Sites would also result in some disturbance of land cover, but overall these actions are expected to benefit the Covered Species. The Solar Site Parcels encompass 3,798 acres (plus 91 acres of existing public easements), and Conservation Sites total 1,894 acres. The Covered Lands are primarily comprised of currently undeveloped and vacant agricultural land, and are relatively flat. Surrounding land uses are both active and inactive agricultural land; they also include lands designated as flood hazard areas, public facilities, lands designated for the protection of important watershed recharge areas or wildlife habitat, lands having important value as a buffer between resource areas

and urban areas, and lands designated for industrial uses. Covered Activity impacts to existing land cover types were used as a surrogate to identify maximum potential impacts to species and the potential take of each Covered Species. The proposed HCP conservation strategy prescribes conditions for implementing each Covered Activity that avoid or minimize potential take of the Covered Species, and identifies mitigation for species impacts that cannot be avoided.

National Environmental Policy Act Compliance

Our proposed permit issuance decision triggers compliance with NEPA, which requires that environmental information be available to public officials and citizens before Federal decisions are made and before Federal actions are taken. We formally initiated an environmental review of the draft EIS through publication of a notice of intent (NOI) to prepare a draft EIS in the **Federal Register** on Friday, December 23, 2011 (76 FR 80385). That notice also announced a public scoping period, during which we invited interested parties to provide written comments expressing their issues or concerns related to the proposal. A public scoping meeting was held in Bakersfield, California, on January 23, 2012. We prepared a draft EIS and published a notice of availability (NOA) in the **Federal Register** on Wednesday, May 28, 2014 (79 FR 30638). We received one comment letter on the draft EIS. A response to the comment received has been included in the final EIS and revisions to the final EIS. The analysis provided in the final EIS is intended to accomplish the following: Inform the public of the Service's proposed permit action and alternatives and the environmental impacts of the alternatives, and address public comments received on the draft EIS.

Public Comments

The Service invites the public to review the permit application, final EIS, and final HCP during the public comment period (see **DATES**). You may submit any comments and materials by one of the methods listed in **ADDRESSES**. Before including your address, phone number, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Next Steps

We will evaluate the application, associated documents, and comments submitted to determine whether the application meets the requirements of section 10(a) of the Act. The Service will then prepare a Record of Decision. A permit decision will be made no sooner than 30 days after the publication of the final EIS notice in the **Federal Register** and completion of the Record of Decision.

Dated: December 2, 2014.

Paul B. McKim

Deputy Regional Director, Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2014–28696 Filed 12–5–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L71220000.FR0000 LVTFG13G4430; NMNM 124261]

Notice of Realty Action: Proposed Non-Competitive Lease of Public Land in Sierra County, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM), Las Cruces District Office, proposes to lease two parcels of public land totaling 4.12 acres in Sierra County, New Mexico, for agricultural purposes (pecan orchard). The subject parcels were inadvertently developed by the adjacent landowner into a pecan orchard without authorization. The area has a long history of agricultural use and the proposed lease would provide the BLM with a reasonable option to resolve the continued unauthorized use of the affected public lands. The BLM proposes to lease the lands for not less than the fair market value to Winder Farm. The BLM White Sands Resource Management Plan, dated October 1986, does not exclude the subject parcel from the authorized officer's discretion to consider lease proposals in the subject area.

DATES: Written comments may be submitted to the address below. The BLM must receive your comments on or before January 22, 2015.

ADDRESSES: Send written comments concerning the proposed lease to the District Manager, BLM, Las Cruces District Office, 1800 Marquess Street, Las Cruces, NM 88005.

FOR FURTHER INFORMATION CONTACT: Anthony Hom, Realty Specialist, at the address above, or by telephone at 575–525–4331, or by email at *ahom@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM has determined that the two parcels of land described below are suitable for consideration as an agricultural lease under Section 302 of the Federal Land Policy Management Act of 1976 (43 U.S.C. 1732), (FLPMA) and the implementing regulations at 43 CFR 2920.

Parcel A: New Mexico Principal Meridian, Sierra County, New Mexico

A portion of land situated in the southeast quarter (SE1/4) of the northwest quarter (NW1/4) of section 10, township 18 south, range 7 west, New Mexico Principal Meridian, Sierra County, New Mexico. Depicted in the Survey of Farmed Lands by Underwood Engineering Inc., signed September 16, 2013, and shown as Parcel A and is described as follow:

BEGINNING at the northeast corner of PARCEL A. Said point of beginning hereinafter referred as "Corner No. 1 of Parcel A" for this description. From said point of beginning of Parcel A, the center north one-sixteenth (1/16) section corner bears S. 89°15′41″ E., a distance of 309.39 feet.

THENCE, S. 16°01′00″ W., a distance of 325.87 feet to corner No. 2 of Parcel A;

THENCE, N. 81°28′42″ W., a distance of 414.02 feet to corner No. 3 of Parcel A;

THENCE, N. 31°47′03″ W., a distance of 290.69 feet to corner No. 4 of Parcel A;

THENCE, N. 13°52′20″ W., a distance of 13.63 feet to corner No. 5 of Parcel A;

THENCE, S. 89°15′41″ E., a distance of 655.80 feet to the POINT OF BEGINNING OF PARCEL A containing 3.50 acres of land.

Parcel B: New Mexico Principal Meridian, Sierra County, New Mexico

A portion of land situated in the northeast quarter (NE¼) of the southwest quarter (SW¼) of section 10, township 18 south, range 7 west, New Mexico Principal Meridian, Sierra County, New Mexico. Depicted in the

Survey of Farmed Lands by Underwood Engineering Inc., signed September 16, 2013, and shown as Parcel B and is described as follow:

BEGINNING at the northerly corner of PARCEL B. Said point of beginning hereinafter referred as "Corner No. 1 of Parcel B" for this description. From said point of beginning of Parcel B the center one quarter (¼) section corner bears N. 2°21′17″ E., a distance of 364.11 feet.

THENCE, S. 2°21′17″ W., a distance of 449.78 feet to corner No. 2 of Parcel B;

THENCE, S. 81°51′43″ W., a distance of 122.42 feet to corner No. 3 of Parcel B;

THENCE, N. 16°39′35″ E., a distance of 487.18 feet to the POINT OF BEGINNING OF PARCEL B containing 0.62 acres of land.

The area described (Parcels A and B) in aggregate is 4.12 acres.

The applicable regulation at 43 CFR 2920.5–4(b) provides that, "land use authorizations may be offered on a negotiated, non-competitive basis, when, in the judgment of the authorized officer equities, such as prior use of the lands, exist, no competitive interest exists or where competitive bidding would represent unfair competitive and economic disadvantage to the originator of the unique land use concept." Based on past use of the subject parcels for the establishment of pecan trees owned by Winder Farm, it is the authorized officer's decision to offer the proposed agricultural lease to Winder Farm on a non-competitive basis because competitive bidding would represent an unfair competitive and economic disadvantage to Winder Farm. As noted above, Winder Farms' use of the parcels constituted an inadvertent trespass that they discovered and subsequently reported to the BLM. Winder Farms has since worked with the BLM to resolve the trespass. Subsequent to the BLM's receipt of an application for leasing by Winder Farm that complies with all applicable requirements set forth at 43 CFR 2920.5, processing of the proposed lease will take place in accordance with 43 CFR 2920.6, and other applicable regulations. Information and documentation regarding processing of the lease application is available as described in **ADDRESSES**, above, and reference should be made to National Environmental Policy Act (NEPA) analysis, to be conducted under DOI–BLM–NM–L000–2014–0168–EA. No final decision on the lease will be made until all required analyses are completed. If authorized, the lease would be subject to provisions of FLPMA and all applicable regulations of the Secretary of the Interior, including, but not limited to, 43 CFR part 2920, and to valid existing rights.

Public comments regarding the proposed lease may be submitted in writing—see **ADDRESSES** above—on or before January 22, 2015. Comments received in electronic form, such as email or fax, will not be considered. Any adverse comments regarding the proposed lease will be reviewed by the BLM State Director or another authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 CFR 2920.4)

Michael H. Tupper,

Deputy State Director, Lands and Minerals.

[FR Doc. 2014–28687 Filed 12–5–14; 8:45 am]

BILLING CODE 4310–FB–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–482–484 and 731–TA–1191–1194 (Final) (Remand)]

Circular Welded Carbon-Quality Steel Pipe From India, Oman, the United Arab Emirates, and Vietnam

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission ("Commission") hereby gives notice of the court-ordered remand of its final determinations in the countervailing duty investigations of circular welded carbon-quality steel pipe ("CWP") from India, Oman, and the United Arab Emirates ("UAE") and the antidumping duty investigations of CWP from India, Oman, the UAE, and Vietnam. For further information concerning the conduct of these remand proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207).

DATES: *Effective Dates:* December 8, 2014.

FOR FURTHER INFORMATION CONTACT: Doug Corkran (202–205–3057), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record of Investigation Nos. 701–TA–482–484 and 731–TA–1191–1194 (Final) may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background: In November 2012, the Commission determined by a vote of four to two that an industry in the United States was not materially injured or threatened with material injury by reason of imports of CWP from India, Oman, the UAE, and Vietnam that were sold in the United States at less than fair value and that were subsidized by the Governments of India, Oman, and the UAE. Petitioners and domestic producers contested the Commission's determinations before the U.S. Court of International Trade ("CIT"). The CIT remanded certain issues to the Commission and affirmed all other aspects of the Commission's determinations. *JMC Steel Group* v. *United States,* Slip. Op. 14–120 (Ct. Int'l Trade Oct. 15, 2014).

Participation in the proceeding: Only those persons who were interested parties that participated in the investigations (*i.e.,* persons listed on the Commission Secretary's service list) and also parties to the appeal may participate in the remand proceedings. Such persons need not make any additional filings with the Commission to participate in the remand proceedings, unless they are adding new individuals to the list of persons entitled to receive business proprietary information ("BPI") under administrative protective order. BPI referred to during the remand proceedings will be governed, as appropriate, by the administrative protective order issued in the investigations. The Secretary will maintain a service list containing the names and addresses of all persons or their representatives who are parties to the remand proceedings, and the

Secretary will maintain a separate list of those authorized to receive BPI under the administrative protective order during the remand proceedings.

Written Submissions: The Commission is not reopening the record and will not accept the submission of new factual information for the record. The Commission will permit the parties to file comments concerning how the Commission could best comply with the Court's remand instructions.

The comments must be based solely on the information in the Commission's record. The Commission will reject submissions containing additional factual information or arguments pertaining to issues other than those on which the Court has remanded this matter. The deadline for filing comments is December 24, 2014. Comments shall be limited to no more than twenty (20) double-spaced and single-sided pages of textual material.

Parties are advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission. All written submissions, including those that contain BPI, must conform to the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. *See* 76 FR 61937 (Oct. 6, 2011) and the newly revised Commission Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov.*

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

By order of the Commission.

Issued: December 3, 2014.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2014–28679 Filed 12–5–14; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–895]

Certain Multiple Mode Outdoor Grills and Parts Thereof; Commission's Determination To Review-In-Part a Final Initial Determination Finding a Violation of Section 337; Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, the Public Interest and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on September 26, 2014, finding a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in this investigation.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 26, 2013, based on a complaint filed on behalf of A&J Manufacturing, LLC of St. Simons, Georgia and A&J Manufacturing, Inc. of Green Cove Springs, Florida (collectively, "A&J" or "Complainants"). 78 FR 59373 (Sept. 26, 2013). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of certain claims of U.S. Patent No. 8,381,712, U.S. Patent No. D660,646, and U.S. Patent No. D662,773 patent. The Commission's notice of investigation, as amended, named numerous respondents including: The Brinkmann Corporation ("Brinkmann"); Academy Ltd., d/b/a Academy Sports + Outdoors ("Academy"); Ningbo Huige Outdoor Products Co. ("Huige"); Char-Broil, LLC ("Char-Broil"); Zhejiang Fudeer Electric Appliance Co., Ltd. ("Fudeer"); Outdoor Leisure Products, Incorporated ("OLP"); Dongguan Kingsun Enterprises Co., Ltd. ("Kingsun"); and Keesung Manufacturing Co., Ltd. ("Keesung") (collectively "the Respondents"). The Office of Unfair Import Investigations (OUII) is also a party to this investigation.

On June 24, 2014, the Commission affirmed-in-part and vacated-in-part an initial determination granting-in-part a motion for summary determination of non-infringement filed by Char-Broil, Fudeer, OLP, Kingsun, Tractor Supply Co. ("TSC"), and Chant Kitchen Equipment (HK) Ltd. ("Chant"). The Commission found that Complainants admit that the following redesigned grills do not infringe the '712 patent: (1) Chant/Tractor Supply's New Model 1046761; (2) Rankam's Member's Mark Grill, Model No. GR2071001–MM (Ver. 2) and (3) Rankam's Smoke Canyon Grill, Model No. GR2034205–SC (Ver. 2). Comm'n Op. at 1 (Jun. 24, 2014). The Commission found the other redesigned products at issue were within the scope of the investigation. *Id.* The Commission adopted the ALJ's construction of the "openable [] cover" limitations of claims 1 and 17 on modified grounds. *Id.* The Commission affirmed the ALJ's finding of non-infringement of claims 1 and 17 for the Char-Broil Oklahoma Joe Longhorn Model 12210767 Grill and adopted the ALJ's findings that the redesigned grills do not infringe claims 1 and 17 on modified grounds. *Id.* The Commission also found that the "openable [] cover means" limitations of claim 10 are means-plus-function limitations and directed the ALJ to make findings consistent with its means-plus-function interpretation. *Id.* at 2.

On September 26, 2014, the ALJ issued the final ID, finding a violation of section 337 as to Respondents Brinkmann, OLP, Kingsun, Academy, and Huige based upon his determinations: (i) That certain, but not all, accused products infringe at least one claim of the '712 patent; (ii) that the domestic industry requirement has been satisfied with respect to the '712 patent; and (iii) that the asserted claims of the

'712 patent have not been shown by clear and convincing evidence to be invalid. On October 9, 2014, the ALJ issued his recommended determination on remedy and bonding.

On October 14, 2014, A&J filed a petition for review of the following issues: (1) The ALJ's interpretation of the scope of claim 10 of the '712 patent; (2) the ALJ's finding that certain Char-Broil Grills and the certain redesigned OLP Grills do not satisfy the "openable [] cover means" limitations of claim 10 of the '712 patent; and (3) the ALJ's finding that the Char-Broil Model 463724512 and GHP DGB730SNB–D grills do not satisfy the claim limitation that the first cover "includes at least one exhaust" in claims 1, 10, and 17 of the '712 patent.

On the same day, Respondents Academy, Huige, OLP, and Brinkmann filed three separate petitions for review of the final ID. Brinkmann, OLP, and Academy together seek review of the following determinations: (1) That the asserted claims have not been shown by clear and convincing evidence to be invalid as obvious over U.S. Patent No. 5,632,265 in view of U.S. Patent No. 4,773,319 ("Holland '319") and U.S. Patent No. 6,606,986; and (2) that the asserted claims have not been shown by clear and convincing evidence to be invalid as obvious over U.S. Patent No. 6,189,528, either alone or in view of Holland '319. OLP separately challenges the ALJ's construction of the claim term "exhaust," and his finding that certain OLP products infringe claims 1–16 of the '712 patent. Academy and Huige petition for review of the ALJ's determination (Order No. 47) to exclude evidence and testimony concerning their redesigns, and the ALJ's refusal to make a determination as to whether those redesigns infringe the '712 patent. A&J, Respondents, and OUII each filed a response to the petitions on October 22, 2014.

Having examined the record of this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review: (1) The ID's construction of the "exhaust" and "exhaust means" limitations in claims 10 and 16, and related findings regarding infringement of claims 10–16; (2) the ID's findings regarding infringement of claims 1, 4, and 6–8 by the accused Dyna-Glo grills imported by Respondent GHP; (3) the ID's findings regarding infringement of claims 1, 2, 4–8, 10, 11, and 13–15 by the accused Char-Broil Model No. 463724512 grill; and (4) the ID's finding that the '712 patent was not shown to be invalid.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission requests responses to the following questions only. Each party's brief responding to the following questions should be no more than 60 pages.

1. Discuss whether the "exhaust" limitation and/or the "exhaust means" limitations in claims 10 and 16 should be interpreted as means-plus-function limitations, including whether any presumption that these limitations are means-plus-function limitations has been rebutted.

2. If the "exhaust" limitation and/or the "exhaust means" limitations in claims 10 and 16 are correctly interpreted as means-plus-function limitations, (a) please identify the functions claimed in these limitations, as well as what structure(s) in the specification perform the claimed functions, and (b) discuss whether the limitations of claims 10–16 are met by the accused products at issue in the final ID.

3. Please discuss whether A&J waived petition of the ID's finding that the Dyna-Glo DGJ810CSB–D grill does not infringe any asserted claim of the '712 patent because it lacks the claimed "exhaust" and "exhaust means" on its openable covers. Assuming that A&J did not waive this finding, please discuss whether the DGJ810CSB–D grill infringes claims 1, 4, and 6–8 of the '712 patent.

4. The Commission is not changing its interpretation of the claim term "includes," which requires that an "exhaust" be located *on* the "openable [ ] cover," as set forth in the Commission's Opinion on June 27, 2014. Assuming that the asserted claims require that an "exhaust" be located *on* (but not necessarily wholly within) the "openable [ ] cover," please discuss with citations to the record evidence whether the Char-Broil Model No. 463724512 grill and the GHP DGB730SNB–D grill satisfy the "includes at least one exhaust" limitation for the claimed "first cover" in claim 1 and/or claim 10.

5. The ID found that the Respondents did not prove by clear and convincing evidence that the asserted claims of the '712 patent have been shown to be invalid as obvious over U.S. Patent No. 5,632,265 ("Koziol") in view of U.S. Patent No. 4,773,319 ("Holland '319") and/or U.S. Patent No. 6,606,986 ("Holland '986"). Please discuss what evidence supports or does not support modifying Koziol to include the smoke stacks disclosed in Holland '319 and/or Holland '986. If the "exhaust" limitation and/or the "exhaust means" limitations in claims 10 and 16 are correctly interpreted as means-plus-function limitations, please discuss whether the means-plus-function limitations of claims 10 and 16 are met by the prior art combination.

6. The ID found that the Respondents did not prove by clear and convincing evidence that the asserted claims of the '712 patent have been shown to be invalid as obvious over U.S. Patent No. 6,189,528 ("Oliver") in view of Holland '319. Please discuss what evidence supports or does not support modifying Oliver to include the smoke stacks disclosed in Holland '319. Please also discuss what evidence supports or does not support interpreting the lid ends 18 as described at column 4, line 67 to column 5, line 2 in Oliver as part of the "openable [] cover" and "openable [] cover means," and whether the space between the lid ends and the lid reflector meets the ALJ's construction of "exhaust." If the "exhaust" limitation and/or the "exhaust means" limitations in claims 10 and 16 are correctly interpreted as means-plus-function limitations, please discuss whether the means-plus-function limitations of claims 10 and 16 are met by the prior art combination.

7. Please discuss the evidence in the record that shows or does not show that the limitations in each of the dependent claims are disclosed in the prior art.

8. What record evidence supports a finding that OLP maintains commercially significant inventories of its original grills in the United States?

9. What relief, if any, does A&J request as to defaulting respondent Keesung?

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely

affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *FR* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding with respect to the asserted patent. Complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the date that the patent expires and the HTSUS numbers under which the accused products are imported, and provide identification information for all known importers of the subject articles. A party's written submission on the issues of remedy, the public interest, and bonding do not count towards its 60-page limit. The written submissions and proposed remedial orders must be filed no later than close of business on Friday, December 12, 2014. Reply submissions must be filed no later than the close of business on Friday, December 19, 2014. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337–TA–895") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

Issued: December 2, 2014.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2014–28640 Filed 12–5–14; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearings of the Judicial Conference Advisory Committees on Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure; Federal Register Citation of Previous Announcement: 79FR 48250

AGENCY: Judicial Conference of the United States Advisory Committees on Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure.

ACTION: Revised Notice of Proposed Amendments and Open Hearings.

Please note: The public hearing on the amendments to the Appellate Rules and Forms previously scheduled in Washington, DC on February 12, 2015, will now take place on February 17, 2015.

SUMMARY: The Advisory Committees on Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure have proposed amendments to the following rules and forms:

Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7

Bankruptcy Rules 1010, 1011, 2002, 3002, 3002.1, 3007, 3012, 3015, 4003, 5009, 7001, 9006, 9009, and New Rule 1012, and Official Forms 11A, 11B, 106J, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions, and New Official Forms 106J–2 and 113

Civil Rules 4, 6, and 82

Criminal Rules 4, 41, and 45

Public hearings are scheduled to be held on the amendments to:

- Appellate Rules and Forms in Phoenix, Arizona, on January 9, 2015, and in Washington, DC, on February 17, 2015;
- Bankruptcy Rules and Official Forms in Washington, DC, on January 23, 2015, and in Pasadena, California, on February 6, 2015;
- Civil Rules in Washington, DC, on October 31, 2014, and in Phoenix, Arizona, on January 9, 2015; and
- Criminal Rules in Washington, DC, on November 5, 2014, and in Nashville, Tennessee, on January 30, 2015.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing. All written comments and suggestions with respect to the proposed amendments may be submitted on or after the opening of the period for public comment on August 15, 2014, but no later than February 17, 2015. Written comments must be submitted electronically, following the instructions provided at: *http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx*. In accordance with established procedures, all comments submitted are available for public inspection.

The text of the proposed rules amendments and the accompanying Committee Notes can be found at the

United States Federal Courts' Web site at *http://www.uscourts.gov/rulesandpolicies/rules/proposed-amendments.aspx.*

FOR FURTHER INFORMATION CONTACT: Jonathan C. Rose, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE., Suite 7–240, Washington, DC 20544, Telephone (202) 502–1820.

Dated: December 2, 2014.

Jonathan C. Rose,

Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

[FR Doc. 2014–28595 Filed 12–5–14; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

RIN 1250–AA07

Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice.

SUMMARY: As a part of its continuing effort to reduce paperwork and respondent burdens, the Department of Labor (DOL) conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3505(c)(2)(A). The program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of the collection requirements on respondents can be properly assessed.

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB number. Notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 5 CFR 1230.5(a) and 1320.6.

DATES: Written comments must be submitted by February 6, 2015.

ADDRESSES: You may submit comments, identified by Control Number 1250–0NEW, by either one of the following methods:

Electronic comments: Through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments.

Mail, Hand Delivery, Courier: Address comments to Debra Carr, Director, Division of Policy, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB control number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to either transmit their comments electronically via the regulations.gov Web site or mail their comments early to ensure that they are timely received. Comments, including any personal information provided, become a matter of public record and will be posted to the regulations.gov Web site. They will also be summarized and/or included in the request for Office of Management and Budget approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Debra Carr, Director, Division of Policy, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers). Copies of this notice may be obtained in alternative formats (*e.g.*, Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0103 (not a toll-free number). TTY/TDD callers may call (202) 693–1337 (not a toll-free number) to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Background: On July 21, 2014 President Obama issued Executive Order 13672, titled "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government and Executive Order 11246, Equal Employment Opportunity." Executive Order 13672 amends Executive Order 11246 and directs DOL to prepare regulations to implement its requirements. Concurrent with this Notice, DOL is publishing a final rule implementing Executive Order 13672, which amended the existing regulations implementing Executive Order 11246 by substituting "sex, sexual orientation, gender identity, or national origin" for "sex or national origin" wherever the list of bases upon which Federal contractors are prohibited from discriminating against job applicants and employees appeared.[1] Among other things, these regulations set forth information disclosure and reporting requirements for covered Federal contractors, subcontractors, and federally assisted construction contractors and subcontractors. Information collection requirements addressed in this rule include modified language in the equal opportunity clause that contractors[2] must use in covered subcontracts and purchase orders; modified language that contractors must use in job advertisements and employment solicitations; and a modification to the requirement that a contractor report to the Department of State and OFCCP when their employees or prospective employees are denied a visa or entry to a country in which or with which it is doing business, and it believes the denial is due to a basis covered by Executive Order 11246, as amended by Executive Order 13672.

Current Action: Pursuant to the PRA implementing regulations at 5 CFR 1320.8(d)(1), this notice requests comments on the information collection request discussed above in the Background section of this notice. Interested parties are encouraged to provide comments to the individual identified in the **ADDRESSES** section above. In addition to having a 60-day opportunity to file comments with the Department, written comments under the PRA about the information collection requirements may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the DOL–OS, Office of Management and Budget, Room 10235, Washington, DC

[1] While the text of 41 CFR 60–1.11 contains the full list of protected characteristics, that section has been indefinitely suspended as per *Notice of Further Deferral of Effective Dates of Regulations,* 46 FR 18951 (Mar. 27, 1981) and *Payment of Membership Fees and Other Expenses to Private Organizations; Proposed Rule Withdrawal,* 46 FR 19004 (Mar. 27, 1981), and thus cannot be amended.

[2] Unless otherwise stated, the term "contractor" includes both "contractors" and "subcontractors," and the term "contract" also includes "subcontracts."

20503; You can submit comments to OMB by email at *OIRA_submission@omb.eop.gov*. The OMB will consider all written comments it receives within 30 days of publication of this notice.

II. Desired Focus of Comments: DOL and OMB are particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- 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: Office of Federal Contract Compliance Programs.

Type of Review: New Collection.

Title of Collection: Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors.

OMB Control Number: 1250—0NEW.

Affected Public: Private Sector—Business.

Estimated Number of Respondents: 100,000.

Frequency: On occasion.

Estimated Total Annual Burden Hours: 38,769.

Total estimated Annual Cost Burden (excluding hour monetization): $0.

Comments submitted in response to this notice will be summarized and may be included in the request for OMB approval of the final information collection request. The comments will become a matter of public record.

Signed at Washington, DC, this 3rd day of December, 2014.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

[FR Doc. 2014–28723 Filed 12–5–14; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the "National Longitudinal Survey of Youth 1997." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed in the Addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section below on or before February 6, 2015.

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (See Addresses section.)

SUPPLEMENTARY INFORMATION:

I. Background

The National Longitudinal Survey of Youth 1997 (NLSY97) is a nationally representative sample of persons who were born in the years 1980 to 1984. These respondents were ages 12–17 when the first round of annual interviews began in 1997; starting with round sixteen, the NLSY97 is conducted on a biennial basis. Round seventeen interviews will occur from September 2015 to May 2016. The Bureau of Labor Statistics (BLS) contracts with a vendor to conduct the NLSY97. The primary objective of the survey is to study the transition from schooling to the establishment of careers and families. The longitudinal focus of this survey requires information to be collected from the same individuals over many years in order to trace their education, training, work experience, fertility, income, and program participation.

One of the goals of the Department of Labor (DOL) is to produce and disseminate timely, accurate, and relevant information about the U.S. labor force. The BLS contributes to this goal by gathering information about the labor force and labor market and disseminating it to policymakers and the public so that participants in those markets can make more informed, and thus more efficient, choices. Research based on the NLSY97 contributes to the formation of national policy in the areas of education, training, work experience, fertility, income, and program participation. In addition to the reports that the BLS produces based on data from the NLSY97, members of the academic community publish articles and reports based on NLSY97 data for the DOL and other funding agencies. To date, approximately 372 articles examining NLSY97 data have been published in scholarly journals. The survey design provides data gathered from the same respondents over time to form the only dataset that contains this type of information for this important population group. Without the collection of these data, an accurate longitudinal dataset could not be provided to researchers and policymakers, thus adversely affecting the DOL's ability to perform its policy- and report-making activities.

II. Current Action

The BLS seeks approval to conduct round 17 of biennial interviews of the NLSY97. Respondents of the NLSY97 will undergo an interview of approximately 61 minutes during which they will answer questions about schooling and labor market experiences, family relationships, and community background.

During the fielding period for the main round 17 interviews, about 2 percent of respondents will be asked to participate in a brief validation interview a few weeks after the initial interview. The purpose of the validation interview is to verify that the initial interview took place as the interviewer reported and to assess the data quality of selected questionnaire items.

The BLS plans to record randomly selected segments of the main interviews during round 17. Recording interviews helps the BLS and NORC to

ensure that the interviews actually took place and interviewers are reading the questions exactly as worded and entering the responses properly. Recording also helps to identify parts of the interview that might be causing problems or misunderstanding for interviewers or respondents. Each respondent will be informed that the interview may be recorded for quality control, testing, and training purposes. If the respondent objects to the recording of the interview, the interviewer will confirm to the respondent that the interview will not be recorded and then proceed with the interview.

The round 17 questionnaire will resemble the round 16 questionnaire with few modifications. The round 17 questionnaire proposes an experiment to investigate the efficacy of preloads in bounding the respondents' recall of migration dates. This experiment will allow us to build a body of knowledge about the feasibility of web questionnaire administration, which may require fielding questions without preloads. The results will give us some insight into the impact of removing these preloads on data quality.

New questions include respondents' business ownership, new wage bargaining questions, questions about nonresident children, one question about medical debt and mental health scale questions. Round 17 also reintroduced the child care long section, parent supportiveness, "whom do you turn to", alcohol and drug use, and health behaviors questions from previous rounds.

As in prior rounds of the NLSY97, round 17 will include a pretest conducted several months before the main fielding to test survey procedures and questions and resolve problems before the main fielding begins.

III. Desired Focus of Comments

The Bureau of Labor Statistics 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.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: Revision of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: National Longitudinal Survey of Youth 1997.

OMB Number: 1220–0157.

Affected Public: Individuals or households.

Form	Total respondents	Frequency	Total responses	Average time per response	Estimated total burden (hours)
NLSY97 Pretest June–July	150	One-time	150	61	152.5
NLSY97 R16 advance web test June–July 2013	1,200	One-time	1,200	10	200
Main NLSY97: September 2013–May 2014	7,200	One-time	7,200	61	7,320
Validation interview: October 2013–June 2014	144	One-time	144	4	9.6
*Totals**	*7,400*		*8,694*		*7,682*

* The difference between the total number of respondents and the total number of responses reflects the fact that about 7,200 are expected to complete the main interview. In addition, about 144 respondents will be interviewed twice, once in the main survey and a second time in the 4-minute validation interview. We estimate achieving about 1,200 web updates; most of these will be from respondents who also complete the main interview, but a small number (perhaps 50) may complete only the web update and not also the main interview.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 3rd day of December 2014.

Kimberly D. Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2014–28655 Filed 12–5–14; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 14–126]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from December 8, 2014.

ADDRESSES: Interested persons are invited to submit written comments regarding the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 7th Street NW., Washington DC, 20543. Attention: Desk Officer for NASA.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Frances Teel, NASA PRA Clearance Officer, NASA Headquarters, 300 E Street SW., Mail Code JF000, Washington, DC 20546, *Frances.C.Teel@nasa.gov.*

I. Abstract

NASA's founding legislation, the Space Act of 1958, as amended, directs the agency to expand human knowledge of Earth and space phenomena and to preserve the role of the United States as a leader in aeronautics, space science,

and technology. The NASA Office of Education administers the agency's national education activities in support of the Space Act, including the performance measurement and evaluation of educational projects and programs. This generic clearance will allow the Office of Education to test and pilot with subject matter experts, higher education students, educators, and interested parties new and existing information collection forms and assessment instruments for the purposes of improvement and establishing validity and reliability characteristics of the forms and instruments. Forms and instruments to be tested include program application forms, customer satisfaction questionnaires, focus group and cognitive interview protocols, and project activity survey instruments. Methodological testing will include focus group discussions, pilot surveys to test new individual question items as well as the complete form and instrument. In addition, split-half methodology and similar protocols will be used to determine reliability characteristics of the forms and instruments. Methodological testing will assure that forms and instruments accurately and consistently collect and measure what they are intended to measure and that data collection items are interpreted precisely and consistently, all towards the goal of accurate Agency reporting while improving the execution of NASA Education project activities.

This 30-day FRN reflects a reduction in the estimated number of respondents, as published in the 60-day FRN, Volume 78, Number 237, pages 74169–74170 on Tuesday, December 10, 2013. The targeted respondent pool will include educators, pre-college, undergraduate, graduate, and post-graduate students only. As a result of this reduction, the estimated cost burden also decreased. The cost burden reflects the estimated amount of time it will take for respondents to read the instructions, gather and submit the information. This 30-day notice also replaces FRN Notice 14–121, Volume 79, Number 225, pages 69537–69538 published on Friday, November 21, 2014 which incorrectly identified secondary students as part of the respondent pool.

II. Method of Collection

Electronic, paper, and focus group interviews.

III. Data

Title: Generic Clearance for the NASA Office of Education Performance Measurement and Evaluation (Testing).

OMB Number: 2700–XXXX.

Type of review: New Generic Clearance.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 3,358.

Estimated Annual Responses: Variable.

Estimated Time per Response: Variable.

Estimated Total Annual Burden Hours: 2,312.

Estimated Total Annual Cost: $31,876.37.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Frances Teel,

NASA PRA Clearance Officer.

[FR Doc. 2014–28654 Filed 12–5–14; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (14–129)]

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of license availability.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 207, 37 CFR part 404. The inventions listed below are assigned to the United States Government as represented by the Administrator of the National Aeronautics Space Administration (NASA). The inventions collectively known as SpaceCube 2.0 provide Radiation-tolerant data processing systems are made available for licensing by the NASA. The inventions are disclosed in United States Patent Number SpaceCube v. 2.0 Flight Power Card, Application No. 14/040848; SpaceCube v2.0 Micro, Application No. 14/040924; SpaceCube v2.0 Flight Processor Card, Application No. 14/041407; SpaceCube 2.0 an Advanced Hybrid On-Board Data Processor, Application No. 12/570134; SpaceCube v2.0 Processor Card, Engineering Model, Application No. 14/041510.

DATES: Requests should be made prior to December 17, 2014.

FOR FURTHER INFORMATION CONTACT: Requests for data and inventor interviews should be directed to Sia Argue, (301) 286–8994, *sia.argue@nasa.gov,* NASA Goddard Space Flight Center, 8800 Greenbelt Road GSFC: 504, 022:C265B, Greenbelt, MD 20771.

SUPPLEMENTARY INFORMATION: NASA–GSFC intends to move expeditiously to commercialize these patents by licensing to a cooperative research and development partner. Licensing application packages can be obtained by contacting Sia Argue and all applications and commercialization plans should be returned to NASA–GSFC by January 31, 2014. NASA–GSFC intends to ensure that its licensed inventions are broadly commercialized throughout the United States. Ideal licensees will be able to manufacture and commercialize boards that are fully tested to NASA's highest space flight specifications (IPC 6012B Class 3/A, GEVS, etc.), mount (and rework) back-to-back Virtex 5 FPGAs on a two-sided board, meet the NPR/ISO requirements for space flight board fabrication, comply with NASA–STD–8739.1 (staking, etc.), proven experience in managing a Level 1 parts program, ability to provide customer technical support, and will possess adequate facilities to conduct function and environment testing.

Enidia Santiago-Arce,

Technology Transfer Manager.

[FR Doc. 2014–28666 Filed 12–5–14; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

[NARA–2015–015]

State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS–PAC)

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of Advisory Committee meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing

regulation 41 CFR 101–6, NARA announces the following committee meeting.

DATES: The meeting will be held on January 28, 2015, from 10:00 a.m. to 12:00 p.m. EDT.

ADDRESSES: National Archives and Records Administration, 700 Pennsylvania Avenue NW., Jefferson Room, Washington, DC 20408.

FOR FURTHER INFORMATION CONTACT: Robert J. Skwirot, Senior Program Analyst, by mail at ISOO, National Archives Building, 700 Pennsylvania Avenue NW., Washington, DC 20408, by telephone number at (202) 357–5398, or by email at *robert.skwirot@nara.gov.* Contact ISOO at *ISOO@nara.gov.*

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss matters relating to the Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities. The meeting will be open to the public. However, due to space limitations and access procedures, you must submit the name and telephone number of individuals planning to attend to the Information Security Oversight Office (ISOO) no later than Friday, January 23, 2015. ISOO will provide additional instructions for accessing the meeting's location.

Dated: December 2, 2014.

Patrice Little Murray,

Committee Management Officer.

[FR Doc. 2014–28683 Filed 12–5–14; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10:00 a.m., Thursday, December 11, 2014.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. NCUA's Rules and Regulations, Appraisals.
2. Notice and Request for Comments, Economic Growth and Regulatory Paperwork Reduction Act Review.
3. 2015 Corporate Stabilization Fund Oversight Budget.

FOR FURTHER INFORMATION CONTACT: Gerard Poliquin, Secretary of the Board, Telephone: 703–518–6304.

Gerard Poliquin,

Secretary of the Board.

[FR Doc. 2014–28826 Filed 12–4–14; 4:15 pm]

BILLING CODE 7535–01–P

NATIONAL LABOR RELATIONS BOARD

Realignment of Regional Office Geographic Boundaries

AGENCY: National Labor Relations Board.

ACTION: Notice of geographic realignment of the following Regional Offices: Boston (Region 1), Buffalo (Region 3), Baltimore (Region 5), Pittsburgh (Region 6) and Cincinnati (Region 9).

SUMMARY: The National Labor Relations Board gives notice of its intent to realign the geographic boundaries between the Boston and Buffalo Regional Offices and between the Baltimore, Pittsburgh, and Cincinnati Regional Offices.

DATES: *Effective Date:* January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, 1099 14th Street NW., Room 11600, Washington, DC 20570. Telephone: (202) 273–1067.

SUPPLEMENTARY INFORMATION: The National Labor Relations Board has decided to realign the geographic boundaries between the Boston and Buffalo Regional Offices and between the Baltimore, Pittsburgh, and Cincinnati Regional Offices in order to improve service to the public, promote increased administrative efficiency and reduce travel costs and staff time spent in transit. Accordingly, the jurisdiction over the following counties is transferred as indicated.

County and State	Transferring region	Receiving region
Addison, Bennington, Chittenden, Franklin, Grand Isle, Lamoille, Orange, Rutland, Washington, Windham and Windsor Counties, VT.	Boston	Buffalo.
Clay, Fayette, Nicholas, Raleigh and Wyoming Counties, WV	Cincinnati	Pittsburgh.
Grant, Hardy, Mineral and Pendleton Counties, WV	Baltimore	Pittsburgh.
Allegany and Garret Counties, MD	Baltimore	Pittsburgh.
Highland County, VA	Baltimore	Pittsburgh.

Cases that are pending as of the effective date of the realignment will remain in the Regional Office in which they were originally filed for further processing unless the parties to a specific case are advised otherwise by an order transferring that case. The addresses of the Regional Offices affected by the realignment are:

National Labor Relations Board, Region 1, 10 Causeway Street, 6th Floor, Boston, MA 02222–1072, (617) 565–6700.

National Labor Relations Board, Region 3, Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202–2387, (716) 551–4931.

National Labor Relations Board, Region 5, Bank of America Center, Tower II, 100 S. Charles Street, 6th Floor, Baltimore, MD 21201, (410) 962–2822.

National Labor Relations Board, Region 6, William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, PA 15222–4111, (412) 395–4400.

National Labor Relations Board, Region 9, John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202–3271, (513) 684–3686.

Dated: December 2, 2014.

By direction of the Board.

William B. Cowen,

Solicitor, National Labor Relations Board.

[FR Doc. 2014–28587 Filed 12–5–14; 8:45 am]

BILLING CODE 7545–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–275–LR and 50–323–LR; ASLBP No. 10–900–01–LR–BD01]

Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2); Notice of Atomic Safety and Licensing Board Reconstitution

Pursuant to 10 CFR 2.313(c) and 2.321(b), the Atomic Safety and Licensing Board in the above-captioned *Diablo Canyon Nuclear Power Plant, Units 1and 2* license renewal proceeding is hereby reconstituted by appointing Administrative Judge Paul S. Ryerson to serve as Chairman in place of Administrative Judge Alex S. Karlin.

All correspondence, documents, and other materials shall continue to be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302 *et seq.*

Issued at Rockville, Maryland this 1st day of December 2014.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2014–28707 Filed 12–5–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2014–0001]

Sunshine Act Meeting Notice

DATE: December 8, 15, 22, 29, 2014; January 5, 12, 2015.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of December 8, 2014

There are no meetings scheduled for the week of December 8, 2014.

Week of December 15, 2014—Tentative

Tuesday, December 16, 2014

9:00 a.m. Update on Research and Test Reactor Initiatives (Public Meeting) (Contact: Alexander Adams, 301–415–1127)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Thursday, December 18, 2014

9:30 a.m. Briefing on Equal Employment Opportunity, Diversity, and Small Business Programs (Public Meeting) (Contact: Larniece McKoy Moore, 301–415–1942)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of December 22, 2014—Tentative

There are no meetings scheduled for the week of December 22, 2014.

Week of December 29, 2014—Tentative

There are no meetings scheduled for the week of December 29, 2014.

Week of January 5, 2015—Tentative

There are no meetings scheduled for the week of January 5, 2015.

Week of January 12, 2015—Tentative

There are no meetings scheduled for the week of January 12, 2015.

* * * * *

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Glenn Ellmers at (301) 415–0442 or via email at *Glenn.Ellmers@nrc.gov.*

* * * * *

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 301–287–0727, 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 Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *Patricia.Jimenez@nrc.gov* or *Brenda.Akstulewicz@nrc.gov.*

Dated: December 4, 2014.

Glenn Ellmers,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2014–28788 Filed 12–4–14; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250–LA and 50–251–LA; ASLBP No. 15–935–02–LA–BD01]

Atomic Safety and Licensing Board; In the Matter of Florida Power & Light Company (Turkey Point Nuclear Generating, Units 3 and 4); Notice and Order (Scheduling Oral Argument)

December 1, 2014.

Before Administrative Judges:
Michael M. Gibson, Chairman;
Dr. Michael F. Kennedy;
Dr. William W. Sager.

On October 14, 2014, petitioner Citizens Allied for Safe Energy, Inc. (CASE) filed a petition requesting a hearing on license amendments issued to the Florida Power & Light Company's (FPL) Turkey Point Nuclear Generating Units 3 and 4 that increased the ultimate heat sink water temperature limit for the plant's cooling canal system (CCS).[1] CASE's petition includes four proposed contentions, which read as follows:

Contention 1—The uprate of Turkey Point reactors 3 & 4 has been concurrent with alarming increases in salinity, temperature, tritium and chloride in the CCS area.

Contention 2—The exigent CCS problems started years before July, 2014 and were being addressed in 2013 and earlier.

Contention 3—The measures being used to control the CCS conditions are extraordinarily invasive, environmentally usurious and some untested.

Contention 4—The CCS is aging, old technology and FPL has no redundancy for Units 3 & 4 limiting corrective actions.[2]

On November 10, 2014, the NRC Staff and FPL filed answers arguing that CASE fails to meet the NRC's standing and contention admissibility requirements.[3] On November 17, 2014, CASE submitted a consolidated reply to the NRC Staff and FPL answers.[4]

The Board hereby schedules an oral argument on standing and contention admissibility to be held on January 14, 2015, at the Hampton Inn and Suites, 2855 NE 9th Street, Homestead, FL 33033, in the Reef Room. The argument will commence at 9:00 a.m. EST. The Board anticipates that the argument will be completed by 5:00 p.m. EST on

[1] Citizens Allied for Safe Energy, Inc. Petition to Intervene and Request for a Hearing (Oct. 14, 2014).

[2] *Id.* at 5.

[3] NRC Staff's Answer to Citizens Allied for Safe Energy, Inc.'s Petition for Leave to Intervene and Request for Hearing (Nov. 10, 2014); FPL's Answer to Citizens Allied for Safe Energy, Inc.'s Petition to Intervene and Request for a Hearing (Nov. 10, 2014).

[4] Citizens Allied for Safe Energy, Inc.'s Reply to FPL and to NRC Staff Answers to Its Petition to Intervene and Request for a Hearing (Nov. 17, 2014).

January 14. Only authorized representatives or counsel for CASE, FPL, and the NRC Staff who have entered written notice of appearance pursuant to 10 CFR 2.314(b) will be entitled to participate.

The sole purpose of the oral argument is to enable the Board to obtain the necessary factual and legal information to determine whether CASE has standing and whether its proffered contentions are admissible. Participants should be prepared to answer the Board's questions concerning all factual and legal issues raised in the pleadings. While this oral argument will be open to the public, no witnesses, other representatives of the parties, or members of the public will be heard during the argument.

It is so ordered.

Rockville, Maryland, December 1, 2014.

For the Atomic Safety and Licensing Board.

Michael M. Gibson,

Chairman, Administrative Judge.

[FR Doc. 2014–28606 Filed 12–5–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0232]

Probabilistic Risk Assessment and Severe Accident Evaluation for New Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Standard review plan-draft section revision; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on the NUREG–0800, "Standard Review Plan (SRP) for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR [Light Water Reactor] Edition," Section 19.0, Revision 3, "Probabilistic Risk Assessment and Severe Accident Evaluation for New Reactors." The NRC seeks public comment on draft Section 19.0, Revision 3, concerning deletion of certain considerations for the design certification rule, additional proposed acceptance criteria and review procedures for the NRC staff's review of an applicant's assessment of risk from accidents that could affect multiple modules in facilities with small modular integral pressurized water reactors (iPWRs), and additional procedures for the NRC staff's review of the results of the Probabilistic Risk Assessment (PRA) for non-power modes of operation.

DATES: Submit comments by February 6, 2015. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject).

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0232. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- Mail comments to: Cindy Bladey, Office of Administration, Mail Stop: 3WFN–06–44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Jonathan DeGange, telephone: 301–415–6992, email: *Jonathan.DeGange@nrc.gov* or Nishka Devaser, telephone: 301–415–5196, email: *Nishka.Devaser@nrc.gov*, both are staff of the Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555 0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2012–0232 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document by any of the following methods:

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0232.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may access publicly available documents online in the NRC Library 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*. The SRP draft Section 19.0, Revision 3, Section Revision 2, and a redline strikeout detailing the specific changes from Revision 2 to Revision 3 are available in ADAMS under Accession Nos. ML14161A594, ML071700652, and ML14161A558.
- 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.

B. Submitting Comments

Please include Docket ID NRC–2012–0232 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, 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 the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

On October 9, 2012 (77 FR 61446), the NRC solicited public comment on a prior version of draft Section 19.0, Revision 3. However, recent pre-application interactions between NRC staff and potential applicants for design certification have highlighted the NRC's expectations for information that is sufficiently complete and technically adequate to allow the NRC staff to conduct its detailed technical review and complete it within a predictable timeframe. For this reason, the NRC believes that it is important to include the additional guidance in Section 19.0, Revision 3, at this time.

III. Further Information

The NRC seeks public comment on draft Section 19.0, Revision 3.

Specifically, the NRC seeks public comment only on the following three specific areas of focus: (1) Deletion of considerations for the design certification rule, (2) proposed acceptance criteria and review procedures for the NRC staff's review of the applicant's assessment of risk from accidents that could affect multiple modules in facilities with small modular iPWRs, and (3) procedures for the NRC staff's review of the results of the PRA for non-power modes of operation. This revision should clarify guidance related to the PRA for non-power modes of operation and small modular iPWRs.

Following the NRC staff's evaluation of public comments, the NRC intends to finalize SRP Section 19.0, Revision 3 in ADAMS and post it on the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0800/*. The SRP is guidance for the NRC staff. The SRP is not a substitute for the NRC's regulations, and compliance with the SRP is not required.

III. Backfitting and Issue Finality

Issuance of this draft SRP, if finalized, would not constitute backfitting as defined in § 50.109 of Title 10 of the *Code of Federal Regulations* (10 CFR) (the Backfit Rule) or otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The NRC's position is based upon the following considerations:

1. *The draft SRP positions, if finalized, would not constitute backfitting, inasmuch as the SRP is internal guidance to the NRC staff.*

The SRP provides internal guidance to the NRC staff on how to review an application for NRC's regulatory approval in the form of licensing. Changes in internal staff guidance are not matters for which either nuclear power plant applicants or licensees are protected under either the Backfit Rule or the issue finality provisions of 10 CFR part 52.

2. *The NRC staff has no intention to impose the SRP positions on existing licensees either now or in the future.*

The NRC staff does not intend to impose or apply the positions described in the draft SRP to existing licenses and regulatory approvals. Hence, the issuance of a final SRP—even if considered guidance within the purview of the issue finality provisions in 10 CFR part 52—would not need to be evaluated as if it was a backfit or as being inconsistent with issue finality provisions. If, in the future, the NRC staff seeks to impose a position in the SRP on holders of already issued licenses in a manner that does not provide issue finality as described in the applicable issue finality provision, then the NRC staff must make the showing as set forth in the Backfit Rule or address the criteria for avoiding issue finality as described in the applicable issue finality provision.

3. *Backfitting and issue finality do not—with limited exceptions not applicable here—protect current or future applicants.*

Applicants and potential applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. Neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52, with certain exclusions, were intended to apply to every NRC action that substantially changes the expectations of current and future applicants. The exceptions to the general principle are applicable whenever an applicant references a 10 CFR part 52 license (*e.g.*, an early site permit) and/or NRC regulatory approval (*e.g.*, a design certification rule) with specified issue finality provisions.

The NRC staff does not, at this time, intend to impose the positions represented in the draft SRP in a manner that is inconsistent with any issue finality provisions. If, in the future, the NRC staff seeks to impose a position in the draft SRP in a manner that does not provide issue finality as described in the applicable issue finality provision, then the NRC staff must address the criteria for avoiding issue finality as described in the applicable issue finality provision.

Dated at Rockville, Maryland, this 24th day of November 2014.

For the Nuclear Regulatory Commission.

Joseph Colaccino,

Chief, New Reactor Rulemaking and Guidance Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.

[FR Doc. 2014–28601 Filed 12–5–14; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: (1) Report of Withholdings and Contributions for Health Benefits, Life Insurance and Retirement (Standard Form 2812); (2) Report of Withholdings and Contributions for Health Benefits By Enrollment Code (Standard Form 2812–A); (3) Supplemental Semiannual Headcount Report (OPM Form 1523), 3206–0262

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: Trust Funds Group of the Office of Chief Financial Officer, Office of Personnel Management (OPM), offers the general public and other federal agencies the opportunity to comment on changes to the existing information collection 3206–0262, Standard Form 2812, Standard Form 2812–A, and OPM Form 1523. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35), as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection.

DATES: Comments are encouraged and will be accepted until February 6, 2015. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Trust Funds Group, Room 4416, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Attention: Paul Gvozdov, or sent via electronic mail to *FundsManagement-TrustFunds@opm.gov*.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Trust Funds Group, Room 4416, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Attention: Paul Gvozdov, or sent via electronic mail to *FundsManagement-TrustFunds@opm.gov*.

SUPPLEMENTARY INFORMATION: Section 401 of the "Bipartisan Budget Act of 2013," signed into law by the President on December 26, 2013, makes another change to the Federal Employees' Retirement System (FERS). Beginning January 1, 2014, new employees (as designated in the statute) will have to pay higher employee contributions, an increase of 1.3 percent of salary above the percentage set for the FERS Revised Annuity Employees (RAE). Section 8401 of Title 5, United States Code, has been amended to add a new definition of FERS Further Revised Annuity Employees (FRAE). With one exception, there is no difference in the FERS basic benefit paid to FERS, FERS–RAE, and FERS–FRAE employees. (The FERS basic benefit for congressional employees and Members of Congress under FERS–RAE and FERS–FRAE is different than the basic benefit paid to those groups under FERS.)

The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Analysis

Agency: Trust Funds Group of the Office of Chief Financial Officer, Office of Personnel Management.

Title: (1) Report of Withholdings and Contributions for Health Benefits, Life Insurance and Retirement (Standard Form 2812); (2) Report of Withholdings and Contributions for Health Benefits By Enrollment Code (Standard Form 2812–A); (3) Supplemental Semiannual Headcount Report (OPM Form 1523).

OMB Number: 3260–0262.

Frequency: Semiannually for OPM Form 1523 and once-per-pay-period for the Standard Form 2812 and Standard Form 2812–A.

Affected Public: Public Entities with Federal Employees and Retirees.

Number of Respondents: 100.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 2700.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–28612 Filed 12–5–14; 8:45 am]

BILLING CODE 6325–23–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Application for Death Benefits Under the Federal Employees Retirement System SF 3104; and Documentation and Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death SF 3104B, 3206–0172

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an extension, without change, of a currently approved information collection (ICR) 3206–0172, Application for Death Benefits Under the Federal Employees Retirement System and Documentation and Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection.

DATES: Comments are encouraged and will be accepted until February 6, 2015. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the U.S. Office of Personnel Management, Retirement Services, Union Square Room 370, 1900 E. Street NW., Washington, DC 20415–3500, Attention: Alberta Butler or sent via electronic mail to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E. Street, NW., Washington, DC 20415, Attention: Cyrus S. Benson or sent via electronic mail to *Cyrus.Benson@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

SF 3104 is needed to collect information so that OPM can pay death benefits to the survivor of Federal employees and annuitants. SF 3104B is needed for deaths in service so that survivors can make the needed elections regarding health benefits, military service and payment of the death benefit.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management

Title: Application for Death Benefits Under the Federal Employees Retirement System and Documentation and Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death

OMB Number: 3206–0172

Frequency: On occasion

Affected Public: Individuals or Households

Number of Respondents: SF 3104 = 12,734 and SF 3104B = 4,017

Estimated Time Per Respondent: 60

Total Burden Hours: 16,751

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–28613 Filed 12–5–14; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from September 1, 2014, to September 30, 2014.

FOR FURTHER INFORMATION CONTACT: Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, (202) 606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific

authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/*. OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule A authorities to report during September 2014.

Schedule B

No Schedule B authorities to report during September 2014.

Schedule C

The following Schedule C appointing authorities were approved during September 2014.

Agency name	Organization name	Position title	Authorization No.	Effective date
Department of Agriculture	Farm Service Agency	State Executive Director—Utah	DA140116	9/8/2014
	Office of the Assistant Secretary for Congressional Relations.	Legislative Analyst	DA140120	9/8/2014
	Office of the Secretary	Deputy White House Liaison	DA140123	9/18/2014
	Office of Communications	Deputy Director of Scheduling	DA140122	9/23/2014
Department of Commerce	Office of the General Counsel	Deputy General Counsel for Strategic Initiatives.	DC140156	9/8/2014
	Office of the Assistant Secretary for Economic Development.	Director of Public Affairs	DC140162	9/8/2014
	Office of Assistant Secretary for Legislative and Intergovernmental Affairs.	Associate Director of Legislative and Intergovernmental Affairs.	DC140164	9/16/2014
	Office of Public Affairs	Deputy Speechwriter	DC140165	9/19/2014
	Office of the Under Secretary	Chief Speechwriter	DC140170	9/23/2014
Commission on Civil Rights	Office of Commissioners	Special Assistant (3)	CC140003	9/22/2014
			CC140005	9/22/2014
			CC140006	9/25/2014
Consumer Product Safety Commission.	Office of Commissioners	Chief of Staff	PS140013	9/15/2014
		Special Assistant	PS140016	9/30/2014
Department of Defense	Office of the Secretary	Confidential Assistant	DD140142	9/10/2014
		Special Assistant for Protocol	DD140143	9/16/2014
		Speechwriter	DD140139	9/19/2014
	Office of the Assistant Secretary of Defense (Asian and Pacific Security Affairs).	Special Assistant for East Asia	DD140134	9/19/2014
	Office of the Assistant Secretary of Defense (Homeland Defense and America's Security Affairs).	Special Assistant for Homeland Defense and America's Security Affairs.	DD140146	9/29/2014
Department of the Air Force	Office of the Under Secretary	Special Assistant	DF140031	9/8/2014
Department of Education	Office of the Under Secretary	Confidential Assistant	DB140104	9/8/2014
	Office of the Deputy Secretary	Special Assistant	DB140051	9/9/2014
	Office of Postsecondary Education	Deputy Assistant Secretary	DB140117	9/17/2014
	Office of Innovation and Improvement.	Special Assistant	DB140118	9/19/2014
Department of Energy	Office of Management	Deputy Director, Office of Scheduling and Advance.	DE140101	9/8/2014
	Assistant Secretary for Congressional and Intergovernmental Affairs.	Special Advisor	DE140096	9/19/2014
	Office of the Deputy Secretary	Special Assistant	DE140106	9/19/2014
	Office of Public Affairs	Director of Digital Strategy	DE140108	9/19/2014
	Loan Programs Office	Senior Advisor	DE140109	9/19/2014
	Office of Environmental Management.	Special Assistant	DE140110	9/19/2014
Environmental Protection Agency	Office of Public Affairs	Advisor for Digital Strategy and Engagement.	EP140047	9/15/2014
	Office of Public Engagement and Environmental Education.	Deputy Associate Administrator for Public Engagement and Environmental Education.	EP140049	9/25/2014
Export–Import Bank	Office of Communications	Senior Vice President for Communications.	EB140011	9/15/2014
	Office of Congressional Affairs	Senior Vice President	EB140012	9/23/2014
Department of Health and Human Services.	Office of the Assistant Secretary for Legislation.	Special Assistant and Director of Special Projects.	DH140123	9/2/2014
		Special Assistant for Human Services.	DH140126	9/2/2014
	Office of the Secretary	Special Assistant	DH140125	9/4/2014
	Office of the Assistant Secretary for Public Affairs.	Communications Director for Health Care.	DH140135	9/19/2014
		Press Secretary	DH140137	9/19/2014
Department of Homeland Security	Office of the Chief Privacy Officer	Special Assistant	DM140237	9/2/2014
	Office of the Executive Secretariat	Writer-Editor	DM140232	9/8/2014
	Office of the Assistant Secretary for Public Affairs.	Deputy Press Secretary	DM140244	9/22/2014

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Under Secretary for National Protection and Programs Directorate.	Advisor for Counterterrorism and Intelligence.	DM140246	9/24/2014
Department of Housing and Urban Development.	Office of the General Counsel	Senior Counsel for Oversight	DU140048	9/11/2014
	Office of Public Affairs	Assistant Press Secretary	DU140050	9/19/2014
Department of Justice	Office of Legal Policy	Senior Counsel	DJ140119	9/2/2014
	Office on Violence Against Women	Confidential Assistant	DJ140120	9/2/2014
	Civil Division	Senior Counsel	DJ140122	9/8/2014
	Office of Public Affairs	Press Assistant (2)	DJ140126	9/22/2014
			DJ140134	9/30/2014
Department of Labor	Office of the Secretary	Counselor to the Secretary	DL140095	9/2/2014
	Office of Congressional and Intergovernmental Affairs.	Regional Representative	DL140097	9/11/2014
		Deputy Director of Intergovernmental Affairs.	DL140103	9/19/2014
		Director of Intergovernmental Affairs.	DL140094	9/22/2014
National Aeronautics and Space Administration.	Office of Legislative and Intergovernmental Affairs.	Senior Advisor	NN140066	9/8/2014
Office of Management and Budget	Office of Information and Regulatory Affairs.	Counselor	BO140034	9/8/2014
	Office of Federal Procurement Policy.	Confidential Assistant	BO140036	9/29/2014
Office of National Drug Control Policy.	Office of the Director	Policy and Administrative Coordinator.	QQ140006	9/9/2014
	Office of Public Affairs	Associate Director, Office of Public Affairs.	QQ140007	9/9/2014
Pension Benefit Guaranty Corporation.	Deputy Chief Policy Office	Confidential Assistant	BG140001	9/23/2014
Small Business Administration	Office of the Administrator	Director of Scheduling and Advance.	SB140035	9/11/2014
	Office of International Trade	Associate Administrator for International Trade.	SB140037	9/24/2014
Department of State	Office of the Chief of Protocol	Protocol Officer (Visits)	DS140121	9/2/2014
		Protocol Officer (Gifts)	DS140122	9/15/2014
	Bureau of Economic and Business Affairs.	Staff Assistant	DS140128	9/16/2014
	Foreign Policy Planning Staff	Staff Assistant	DS140130	9/16/2014
	Bureau of Energy Resources	Special Assistant	DS140135	9/30/2014
Department of Transportation	Office of the Administrator	Director of Governmental Affairs	DT140056	9/9/2014
		Associate Administrator for Communications and Legislative Affairs.	DT140058	9/19/2014
	Office of General Counsel	Associate General Counsel	DT140057	9/19/2014
	Office of Public Affairs	Deputy Director of Public Affairs	DT140060	9/19/2014
	Office of Assistant Secretary for Aviation and International Affairs.	Special Assistant	DT140061	9/30/2014
Department of the Treasury	Office of the Secretary of the Treasury.	Counselor to the Secretary	DY140120	9/11/2014

The following Schedule C appointing authorities were revoked during September 2014.

Agency name	Organization name	Position title	Authorization number	Vacate date
Department of Agriculture	Farm Service Agency	State Executive Director—California.	DA130169	9/7/2014
	Office of the Assistant Secretary for Congressional Relations.	Staff Assistant	DA110044	9/20/2014
Department of Commerce	Assistant Secretary and Director General for United States and Foreign Commercial Service.	Special Assistant	DC130015	9/6/2014
	Director General of the United States and Foreign Commercial Service and Assistant Secretary for Global Markets.	Special Assistant for Policy Initiatives.	DC140106	9/20/2014
Commission on Civil Rights	Office of Commissioners	Special Assistant to the Commissioner.	CC130003	9/15/2014

Agency name	Organization name	Position title	Authorization number	Vacate date
Department of Education	Office of the Deputy Secretary	Confidential Assistant	DB130044	9/20/2014
Department of Energy	Office of the Deputy Secretary	Special Assistant to the Deputy Chief of Staff.	DE130090	9/6/2014
Department of Health and Human Services.	Office of the Secretary	Director of Scheduling and Advance.	DH130059	9/2/2014
	Office of the Assistant Secretary for Legislation.	Confidential Assistant to the Deputy Assistant Secretary for Mandatory Health Programs.	DH120011	9/6/2014
		Special Assistant	DH130036	9/6/2014
	Office of the Assistant Secretary for Preparedness and Response.	Confidential Assistant	DH130049	9/6/2014
Department of Homeland Security	Office of the Assistant Secretary for Policy.	Senior Director	DM130155	9/5/2014
	Office of the Assistant Secretary for Public Affairs.	Public Affairs and Strategic Communications Assistant.	DM120151	9/6/2014
	United States Immigration and Customs Enforcement.	Special Assistant	DM110170	9/9/2014
	Office of the Assistant Secretary for Policy.	Confidential Assistant	DM140015	9/20/2014
Department of Justice	Executive Office for United States Attorneys.	Counsel	DJ140037	9/6/2014
Department of Labor	Office of the Secretary	Special Assistant	DL090130	9/6/2014
Department of the Navy	Office of the Under Secretary of the Navy.	Director, Strategic Communications	DN110038	9/6/2014
Office of the Secretary of Defense	Office of Assistant Secretary of Defense (Public Affairs).	Speechwriter	DD130026	9/20/2014
Department of Transportation	Office of the Secretary	Associate Director for Transportation Policy.	DT130039	9/1/2014
	Office of the Administrator	Director of Communications and Legislative Affairs.	DT100045	9/20/2014
	Office of Assistant Secretary for Governmental Affairs.	Deputy Assistant Secretary for Governmental Affairs.	DT110045	9/20/2014
	Office of Congressional Affairs	Director of Congressional Affairs	DT130027	9/20/2014
	Office of Chief Information Officer	Director of Information Technology Strategy.	DT130030	9/20/2014

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–28622 Filed 12–5–14; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of Federal Prevailing Rate Advisory Committee meeting dates in 2015.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on—

Thursday, January 15, 2014
Thursday, February 19, 2014
Thursday, March 19, 2014
Thursday, April 16, 2014
Thursday, May 21, 2014
Thursday, June 18, 2014
Thursday, July 16, 2014
Thursday, August 20, 2014
Thursday, September 17, 2014
Thursday October 15, 2014
Thursday, November 19, 2014
Thursday, December 17, 2014

The meetings will start at 10 a.m. and will be held in Room 5A06A, U.S. Office of Personnel Management Building, 1900 E Street NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal prevailing rate employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the U.S. Office of Personnel Management.

These scheduled meetings are open to the public with both labor and management representatives attending. During the meetings either the labor members or the management members may caucus separately to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the U.S. Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public. Reports for calendar years 2008 to 2013 are posted at *http://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wage-system/#url=FPRAC.* Previous reports are also available, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee at U.S. Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5H27, 1900 E Street NW., Washington, DC 20415, (202) 606–2858.

U.S. Office of Personnel Management.

Sheldon Friedman,

Chairman, Federal Prevailing Rate Advisory Committee.

[FR Doc. 2014–28616 Filed 12–5–14; 8:45 am]

BILLING CODE 6325–49–P

OFFICE OF PERSONNEL MANAGEMENT

Hispanic Council on Federal Employment; Meeting

AGENCY: U.S. Office of Personnel Management.

ACTION: Updated time of December 19, 2014 council meeting.

SUMMARY: The Hispanic Council on Federal Employment (Council) is updating the time of the Friday, December 19, 2014 meeting and will hold the next Council meeting at the location shown below at the following time: 2:00 to 4:00 p.m.

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.

Location: U.S. Office of Personnel Management, 1900 E St. NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Veronica E. Villalobos, Director for the Office of Diversity and Inclusion, Office of Personnel Management, 1900 E St. NW., Suite 5H35, Washington, DC 20415. Phone (202) 606–0020 FAX (202) 606–2183 or email at *veronica.villalobos@opm.gov.*

U.S. Office of Personnel Management.

Katherine L. Archuleta,

Director.

[FR Doc. 2014–28615 Filed 12–5–14; 8:45 am]

BILLING CODE 6820–B2–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2015–14 and CP2015–17; Order No. 2268]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Priority Mail Express Contract 21 negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 10, 2014.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Express Contract 21 to the competitive product list.[1]

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B.

To support its Request, the Postal Service filed a copy of the contract, a copy of the Governors' Decision authorizing the product, proposed changes to the Mail Classification Schedule, a Statement of Supporting Justification, a certification of compliance with 39 U.S.C. 3633(a), and an application for non-public treatment of certain materials. It also filed supporting financial workpapers.

[1] Request of the United States Postal Service to Add Priority Mail Express Contract 21 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, December 2, 2014 (Request).

II. Notice of Commission Action

The Commission establishes Docket Nos. MC2015–14 and CP2015–17 to consider the Request pertaining to the proposed Priority Mail Express Contract 21 product and the related contract, respectively.

The Commission invites comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comments are due no later than December 10, 2014. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Pamela A. Thompson to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2015–14 and CP2015–17 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Pamela A. Thompson is appointed to serve as an officer of the Commission to represent the interests of the general public in these proceedings (Public Representative).

3. Comments are due no later than December 10, 2014.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2014–28675 Filed 12–5–14; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31360; File No. 812–14328]

Alternative Strategies Fund and Ladenburg Thalmann Asset Management, Inc.; Notice of Application

December 1, 2014.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 18(c) and 18(i) of the Act, under sections 6(c) and 23(c)(3) of the Act for an exemption from rule 23c–3 under the Act, and for an order pursuant to section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY: *Summary of Application:* Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of shares and to impose asset-based distribution fees and early withdrawal charges ("EWCs").

APPLICANTS: Alternative Strategies Fund ("Initial Fund") and Ladenburg Thalmann Asset Management, Inc. ("Adviser").

FILING DATES: The application was filed on July 2, 2014, and amended on September 19, 2014 and November 25, 2014.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 23, 2014 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants, 570 Lexington Avenue, 11th Floor, New York, NY 10022.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812 or David P. Bartels, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Initial Fund is a Delaware statutory trust that is registered under the Act as a diversified, closed-end management investment company. The Initial Fund's primary investment objective is to seek attractive risk-adjusted returns with low to moderate volatility and low correlation to the broader markets, through a concentrated multi-strategy alternative investment approach with an emphasis on income generation. The Initial Fund pursues its investment objectives by investing primarily in private and publicly traded alternative investment funds and real estate investment trusts. The Initial Fund will limit its total investments in private pooled vehicles to 35% or less of its total assets, including no more than 15% in hedge funds.

2. The Adviser is a New York corporation and is registered as an investment adviser under the Investment Advisers Act of 1940, as amended. The Adviser serves as investment adviser to the Initial Fund. The Adviser is responsible for the overall management of the Initial Fund's business affairs and selecting the Initial Fund's investments according to the Initial Fund's investment objectives, policies, and restrictions.

3. The Applicants seek an order to permit the Initial Fund to issue multiple classes of shares, each having its own fee and expense structure, and to impose EWCs and asset-based distribution fees with respect to a certain class.

4. Applicants request that the order also apply to any continuously-offered registered closed-end management investment company that has been previously organized or that may be organized in the future for which the Adviser or any entity controlling, controlled by, or under common control with the Adviser, or any successor in interest to any such entity,[1] acts as investment adviser and which operates as an interval fund pursuant to rule 23c–3 under the Act or provides periodic liquidity with respect to its shares pursuant to rule 13e–4 under the Securities Exchange Act of 1934 ("Exchange Act") (together with the Initial Fund, the "Funds").[2]

5. The Initial Fund is currently making a continuous public offering of its common shares following the effectiveness of its registration statement. The Initial Fund anticipates that it will continue its continuous public offering of its common shares. Applicants state that additional offerings by any Fund relying on the order may be on a private placement or public offering basis. Shares of the Funds will not be listed on any securities exchange, nor quoted on any quotation medium. The Funds do not expect there to be a secondary trading market for their shares.

6. If the requested relief is granted, the Initial Fund intends to redesignate its common shares as "Class A Shares." Additionally, if the requested relief is granted, the Initial Fund intends to continuously offer an additional class of shares ("Class C Shares"), with such class having its own fee and expense structure. Applicants state that Class A Shares will be subject to a front-end sales charge, with breakpoints generally based on the size of the investment, but no distribution fees or EWCs. Class C Shares will be subject to a deferred sales charge (load), as well as a distribution and service fee, an EWC, and other expenses.

7. Applicants state that, from time to time, the Initial Fund may create additional classes of shares, the terms of which may differ from the Class A and Class C Shares in the following respects: (i) The amount of fees permitted by different distribution plans or different service fee arrangements; (ii) voting rights with respect to a distribution plan of a class; (iii) different class designations; (iv) the impact of any class expenses directly attributable to a particular class of shares allocated on a class basis as described in this application; (v) any differences in dividends and net asset value resulting from differences in fees under a distribution plan or in class expenses; (vi) any EWC or other sales load structure; and (vii) exchange or conversion privileges of the classes as permitted under the Act.

8. Applicants state that the Initial Fund has adopted a fundamental policy to repurchase a specified percentage of its shares (no less than 5%) at net asset value on a quarterly basis. Such repurchase offers will be conducted pursuant to rule 23c–3 under the Act. Each of the other Funds will likewise adopt fundamental investment policies in compliance with rule 23c–3 and make quarterly repurchase offers to its

[1] A successor in interest is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] Any Fund relying on this relief in the future will do so in a manner consistent with the terms and conditions of the application. Applicants represent that each entity presently intending to rely on the requested relief is listed as an applicant.

shareholders or provide periodic liquidity with respect to its shares pursuant to rule 13e–4 under the Exchange Act.[3] Any repurchase offers made by the Funds will be made to all holders of shares of each such Fund.

9. Applicants represent that any asset-based service and distribution fees for each class of shares will comply with the provisions of NASD Rule 2830(d) ("NASD Sales Charge Rule").[4] Applicants also represent that each Fund will disclose in its prospectus the fees, expenses and other characteristics of each class of shares offered for sale by the prospectus, as is required for open-end multiple class funds under Form N–1A. As is required for open-end funds, each Fund will disclose its expenses in shareholder reports, and disclose any arrangements that result in breakpoints in or elimination of sales loads in its prospectus.[5] In addition, applicants will comply with applicable enhanced fee disclosure requirements for fund of funds, including registered funds of hedge funds.[6]

10. Each of the Funds will comply with any requirements that the Commission or FINRA may adopt regarding disclosure at the point of sale and in transaction confirmations about the costs and conflicts of interest arising out of the distribution of open-end investment company shares, and regarding prospectus disclosure of sales loads and revenue sharing arrangements, as if those requirements applied to the Fund. In addition, each Fund will contractually require that any distributor of the Fund's shares comply with such requirements in connection with the distribution of such Fund's shares.

11. Each Fund will allocate all expenses incurred by it among the various classes of shares based on the net assets of the Fund attributable to each class, except that the net asset value and expenses of each class will reflect the expenses associated with the distribution plan of that class (if any), service fees attributable to that class (if any), including transfer agency fees, and any other incremental expenses of that class. Expenses of the Fund allocated to a particular class of shares will be borne on a pro rata basis by each outstanding share of that class. Applicants state that each Fund will comply with the provisions of rule 18f–3 under the Act as if it were an open-end investment company.

12. Applicants state that each Fund may impose an EWC on shares submitted for repurchase that have been held less than a specified period and may waive the EWC for certain categories of shareholders or transactions to be established from time to time. Applicants represent that each of the Funds will apply the EWC (and any waivers or scheduled variations of the EWC) uniformly to all shareholders in a given class and consistently with the requirements of rule 22d–1 under the Act as if the Funds were open-end investment companies.

13. Each Fund operating as an interval fund pursuant to rule 23c–3 under the Act may offer its shareholders an exchange feature under which the shareholders of the Fund may, in connection with the Fund's periodic repurchase offers, exchange their shares of the Fund for shares of the same class of (i) registered open-end investment companies or (ii) other registered closed-end investment companies that comply with rule 23c–3 under the Act and continuously offer their shares at net asset value, that are in the Fund's group of investment companies (collectively, "Other Funds"). Shares of a Fund operating pursuant to rule 23c–3 that are exchanged for shares of Other Funds will be included as part of the amount of the repurchase offer amount for such Fund as specified in rule 23c–3 under the Act. Any exchange option will comply with rule 11a–3 under the Act, as if the Fund were an open-end investment company subject to rule 11a–3. In complying with rule 11a–3, each Fund will treat an EWC as if it were a contingent deferred sales load ("CDSL").

Applicants' Legal Analysis

Multiple Classes of Shares

1. Section 18(c) of the Act provides, in relevant part, that a closed-end investment company may not issue or sell any senior security if, immediately thereafter, the company has outstanding more than one class of senior security. Applicants state that the creation of multiple classes of shares of the Funds may be prohibited by section 18(c), as a class may have priority over another class as to payment of dividends because shareholders of different classes would pay different fees and expenses.

2. Section 18(i) of the Act provides that each share of stock issued by a registered management investment company will be a voting stock and have equal voting rights with every other outstanding voting stock. Applicants state that multiple classes of shares of the Funds may violate section 18(i) of the Act because each class would be entitled to exclusive voting rights with respect to matters solely related to that class.

3. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction or any class or classes of persons, securities or transactions from any provision of the Act, or from any rule thereunder, if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) from sections 18(c) and 18(i) to permit the Funds to issue multiple classes of shares.

4. Applicants submit that the proposed allocation of expenses and voting rights among multiple classes is equitable and will not discriminate against any group or class of shareholders. Applicants submit that the proposed arrangements would permit a Fund to facilitate the distribution of its shares and provide investors with a broader choice of shareholder services. Applicants assert that the proposed closed-end investment company multiple class structure does not raise the concerns underlying section 18 of the Act to any greater degree than open-end investment companies' multiple class structures that are permitted by rule 18f–3 under the Act. Applicants state that each Fund will comply with the provisions of rule 18f–3 as if it were an open-end investment company.

Early Withdrawal Charges

1. Section 23(c) of the Act provides, in relevant part, that no registered closed-end investment company will purchase securities of which it is the issuer, except: (a) On a securities exchange or other open market; (b) pursuant to tenders, after reasonable opportunity to submit tenders given to

[3] Applicants submit that rule 23c–3 and Regulation M under the Exchange Act permit an interval fund to make repurchase offers to repurchase its shares while engaging in a continuous offering of its shares pursuant to Rule 415 under the Securities Act of 1933.

[4] Any reference to the NASD Sales Charge Rule includes any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority ("FINRA").

[5] *See* Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Investment Company Act Release No. 26372 (Feb. 27, 2004) (adopting release) (requiring open-end investment companies to disclose fund expenses in shareholder reports); and Disclosure of Breakpoint Discounts by Mutual Funds, Investment Company Act Release No. 26464 (June 7, 2004) (adopting release) (requiring open-end investment companies to provide prospectus disclosure of certain sales load information).

[6] Fund of Funds Investments, Investment Company Act Rel. Nos. 26198 (Oct. 1 2003) (proposing release) and 27399 (Jun. 20, 2006) (adopting release). See also Rules 12d1–1, *et seq.* of the Act.

all holders of securities of the class to be purchased; or (c) under other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors.

2. Rule 23c–3 under the Act permits a registered closed-end investment company (an "interval fund") to make repurchase offers of between five and twenty-five percent of its outstanding shares at net asset value at periodic intervals pursuant to a fundamental policy of the interval fund. Rule 23c–3(b)(1) under the Act provides that an interval fund may deduct from repurchase proceeds only a repurchase fee, not to exceed two percent of the proceeds, that is paid to the interval fund and is reasonably intended to compensate the fund for expenses directly related to the repurchase.

3. Section 23(c)(3) provides that the Commission may issue an order that would permit a closed-end investment company to repurchase its shares in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased.

4. Applicants request relief under sections 6(c), discussed above, and 23(c)(3) from rule 23c–3 to the extent necessary for the Funds to impose EWCs on shares of the Funds submitted for repurchase that have been held for less than a specified period.

5. Applicants state that the EWCs they intend to impose are functionally similar to CDSLs imposed by open-end investment companies under rule 6c–10 under the Act. Rule 6c–10 permits open-end investment companies to impose CDSLs, subject to certain conditions. Applicants note that rule 6c–10 is grounded in policy considerations supporting the employment of CDSLs where there are adequate safeguards for the investor and state that the same policy considerations support imposition of EWCs in the interval fund context. In addition, applicants state that EWCs may be necessary for the distributor to recover distribution costs. Applicants represent that any EWC imposed by the Funds will comply with rule 6c–10 under the Act as if the rule were applicable to closed-end investment companies. The Funds will disclose EWCs in accordance with the requirements of Form N–1A concerning CDSLs. Applicants further state that the Funds will apply the EWC (and any waivers or scheduled variations of the EWC) uniformly to all shareholders in a given class and consistently with the requirements of rule 22d–1 under the Act.

Asset-Based Distribution Fees

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit an affiliated person of a registered investment company or an affiliated person of such person, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates unless the Commission issues an order permitting the transaction. In reviewing applications submitted under section 17(d) and rule 17d–1, the Commission considers whether the participation of the investment company in a joint enterprise or joint arrangement is consistent with the provisions, policies and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants.

2. Rule 17d–3 under the Act provides an exemption from section 17(d) and rule 17d–1 to permit open-end investment companies to enter into distribution arrangements pursuant to rule 12b–1 under the Act. Applicants request an order under section 17(d) and rule 17d–1 under the Act to the extent necessary to permit the Fund to impose asset-based distribution fees. Applicants have agreed to comply with rules 12b–1 and 17d–3 as if those rules applied to closed-end investment companies, which they believe will resolve any concerns that might arise in connection with a Fund financing the distribution of its shares through asset-based distribution fees.

For the reasons stated above, applicants submit that the exemptions requested under section 6(c) are necessary and appropriate in the public interest and are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants further submit that the relief requested pursuant to section 23(c)(3) will be consistent with the protection of investors and will insure that applicants do not unfairly discriminate against any holders of the class of securities to be purchased. Finally, applicants state that the Funds' institution of asset-based distribution fees is consistent with the provisions, policies and purposes of the Act and does not involve participation on a basis different from or less advantageous than that of other participants.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Each Fund relying on the order will comply with the provisions of rules 6c–10, 12b–1, 17d–3, 18f–3, 22d–1, and, where applicable, 11a–3 under the Act, as amended from time to time, as if those rules applied to closed-end management investment companies, and will comply with the NASD Sales Charge Rule, as amended from time to time, as if that rule applied to all closed-end management investment companies.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28648 Filed 12–5–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31363; 812–14264]

Elkhorn Investments, LLC and Elkhorn ETF Trust; Notice of Application

December 2, 2014.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the "Act") for exemptions from sections 12(d)(1)(A), (B), and (C) of the Act, under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act, and under section 6(c) of the Act for an exemption from rule 12d1–2(a) under the Act.

SUMMARY OF THE APPLICATION: Applicants request an order that would (a) permit certain registered open-end management investment companies that operate as "funds of funds" to acquire shares of certain registered open-end management investment companies, registered closed-end management investment companies, business development companies, as defined by section 2(a)(48) of the Act ("business development companies"), and registered unit investment trusts that are within or outside the same group of investment companies as the acquiring investment companies and (b) permit certain registered open-end management investment companies relying on rule 12d1–2 under the Act to invest in certain financial instruments.

APPLICANTS: Elkhorn Investments, LLC ("Adviser") and Elkhorn ETF Trust ("Trust").

FILING DATES: The application was filed on January 9, 2014, and amended on May 30, 2014, and October 10, 2014.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 26, 2014, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Adviser and Trust, 207 Reber Street, Suite 201, Wheaton, IL 60187.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551–6811, or Daniele Marchesani, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the "Company" name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is an open-end management company registered under the Act and organized as a Massachusetts business trust. The Trust intends to have multiple series ("Funds") which pursue distinct investment objectives and strategies.[1] The Adviser, a Delaware limited liability company, is a registered investment adviser under the Investment Advisers Act of 1940. The Adviser, or an entity controlling, controlled by, or under common control with the Adviser, will serve as the investment adviser to each of the Funds.[2]

3. Applicants request relief to the extent necessary to permit: (a) A Fund (each, a "Fund of Funds," and collectively, the "Funds of Funds") to acquire shares of registered open-end management investment companies (each an "Unaffiliated Open-End Investment Company"), registered closed-end management investment companies, business development companies (each registered closed-end management investment company and each business development company, an "Unaffiliated Closed-End Investment Company" and, together with the Unaffiliated Open-End Investment Companies, the "Unaffiliated Investment Companies"), and registered unit investment trusts ("UITs") (the "Unaffiliated Trusts," and collectively with the Unaffiliated Investment Companies, the "Unaffiliated Funds"), in each case, that are not part of the same "group of investment companies" as the Funds of Funds;[3] (b) the Unaffiliated Funds, their principal underwriters and any broker or dealer registered under the Securities Exchange Act of 1934 (the "1934 Act") ("Broker") to sell shares of such Unaffiliated Funds to the Funds of Funds; (c) the Funds of Funds to acquire shares of other registered investment companies, including open-end management investment companies and series thereof, closed-end management investment companies and UITs, as well as business development companies (if any), in the same group of investment companies as the Funds of Funds (collectively, the "Affiliated Funds," and, together with the Unaffiliated Funds, the "Underlying Funds");[4] and (d) the Affiliated Funds, their principal underwriters and any Broker to sell shares of the Affiliated Funds to the Funds of Funds.[5] Applicants also request an order under sections 6(c) and 17(b) of the Act to exempt applicants from section 17(a) to the extent necessary to permit Underlying Funds organized as open-end management investment companies and UITs to sell their shares to Funds of Funds and redeem their shares from Funds of Funds.

4. Applicants also request an exemption under section 6(c) from rule 12d1–2 under the Act to permit any existing or future Fund of Funds that relies on section 12(d)(1)(G) of the Act ("Section 12(d)(1)(G) Fund of Funds") and that otherwise complies with rule 12d1–2 under the Act, to also invest, to the extent consistent with its investment objective(s), policies, strategies and limitations, in other financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act ("Other Investments").

Applicants' Legal Analysis

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act, in relevant part, prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, and any Broker from selling the investment company's shares to another investment company if the

[1] The Applicants request that the order apply not only to any existing series of the Trust, but that the order also extend to any future series of the Trust, and any other existing or future registered open-end management investment companies and any series thereof that are part of the same group of investment companies, as defined in Section 12(d)(1)(G)(ii) of the Act, as the Trust and are advised by the Adviser or any other investment adviser controlling, controlled by, or under common control with the Adviser (together with the series of the Trust, each series a "Fund," and collectively, the "Funds"). All entities that currently intend to rely on the requested order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[2] All references to the term "Adviser" include successors-in-interest to the Adviser. A successor-in-interest is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[3] For purposes of the request for relief, the term "group of investment companies" means any two or more investment companies, including closed-end investment companies and business development companies, that hold themselves out to investors as related companies for purposes of investment and investor services.

[4] Certain of the Underlying Funds may be registered under the Act as either UITs or open-end management investment companies and have obtained exemptions from the Commission necessary to permit their shares to be listed and traded on a national securities exchange at negotiated prices and, accordingly, to operate as exchange-traded funds (collectively, "ETFs" and each, an "ETF"). In addition, certain of the Underlying Funds may in the future pursue, their investment objectives through a master-feeder arrangement in reliance on section 12(d)(1)(E) of the Act. In accordance with condition 12, a Fund of Funds may not invest in an Underlying Fund that operates as a feeder fund unless the feeder fund is part of the same "group of investment companies" as its corresponding master fund or the Fund of Funds. If a Fund of Funds invests in an Affiliated Fund that operates as a feeder fund and the corresponding master fund is not within the same "group of investment companies" as the Fund of Funds and Affiliated Fund, the master fund would be an Unaffiliated Fund for purposes of the application and its conditions.

[5] Applicants state that they do not believe that investments in business development companies present any particular considerations or concerns that may be different from those presented by investments in registered closed-end investment companies.

sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally. Section 12(d)(1)(C) prohibits an investment company from acquiring any security issued by a registered closed-end investment company if such acquisition would result in the acquiring company, any other investment companies having the same investment adviser, and companies controlled by such investment companies, collectively, owning more than 10% of the outstanding voting stock of the registered closed-end investment company.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants request an exemption under section 12(d)(1)(J) of the Act from the limitations of sections 12(d)(1)(A), (B) and (C) to the extent necessary to permit: (i) The Funds of Funds to acquire shares of Underlying Funds in excess of the limits set forth in section 12(d)(1)(A) and (C) of the Act; and (ii) the Underlying Funds, their principal underwriters and any Broker to sell shares of the Underlying Funds to the Funds of Funds in excess of the limits set forth in section 12(d)(1)(B) of the Act.

3. Applicants state that the proposed arrangement will not give rise to the policy concerns underlying sections 12(d)(1)(A), (B), and (C), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

4. Applicants submit that the proposed structure will not result in the exercise of undue influence by a Fund of Funds or its affiliated persons over the Underlying Funds. Applicants assert that the concern about undue influence does not arise in connection with a Fund of Funds' investment in the Affiliated Funds because they are part of the same group of investment companies. To limit the control a Fund of Funds or Fund of Funds Affiliate [6] may have over an Unaffiliated Fund, applicants propose a condition prohibiting the Adviser and any person controlling, controlled by or under common control with the Adviser, and any investment company and any issuer that would be an investment company but for section 3(c)(1) or section 3(c)(7) of the Act advised or sponsored by the Adviser or any person controlling, controlled by or under common control with the Adviser (collectively, the "Group") from controlling (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any other investment adviser within the meaning of section 2(a)(20)(B) of the Act to a Fund of Funds ("Sub-Adviser") and any person controlling, controlled by or under common control with the Sub-Adviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Sub-Adviser or any person controlling, controlled by or under common control with the Sub-Adviser (collectively, the "Sub-Adviser Group").

5. With respect to closed-end Underlying Funds, applicants note that although closed-end funds may not be unduly influenced by a holder's right of redemption, closed-end Underlying Funds may be unduly influenced by a holder's ability to vote a large block of stock. To address this concern, applicants submit that, with respect to a Fund's investment in an Unaffiliated Closed-End Investment Company, (i) each member of the Group or Sub-Adviser Group that is an investment company or an issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act will vote its shares of the Unaffiliated Closed-End Investment Company in the manner prescribed by section 12(d)(1)(E) of the Act and (ii) each other member of the Group or Sub-Adviser Group will vote its shares of the Unaffiliated Closed-End Investment Company in the same proportion as the vote of all other holders of the same type of such Unaffiliated Closed-End Investment Company's shares. Applicants state that, in this way, an Unaffiliated Closed-End Investment Company will be protected from undue influence by a Fund of Funds through the voting of the Unaffiliated Closed-End Investment Company's shares.

6. Applicants propose other conditions to limit the potential for undue influence over the Unaffiliated Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in an offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate ("Affiliated Underwriting").[7]

7. To further ensure that an Unaffiliated Investment Company understands the implications of a Fund of Funds' investment under the requested exemptive relief, prior to its investment in the shares of an Unaffiliated Investment Company in excess of the limit of section 12(d)(1)(A)(i) of the Act, a Fund of Funds and the Unaffiliated Investment Company will execute an agreement stating, without limitation, that each of their boards of directors or trustees (each, a "Board") and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (the "Participation Agreement"). Applicants note that an Unaffiliated Investment Company (including an ETF or an Unaffiliated Closed-End Investment Company) would also retain its right to reject any initial investment by a Fund of Funds in excess of the limits in section 12(d)(1)(A)(i) of the Act by declining to execute the Participation Agreement with the Fund of Funds. In addition, an Unaffiliated Investment Company (other than an ETF or Unaffiliated Closed-End Investment Company whose shares are purchased by a Fund of Funds in the secondary market) will retain its right at all times to reject any investment by a Fund of Funds. Finally, solely upon notice to a Fund of Funds, an Unaffiliated Investment Company could terminate a Participation Agreement with the Fund of Funds effective at the end of the notice period specified in the Participation Agreement.

[6] A "Fund of Funds Affiliate" is the Adviser, any Sub-Adviser, promoter or principal underwriter of a Fund of Funds, as well as any person controlling, controlled by or under common control with any of those entities. An "Unaffiliated Fund Affiliate" is an investment adviser(s), sponsor, promoter or principal underwriter of any Unaffiliated Fund or any person controlling, controlled by or under common control with any of those entities.

[7] An "Underwriting Affiliate" is a principal underwriter in any underwriting or selling syndicate that is an officer, director, trustee, advisory board member, investment adviser, sub-adviser or employee of the Fund of Funds, or a person of which any such officer, director, trustee, investment adviser, sub-adviser, member of an advisory board or employee is an affiliated person. An Underwriting Affiliate does not include any person whose relationship to an Unaffiliated Fund is covered by section 10(f) of the Act.

8. Applicants state that they do not believe that the proposed arrangement will result in excessive layering of fees. The Board of each Fund of Funds, including a majority of the trustees who are not "interested persons" within the meaning of section 2(a)(19) of the Act (the "Independent Trustees"), will find that the management or advisory fees charged under a Fund of Funds' advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. In addition, the Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company under rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or an affiliated person of the Adviser by the Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund.

9. Applicants further state that any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to funds of funds set forth in in rule 2830 of the Conduct Rules of the NASD ("NASD Conduct Rule 2830").[8]

10. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except in certain circumstances identified in condition 12 below.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that the Funds of Funds and the Affiliated Funds may be deemed to be under the common control of the Adviser and, therefore, affiliated persons of one another. Applicants also state that the Funds of Funds and the Underlying Funds organized as open-end management investment companies and UITs may also be deemed to be affiliated persons of one another if a Fund of Funds owns 5% or more of the outstanding voting securities of one or more of such Underlying Funds. Applicants state that the sale of shares by Underlying Funds organized as open-end management investment companies and UITs to the Funds of Funds and the purchase of those shares from the Funds of Funds by such Underlying Funds (through redemptions) could be deemed to violate section 17(a).[9]

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (i) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (ii) the proposed transaction is consistent with the policies of each registered investment company concerned; and (iii) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed transactions satisfy the standards for relief under sections 17(b) and 6(c) of the Act. Applicants state that the terms of the transactions are reasonable and fair and do not involve overreaching. Applicants state that the terms upon which an Underlying Fund that is an open-end management investment company will sell its shares to or purchase its shares from a Fund of Funds will be in accordance with the rules and regulations under the Act.[10] Applicants also state that the proposed transactions will be consistent with the policies of each Fund of Funds and Underlying Fund, and with the general purposes of the Act.

C. Other Investments by Section 12(d)(1)(G) Funds of Funds

1. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquiring company and acquired company are part of the same "group of investment companies," as defined in section 12(d)(1)(G)(ii) of the Act; (ii) the acquiring company holds only securities of acquired companies that are part of the same "group of investment companies," as defined in section 12(d)(1)(G)(ii) of the Act, government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the 1934 Act or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end management investment companies or registered UITs in reliance on section 12(d)(1)(F) or (G) of the Act.

2. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered UIT that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, government

[8] Any references to NASD Conduct Rule 2830 include any successor or replacement Financial Industry Regulatory Authority rule to NASD Conduct Rule 2830.

[9] Applicants acknowledge that receipt of any compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of shares of an Underlying Fund or (b) an affiliated person of an Underlying Fund, or an affiliated person of such person, for the sale by the Underlying Fund of its shares to a Fund of Funds may be prohibited by section 17(e) (1) of the Act. The Participation Agreement also will include this acknowledgement.

[10] Applicants note that a Fund of Funds generally would purchase and sell shares of an Underlying Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Underlying Fund. Applicants nevertheless request relief from sections 17(a)(1) and (2) to permit each Fund of Funds that is an affiliated person, or an affiliated person of an affiliated person, as defined in section 2(a)(3) of the Act, of an ETF to purchase or redeem shares from the ETF. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETF could be deemed an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds because an investment adviser to the ETF or an entity controlling, controlled by or under common control with the investment adviser to the ETF is also an investment adviser to the Fund of Funds. Applicants note that a Fund of Funds will purchase and sell shares of an Underlying Fund that is a closed-end fund through secondary market transactions at market prices rather than through principal transactions with the closed-end fund. Accordingly, applicants are not requesting section 17(a) relief with respect to principal transactions with closed-end funds (including business development companies).

securities, and short-term paper: (1) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (2) securities (other than securities issued by an investment company); and (3) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, "securities" means any security as defined in section 2(a)(36) of the Act.

3. Applicants state that the proposed arrangement would comply with rule 12d1–2 under the Act, but for the fact that the Section 12(d)(1)(G) Funds of Funds may invest a portion of their assets in Other Investments. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Section 12(d)(1)(G) Funds of Funds to invest in Other Investments. Applicants assert that permitting a Section 12(d)(1)(G) Fund of Funds to invest in Other Investments as described in the application would not raise any of the concerns that section 12(d)(1) of the Act was intended to address.

4. Consistent with its fiduciary obligations under the Act, a Section 12(d)(1)(G) Fund of Funds' Board will review the advisory fees charged by the Section 12(d)(1)(G) Fund of Funds' investment adviser(s) to ensure that the fees are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Section 12(d)(1)(G) Fund of Funds may invest.

Applicants' Conditions

A. Investments by Funds of Funds in Underlying Funds

Applicants agree that the order granting the requested relief to permit Funds of Funds to invest in Underlying Funds shall be subject to the following conditions:

1. The members of the Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. The members of a Sub-Adviser Group will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. With respect to a Fund's investment in an Unaffiliated Closed-End Investment Company, (i) each member of the Group or Sub-Adviser Group that is an investment company or an issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act will vote its shares of the Unaffiliated Closed-End Investment Company in the manner prescribed by section 12(d)(1)(E) of the Act and (ii) each other member of the Group or Sub-Adviser Group will vote its shares of the Unaffiliated Closed-End Investment Company in the same proportion as the vote of all other holders of the same type of such Unaffiliated Closed-End Investment Company's shares. If, as a result of a decrease in the outstanding voting securities of any other Unaffiliated Fund, the Group or a Sub-Adviser Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of such Unaffiliated Fund, then the Group or the Sub-Adviser Group will vote its shares of the Unaffiliated Fund in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares. This condition will not apply to a Sub-Adviser Group with respect to an Unaffiliated Fund for which the Sub-Adviser or a person controlling, controlled by or under common control with the Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act (in the case of an Unaffiliated Investment Company) or as the sponsor (in the case of an Unaffiliated Trust).

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in an Unaffiliated Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Unaffiliated Fund or an Unaffiliated Fund Affiliate.

3. The Board of each Fund of Funds, including a majority of the Independent Trustees, will adopt procedures reasonably designed to ensure that its Adviser and any Sub-Adviser to the Fund of Funds are conducting the investment program of the Fund of Funds without taking into account any consideration received by the Fund of Funds or Fund of Funds Affiliate from an Unaffiliated Investment Company or Unaffiliated Trust or any Unaffiliated Fund Affiliate of such Unaffiliated Investment Company or Unaffiliated Trust in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, the Board of the Unaffiliated Investment Company, including a majority of the Independent Trustees, will determine that any consideration paid by the Unaffiliated Investment Company to a Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Investment Company; (b) is within the range of consideration that the Unaffiliated Investment Company would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between an Unaffiliated Investment Company and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

5. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to an Unaffiliated Investment Company or sponsor to an Unaffiliated Trust) will cause an Unaffiliated Fund to purchase a security in any Affiliated Underwriting.

6. The Board of an Unaffiliated Investment Company, including a majority of the Independent Trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Unaffiliated Investment Company in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of the Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board of the Unaffiliated Investment Company will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Unaffiliated Investment Company. The Board of the Unaffiliated Investment Company will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Investment Company; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Unaffiliated Investment Company in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The

Board of the Unaffiliated Investment Company will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders.

7. Each Unaffiliated Investment Company will maintain and preserve permanently, in an easily accessible place, a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in an Affiliated Underwriting once an investment by a Fund of Funds in the securities of an Unaffiliated Investment Company exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth (1) the party from whom the securities were acquired, (2) the identity of the underwriting syndicate's members, (3) the terms of the purchase, and (4) the information or materials upon which the determinations of the Board of the Unaffiliated Investment Company were made.

8. Prior to its investment in shares of an Unaffiliated Investment Company in excess of the limit set forth in section 12(d)(1)(A)(i) of the Act, the Fund of Funds and the Unaffiliated Investment Company will execute a Participation Agreement stating, without limitation, that their Boards and their investment advisers understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Investment Company in excess of the limit set forth in section 12(d)(1)(A)(i), a Fund of Funds will notify the Unaffiliated Investment Company of the investment. At such time, the Fund of Funds will also transmit to the Unaffiliated Investment Company a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Unaffiliated Investment Company of any changes to the list as soon as reasonably practicable after a change occurs. The Unaffiliated Investment Company and the Fund of Funds will maintain and preserve a copy of the order, the Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. Before approving any advisory contract under section 15 of the Act, the Board of each Fund of Funds, including a majority of the Independent Trustees, shall find that the advisory fees charged under the advisory contract are based on services provided that are in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Underlying Fund in which the Fund of Funds may invest. Such finding, and the basis upon which the finding was made, will be recorded fully in the minute books of the appropriate Fund of Funds.

10. The Adviser will waive fees otherwise payable to it by a Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by an Unaffiliated Investment Company pursuant to rule 12b–1 under the Act) received from an Unaffiliated Fund by the Adviser, or an affiliated person of the Adviser, other than any advisory fees paid to the Adviser or its affiliated person by the Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund. Any Sub-Adviser will waive fees otherwise payable to the Sub-Adviser, directly or indirectly, by the Fund of Funds in an amount at least equal to any compensation received by the Sub-Adviser, or an affiliated person of the Sub-Adviser, from an Unaffiliated Fund, other than any advisory fees paid to the Sub-Adviser or its affiliated person by the Unaffiliated Investment Company, in connection with the investment by the Fund of Funds in the Unaffiliated Fund made at the direction of the Sub-Adviser. In the event that the Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Fund of Funds.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to funds of funds set forth in NASD Conduct Rule 2830.

12. No Underlying Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act, in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that such Underlying Fund: (a) Acquires such securities in compliance with section 12(d)(1)(E) of the Act and either is an Affiliated Fund or is in the same "group of investment companies" as its corresponding master fund; (b) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act); or (c) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such Underlying Fund to: (i) Acquire securities of one or more investment companies for short-term cash management purposes or (ii) engage in inter-fund borrowing and lending transactions.

B. Other Investments by Section 12(d)(1)(G) Funds of Funds

Applicants agree that the order granting the requested relief to permit Section 12(d)(1)(G) Funds of Funds to invest in Other Investments shall be subject to the following condition:

1. Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2) to the extent that it restricts any Section 12(d)(1)(G) Fund of Funds from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28682 Filed 12–5–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73716; File No. SR–NYSEArca–2014–134]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to Listing and Trading the following Series of IndexIQ Active ETF Trust Under NYSE Arca Equities Rule 8.600: IQ Wilshire Alternative Strategies ETF

December 2, 2014.

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 18, 2014, 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, II, and III 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to list and trade the following series of IndexIQ Active ETF Trust under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): IQ Wilshire Alternative Strategies ETF. The text of 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares ("Shares") of the IQ Wilshire Alternative Strategies ETF (the "Fund") under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares [4] on the Exchange.[5] The Fund is a series of the IndexIQ Active ETF Trust (the "Trust").[6]

The Fund is an actively-managed exchange-traded fund and does not seek to replicate the performance of a specified index.

IndexIQ Advisors LLC (the "Adviser") is the investment adviser for the Fund.[7] The Bank of New York Mellon ("Administrator"), is the administrator, custodian, transfer agent and securities lending agent for the Fund. ALPS Distributors Inc. ("Distributor"), is the distributor for the Fund.

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. In the event (a) any of the Adviser, Wilshire or the Underlying Managers is or becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or subadviser is a registered broker-dealer or becomes affiliated with a broker-dealer, then, to the extent the broker-dealer or affiliated broker-dealer is not a limited purpose broker-dealer used for marketing and not trading purposes, it will implement a firewall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

According to the Registration Statement, the Fund will seek long-term capital appreciation. Under normal circumstances,[8] 100% of the Fund's assets will be allocated among the Underlying Managers and that will employ a variety of alternative investment strategies.[9] In making these allocations, the Advisor will seek to combine the strategies of the Underlying Managers efficiently and systematically so that the Fund will generate a positive total return with relatively low volatility and low sensitivity or correlation to market indices.

According to the Registration Statement, Wilshire Associates

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1), as amended ("1940 Act"), organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission has previously approved the listing and trading on the Exchange of other of actively managed funds under Rule 8.600. *See, e.g.*, Securities Exchange Act Release Nos. 60717 (September 24, 2009), 74 FR 50853 (October 1, 2009) (SR–NYSEArca–2009–74) (order approving listing of Four Grail Advisors RP Exchange-Traded Funds) and 67320 (June 29, 2012), 77 FR 39763 (July 5, 2012) (SR–NYSEArca–2012–44) (order approving listing of the iShares Strategic Beta U.S. Large Cap Fund and iShares Strategic Beta U.S. Small Cap Fund).

[6] The Trust is registered under the 1940 Act. On April 25, 2014, the Trust filed with the Commission an amendment to its registration statement on Form N–1A relating to the Fund (File Nos. 333–193560 and 811–22739) (the "Registration Statement"). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 30198 (September 10, 2012) (File No. 812–13956) (the "Exemptive Order").

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). The Adviser, Wilshire and the underlying managers that are sub-advisers to the Fund (the "Underlying Managers") are each registered as an investment adviser under the Advisers Act. As a result, each of the Adviser, Wilshire and the Underlying Managers and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, each of the Adviser, Wilshire and the Underlying Managers and its related personnel are subject to the provisions of Rule 206(4)–7 under the Advisers Act, which makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[8] The term "under normal circumstances" includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[9] According to the Registration Statement, the investment of Fund assets not allocated to the Underlying Managers may be directly managed by the Advisor, although the Advisor does not currently intend to manage a significant portion of the Fund's assets directly, and to the extent the Advisor does manage a portion of the Fund's assets it would invest such assets in the same manner as the Underlying Managers.

Incorporated ("Wilshire") will be a sub-advisor to the Fund and, in that role, will evaluate and recommend strategies and Underlying Managers to the Advisor for use by the Fund. Additionally, according to the Registration Statement Wilshire will provide recommendations to the Advisor for allocating and reallocating Fund assets among the Underlying Managers. Wilshire will not directly manage any assets of the Fund, although it may provide the Advisor or an Underlying Manager with non-discretionary advice on investment decisions and underlying positions.

According to the Registration Statement, the Fund and each of its Underlying Managers may use all or some of the following strategies in managing the assets of the Fund: Equity hedge (long/short) strategies,[10] relative value strategies,[11] global macro strategies,[12] event driven strategies,[13] opportunistic credit strategies,[14] tactical trading strategies [15] and liquid alternative beta strategies.[16] The Fund, and each of its Underlying Managers, may also add additional strategies in the future. According to the Registration Statement, the Advisor may allocate 0 to 100 percent of the Fund's assets to any of these strategies or any of the Underlying Managers at any time.

According to the Registration Statement, in implementing the aforementioned strategies, the Fund will invest in a portfolio consisting of some or all of the following:

Equity Securities

The Fund may invest in exchange-traded Equity Securities, which will consist of:

- Common stocks;
- Preferred stocks;
- Convertible securities;
- Rights and warrants;
- Depositary receipts;
- Exchange-traded Funds ("ETFs"); [17]
- Non-ETF exchange-traded vehicles ("ETVs"); [18] and
- Partnership interests, including master limited partnerships.

Fixed Income Securities

The Fund may invest in Fixed Income Securities, which will consist of:

- Debt issued by corporations; [19]
- Debt issued by governments, their agencies, instrumentalities, sponsored entities, and political subdivisions;
- Covered bonds;
- Debt participations;
- Convertible bonds;
- Non-investment grade securities;
- Senior bank loans;
- Exchange-traded notes ("ETNs");
- Mortgage-backed and other asset-backed securities; and
- To-be-announced securities.[20]

According to the Registration Statement, the Fund may also invest directly in currencies.

According to the Registration Statement, the Fund may invest in the following derivative instruments: Futures contracts (consisting of futures contracts based on equity or fixed income securities and/or equity or fixed income indices, commodities, interest rates and currencies); swap agreements on any of the following asset classes: Equity, fixed income, currency and interest rates (such swaps may be based on the price return or total return of the referenced asset); credit default swaps (consisting of credit default swaps in which the referenced asset is a single fixed income security or a group of fixed income securities); options (consisting of long and short positions in call options and put options on indices based on equities, fixed income securities, interest rates, currencies or commodities, individual securities or currencies, swaptions and options on futures contracts); forward contracts (consisting of forward contracts based on equity or fixed income securities and/or equity or fixed income indices, currencies, interest rates, swap forwards and non-deliverable forwards); and structured securities (such derivative instruments, collectively "Financial Instruments").[21]

According to the Registration Statement, the Fund may use leverage (*e.g.*, through the use of Financial Instruments) to obtain exposure in excess of 100% in an investment. The Fund may employ leverage to increase exposure to the Fund's portfolio holdings by up to 100% of the net assets of the Fund to gain additional exposure to the Fund's portfolio holdings, such that the Fund will have up to 200% net exposure to its investments.

According to the Registration Statement, the Fund may take long and/or short positions in Equity Securities, Fixed Income Securities, commodities [22] and currencies, among others.

[10] According to the Registration Statement, an equity hedge (long/short) strategy will seek to identify equities that are trading under or over their perceived intrinsic value or are deemed to be mispriced based on fundamental, statistical, technical or other factors.

[11] According to the Registration Statement, a relative value strategy will seek to exploit differences in valuation through the simultaneous purchase and sale of related financial instruments.

[12] According to the Registration Statement, a global macro strategy will seek to analyze macroeconomic variables to identify global asset/security mispricings (*i.e.*, securities that are trading higher or lower than their intrinsic or actual value) and forecast future moves in such asset/security prices on a directional or relative value basis.

[13] According to the Registration Statement, an event driven strategy will involve investing in securities of companies currently or prospectively involved in a wide variety of corporate transactions or other events where the investment thesis is predicated on the anticipated effect of such transactions or events (*e.g.*, merger arbitrage strategy, which involves the simultaneous purchase of stock in a company being acquired and the sale of stock in its acquirer in an attempt to profit from the spread in prices).

[14] According to the Registration Statement, an opportunistic credit strategy will seek to deliver positive absolute returns in excess of cash investments regardless of economic cycle (*i.e.*, downturns and upswings) or cyclical credit availability primarily by investing in mispriced credit securities (*i.e.*, credit securities that are trading higher or lower than their intrinsic or actual value).

[15] According to the Registration Statement, a tactical trading strategy will relate to a variety of strategic and opportunistic investment strategies not captured by one of the other enumerated strategies, such as short-term trading opportunities.

[16] According to the Registration Statement, a liquid alternative beta strategy will seek to track the beta portion of the returns (*i.e.*, that portion of the returns of hedge funds that are non-idiosyncratic, or unrelated to manager skill) of hedge funds that employ various hedge fund investment styles.

[17] For purposes of this filing, ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs all will be listed and traded in the U.S. on registered exchanges or a non-U.S. securities exchange that is a member of the Intermarket Surveillance Group ("ISG") or a party to a comprehensive surveillance sharing agreement with the Exchange. The ETFs in which the Fund may invest will primarily be index-based exchange-traded funds that hold substantially all of their assets in securities representing a specific index.

[18] According to the Adviser, an ETV is a non-investment company exchange-traded vehicle that issues equity securities, such as an exchange-traded commodity pool.

[19] The Adviser expects that, under normal market circumstances, the Fund will generally seek to invest in corporate bond issuances in developed countries that have at least $100,000,000 par amount outstanding and at least $200,000,000 par amount outstanding with respect to corporate bond issuances in emerging market countries.

[20] The Fund will seek to gain exposure to U.S. agency mortgage pass-through securities primarily through the use of "to-be-announced securities." "To-be-announced" refers to a commonly used mechanism for the forward settlement of U.S. agency mortgage pass-through securities, and not to a separate type of mortgage-backed security. Most transactions in mortgage pass-through securities occur through the use of to-be-announced securities.

[21] According to the Registration Statement, as a result of the Fund's ability to invest in Financial Instruments, it may also hold U.S. Treasury Bills or short-term investments as collateral for the Financial Instruments, including money market funds, repurchase agreements, cash and time deposits.

[22] According to the Registration Statement, the Fund may gain exposure to commodities through investments in other investment companies, ETFs or ETVs.

Investment Restrictions

According to the Adviser, all Equity Securities will be listed on a U.S. national securities exchange or a non-U.S. securities exchange that is a member of the ISG or a party to a comprehensive surveillance sharing agreement with the Exchange; provided, however, that up to 10% of the assets of the Fund may be invested in non-U.S. listed Equity Securities that do not meet these requirements.

The Adviser has represented that all options contracts will be listed on a U.S. national securities exchange or a non-U.S. securities exchange that is a member of ISG or a party to a comprehensive surveillance sharing agreement with the Exchange.

The Adviser has represented that not more than 20% of the Fund's assets will be invested, in the aggregate, in non-investment grade securities and structured securities.

According to the Registration Statement, up to 10% of the weight of the futures contracts held by the Fund may consist of futures contracts whose principal trading market is not a member of ISG or a party to a comprehensive surveillance sharing agreement with the Exchange.

According to the Advisor, the Fund may invest up to 20% of its total assets in mortgage-backed securities or in other asset-backed securities, although this 20% limitation will not apply to U.S. government securities.

According to the Registration Statement, the 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.[23] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in the 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 the Fund's net assets are held in illiquid assets.

The Fund will not invest more than 10% of its net assets in unsponsored depositary receipts.

According to the Registration Statement, the Fund is considered non-diversified, which means that it can invest a higher percentage of assets in securities of individual issuers than a diversified fund.

Net Asset Value

According to the Registration Statement, the net asset value ("NAV") of the Shares of the Fund will be equal to the Fund's total assets minus the Fund's total liabilities divided by the total number of shares outstanding. The NAV that is published will be rounded to the nearest cent; however, for purposes of determining the price of Creation Units, the NAV will be calculated to five decimal places.

For purposes of calculating NAV, portfolio securities and other assets for which market quotations are readily available will be valued at market value. Market value will generally be determined on the basis of last reported sales prices, or if no sales are reported, based on quotes obtained from a quotation reporting system, established market makers, or pricing services.

In calculating NAV, the Fund's exchange-traded Equity Securities will be valued at market value, which will generally be determined using the last reported official closing or last trading price on the exchange or market on which the security is primarily traded at the time of valuation or, if no sale has occurred, at the last quoted mid price on the primary market or exchange on which they are traded. Investment company securities (other than ETFs) will be valued at NAV.

Unsponsored depositary receipts will be valued at the last quoted mid price on the primary market on which they are traded. Fixed Income Securities will be valued using market quotations when available or other equivalent indications of value provided by an independent third-party pricing service. Short-term Fixed Income Securities having a remaining maturity of 60 days or less are generally valued at amortized cost, which approximates market value.

A swap on an exchange-listed security or securities is valued at the last reported sale price of the swap's underlying security or securities on the exchange where the security or securities is primarily traded, or if no sale price is available, at the mid price of the security or securities underlying the swap on the exchange where the security is primarily traded. A swap on Fixed Income Securities will be valued on the price of the referenced Fixed Income Securities on which the swap is based (*i.e.*, using market quotations when available or other equivalent indications of value provided by an independent third-party pricing service; short term Fixed Income Securities having a remaining maturity of 60 days or less are generally valued at amortized cost, which approximates market value). A swap on an index is valued based on the publicly available index price. The index price, in turn, is determined by the applicable index calculation agent, which generally values the securities underlying the index at the last reported sale price.

Currency swaps will generally be valued on the basis of quotes obtained from brokers and dealers or pricing services using data reflecting the earlier closing of the principal markets for those assets. Credit default swaps will be valued on the basis of market prices, generally the mid point between the bid/ask quotes, obtained from a third-party pricing service at the time the Fund calculates its NAV.

Futures contracts will be valued at the settlement or closing price determined by the applicable exchange. Exchange-traded option contracts, including options on futures, will be valued at their most recent sale price. If no such sales are reported, these contracts will be valued at their last traded price.

The Fund's OTC-traded Financial Instruments that are based on exchange-listed underlying securities or for which exchange pricing is otherwise available will generally be valued at the last reported official closing or last traded price of the applicable underlying securities. Other OTC-traded Financial Instruments will normally be valued on the basis of quotes obtained from a third party broker-dealer who makes markets in such securities or on the basis of quotes obtained from an independent third-party pricing service.

Foreign securities and instruments will be valued in their local currency following the methodologies described above. Foreign securities, instruments and currencies will be translated to U.S. dollars, based on foreign currency exchange rate quotations supplied by the London Stock Exchange.

When market quotations are not readily available, are deemed unreliable or do not reflect material events occurring between the close of local markets and the time of valuation, investments will be valued using fair value pricing as determined in good

[23] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 8901 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also,* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the ETF. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

faith by the Adviser under procedures established by and under the general supervision and responsibility of the Trust's Board of Trustees. According to the Registration Statement, the NAV will be calculated by the Administrator and determined each business day as of the close of regular trading on the Exchange (ordinarily 4:00 p.m., Eastern time ("E.T.")). The Shares of the Fund will not be priced on days on which the Exchange is closed for trading.

Indicative Intra-Day Value

According to the Registration Statement, an independent third party calculator will calculate the Indicative Intra-Day Value ("IIV") for the Fund during hours of trading on the Exchange by dividing the "Estimated Fund Value" as of the time of the calculation by the total number of outstanding Shares of that Fund. "Estimated Fund Value" is the sum of the estimated amount of cash held in the Fund's portfolio, the estimated amount of accrued interest owed to the Fund and the estimated value of the assets held in the Fund's portfolio, minus the estimated amount of the Fund's liabilities. The IIV will be calculated based on the same portfolio holdings disclosed on the Trust's Web site. All assets held by the Fund will be included in the IIV calculation.

According to the Registration Statement, the Fund will provide the independent third party calculator with information to calculate the IIV, but the Fund will not be involved in the actual calculation of the IIV and is not responsible for the calculation or dissemination of the IIV. The Fund makes no warranty as to the accuracy of the IIV. The IIV should not be viewed as a "real-time" update of NAV because the IIV may not be calculated in the same manner as NAV, which is computed once per day.

Creations and Redemptions of Shares

According to the Registration Statement, the Fund will issue and redeem Shares on a continuous basis, at their NAV next determined after receipt, on any business day, for a creation order or redemption request received in proper form. The Fund will issue and redeem Shares only in blocks of 50,000 Shares or whole multiples thereof ("Creation Units").

According to the Registration Statement, Creation Units will be sold in exchange for an in-kind basket of a designated portfolio of securities and a cash component. All orders to create Creation Units must be received by the Distributor no later than 3:00 p.m. E.T. on the date such order is placed, in order for the creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

According to the Registration Statement, beneficial owners must accumulate enough Shares in the secondary market to constitute a Creation Unit in order to have such Shares redeemed by the Trust. The redemption proceeds for a Creation Unit will consist of consideration in an amount equal to the NAV of the Shares being redeemed, as next determined after receipt of a request in proper form less a redemption transaction fee. Creation Units will be redeemed principally in-kind for securities included in the Fund but also including cash based on the then-current value of the securities sold short by the Fund and/or the Financial Instruments used by the Fund (as applicable). With respect to the Funds, the Administrator, through the National Securities Clearing Corporation ("NSCC"), will make available immediately prior to the opening of business on the Exchange (currently 9:30 a.m., E.T.) on each business day, the designated portfolio of securities (the "Fund Securities") or cash component, as applicable, per Creation Unit that will be applicable to redemption requests received in proper form on that day. An order to redeem Creation Units must be received by the Administrator not later than 3:00 p.m., E.T.

Availability of Information

The Fund's Web site (*www.indexiq.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[24] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

On each business day, before commencement of trading in Shares in the Core Trading Session (9:30 a.m. E.T. to 4:00 p.m. E.T.) on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day.[25] The Web site information will be publicly available at no charge.

On a daily basis, the Fund will disclose on *www.indexiq.com* the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio.

In addition, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the NSCC. The basket represents one Creation Unit of the Fund.

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), Shareholder Reports and Form N–CSR. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov*. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Quotation and last sale information for the Shares and underlying securities that are U.S. exchange listed will be

[24] The Bid/Ask Price of the Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[25] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T + 1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

available via the Consolidated Tape Association ("CTA") high-speed line. Quotation and last sale information for such U.S. exchange-listed securities as well as futures will be available from the exchange on which they are listed. Quotation and last sale information for options contracts will be available via the Options Price Reporting Authority.

Quotation information for OTC-traded securities and OTC-traded Financial Instruments (such as forwards, swaps and currency-related derivatives), and investment company securities (excluding ETFs), may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements. Quotation information from brokers and dealers or pricing services will be available for spot and forward currency transactions held by the Fund.

In addition, the Portfolio Indicative Value of the Fund, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.[26] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees (including money manager and other advisory or management fees), portfolio holdings disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[27] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. 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 the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will be subject to NYSE Arca Equities Rule 8.600, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, each Trust will be in compliance with Rule 10A–3[28] under the Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) will be made available to all market participants at the same time.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[29] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to detect and help deter violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, Equity Securities, exchange-traded options, futures contracts and options on futures contracts with other markets that are members of the ISG and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, exchange-traded equities, exchange-traded options, futures contracts and options on futures contracts from such markets. In addition, the Exchange may obtain information regarding trading in the Shares, exchange-traded equities, exchange-traded options, futures contracts and options on futures contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[30] FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit ("ETP") Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that

[26] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Portfolio Indicative Values taken from CTA or other data feeds.

[27] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[28] 17 CFR 240.10A–3.

[29] FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[30] For a list of the current members of ISG, see *www.isgportal.org*. The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[31] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. All of the Equity Securities in which the Fund will invest will be listed on a U.S. national securities exchange or a non-U.S. securities exchange that is a member of the ISG or a party to a comprehensive surveillance sharing agreement with the Exchange; provided, however, that up to 10% of the assets of the Fund may be invested in non-U.S. listed equity securities that do not meet these requirements. The Adviser has represented that not more than 20% of the Fund's assets will be invested, in the aggregate, in non-investment grade securities and structured securities. The Fund's investments will, under normal circumstances, be consistent with its investment objective. The Fund will not hold more than 15% of its net assets in illiquid securities, including Rule 144A securities. The Adviser is not a broker-dealer and is not affiliated with a broker-dealer. In the event (a) the Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or subadviser is a registered broker-dealer or becomes affiliated with a broker-dealer it will implement a firewall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Adviser is not affiliated with broker-dealers. The Exchange will obtain a representation from the issuer of the Shares that the NAVs per Share will be calculated daily and that the NAVs and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. The Fund's portfolio holdings will be disclosed on its Web site daily after the close of trading on the Exchange and prior to the opening of trading on the Exchange the following day. Moreover, the Portfolio Indicative Value will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last sale information will be available via the CTA high-speed line. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to the Fund's NAVs and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the 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 the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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 purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace.

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.

[31] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2014–134 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–2014–134. 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–NYSEArca–2014–134, and should be submitted on or before December 29, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28643 Filed 12–5–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73717; File No. SR–NYSEArca–2014–126]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the AdvisorShares Pacific Asset Enhanced Floating Rate ETF Under NYSE Arca Equities Rule 8.600

December 2, 2014.

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 19, 2014, 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 Exchange. On November 26, 2014, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): AdvisorShares Pacific Asset Enhanced Floating Rate ETF. The text of 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 list and trade shares ("Shares") of the following under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares[5]: AdvisorShares Pacific Asset Enhanced Floating Rate ETF ("Fund").[6] The Shares will be

[32] 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] Amendment No. 1 amends the proposed rule change in the following ways: (1) Specifies that the floating rate high yield corporate bonds in which the Fund invests generally must have a $100 million par amount outstanding at the time of investment; (2) clarifies that senior loans in which the Fund may invest includes leveraged loans; and (3) specifies that the U.S. exchange-traded futures contracts, U.S. exchange-traded options on futures contracts and U.S. exchange-traded put and call options in which the Fund invests will trade on exchanges that are members of the Intermarket Surveillance Group.

[5] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[6] The Commission has approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.*, Securities Exchange Act Release Nos. 69591 (May 16, 2013), 78 FR 30372 (May 22, 2013) (SR–NYSEArca–2013–33) (order approving Exchange listing and trading of International Bear ETF); 69061 (March 7, 2013), 78 FR 15990 (March 13, 2013) (SR–NYSEArca–2013–01) (order approving Exchange

offered by AdvisorShares Trust (the "Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Securities and Exchange Commission (the "Commission") as an open-end management investment company.[7] The investment adviser to the Fund will be AdvisorShares Investments, LLC (the "Adviser"). Pacific Asset Management (the "Sub-Adviser")[8], will be the sub-advisor to the Fund, and is subject to the oversight of the Adviser and the Trust's Board of Directors ("Board"). Foreside Fund Services, LLC (the "Distributor") will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon (the "Administrator") will serve as the administrator, custodian, transfer agent and fund accounting agent for the Fund.

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio.[9] Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. The Sub-Adviser is not registered as a broker-dealer but is affiliated with Pacific Select Distributors, Inc., a registered broker-dealer.[10]

In the event (a) the Adviser or Sub-Adviser becomes, or becomes newly affiliated with, a broker-dealer, or (b) any new adviser or sub-adviser is, or becomes affiliated with, a broker-dealer, it will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

Principal Investments

According to the Registration Statement, the Fund's investment objective will seek to provide a high level of current income.

Under normal circumstances,[11] the Fund will invest at least 80% of its net assets (plus any borrowings for investment purposes) in floating rate loans and other floating rate debt securities, derivatives or other instruments that have economic interests similar to such securities (each as described further below).

The Fund will attempt to achieve its investment objective through investments in a focused portfolio comprised primarily of senior secured floating rate loans ("Senior Loans"), floating rate high yield corporate bonds,[12] index credit default swap agreements, single name credit default swap agreements, total return swap agreements,[13] interest rate swap agreements and cash.[14] The Fund will invest in Senior Loans that the Adviser or the Sub-Adviser deems to be highly liquid with readily available prices. The Fund will invest in Senior Loans rated C or higher by a credit rating agency registered as a nationally recognized statistical rating organization ("NRSRO") with the Commission (for

listing and trading of Newfleet Multi-Sector Income ETF); and 67277 (June 27, 2012), 77 FR 39554 (July 3, 2012) (SR–NYSEArca–2012–39) (order approving Exchange listing and trading of the Global Alpha & Beta ETF).

[7] The Trust is registered under the 1940 Act. On June 25, 2014, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) ("Securities Act") and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) ("Registration Statement"). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812–13677) ("Exemptive Order").

[8] Pacific Life Fund Advisors LLC, a registered adviser, conducts its fixed income asset management business under the name Pacific Asset Management.

[9] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[10] The Sub-Adviser represents that Pacific Select Distributors, Inc. is a limited purpose broker-dealer with a primary business purpose of serving as distributor for mutual funds and variable annuity products. Pacific Select Distributors, Inc. does not engage in any brokerage or trading activity.

[11] The term "under normal circumstances" includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[12] Senior Loans and floating rate high yield corporate bonds are instruments with interest rates which float, adjust or vary periodically based upon a benchmark indicator, a specified adjustment schedule, or prevailing interest rates. Senior Loans will generally be purchased from banks or other financial institutions through assignments or participations. A direct interest in a Senior Loan may be acquired directly from the agent of the lender or another lender by assignment or an indirect interest may be acquired as a participation in another lender's portion of a Senior Loan.

[13] Index Credit default swaps (CDX) can be used to gain exposure to a basket of credit risk by selling protection against default or other credit events or by buying protection in order to hedge broad market credit risk. Single name credit default swaps (CDS) can be used to allow the Fund to increase or decrease exposure to specific issuers through lower trading costs. Total return swaps (TRS) are contracts to obtain the total return of a reference asset or index in exchange for paying a financing cost. interest rate swaps (IRS) are agreements between two parties to exchange one stream of interest payments for another. Each of these swaps is a type of derivative instrument, a financial contract whose value depends upon, or is derived from, the value of an underlying asset, reference rate or index, and may relate to bonds, loans, interest rates and related indexes. CDX, CDS, TRS and IRS are collectively referred to in the "Principal Investments" section of this filing as "swap agreements." The Fund will typically use exchange-traded and over-the-counter ("OTC") swap agreements as (i) a method to enhance returns; (ii) a substitute for taking a position in the underlying asset; and, (iii) as a part of a strategy designed to reduce exposure to other risks. To limit potential risks associated with such transactions, the Fund will segregate assets determined to be liquid by the Sub-Adviser in accordance with the 1940 Act to cover its obligations under derivative instruments. The Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. The use of swap agreements will increase the Fund's net exposure to a particular issue, fixed income markets or the financial markets generally.

[14] In pursuing its investment objective, the Fund will seek to outperform the Credit Suisse Institutional Leveraged Loan Index (the "Index").

example, Moody's Investor Service, Inc.), or is unrated but considered to be of comparable quality by the Adviser or Sub-Adviser. The Fund will not invest in Senior Loans that are in default at the time of purchase. In addition, for investment purposes, the Senior Loan must have a par amount outstanding of $150 million or greater at the time the loan is originally issued.[15] Floating rate high yield corporate bonds in which the Fund invests generally must have $100 million or more par amount outstanding at the time of investment.

According to the Fund's Registration Statement, the Fund generally will invest in Senior Loans (including leveraged loans) that may be in the form of participations and assignments. A direct interest in a Senior Loan may be acquired directly from the agent of the lender or another lender by assignment or an indirect interest may be acquired as a participation in another lender's portion of a Senior Loan.

Generally, secured Senior Loans are secured by specific assets of the borrower. Senior Loans, and some floating rate high yield corporate bonds, are debt instruments that may have a right to payment that is senior to most other debts of the borrowers. Borrowers may include corporations, partnerships and other entities that operate in a variety of industries and geographic regions. Senior Loans in which the Fund will invest consist of domestic issuers and U.S. dollar denominated foreign issuers.

Senior Loans and floating rate high yield corporate bonds in which the Fund intends to invest are expected to be rated below investment grade (*i.e.*, high yield/high risk securities, sometimes called non-investment grade securities) [16] or, may not be rated by any nationally recognized rating service, and if unrated, of comparable quality as determined by the Sub-Adviser.

Investment Characteristics

According to the Registration Statement, the Sub-Adviser's selection process will start with a top-down market analysis and will be complemented by bottom-up security selection. The strategy will aim to provide exposure to the most liquid segment of the bank loan marketplace. In general, the investable universe will be comprised of the largest loans in the Index. The factors considered by the Sub-Adviser when determining liquidity specifically for loans may include the frequency of trading or quotes, the number of dealers in the market willing to purchase or sell the loan, trading volume, the nature of the security, and the market for the security including prospects for future demand for the loan.

Once the Sub-Adviser has determined the investable universe, both the macro-economic environment and technical factors that could materially impact the credit markets are assessed. The Sub-Adviser then will determine an overall target of portfolio risk and leverage to employ for the near term.

Once the Sub-Adviser has determined the target risk and investable universe, the Sub-Adviser will construct what is believed to be the most effective mix of investments in accordance with the overall portfolio guidelines. As a result, investments with the most favorable risk/reward analyses will tend to have a greater representation or leverage in the Fund's portfolio. Due to the nature of the exchange-traded fund ("ETF") structure and liquidity requirements, the portfolio will place a higher value on liquidity relative to products without such a requirement. The portfolio will be diversified by industry and issuer, with no individual issuer representing more than 5% of the portfolio. The typical duration positioning will be between 0.25 years to 0.75 years as determined by the Sub-Adviser.[17]

Once an investment is made, monitoring will take place each business day. Portfolio values will be monitored through daily third-party pricing. Credit updates will be captured through the Sub-Adviser's research system. This system will serve as a centralized credit hub for the Sub-Adviser's research team. The system will aggregate information such as portfolio holdings, outlooks, analyst comments, and investment theses for the portfolio management, operations, and credit teams. Investments will be sold based upon relative value opportunities or changes in corporate fundamentals.

An investment will generally be sold when the issue no longer offers relative value or an adverse change in corporate or sector fundamentals has occurred.

Leverage

To seek an increase in yield, the Fund expects to employ leverage to enhance potential return. The Fund may use leverage by (i) borrowing money, up to the maximum amount permitted under the 1940 Act, for investment purposes normally on a floating rate basis or (ii) through swap agreements. The timing and terms of leverage will be determined by the Sub-Adviser's ETF Investment Committee.

The Fund's investments in swap agreements will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and policies.[18]

The Fund's assets that are not invested directly in floating rate loans, floating rate high yield corporate bonds or swap agreements will be held in cash or cash equivalents, including money market instruments and exchange traded products ("ETPs") [19] that invest in these and other highly liquid instruments, in order to cover its obligations under certain swap agreements. The larger the value of the Fund's derivative positions, the more the Fund will be required to maintain cash or cash equivalents as collateral for such derivatives.

Other (Non-Principal) Investments

According to the Registration Statement, while the Fund, under normal circumstances, will invest at least 80% of its net assets in securities and financial instruments described above, the Fund may invest up to 20% of its net assets in the following securities and financial instruments.[20]

The Fund may invest in debt securities (other than those described in the Principal Investments section above), which are securities consisting

[15] The Commission previously has approved listing and trading on NYSE Arca of an issue of Managed Fund Shares that primarily holds senior loans that include leveraged loans. See Securities Exchange Act Release No. 69244 (March 27, 2013), 78 FR 19766 (April 2, 2013) (SR–NYSEArca–2013–08) (order approving listing and trading of SPDR Blackstone/GSO Senior Loan ETF under NYSE Arca Equities Rule 8.600).

[16] Non-investment-grade securities, also referred to as "high yield securities" or "junk bonds," are debt securities that are rated lower than the four highest rating categories by a nationally recognized statistical rating organization (for example, lower than Baa3 by Moody's Investors Service, Inc. ("Moody's") or lower than BBB- by Standard & Poor's ("S&P")) or are determined to be of comparable quality by the Fund's Sub-Adviser.

[17] Duration is a measure used to determine the sensitivity of a security's price to changes in interest rates. The longer a security's duration, the more sensitive it will be to changes in interest rates.

[18] The Fund will seek, where possible, to use counterparties whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Sub-Adviser evaluates each approved counterparty using various methods of analysis, including earning updates, a broker-dealer's reputation, the Sub-Adviser's past experience with the broker-dealer, a counterparty's liquidity and its share of market participation.

[19] *See* note 23, *infra*.

[20] Unless otherwise indicated, the Fund may invest up to 20% of its net assets in the types of investments referenced below in this section, subject to the limitations imposed by the Fund's investment objective, policies, and restrictions described in the Fund's Registration Statement, as well as the federal securities laws.

of a certificate or other evidence of a debt (secured or unsecured) on which the issuing company or governmental body promises to pay the holder thereof a fixed, variable, or floating rate of interest for a specified length of time, and to repay the debt on the specified maturity date.

Debt securities include investment-grade securities, non-investment-grade securities, and unrated securities. Selection of such debt securities will generally be dependent on an independent analysis performed by the Sub-Adviser.

Debt securities in which the Fund may invest consist of the following:

Bank Obligations of domestic and foreign banks, which may include certificates of deposit, commercial paper,[21] bankers' acceptances, and fixed time deposits. The Fund will not invest in fixed time deposits which (i) are not subject to prepayment; or (ii) provide for withdrawal penalties upon prepayment, if in the aggregate, more than 15% of its net assets would be invested in such deposits, repurchase agreements with remaining maturities of more than seven days or other illiquid assets;

Corporate Debt, which are debt securities issued by businesses to finance their operations and consist of notes, corporate bonds, high yield bonds, debentures and commercial paper. The Fund may invest in corporate debt issued by domestic or foreign companies of all kinds, including those with small-, mid- and large-capitalizations. The Fund may also invest in corporate debt securities which are representative of one or more high yield bond or credit derivative indices, which may change from time to time;

Asset-backed securities ("ABS") are instruments created from many types of assets, including auto loans, credit card receivables, home equity loans, and student loans. ABS are issued through special purpose vehicles that are bankruptcy remote from the issuer of the collateral. The Fund may invest in ABS provided such securities are consistent with the Fund's investment objectives and policies. The Fund will not invest more than 5% of its net assets in non-agency ABS;

Mortgage Backed Securities ("MBS") and mortgage-related securities, which are interests in pools of residential or commercial mortgage loans, including mortgage loans made by savings and loan institutions, mortgage bankers, commercial banks and others. Pools of mortgage loans are assembled as securities for sale to investors by various governmental, government-related and private organizations. The Fund also may invest in debt instruments which are secured with collateral consisting of mortgage-related securities. The Fund will not invest, however, more than 5% of its net assets in mortgage-related securities;

Inflation-indexed bonds, which are debt securities whose principal value is periodically adjusted according to the rate of inflation;

Floating rate loans (other than those described in the Principal Investments section above) consisting of (i) unsecured senior loans and (ii) secured and unsecured subordinated loans, second lien loans and subordinated bridge loans ("Junior Loans").[22] Unsecured senior loans and Junior Loans are subject to the same general risks of Senior Loans; however, due to their lower place in the borrower's capital structure and possible unsecured status, unsecured senior loans and Junior Loans involve a higher degree of overall risk than Senior Loans of the same borrower; and,

U.S. government securities, which are securities issued or guaranteed by the U.S. government or its agencies or instrumentalities. U.S. government securities consist of U.S. Treasury bills, U.S. Treasury notes, U.S. Treasury bonds, obligations issued by U.S. government agencies and instrumentalities which are supported by (i) the full faith and credit of the U.S. Treasury, (ii) the discretionary authority of the U.S. government, or (iii) the right of the issuer to borrow from the U.S. Treasury, and separately traded principal and interest components of securities guaranteed or issued by the U.S. government or its agencies, instrumentalities or sponsored enterprises if such components trade independently under the Separate Trading of Registered Interest and Principal of Securities program ("STRIPS") or any similar program sponsored by the U.S. government, or U.S. Treasury zero-coupon bonds, which are U.S. Treasury bonds which have been stripped of their unmatured interest coupons, the coupons themselves, and receipts or certificates representing interests in such stripped debt obligations and coupons.

The Fund may invest in issuers located outside the United States directly, or in financial instruments, ETFs or other ETPs that are indirectly linked to the performance of foreign issuers.[23] Such financial instruments consist of American Depositary Receipts ("ADRs"), Global Depositary Receipts ("GDRs"), European Depositary Receipts ("EDRs"), International Depository Receipts ("IDRs"), "ordinary shares," and "New York shares" issued and traded in the U.S.[24]

[21] Commercial paper is a short-term obligation with a maturity ranging from one to 270 days issued by banks, corporations and other borrowers. The Fund may invest in commercial paper rated A–1 or A–2 by S&P or Prime-1 or Prime-2 by Moody's.

[22] The Fund will invest in Junior Loans the Adviser or Sub-Adviser deems to be highly liquid with readily available prices. The Fund will invest in Junior Loans rated C or higher by a NRSRO, or is unrated but considered to be of comparable quality by the Adviser or Sub-Adviser. The Fund will not invest in Junior Loans that are in default at time of purchase. In addition, for investment purposes, the Junior Loan must have a par amount outstanding of $150 million or greater at the time the loan is originally issued.

[23] For purposes of this proposed rule change, ETPs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETPs all will be listed and traded in the U.S. on registered exchanges. The Fund will invest in the securities of ETFs registered under the 1940 Act consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof. The Fund will only make such ETF investments in conformity with the requirements of Regulation M of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"). While the Fund may invest in inverse ETPs, the Fund will not invest in leveraged or inverse leveraged ETPs (*e.g.*, 2X or 3X).

[24] ADRs are U.S. dollar denominated receipts typically issued by U.S. banks and trust companies that evidence ownership of underlying securities issued by a foreign issuer. The underlying securities may not necessarily be denominated in the same currency as the securities into which they may be converted. The underlying securities are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions. Generally, ADRs in registered form are designed for use in domestic securities markets and are traded on exchanges or OTC in the U.S. GDRs, EDRs, and IDRs are similar to ADRs in that they are certificates evidencing ownership of shares of a foreign issuer; however, GDRs, EDRs, and IDRs may be issued in bearer form and denominated in other currencies, and are generally designed for use in specific or multiple securities markets outside the U.S. EDRs, for example, are designed for use in European securities markets while GDRs are designed for use throughout the world. Ordinary shares are shares of foreign issuers that are traded abroad and on a U.S. exchange. New York shares are shares that a foreign issuer has allocated for

Continued

The Fund may trade U.S. exchange-traded futures contracts, U.S. exchange-traded or OTC options on futures contracts, and U.S. exchange-traded or OTC put and call options on securities and securities indices, as the Sub-Adviser determines is appropriate in seeking the Fund's investment objective, and except as restricted by the Fund's investment limitations. The Fund may purchase futures contracts and options to protect against a decline in the market value of the securities in its portfolio or to anticipate an increase in the market value of securities that the Fund may seek to purchase in the future. In addition, the Fund may sell futures contracts or write covered call options as a means of increasing the yield on its assets and as a means of providing limited protection against decreases in its market value. U.S. exchange-traded futures contracts, U.S. exchange-traded options on futures contracts and U.S. exchange-traded put and call options in which the Fund invests will trade on exchanges that are members of ISG.

The Fund may invest in structured notes, which are debt obligations that also contain an embedded derivative component with characteristics that adjust the obligation's risk/return profile. Generally, the performance of a structured note will track that of the underlying debt obligation and the derivative embedded within it. The Fund has the right to receive periodic interest payments from the issuer of the structured notes at an agreed-upon interest rate and a return of the principal at the maturity date.

The Fund may invest in exchange-traded equity securities that represent ownership interests in a company or partnership and that consist of common stocks, preferred stocks, warrants to acquire common stock, securities convertible into common stock, investments in master limited partnerships, and rights.

The Fund may invest in the securities of other investment companies to the extent that such an investment would be consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof.

Consistent with the restrictions discussed above, the Fund may invest in several different types of investment companies from time to time, including mutual funds, ETFs, exchange and OTC-traded closed-end funds, and exchange and OTC-traded BDCs, when the Adviser or the Sub-Adviser believes such an investment is in the best interests of the Fund and its shareholders. For example, the Fund may elect to invest in another investment company when such an investment presents a more efficient investment option than buying securities individually. The Fund also may invest in investment companies that are included as components of an index, such as business development companies ("BDCs"), to seek to track the performance of that index. A BDC is a less common type of closed-end investment company that more closely resembles an operating company than a typical investment company. Investment companies may include index-based investments, such as ETFs that hold substantially all of their assets in securities representing a specific index as well as ETFs that are actively managed.

The Fund may invest in the securities of exchange and OTC-traded pooled investment vehicles that are not investment companies and, thus, not required to comply with the provisions of the 1940 Act. These pooled vehicles typically hold commodities, such as gold or oil, currency, or other property that is itself not a security.[25]

The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans. It is the current policy of the Fund not to invest in repurchase agreements that do not mature within seven days if any such investment, together with any other illiquid assets held by the Fund, amounts to more than 15% of the Fund's net assets. The investments of the Fund in repurchase agreements, at times, may be substantial when, in the view of the Sub-Adviser, liquidity or other considerations so warrant.

The Fund may engage in short sales transactions in which the Fund sells a security it does not own.

The Fund may utilize swap agreements, other than those referenced in the Principal Investments section above, in an attempt to gain exposure to the securities in a market without actually purchasing those securities, or to hedge a position. Such swap agreements consist of interest rate caps, under which, in return for a premium, one party agrees to make payments to the other to the extent that interest rates exceed a specified rate, or "cap", interest rate floors, under which, in return for a premium, one party agrees to make payments to the other to the extent that interest rates fall below a specified level, or "floor"; and interest rate collars, under which a party sells a cap and purchases a floor or vice versa in an attempt to protect itself against interest rate movements exceeding given minimum or maximum levels.

Investment Restrictions

According to the Registration Statement, the Fund may not:

(i) With respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective depositary receipt; [26] or

(ii) [sic] Invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments in securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, or shares of investment companies. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates.[27]

The 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 Adviser or Sub-Adviser,[28] in accordance

trading in the U.S. ADRs, ordinary shares, and New York shares all may be purchased with and sold for U.S. dollars, which protects the Fund from the foreign settlement risks described below. ADRs may be sponsored or unsponsored, but unsponsored ADRs will not exceed 10% of the Fund's net assets. Not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) shall consist of equity securities whose principal market is not a member of the Intermarket Surveillance Group ("ISG") or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. *See* note 40, *infra*.

[25] Exchange-traded pooled investment vehicles include Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); and Trust Units (as described in NYSE Arca Equities Rule 8.500).

[26] The diversification standard is set forth in Section 5(b)(1) of the 1940 Act. *See* note 24, *supra*, regarding depositary receipts that the Fund may hold.

[27] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.*, Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[28] In reaching liquidity decisions, the Adviser or Sub-Adviser may consider the following factors: the frequency of trades and quotes for the security; the

with Commission guidance. The Fund will monitor 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 the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[29]

To respond to adverse market, economic, political or other conditions, the Fund may invest up to 100% of its total assets, without limitation, in debt securities and money market instruments, either directly or through ETPs (*see supra* note 23). The Fund may be invested in this manner for extended periods, depending on the Sub-Adviser's assessment of market conditions. For purposes of this paragraph, debt securities and money market instruments include shares of mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. government securities, repurchase agreements and bonds that are rated BBB or higher.

According to the Registration Statement, the Fund will seek to qualify for treatment as a Regulated Investment Company ("RIC") under the Internal Revenue Code.[30]

The Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[31]

Net Asset Value

The NAV per Share of the Fund will be computed by dividing the value of the net assets of the Fund (*i.e.*, the value of its total assets less total liabilities) by the total number of Shares of the Fund outstanding, rounded to the nearest cent. Expenses and fees, including without limitation, the management, administration and distribution fees, are accrued daily and taken into account for purposes of determining NAV per Share. The NAV per Share for the Fund will be calculated by the Administrator and determined as of the close of the regular trading session on the New York Stock Exchange ("NYSE") (ordinarily 4:00 p.m., Eastern Time) on each day that such exchange is open.

In computing the Fund's NAV, the Fund's securities holdings will be valued based on their last readily available market price. Price information on listed securities, including ETPs in which the Fund invests, will be taken from the exchange where the security is primarily traded. Other portfolio securities and assets for which market quotations are not readily available or determined to not represent the current fair value will be valued based on fair value as determined in good faith by the Fund's Sub-Adviser in accordance with procedures adopted by the Board.

U.S. exchange-traded options, exchange-traded swaps and exchange-traded closed end funds will be valued at the closing settlement price determined by the applicable exchange. Exchange-traded equity securities, including common stocks, preferred stocks, warrants, convertible securities, rights, pooled investment vehicles, exchange-traded BDC's, master limited partnerships, ETPs, sponsored ADRs, GDRs, EDRs, IDRs, ordinary shares, and New York shares (collectively, "Exchange-traded Equity") will be valued at market value, which will generally be determined using the last reported official closing or last trading price on the exchange or market on which the security is primarily traded at the time of valuation or, if no sale has occurred, at the last quoted bid price on the primary market or exchange on which they are traded. If market prices are unavailable or the Fund believes that they are unreliable, or when the value of a security has been materially affected by events occurring after the relevant market closes, the Fund will price those securities at fair value as determined in good faith using methods approved by the Trust's Board.

Unsponsored ADRs, which are traded OTC, will be valued on the basis of the market closing price on the exchange where the stock of the foreign issuer that underlies the ADR is listed. Investment company securities (other than ETFs, exchange-traded closed-end funds and exchange-traded BDCs), including mutual funds, OTC-traded closed-end funds, and OTC-traded BDCs, will be valued at net asset value. Non-exchange-traded derivatives, including swaps, options traded OTC, options on futures traded OTC, and certain structured notes, will normally be valued on the basis of quotes obtained from brokers and dealers or pricing services using data reflecting the earlier closing of the principal markets for those assets. Prices obtained from independent pricing services use information provided by market makers or estimates of market values obtained from yield data relating to investments or securities with similar characteristics.

Futures contracts will be valued at the settlement or closing price determined by the applicable exchange.

Debt securities, floating rate loans, other floating rate debt securities, Senior Loans, Junior Loans, U.S. Treasury securities, OTC-traded pooled investment vehicles, other obligations issued or guaranteed by U.S. government agencies and instrumentalities, STRIPs, zero-coupon bonds, bank obligations, corporate debt securities, ABS, mortgage-backed securities, mortgage-related securities, commercial paper, repurchase agreements, inflation-indexed bonds, certificates of deposits, bankers' acceptances, and certain structured notes (collectively, "OTC-traded Securities") generally trade in the OTC market rather than on a securities exchange. The Fund will generally value OTC-traded Securities by relying on independent pricing services. The Fund's pricing services will use valuation models or matrix pricing to determine current value. In general, pricing services use information with respect to comparable bond and note transactions, quotations from bond dealers or by reference to other securities that are considered comparable in such characteristics as

number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

[29] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also*, Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act).

[30] 26 U.S.C. 851.

[31] The Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund's first full calendar year of performance.

rating, interest rate, maturity date, option adjusted spread models, prepayment projections, interest rate spreads and yield curves. Matrix price is an estimated price or value for a fixed-income security. Matrix pricing is considered a form of fair value pricing. The Fund's debt securities will generally be valued at bid prices. In certain cases, some of the Fund's debt securities may be valued at the mean between the last available bid and ask prices.

Foreign exchange rates will be priced using 4:00 p.m. (Eastern Time) mean prices from major market data vendors.

Creation and Redemption of Shares

According to the Registration Statement, the Fund will issue and redeem Shares on a continuous basis at NAV in aggregated lots which shall initially be of 25,000 Shares (each, a "Creation Unit").

All orders to create or redeem Creation Units must be received by the Distributor no later than 3:00 p.m., Eastern Time in order for the creation or redemption of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date.

The Fund typically will issue and redeem Creation Units principally for cash, calculated based on the NAV per Share, multiplied by the number of Shares representing a Creation Unit ("Deposit Cash"), plus a fixed and/or variable transaction fee; however, the Trust reserves the right to permit or require Creation Units to be issued in exchange for the Deposit Securities together with the Cash Component, described below. [32]

The consideration for purchase of a Creation Unit of each Fund generally will consist of an in-kind deposit of a designated portfolio of securities—the "Deposit Securities"—per each Creation Unit constituting a substantial replication, or a representation, of the securities included in the Fund's portfolio and an amount of cash—the "Cash Component." Together, the Deposit Securities and the Cash Component will constitute the "Fund Deposit," which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund. The Cash Component is an amount equal to the difference between the NAV of the Shares of the Fund (per Creation Unit) and the market value of the Deposit Securities.

In addition, the Trust reserves the right to permit or require the substitution of an amount of cash—*i.e.*, a "cash in lieu" amount—to be added to the Cash Component to replace any Deposit Security which may not be available in sufficient quantity for delivery or which may not be eligible for transfer through the clearing process, or which may not be eligible for trading by an authorized participant or the investor for which it is acting.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through the Administrator and only on a business day. The Trust will not redeem Shares of the Fund in amounts less than Creation Units. Unless cash redemptions are available or specified, the redemption proceeds for a Creation Unit generally will consist of the "Fund Securities"—as announced by the Administrator on the business day of the request for redemption received in proper form—plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities, less a redemption transaction fee.

The Administrator, through the National Securities Clearing Corporation ("NSCC"), will make available immediately prior to the opening of business on the Exchange (currently 9:30 a.m., Eastern Time) on each business day, the Fund Securities, Deposit Securities and Fund Deposit, that will be applicable to creation and redemption requests received in proper form on that day as well as the estimated Cash Component.

According to the Registration Statement, if it is not possible to effect deliveries of the Fund Securities, for example if the investor is not able to accept delivery, the Trust may in its discretion exercise its option to redeem Shares of the Fund in cash, and the redeeming beneficial owner will be required to receive its redemption proceeds in cash. In addition, an investor may request a redemption in cash which the Fund may, in its sole discretion, permit.[33] In either case, the investor will receive a cash payment equal to the NAV of its Shares based on the NAV of Shares of the Fund next determined after the redemption request is received in proper form (minus a redemption transaction fee and additional charge for requested cash redemptions, as described in the Registration Statement). The Fund may also, in its sole discretion, upon request of a shareholder, provide such redeemer a portfolio of securities which differs from the exact composition of the applicable Fund Securities but does not differ in NAV.

Redemptions of Shares for Fund Securities will be subject to compliance with applicable federal and state securities laws and the Fund (whether or not it otherwise permits cash redemptions) reserves the right to redeem Creation Units for cash to the extent that the Fund could not lawfully deliver specific Fund Securities upon redemptions or could not do so without first registering the Fund Securities under such laws. An authorized participant or an investor for which it is acting subject to a legal restriction with respect to a particular stock included in the Fund Securities applicable to the redemption of a Creation Unit may be paid an equivalent amount of cash.

Availability of Information

The Fund's Web site (*www.advisorshares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[34] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund's Web site will disclose the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day.[35]

[32] The Adviser represents that, to the extent the Trust effects the creation of Shares in cash, such transactions will be effected in the same manner for all authorized participants.

[33] The Adviser represents that, to the extent the Trust effects the redemption of Shares in cash, such transactions will be effected in the same manner for all authorized participants.

[34] The Bid/Ask Price of the Fund's Shares will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[35] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

The Fund will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities, if applicable, required to be delivered in exchange for the Fund's Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the Exchange via the NSCC. The basket represents one Creation Unit of the Fund. The NAV of Shares of the Fund will normally be determined as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m. Eastern Time) on each business day. Authorized participants may refer to the basket composition file for information regarding securities and financial instruments that may comprise the Fund's basket on a given day.

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), the Fund's shareholder reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports will be available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov*. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

Quotation and last sale information for the Shares and the underlying U.S. Exchange-traded Equity will be available via the Consolidated Tape Association ("CTA") high-speed line, and from the national securities exchange on which they are listed. Quotation and last sale information for exchange-listed options cleared via the Options Clearing Corporation will be available via the Options Price Reporting Authority. Price information regarding exchange-traded options, exchange-traded swaps, exchange-traded closed end funds, futures and Exchange-traded Equity held by the Fund will be available from the U.S. and non-U.S. exchanges trading such assets.

Quotation information from brokers and dealers or pricing services will be available for unsponsored ADRs; non-exchange-traded derivatives (including swaps, options traded OTC, options on futures traded OTC and certain structured notes); and OTC-traded Securities. Price information for investment company securities (other than ETFs, exchange-traded closed end funds and exchange-traded BDCs) is available from the applicable investment company's Web site and from market data vendors. Pricing information regarding each asset class in which the Fund will invest will generally be available through nationally recognized data service providers through subscription agreements. Foreign exchange prices are available from major market data vendors.

In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.[36] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

[36] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Portfolio Indicative Values taken from CTA or other data feeds. The Portfolio Indicative Value calculation will be an estimate of the value of the Fund's NAV per Share using market data converted into U.S. dollars at the current currency rates. The Portfolio Indicative Value price will be based on quotes and closing prices from the securities' local market and may not reflect events that occur subsequent to the local market's close. Premiums and discounts between the Portfolio Indicative Value and the market price of the Shares may occur. This should not be viewed as a "real-time" update of the NAV per Share of the Fund, which will be calculated only once a day.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[37] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. 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 the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Adviser will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the Fund's portfolio. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [38] under the Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the

[37] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[38] 17 CFR 240.10A–3.

Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) will be made available to all market participants at the same time.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[39]

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.[40]

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, exchange-traded equity securities, futures contracts and exchange-traded options contracts with other markets and other entities that are members of the ISG, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, exchange-traded equity securities, futures contracts and exchange-traded options contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, exchange-traded equity securities, futures contracts and exchange-traded options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

Not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) shall consist of equity securities whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. In addition, not more than 10% of the net assets of the Fund in the aggregate invested in exchange-traded options contracts shall consist of options contracts whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value and the Disclosed Portfolio is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[41] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, exchange-traded equity securities, futures contracts and exchange-traded options contracts with other markets and other entities that are members of the ISG, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, exchange-traded equity securities, futures contracts and exchange-traded options contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, exchange-traded equity securities, futures contracts and exchange-traded options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to TRACE. Not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) shall consist of equity securities whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. The Fund may invest up to 5% of net assets in non-agency ABS. The Fund may invest up to 5% of net

[39] FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[40] For a list of the current members of ISG, *see www.isgportal.org*. The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[41] 15 U.S.C. 78f(b)(5).

assets in mortgage-related securities. The Fund may not purchase or hold illiquid assets if, in the aggregate, more than 15% of its net assets would be invested in illiquid assets. The Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. The Sub-Adviser is not registered as a broker-dealer but is affiliated with Pacific Select Distributors, Inc., a registered broker-dealer. The Sub-Adviser represents that Pacific Select Distributors, Inc. is a limited purpose broker-dealer with a primary business purpose of serving as distributor for mutual funds and variable annuity products. Pacific Select Distributors, Inc. does not engage in any brokerage or trading activity.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the 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. In addition, a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares and the underlying U.S. Exchange-traded Equity will be available via the CTA high-speed line, and from the national securities exchange on which they are listed. Quotation and last sale information for exchange-listed options cleared via the Options Clearing Corporation will be available via the Options Price Reporting Authority. Price information regarding exchange-traded options, exchange-traded swaps, exchange-traded closed end funds, futures and Exchange-traded Equity held by the Fund will be available from the U.S. and non-U.S. exchanges trading such assets. Quotation information from brokers and dealers or pricing services will be available for unsponsored ADRs; non-exchange-traded derivatives (including swaps, options traded OTC, options on futures traded OTC and certain structured notes); and OTC-traded Securities. Price information for investment company securities (other than ETFs, exchange-traded closed end funds and exchange-traded BDCs) is available from the investment company's Web site and from market data vendors. Pricing information regarding each asset class in which the Fund will invest will generally be available through nationally recognized data service providers through subscription agreements. Foreign exchange prices are available from major market data vendors. The Fund will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. Moreover, prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the 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. 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 the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

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 purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2014–126 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2014–126. This file number should be included on the subject line if email is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–126 and should be submitted on or before December 29, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28644 Filed 12–5–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73719; File No. SR–Phlx–2014–76]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Anti-Internalization Functionality for Registered Market Makers on the PHLX Options Market

December 2, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 28, 2014, NASDAQ OMX PHLX LLC ("Phlx," "PHLX," or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt anti-internalization functionality for registered market makers on the PHLX Options Market.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on or before January 15, 2015.

The text of the proposed rule change is below; proposed new language is *italicized;* proposed deletions are in brackets.

* * * * *

Rule 1080. Phlx XL and Phlx XL II

(a)–(o) No Change.

(p) *Execution Protections*

(1) Acceptable Trade Range.

(A) After the opening, the System will calculate an Acceptable Trade Range to limit the range of prices at which an order or quote (except an All-or-none order) will be allowed to execute. The Acceptable Trade Range is calculated by taking the Reference Price, plus or minus a value to be determined by the Exchange. (*i.e.*, the Reference Price − (x) for sell orders/quotes and the Reference Price + (x) for buy orders/quotes). Upon receipt of a new order/quote, the Reference Price is the National Best Bid ("NBB") for sell orders and the National Best Offer ("NBO") for buy orders/quotes or the last price at which the order/quote is posted whichever is higher for a buy order/quote or lower for a sell order/quote.

(B) If an order/quote reaches the outer limit of the Acceptable Trade Range (the "Threshold Price") without being fully executed, it will be posted at the Threshold Price for a brief period, not to exceed one second ("Posting Period"), to allow more liquidity to be collected, unless a Quote Exhaust has occurred, in which case the Quote Exhaust process in Rule 1082(a)(ii)(B)(3) will ensue, triggering a new Reference Price. Upon posting, either the current Threshold Price of the order or an updated NBB for buy orders or the NBO for sell orders (whichever is higher for a buy order/lower for a sell order) then becomes the Reference Price for calculating a new Acceptable Trade Range. If the order/quote remains unexecuted, a New Acceptable Trade Range will be calculated and the order/quote will execute, route, or post up to the new Acceptable Trade Range Threshold Price, unless a member organization has requested that their orders be returned if posted at the outer limit of the Acceptable Trade Range (in which case, the order will be returned). This process will repeat until either (i) the order/quote is executed, cancelled, or posted at its limit price or (ii) the order has been subject to a configurable number of instances of the Acceptable Trade Range as determined by the Exchange (in which case it will be returned).

(C) During the Posting Period, the Exchange will disseminate as a quotation: (i) The Threshold Price for the remaining size of the order triggering the Acceptable Trade Range and (ii) on the opposite side of the market, the best price will be displayed using the "non-firm" indicator message in accordance with the specifications of the network processor. Following the Posting Period, the Exchange will return to a normal trading state and disseminate its best bid and offer.

(2) Anti-Internalization—Quotes and orders entered by Specialists and Registered Options Traders (as defined in Rule 1014) using the same Phlx badge will not be executed against quotes and orders entered on the opposite side of the market using the same badge. In such a case, the System will cancel the resting quote or order back to the entering party prior to execution. This functionality shall not apply in any auction or with respect to complex transactions.

(3) Order Price Protection ("OPP"). OPP is a feature of Phlx XL that prevents certain day limit, good til cancelled, immediate or cancel, and all-or-none orders at prices outside of pre-set standard limits from being accepted by the system. OPP applies to all options but does not apply to market orders, stop limit orders, Intermarket Sweep Orders or complex orders.

(A) OPP is operational each trading day after the opening until the close of trading, except during trading halts. The Exchange may also temporarily deactivate OPP from time to time on an intraday basis at its discretion if it determines that volatility warrants deactivation. Members will be notified of intraday OPP deactivation due to volatility and any subsequent intraday reactivation by the Exchange through the issuance of system status messages.

(B) OPP will reject incoming orders that exceed certain parameters according to the following algorithm.

[42] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(i) If the NBBO on the contra-side of an incoming order is greater than $1.00, orders with a limit more than 50% through such contra-side NBBO will be rejected by Phlx XL upon receipt. For example, if the NBBO on the offer side is $1.10, an order to buy options for more than $1.65 would be rejected. Similarly, if the NBBO on the bid side is $1.10, an order to sell options for less than $0.55 will be rejected.

(ii) If the NBBO on the contra-side of an incoming order is less than or equal to $1.00, orders with a limit more than 100% through such contra-side NBBO will be rejected by Phlx XL upon receipt. For example, if the NBBO on the offer side is $1.00, an order to buy options for more than $2.00 would be rejected. However, if the NBBO of the bid side of an incoming order to sell is less than or equal to $1.00, the OPP limits set forth above will result in all incoming sell orders being accepted regardless of their limit. To illustrate, if the NBBO on the bid side is equal to $1.00, the OPP limits provide protection such that all orders to sell with a limit less than $0.00 would be rejected.

(iii) For purposes of this rule, the NBBO is defined as the PBBO for singly-listed issues.

Commentary .01–.06 No Change.

[Commentary .07—Order Price Protection ("OPP"). OPP is a feature of Phlx XL that prevents certain day limit, good til cancelled, immediate or cancel, and all-or-none orders at prices outside of pre-set standard limits from being accepted by the system. OPP applies to all options but does not apply to market orders, stop limit orders, Intermarket Sweep Orders or complex orders.

(a) OPP is operational each trading day after the opening until the close of trading, except during trading halts. The Exchange may also temporarily deactivate OPP from time to time on an intraday basis at its discretion if it determines that volatility warrants deactivation. Members will be notified of intraday OPP deactivation due to volatility and any subsequent intraday reactivation by the Exchange through the issuance of system status messages.

(b) OPP will reject incoming orders that exceed certain parameters according to the following algorithm.

(i) If the NBBO on the contra-side of an incoming order is greater than $1.00, orders with a limit more than 50% through such contra-side NBBO will be rejected by Phlx XL upon receipt. For example, if the NBBO on the offer side is $1.10, an order to buy options for more than $1.65 would be rejected. Similarly, if the NBBO on the bid side is $1.10, an order to sell options for less than $0.55 will be rejected.

(ii) If the NBBO on the contra-side of an incoming order is less than or equal to $1.00, orders with a limit more than 100% through such contra-side NBBO will be rejected by Phlx XL upon receipt. For example, if the NBBO on the offer side is $1.00, an order to buy options for more than $2.00 would be rejected. However, if the NBBO of the bid side of an incoming order to sell is less than or equal to $1.00, the OPP limits set forth above will result in all incoming sell orders being accepted regardless of their limit. To illustrate, if the NBBO on the bid side is equal to $1.00, the OPP limits provide protection such that all orders to sell with a limit less than $0.00 would be rejected.

(iii) For purposes of this rule, the NBBO is defined as the PBBO for singly-listed issues.]

Commentary .08—Renumbered as Commentary .07.

Commentary .09—Renumbered as Commentary .08.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

PHLX is proposing to provide anti-internalization ("AIQ") functionality to Specialists and Registered Options Traders on the PHLX Options Market.[3] Anti-internalization functionality is widely available and has been for many years.[4] It is designed to assist market participants in complying with certain rules and regulations of the Employee Retirement Income Security Act ("ERISA") that preclude and/or limit managing broker-dealers of such accounts from trading as principal with orders generated for those accounts. It can also assist market makers in reducing trading costs from unwanted executions potentially resulting from the interaction of executable buy and sell trading interest from the same firm when performing the same market making function.

Under the proposal, quotes and orders entered by Specialists and Registered Options Traders using the same PHLX badge will automatically be prevented from interacting with each other in the System. Rather than executing quotes or orders from the same badge, the System will instead cancel the resting quotes and orders back to the entering party. PHLX uses "badges" to identify the party or parties entering trades into the System, similar to Market Participant Identifiers (MPIDs) and other mnemonic devices used at other exchanges. Because firms have multiple badges associated with multiple functions, linking AIQ to specific badges ensures that the functionality will be limited to the appropriate function, as explained in more detail below. Tying AIQ to specific PHLX badges will also enable market participants to carefully and systematically target the orders that should be prevented from interacting.

AIQ will apply in the PHLX XL system with respect to simple orders only; it will not apply in any auction or with respect to complex transactions. AIQ is difficult to apply during auctions, and there is limited benefit in doing so. The difficulty stems from the need to freeze the order book and quickly arrange and match large quantities of orders based upon simple instructions. Even if that could be accomplished, there is limited benefit because, generally speaking, auctions do not raise the same policy concerns for wash sales and ERISA due to the semi-random manner in which trades are matched.[5] AIQ is unnecessary with respect to complex orders due to the highly specialized nature of such orders and the high level of control that market participants exercise over complex orders. In addition, owing to the number of different legs involved in complex orders, applying AIQ to complex orders would also require freezing the book, which market participants and PHLX view as detrimental to the market.

Anti-internalization functionality was requested by Specialists and Registered

[3] *See* PHLX Rule 1014. The category of Specialist and Registered Options Traders ("ROTs") as defined in Rule 1014 are all considered market makers on the Exchange. This category includes the subcategories of Streaming Quote Traders ("SQTs"), Remote Streaming Quote Traders ("RSQTs"), and Non-SQT ROTs, all of which have market making obligations also defined in Rule 1014.

[4] *See, e.g.*, NASDAQ Rule 4757(a)(4), NASDAQ Options Market Rule Chapter VI, Section 10(6), NYSE Arca Equities Rule 7.31(qq)(2), and BATS Rule 11.9(f)(2). PSX Rule 3307(c) governing trading on the PHLX equity facility provides similar self-match prevention for equities trading.

[5] *See* NYSE Arca Equities Rule 7.31(qq).

Options Traders on PHLX. Anti-internalization processing is available only to market makers and only on an individual badge basis. Specialists and Registered Options Traders that conduct order entry business via alternative badges will not be afforded the protection of AIQ functionality with respect to such alternative badges. PHLX considered making AIQ functionality available to other participants, but rejected that approach. Limiting AIQ to Specialists and Registered Options Traders also helps to maintain simplicity of System processing.[6]

PHLX notes that use of the functionality does not relieve or otherwise modify the duty of best execution owed to orders received from public customers. Options market makers generally do not display customer orders in market making quotations, opting instead to enter customer orders using separate identifiers. In the event that an options market maker opts to include a customer order within a market making quotation, the market maker must take appropriate steps to ensure that public customer orders that do not execute due to anti-internalization functionality ultimately receive the same execution price (or better) they would have originally obtained if execution of the order was not inhibited by the functionality.

Finally, the Exchange is proposing to combine several existing price protection mechanisms in Rule 1080(p) and to rename that subsection as "Execution Protections, [sic] PHLX believes the rules will become clearer by adding AIQ and moving current Commentary .07 governing Order Price Protection to existing Rule 1080(p) governing the Acceptable Trade Range. As a result, PHLX will renumber existing Commentaries .08 and .09 as Commentaries .07 and .08. The proposed changes will not impact the substance and operation of the existing functionality of the Acceptable Trade Range, Order Price Protection or Commentaries .08 and .09.

2. *Statutory Basis*

PHLX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(5) of the Act[8] in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and 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, PHLX believes that the change, which is responsive to member input, will facilitate transactions in securities and perfect the mechanism of a free and open market by providing Specialists and Registered Options Traders with additional functionality that will assist them with managing the book of orders that they submit to PHLX and the associated execution costs.

PHLX believes the proposal is consistent with the Act because it provides tools for Specialists and Registered Options Traders to comply with existing rules against internalization in certain circumstances. Limiting AIQ to Specialists and Registered Options Traders is consistent with the Act because inadvertent internalization is much more likely to impact market makers than other participants and offering AIQ more broadly would burden the System and provide little or no offsetting regulatory benefit. Finally, PHLX believes that it is reasonable to limit AIQ to simple options orders, as opposed to complex options and auctions, because the execution risk is much lower with respect to complex options and auctions and because those functions operate quite differently than individual orders in simple options.

B. Self-Regulatory Organization's Statement on Burden on Competition

PHLX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, by providing market participants additional tools to prevent inadvertent internalization of orders submitted to PHLX, the change has the potential to improve the trading environment on the Exchange, which will enhance PHLX's competitiveness with respect to other trading venues, thereby promoting greater competition. Moreover, the change does not burden competition in that it will be provided at no additional cost to members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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)(ii) [sic] of the Act[9] and subparagraph (f)(6) of Rule 19b–4 thereunder.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2014–76 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2014–76. This file

[6] If demand should arise from other participants, PHLX will reconsider providing this functionality to all participants at that time.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(a)(ii) [sic].

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

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 offices 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–Phlx–2014–76, and should be submitted on or before December 29, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28646 Filed 12–5–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73714; File No. SR–FINRA–2014–049]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt FINRA Rule 2122 (Charges for Services Performed) in the Consolidated FINRA Rulebook

December 2, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 21, 2014, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to adopt NASD Rule 2430 (Charges for Services Performed) as FINRA Rule 2122 (Charges for Services Performed) without any substantive changes. FINRA also proposes to update a cross-reference within FINRA Rule 0150 accordingly.

Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

FINRA Rules

* * * * *

0150. Application of Rules to Exempted Securities Except Municipal Securities

(a) through (b) No Change.

(c) Unless otherwise indicated within a particular Rule, the following FINRA and NASD rules are applicable to transactions in, and business activities relating to, exempted securities, except municipal securities, conducted by members and associated persons: FINRA Rules 2010, 2020, 2060, 2111, *2122,* 2150, 2210, 2212, 2261, 2268, 2269, 2320(g), 3110, 3220, 3270, 4120, 4130, 4210, 4311, 4330, 4360, 4510 Series, 4530, 5160, 5210, 5220, 5230, 5310, 5340, 8110, 8120, 8210, 8310, 8311, 8312, 8320, 8330 and 9552; NASD Rules IM–2210–2, 2340, [2430,] 2510, 3040, 3050 and 3140.

* * * * *

[2430] *2122.* Charges for Services Performed

Charges, if any, for services performed, including, *but not limited to,* miscellaneous services such as collection of mon*ie*[y]s due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safe-keeping or custody of securities, and other services[,] shall be reasonable and not unfairly discriminatory [between] *among* customers.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),[4] FINRA is proposing to transfer NASD Rule 2430 (Charges for Services Performed) into the Consolidated FINRA Rulebook as FINRA Rule 2122 (Charges for Services Performed) without any substantive changes. Proposed FINRA Rule 2122 states that charges, if any, for services performed, including, but not limited to, miscellaneous services such as collection of monies due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safe-keeping or custody of securities, and other services shall be reasonable and not unfairly discriminatory among customers. Proposed FINRA Rule 2122 closely tracks the language of NASD Rule 2430 but makes non-substantive changes to the text of the NASD rule.[5]

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from New York Stock Exchange LLC ("NYSE") ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[5] FINRA previously solicited comment on a proposal to move NASD Rule 2430 to the Consolidated FINRA Rulebook with substantive changes. *See Regulatary Natice* 11–08 (February 2011); *see also Regulatory Notice* 13–07 (January 2013). Given that FINRA would like to proceed

Continued

FINRA also proposes to update a cross-reference within FINRA Rule 0150 to reflect the transfer of NASD Rule 2430 to FINRA Rule 2122.

FINRA has filed the proposed rule change for immediate effectiveness pursuant to Section 19(b)(3) of the Act [6] and paragraph (f)(6) of Rule 19b–4 thereunder,[7] in that the proposed rule change does not significantly affect the protection of investors or the public interest; does not impose any significant burden on competition; and does not become operative for 30 days after filing or such shorter time as the Commission may designate. FINRA has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(b)(9) of the Act,[9] which requires that FINRA rules not impose any burden on competition that is not necessary or appropriate in furtherance of the Act. FINRA believes that this proposed rule change, which does not substantively change the rule, is consistent with the Act because it is being undertaken pursuant to the rulebook consolidation process, which is designed to provide additional clarity and regulatory efficiency to FINRA members by consolidating the applicable NASD, Incorporated NYSE, and FINRA rules into one rule set.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, this proposal will not substantively change either the text or application of the rule. FINRA would like to proceed with the rulebook consolidation process expeditiously, which it believes will provide additional clarity and regulatory efficiency to members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received with respect to this proposal to transfer NASD Rule 2430 into the Consolidated FINRA Rulebook without any substantive changes.[10]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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]

A proposed rule change filed under Rule 19(b)(3)(A) of the Act [13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Because FINRA is proposing to transfer NASD Rule 2430 (Charges for Services Performed) into the Consolidated FINRA Rulebook as FINRA Rule 2122 (Charges for Services Performed) without any substantive changes, and because the rulebook consolidation process is designed to provide additional clarity and regulatory efficiency to members, the Commission believes that a waiver of the requirement is appropriate so that the rule change may become operative immediately. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

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 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–FINRA–2014–049 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–FINRA–2014–049. 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

with the rulebook consolidation process expeditiously to provide greater clarity and regulatory efficiency to FINRA members, FINRA is proposing in this rule change to move NASD Rule 2430 to the FINRA rules without substantive changes, and will defer proposing any substantive changes to the rule for a future rule proposal.

[6] 15 U.S.C. 78s(b)(3).

[7] 17 CFR 240.19b–4(f)(6).

[8] 15 U.S.C. 78*o*–3(b)(6).

[9] 15 U.S.C. 78*o*–3(b)(9).

[10] *But see* note 5 *supra*.

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] *Id.*

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 FINRA. 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–FINRA–2014–049 and should be submitted on or before December 29, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28641 Filed 12–5–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73715; File No. SR–OC–2014–06]

Self-Regulatory Organizations; OneChicago, LLC; Notice of Filing of Proposed Rule Change Relating to Bilateral Block and Bilateral EFP Reporting Guidance

December 2, 2014.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 (the "Act"),[1] notice is hereby given that on November 20, 2014, OneChicago, LLC ("OneChicago," "OCX," or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change described in Items I, II, and III 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. OneChicago has also filed this rule change with the Commodity Futures Trading Commission ("CFTC"). OneChicago filed a written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act ("CEA") on November 20, 2014.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

OCX is proposing to issue Notice to Members ("NTM") 2014–33, which provides guidance to market participants regarding bilateral block and bilateral Exchange of Future for Physical ("EFP") reporting. NTM 2014–33 provides guidance relating to four aspects of bilateral block and bilateral EFP reporting.

First, NTM 2014–33 defines the completion time of certain types of block trades. Specifically, the NTM relates to block trades in which a liquidity provider pre-hedges the customer's futures block order by executing in a related product, such as the underlying equity. OCX is clarifying that those types of block trades must be reported upon completion of the customer's full futures order quantity, and are not required to be reported in partial portions throughout the day.

The second topic on which NTM 2014–33 provides guidance is the order in which market participants may report a block trade. Specifically, for block trades that involve an order originator or customer on one side and a liquidity provider on the other, OCX is clarifying that it is acceptable for the liquidity provider to inform the order originator that the trade is complete, and for the order originator to then post the trade to the Exchange (after which time the liquidity provider would then accept the trade details in the OneChicago System). Previous OCX guidance was silent on this issue.

Furthermore, OneChicago is proposing to update its reporting time requirements to account for the dual-party posting guidance described above. Generally, OCX requires the posting party of a block trade to post the trade within five minutes of execution, and the accepting party to accept the reported trade details within five minutes from the time it was posted. OCX is proposing to modify this requirement for pre-hedged blocks for two reasons. First, OCX has become aware that market participants may be unable to comply with a strict five minute deadline when executing a block that involves a hedge in a related market. Second, OCX is tailoring the reporting requirements imposed on each side of a block trade to allow the side with greater reporting requirements more time to meet those obligations.

Finally, NTM 2014–33 states that block and EFP trades may be reported outside the time parameters described in the NTM only in extenuating circumstances. The NTM then provides a non-exhaustive list of scenarios that OCX may consider to constitute an extenuating circumstance.

Block Trade Completion

Generally, block trades in OCX's products occur with one party (the order originator or customer) seeking directional exposure to a single stock future. The counterparty (the liquidity provider) hedges in a related product, such as the underlying equity, and then buys/sells the equivalent number of single stock futures from/to the order originator/customer. OCX considers this type of "pre-hedged" block trade to be complete when the liquidity provider hedges in the related market and then calculates the futures price by adding or subtracting the agreed upon basis from the hedge price.

Under this interpretation, a block trade may be considered complete before the customer's entire order quantity is filled. This interpretation has led to concerns among market participants regarding how to appropriately report amounts that meet the block trade minimum quantity threshold, but that do not satisfy the customer's full order quantity. These situations generally arise when a liquidity provider has completed a blockable amount, but can no longer execute the remaining customer order due to the customer's limit price being crossed, or because of a lack of liquidity in the hedge product.

OCX is now clarifying in NTM 2014–33 that market participants are not required to report these "partial fill" amounts throughout the day. Rather, a block trade of this type is considered complete when the liquidity provider has completed the hedge for the customer's full futures block order quantity. The NTM then lists certain requirements relating to the reporting of block trades pursuant to the NTM. First, if the liquidity provider is unable to complete the customer's entire futures order quantity equivalent by the end of the day, the reporting firm should report the amount that the liquidity provider was able to complete, so long as that amount meets the minimum block trade quantity threshold. Second, if the liquidity provider was not able to hedge an amount at least equal to the minimum block trade quantity threshold, a futures block was not created, and thus no block trade may be reported. In such a situation, the liquidity provider may offset or maintain its long or short position in the hedge product. For example, a liquidity provider that bought stock to hedge its sale of futures may sell the stock if it was unable to hedge enough shares of stock to reach the minimum block trade quantity threshold.

The NTM then describes a customer's obligation to accept a pre-hedged amount greater than or equal to the minimum block trade quantity threshold. A customer is required to accept a futures block that the liquidity provider has completed by pre-hedging. In other words, once a liquidity

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(7).

provider has pre-hedged an amount in a related market, the customer may not refuse to accept the futures equivalent of that pre-hedge. Nonetheless, a customer may permissibly cancel the unexecuted balance of its order that has not been pre-hedged. In such a case, the firms simply report the futures equivalent of the completed pre-hedge amount, so long as that amount meets the minimum block trade quantity threshold.

Dual Party Posting

The OneChicago System requires dual-party posting. Specifically, one party to the block trade must report the details of the trade, while the counterparty must then accept the reported details of the trade. In the case of a block trade described above in which one party seeks directional exposure and the counterparty provides liquidity by pre-hedging in a related market, NTM 2014–33 proposes to allow either side to the trade (the customer/order originator or the liquidity provider) to initially post the trade. Previous Exchange block trading guidance was silent on this issue.

OCX recognizes that for business or operational purposes, market participants may prefer in certain instances for the order originator/customer to initially report the trade and for the liquidity provider to then accept the trade details. Therefore, NTM 2014–33 expressly permits market participants to report bilateral blocks in this manner.

Updated Reporting Time Requirements

OCX Rule 417 (Block Trading) requires that block trades be reported to the Exchange "without delay." The term "without delay" is interpreted by NTM 2012–25 to mean within five minutes of completion of the hedge or, if there is no hedge involved, within five minutes of agreement to the terms of the trade. NTM 2012–25 clarifies that each party to the trade has five minutes to report the trade; that is, the party inserting the trade is required to enter the trade into the OneChicago System within five minutes of execution and the other party is required to accept the trade within five minutes of it being entered into the OneChicago System.

OCX has determined that five minutes per side is not sufficient to allow parties enough time to accurately report their block trades when the block trade is of the type that involves a liquidity provider pre-hedging in a related market, because a trade of this type does not involve a single point of execution during which parties agree to the terms of a trade then immediately report the trade details to the Exchange. Rather, these block trades involve multiple steps. Also, because the point of execution depends on executions in a related market, parties to a block trade need time to respond to their block execution and report the trade to the Exchange.

Accordingly, NTM 2014–33 proposes two alternative reporting time requirements depending on whether the liquidity provider or the customer/order originator is posting the block trade. The proposed reporting times have been made more flexible to account for: (1) The amount of time required for the liquidity provider to calculate the futures price based on its hedge price; (2) the amount of time required for the posting party to enter the trade details into the OneChicago System; and (3) the time it may take for a party not on notice to react to an inbound message or alert from a counterparty or the OneChicago System.[2]

Under NTM 2014–33, in cases where the liquidity provider is initially posting the block trade to the Exchange, the liquidity provider has fifteen minutes from the final execution of its hedge in the related market to calculate the futures price and then insert the trade details into the OneChicago System. The liquidity provider in this case has fifteen minutes rather than the standard five because the liquidity provider must calculate the futures price from its hedge price and manually enter the details of the trade into the OneChicago System. The order originator then has ten minutes to accept the trade in the OneChicago System. The order originator in this case has ten minutes rather than the standard five because it is considered a non-notice party in that it will not become aware that its obligation to post its side of the trade is running until it receives a trade report from the OneChicago System.

Conversely, when the order originator will be posting the block trade, the liquidity provider has ten minutes to calculate the futures price based on the hedge price and then inform the order originator of the futures price. The order originator then has fifteen minutes to insert the details of the trade into the OneChicago System. The liquidity provider then has five additional minutes to accept the trade in the OneChicago System. In this case, the liquidity provider initially has ten minutes rather than the standard five in order to calculate the futures price. The liquidity provider here does not receive the full fifteen minutes, however, because it is not also entering the trade details into the OneChicago System, as was the case in the previous example. The order originator has fifteen minutes rather than the standard five because it is considered a non-notice party that also needs to insert the details of the trade into the OneChicago System. Finally, the liquidity provider then has the standard five minutes to accept the inserted trade because it is on notice that the trade will soon be posted and simply has to review the trade details and accept the trade, and therefore, does not require any additional time.

NTM 2014–33 clarifies that for block trades where there is no hedge in a related market (both parties simply agree to a block trade then post to the Exchange), NTM 2012–25 controls, and the parties must report the block without delay. As such, the reporting party has five minutes to insert the trade details into the OneChicago System and the accepting party then has five minutes to accept the trade. OCX is also clarifying that the standard five minute reporting and five minute accepting requirements are also applicable to bilateral EFP trades, because those trades do not involve a pre-hedge like the block trades described in NTM 2014–33.

Delayed EFP and Block Trade Reporting

OCX recognizes that in some instances parties to a block trade may be unable to report their blocks and EFPs within the timelines required by the Exchange. Accordingly, OCX is permitting market participants to report block or EFP trades outside the reporting requirements in certain situations that the Exchange considers extenuating circumstances. NTM 2014–33 provides a non-exhaustive list of scenarios that the Exchange may consider to be extenuating circumstances, including (1) a technical malfunction or systems outage; (2) disagreement between reporting parties on price or some other material term of the trade; (3) a firm is reporting or accepting multiple block trades within short time period; and (4) unusual or abnormal market conditions.

The text of the proposed rule change is attached as *Exhibit 4* to the filing submitted by the Exchange but is not

[2] For example, when an order originator sends an order to a liquidity provider, the order originator is not on notice as to when it will receive a message from the liquidity provider that the hedge is complete (or, alternatively, receive a message from the OneChicago System that the liquidity provider has inserted the trade details into the OneChicago System and that such details must now be accepted or rejected). Accordingly, requiring a "non-notice party" (such as the order originator in this example) to accept or post a trade within five minutes may be unreasonably burdensome, as the non-notice party may receive this message at any time in the trading day.

attached to the published notice of the filing.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OneChicago included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of OneChicago's filing is to provide its market participants with guidance regarding the method by which bilateral blocks and bilateral EFPs may be reported to the Exchange. Specifically, market participants have raised questions regarding various aspects of bilateral block and bilateral EFP reporting, including how to deal with partial fills and remainders when reporting a bilateral block, which party to a bilateral block must report the trade first, how much time parties have to report a block trade to the Exchange, and under what circumstances, if any, OCX would allow parties to a bilateral block or bilateral EFP trade to exceed the reporting time requirements. OCX is updating its guidance in NTM 2014–33 to account for these questions that have been raised by market participants.

2. Statutory Basis

OneChicago believes that the proposed rule change is consistent with Section 6(b) of the Act,[3] in general, and furthers the objectives of Section 6(b)(5) of the Act,[4] in particular, in that it is designed to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and remove impediments to and perfect the mechanism of a free and open market and national market system. OneChicago believes that providing guidance to its market participants regarding the reporting of bilateral trades allows market participants to engage in these types of trades with regulatory certainty.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78(f)(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

OneChicago does not believe that the proposed rule changes will impose any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act, in that the NTM simply provides guidance regarding how to comply with OCX's bilateral block and bilateral EFP reporting rules. The rule change furthers competition by updating its bilateral block and bilateral EFP guidance to account for the various ways market participants engage in such trades. The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all of the amended rules apply equally to all market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The rule change will become operative on December 10, 2014.

At any time within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.[5]

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–OC–2014–06 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.

[5] 15 U.S.C. 78s(b)(1).

All submissions should refer to File Number SR–OC–2014–06. 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 offices 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–OC–2014–06, and should be submitted on or before December 29, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28642 Filed 12–5–14; 8:45 am]

BILLING CODE 8011–01–P

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73720; File No. SR–NYSEArca–2014–117]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Remove the Exchange's Quote Mitigation Plan as Provided by Commentary .03 to Exchange Rule 6.86

December 2, 2014.

On October 2, 2014, NYSE Arca, Inc., ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission (the "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 remove the Exchange's quote mitigation plan as provided by Commentary .03 to NYSE Arca Rule 6.86. The proposed rule change was published for comment in the **Federal Register** on October 21, 2014.[3] The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is December 5, 2014. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change. The proposed rule change, if approved, would remove the Exchange's quote mitigation plan as provided by Commentary .03 to NYSE Arca Rule 6.86.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 19, 2015, as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSEArca–2014–117).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28647 Filed 12–5–14; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 73362 (October 15, 2014), 79 FR 62983.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73718; File No. SR–NYSEMKT–2014–86]

Self-Regulatory Organizations; NYSE MKT LLC.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Remove the Exchange's Quote Mitigation Plan as Provided by Rule 970.1NY

December 2, 2014.

On October 2, 2014, NYSE MKT LLC, ("NYSE MKT" or "Exchange") filed with the Securities and Exchange Commission (the "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 remove the Exchange's quote mitigation plan as provided by 970.1NY. The proposed rule change was published for comment in the **Federal Register** on October 21, 2014.[3] The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is December 5, 2014. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change. The proposed rule change, if approved, would remove the Exchange's quote mitigation plan as provided by Exchange Rule 970.1NY.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 19, 2015, as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSEMKT–2014–86).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–28645 Filed 12–5–14; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 73367 (October 15, 2014), 79 FR 63009.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SMALL BUSINESS ADMiNISTRATiON

[Docket Number: SBA–2014–0014]

Franchise Agreement Reviews, Affiliation and Eligibility for Financial Assistance

AGENCY: Small Business Administration.

ACTION: Notice; request for comment.

SUMMARY: The U.S. Small Business Administration (SBA) is re-examining the factors the agency considers relevant to the determination of "affiliation" between entities involved in a franchise or other similar business relationship (such as license, dealer, and jobber relationships), as well as the current processes for making such determinations in connection with SBA's business loan programs. SBA also intends to evaluate issues related to the use of SBA's Franchise Findings List and to the use of external resources (such as the Franchise Registry) that are available to assist with the determination of affiliation based on a franchise or similar business relationship. Such issues include the responsibiiity for choosing, approving and/or maintaining these resources and the process by which affiliation determinations are made available to the public. SBA is issuing this notice to solicit feedback from the public on these issues and related matters.

DATES: Comments must be submitted on or before February 6, 2015.

ADDRESSES: You may submit comments, identified by Docket Number: SBA–2014–0014, by any of the following methods: (1) *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments; or (2) *Mail/Hand Delivery/Courier:* U.S. Small Business Administration, Attn: Mary Frias, 409 Third Street SW., 8th Floor, Washington, DC 20416. SBA will post all comments to this notice on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* you must submit such information to the U.S. Small Business Administration,

Attn: Mary Frias, 409 Third Street SW., 8th Floor, Washington, DC 20416, or send an email to *mary.frias@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review your information and determine whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Meghan Milloy, U.S. Small Business Administration, 409 3rd Street SW., 8th Floor, Washington, DC 20416, telephone number (202) 619–1654 or *meghan.milloy@sba.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In general, SBA's programs, including its business loan programs, are available only to independent small businesses as defined by the Small Business Act and Part 121 of Title 13 of the Code of Federal Regulations (CFR). One key step in determining whether an applicant for a business loan is independent and small is to determine whether the applicant is affiliated with any other parties. SBA's regulations at 13 CFR 121.103 set forth the general principles on affiliation, including affiliation resulting from a franchise agreement. Currently, when a small business loan applicant has or will have a franchise, license, dealer, jobber or similar relationship and such relationship (or product, service or trademark covered by such relationship) is critical to the applicant's business operation, affiliation is, in part, determined by reviewing the agreement and any related documents governing the relationship (or product, service or trademark) and identifying any areas of control that could cause the applicant to not be considered independent.

Restraints imposed on a franchisee or licensee related to standardized quality, advertising, accounting format and other similar provisions generally are not considered in determining whether affiliation exists if the applicant has the right to profit from its efforts and bears the risk of loss commensurate with ownership. However, common ownership, common management or excessive restrictions upon the sale of the franchise interest may be means by which affiliation is determined to arise. 13 CFR 121.103(i). SBA has issued procedures for review of such agreements in connection with its business loan programs in SBA's Standard Operating Procedure (SOP) 50 10 5(G), Subpart B, Chapter 2, Paragraph III.B.9 and Subpart C, Chapter 2, Paragraph III.B. 5 (which may be revised periodically). If the franchise review leads to a determination that the parties are affiliated, then the size (*e.g.*, revenues, employees, net worth or net income) of the applicant and the franchisor/licensor/etc. will be combined to determine whether the applicant is small for purposes of SBA's business loan programs.

Under SBA's current processes (discussed more fully in section V below), this review is conducted by SBA for certain loan applications and by participating lenders or certified development companies (CDCs) for other loan applications. SBA conducts the review for applications submitted under "non-delegated" processing by lenders participating in SBA's 7(a) business loan program (7(a) lenders) and by CDCs in SBA's development company program (also known as the 504 loan program). For 7(a) loan applications processed under a 7(a) lender's delegated authority, the 7(a) lender is responsible for conducting the review. However, SBA also provides these lenders the option of submitting the relevant documents to SBA for review and a determination as to whether the parties to the agreement are affiliated.

To assist in the review of franchise and other similar relationships for the SBA business loan programs, SBA makes available a listing that identifies franchise and other similar agreements that have been approved by SBA regarding affiliation and control issues only, and therefore do not require additional review of the franchise agreement for those issues (*i.e.*, these agreements do not demonstrate a level of control, referred to in this notice as "excessive control" such that the parties are considered to be affiliated). SBA posts the listing of agreements approved for those issues on SBA's Web site at *www.sba.gov/for-lenders*. This information is also currently available to the public at no cost at *www.franchiseregistry.com* (the Registry). A franchise system need not be on SBA's Web site or the Registry in order to be considered acceptable for affiliation purposes, but franchise agreements on SBA's Web site or the Registry have already undergone a review and been found acceptable on those issues only. The listing of an agreement does not mean that the loan applicant meets all SBA size, eligibility, underwriting and other loan program requirements. Also, further review may be necessary if there is an amendment to the agreement or there is a formal size protest.

SBA also has developed the Franchise Findings List (the List), available on SBA's Web site at *http://www.sba.gov/content/franchise-findings*, which contains a list of franchise eligibility issues that SBA has identified over the years and contains the names of those franchises and other systems that have requirements in their franchise or other agreement that could cause a franchised business to be affiliated. The List is made available for use by 7(a) lenders and CDCs, as well as by SBA staff, in evaluating the size eligibility of a business that would operate under a franchise or similar agreement. The List is only a guide and is not a substitute for a full review of the agreement and related documents.

Additional information concerning these resources is described more fully below in Section V.

II. Definition of Affiliation for Franchise and Other Similar Relationships

By its nature, the relationship between a franchisor and franchisee necessarily provides for some level of control of the franchisee by the franchisor.[1] It is typical, for example, for a franchisor to establish standards related to quality of the product and to dictate the type of advertising that may be used. SBA rules recognize that without these standards, the brand itself could be adversely affected and, therefore, SBA does not consider such features by themselves to represent a level of control by the franchisor that would result in affiliation between the parties. Depending on other areas of control afforded the franchisor over the franchisee, however, the two may be deemed to be affiliates. Some examples of such control, referred to in this notice as "excessive control" and discussed in greater detail below, could include restrictions on the applicant's right to transfer its ownership interest or to sell the real property it owns.

If a franchisee applying for an SBA business loan is determined to be affiliated with a franchisor's operation, then the combined receipts or employees of the franchisor and its franchisees (as well as any other affiliated entities) are used to determine whether the franchisee applicant is

[1] While relationships established under license, jobber, dealer and similar agreements are not generally described as "franchise" relationships, such agreements in some cases provide for the same type of control issues that are found in franchise agreements and are treated as franchise relationships for purposes of affiliation determinations. For ease of discussion, all license, jobber, dealer and similar relationships will be referred to in this notice as "franchise relationships" and their agreements as "franchise agreements," and the parties to such relationships will be referred to as "franchisor" and "franchisee."

"small" and, therefore, eligible for SBA financing (assuming all other eligibility requirements are met). SBA defines affiliation in general in 13 CFR 121.103(a), which reads in part as follows: "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties control or have the power to control both. It does not matter whether control is exercised, so long as the power to control exists." The regulations further state in 13 CFR 121.103(i) that affiliation may arise "through other means such as common ownership, common management, or excessive restrictions upon the sale of the franchise interest." The same regulation also states "The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership."

SBA would like comments on whether the regulation in 121.103(i) should be amended, including the reasons why any such changes should be made. SBA has set forth specific issues on which it is seeking comment in Section VI, but welcomes comments on all issues arising from this notice. Please provide specific suggestions as to any recommended changes.

III. Examples of Common Affiliation Issues Found in Franchise Agreements

Over the years SBA has identified a number of common provisions in franchise agreements that the Agency has determined to be evidence of excessive control (*i.e.*, a degree of control that results in affiliation) by the franchisor. These determinations have been arrived at in some cases through an adjudicatory process and in other cases through a review of franchise agreements by the Agency. Therefore, in most cases, there is no written decision. SBA's SOP 50 10 includes representative provisions SBA has determined evidence excessive control. As discussed in Section VI, SBA is interested in the public's feedback on whether the inclusion of any of these provisions in a franchise agreement is in fact evidence of excessive control and therefore affiliation between the franchisor and franchisee. SBA also encourages the public to provide detailed information on other factors that may be more indicative of affiliation between the franchisor and franchisee and whether those factors should be used in addition to or in place of those currently identified.

A. Restrictions on the Ability of the Franchisee To Transfer the Business or an Interest in the Business

SBA has long considered the business owner's ability to transfer ownership of the business as a fundamental feature of an independent business. In the context of a franchise relationship, however, SBA has also recognized that the franchisor may want to approve the franchisee's proposed transferee in order to protect the brand. When a franchise agreement requires the consent of the franchisor in order for the franchisee owner to assign or transfer his or her ownership interest in the business, SBA has determined that the parties are considered affiliated unless the franchise agreement contains language stating the franchisor's consent will not be "unreasonably withheld or delayed." This is intended to ensure that the franchisee has the ability to sell the business as long as the new owner meets reasonable requirements established by the franchisor. Franchise agreements that do not contain this language and permit the franchisor to restrict the transferability of the franchise without limitation are deemed to provide excessive control over the franchisee and, consequently, result in a determination of affiliation between the franchisor and franchisee.

Similarly, franchise agreements that require the franchisee owner to remain liable for the actions of the transferee (continuing liability) after the transfer have also been determined by SBA to represent excessive control. Once a franchisor provides its consent to the transfer and accepts the transferee, a truly independent small business franchise owner should not be liable for the actions of the new owner. Non-compete provisions and other provisions that may cause a franchisee owner to be liable for his or her own actions post-transfer have been considered acceptable by SBA (*i.e.*, not excessive control).

B. Deposit of Receipts Into an Account Controlled by the Franchisor

SBA has taken the position that the ability of a franchisee to control the receipts and other funds of the business is a basic indicator of the independence of the business. Thus, a franchisee must have the ability to control its own funds, including the payment of royalty fees to the franchisor. Where the franchise agreement gives the franchisor the right to collect and control the receipts of the franchisee (including but not limited to the right to deposit receipts into an account that the franchisor controls), deduct the royalty fee and remit the remainder to the franchisee, SBA has deemed that to be excessive control.

C. Franchisor Billing and Collecting From Franchisee's Customers

Another basic indicator of an independent business is that its owners should have responsibility for running the business operations, which SBA has interpreted to include control over billing and collections. Therefore, provisions in a franchise agreement that give the franchisor the ability to manage the billing or collections function for a franchisee have generally been considered evidence of excessive control. SBA has accepted direct billing by a franchisor, however, when such practice is reasonable based on the business model, and is a standard and accepted industry practice for that industry. For example, in the fitness industry, many franchisees are part of a network of franchisee-owned businesses and the gym members are provided access to the entire network of fitness centers. Franchisor billing for that industry is necessary to enable the sharing of other facilities in the network.

D. Establishing a Price for the Sale of Assets Upon Termination, Expiration, or Non-Renewal of the Agreement

SBA considers a franchisor's option to purchase the business assets upon termination, expiration or non-renewal of the franchise agreement as not creating excessive control over the franchisee. The franchisee, however, must maintain the ability to make a profit from its efforts and, therefore, a franchisor's right to purchase the franchisee's assets should not unduly restrict the ability of a franchisee to sell the assets at the best price. For example, SBA has considered a franchisor's right to control the appraisal process (such as by selecting the appraiser) to be evidence of excessive control. Those agreements that include the ability of both parties to establish Fair Market Value of the assets, on the other hand, have been considered acceptable (*i.e.*, not excessive control).

E. Franchisor's Assumption of Control of Franchised Operations or Employees ("Step-In Rights")

The nature of the franchise relationship requires the franchisor to have the ability to protect the interest of the brand; therefore, SBA understands that a franchisor may need to step in and assume operations of the

franchisee's business under extreme circumstances. Such provisions have been deemed acceptable (*i.e.*, not excessive control) where the franchise agreement limits the ability of the franchisor to step in and operate the business only in response to a specific type of critical incident and only for a limited time, and gives the franchisee the right to demand review of the situation. However, a franchisor's right to step in and take over the franchisee's operation for an unlimited amount of time or under routine circumstances has been considered excessive control. In addition, provisions in a franchise agreement that give the franchisor the ability to control or hire employees of the franchisee's business, other than approval of managers or key employees, have also been deemed to result in excessive control over the franchisee.

IV. New Issues That May Indicate Affiliation or Excessive Control

Some franchise agreements that SBA has reviewed recently have contained new provisions that the Agency has found to be evidence of excessive control. These issues, described below in paragraphs A through C, do not appear to be prevalent in the franchise community. The Agency would like feedback on whether they should indeed be considered indicators of excessive control. SBA encourages commenters to provide detailed justification for their positions on these issues.

A. Pricing

The Agency has taken the position that an independent business should maintain the ability to set its own pricing, which enables it to make a profit or risk a loss from its own actions. Some franchise agreements now include language giving the franchisor the ability to set both minimum and maximum prices that a franchisee may charge for its products or services. In some franchise agreements, the language is very broad, with no specific parameters or constraints on the franchisor's ability to set prices (unlike, for example, a specifically-timed promotional program or certain established national or regional accounts programs). The Agency has taken the position that franchisors that have the ability to set ranges for pricing in order to control national types of accounts or national advertising promotions are not affiliated with their franchisees as long as the pricing model is not applied in a way that would target a particular franchisee or location. SBA invites comments on whether this issue is an appropriate indicator of a business's independence, and under what circumstances.

B. Right of First Refusal (ROFR) on a Partial Assignment or Change of Ownership

The Agency believes that it is not excessive control for a franchisor to have a ROFR (allowing the franchisor to match an offer for the purchase proposed by a third party) on a sale of the franchised business or the real estate where the business is operating. Some franchise agreements extend these ROFR provisions to other types of transfers, including a transfer of an ownership interest between existing owners of a franchisee entity (*e.g.*, a sale of stock by one owner of a franchisee entity to another existing owner) or a transfer of an ownership interest by one of several existing owners to a third party. These "partial change of ownership" transactions do not contemplate a sale of the business entity but rather a sale of an ownership interest in the business entity. The Agency believes that the ability of the owners of a franchisee entity to change ownership percentages or control of the business entity among themselves or their family members is a basic feature of an independent business. In other words, the business entity should have the ability to transfer its interest among its owners or the families of the owners, and a franchisor should not have the ability to step in under these circumstances and become a partial owner of the franchisee's business without the franchisee's consent. However, if the partial change of ownership involves a transfer to an outside third party (not a current owner or a family member of a current owner), the issue becomes more complicated. SBA invites comments on partial change of ownership interest issues, including whether a franchisor should have the ability to match a third party's offer and become a partial owner of the business without the consent of the franchisee. SBA also invites comments regarding whether transfers between family members or other related parties or entities should impact these issues.

C. Option To Purchase/Lease Real Estate Owned by the Franchisee

SBA has taken the position that an independent business must have the ability to control the real estate that it owns or is purchasing in connection with the establishment of a franchise. If a franchisor wants to control the particular real property on which the franchised business is to be located, the franchisor can acquire the property and lease it to the franchisee. However, if the franchisee is the owner of the real property, the Agency has taken the position that provisions in a franchise agreement that force the franchisee to sell the property to the franchisor upon expiration, termination or non-renewal of a franchise agreement are evidence of excessive control, even if the provision provides for payment of the Fair Market Value of the real estate. A franchisee may prefer to hold on to the property rather than sell it upon expiration, termination or non-renewal of the franchise agreement. SBA believes that an independent franchisee that has met its obligations under the franchise agreement and that owns the real property should not be forced to sell the property and should be able to make a profit from the operation of a subsequent business on the site or through other income-producing means, subject to any non-compete provisions or de-branding requirements of the franchise location. SBA has not, however, objected to language in franchise agreements that gives a franchisor a ROFR on the sale of real estate (the ability to match the offer of a third party). SBA is interested in comments regarding real estate transactions that may occur during or at the conclusion of the franchise agreement term, and whether brand protection by the franchisor should be balanced against the franchisee's right to control and/or dispose of the real property with complete discretion.

Many franchise agreements give the franchisor the option to purchase the real estate in the event of a default under the agreement. It may be reasonable to conclude that if the franchisee does not fulfill its obligations under the franchise agreement, the franchisor should have the right to receive the benefit of its bargain. In other words, if the franchisee defaults under the franchise agreement, the franchisor should have the right to lease the real property from the franchisee (for itself or a third party franchisee) up to and including the full term of the original franchise agreement. Upon expiration of the original term of the franchise agreement, however, SBA has determined that a franchisor should not have the ability to continue leasing the property or to force any renewal rights under the franchise agreement.

We request comments on the impact of these issues on the excessive control determination, including specifics such as whether any such leasing option should be limited in any way or whether the franchisor should be able to require extension of the terms of the lease beyond the initial term of the

franchise agreement, and if so, under what circumstances.

V. Current Process for Reviewing Franchise Agreements and Related Documents for SBA's Business Loan Programs

As stated above in Section I, when a small business loan applicant has or will have a franchise, license, dealer, jobber or similar relationship, and such relationship (or product, service or trademark covered by such relationship) is critical to the small business applicant's business operation, SBA requires a determination as to whether affiliation exists between the franchisor and the franchisee. The current process for reviewing franchise agreements and related documents and making this determination for SBA's business loan programs is outlined in SBA's SOP 50 10 5(G), *Lender and Development Company Loan Programs,* as amended. (The SOP may be found at *www.sba.gov/for-lenders.*) The review is conducted by SBA attorneys for 7(a) loan applications and for 504 loan applications submitted under non-delegated processing. For 504 loan applications processed under a CDC's delegated authority, the CDC is responsible for conducting this review. For 7(a) loan applications processed under a lender's delegated authority, the lender has historically been responsible for conducting this review.

SBA has recognized that delegated lenders in the 7(a) program have become reluctant to use their delegated authority to make loans to franchisees, particularly where the franchise agreement contains novel or complicated provisions, and are sending such loan applications to SBA to be processed on a non-delegated basis. As a result, the burden of processing such loan applications on a non-delegated basis (which includes other eligibility determinations unrelated to the franchise relationship and credit underwriting) has shifted to SBA. In order to encourage 7(a) lenders with delegated authority to continue making franchise loans on a delegated basis, SBA has been providing such lenders the option to submit the franchise agreement and related documents to SBA for review and an affiliation determination. The lender can then process the loan under its delegated authority. This alternate process has become an attractive option for delegated lenders with franchise loan applications but has resulted in a significant shift in workload from delegated lenders to SBA, and a shift in responsibility from the delegated lender back to the SBA. SBA invites comments on this process. SBA also seeks suggestions on improvements to the process, whether it should be limited in some way in order to manage the workload and maintain a reasonable turn-around time for all franchise loan applications while preserving SBA review for those that are truly novel or complicated, or whether other alternatives may prove more successful and efficient in assisting delegated lenders in determining affiliation based on a franchise or similar business relationship.

Currently, delegated lenders that make their own franchise determinations have two resources to use to assist with the review process:

1. *Registry of approved agreements*—SBA makes available a listing of franchise agreements that it has determined do not create excessive control on the part of the franchisor and therefore do not create affiliation between the franchisor and franchisee. The listing of approved agreements, by year, is posted on SBA's Web site at *www.sba.gov/for-lenders.* This information is also currently available to lenders and other members of the public at no cost at *www.franchiseregistry.com* (the Registry). If agreements are found to have provisions deemed to create affiliation, and therefore not eligible for listing, SBA works with the franchisor to draft changes to the agreement or an addendum to the agreement to resolve the issue. If the issue is resolved through a change to the agreement or an addendum, the approved agreement and addendum are listed by date of the agreement (date that the franchisor placed the agreement into circulation). If a lender is making a loan to a franchisee and wants to know whether the franchise has been approved, the lender must have the correct year of the agreement that the applicant/franchisee is operating under. If the franchise agreement that the applicant will operate under is listed on SBA's Web site or the Registry, the lender does not need to review the franchise agreement and related documents.

2. *Franchise Findings List*—This is a list of franchise agreements reviewed by SBA that SBA has concluded contain provisions that represent excessive control on the part of the franchisor. The information provided by the SBA Franchise Findings List is used by lenders to ensure they are making informed affiliation determinations. Lenders consult the "fix available" category on the List to see if SBA and the franchisor have agreed to a solution to remedy the specific issues noted (either through a change to the agreement or an addendum). If a franchise agreement has no negotiated fix available and the noted findings remain in the agreement, then the agreement should be determined to result in affiliation. Lenders can contact SBA counsel in the District Office or the SBA Chief Franchise Counsel for specific questions regarding franchise affiliation determinations.

Lenders that believe SBA's franchise affiliation decision is inconsistent with the Agency's policies and procedures may appeal the decision by forwarding a copy of the decision, along with an explanation of how the determination is inconsistent with the applicable version of SBA's SOP 50 10, to *FranchiseAppeals@sba.gov.* Franchise appeals are reviewed by the SBA Franchise Committee comprised of Office of General Counsel attorneys. For purposes of franchise appeals, the Director for Financial Assistance or designee is an *ex officio* member of the Committee. The Associate General Counsel for Financial Law & Lender Oversight has the authority to reconsider decisions rendered by the Committee. In addition, franchisors that would like to appeal SBA's decision not to place them on the Registry may do so following the same procedures. SBA seeks information regarding these resources, along with their usefulness and efficiency in providing information to assist lenders in making affiliation determinations effectively and with appropriate timing.

VI. Request for Comments

SBA welcomes comments on all franchise affiliation and excessive control related issues discussed in this notice. The Agency also specifically requests comments on the following questions, some of which could require new statutory or regulatory authority:

(1) How can the review of franchise relationships be simplified and still ensure that SBA guaranteed loans are only provided to independent small businesses as required by statute and regulation?

(2) Currently, when a small business loan applicant has or will have a franchise, license, dealer, jobber or similar relationship and such relationship (or product, service or trademark covered by such relationship) is critical to the applicant's business operation, SBA requires a review of the agreement and any related documents governing the relationship (or product, service or trademark). Is it sufficiently clear what relationships are required to be reviewed under this standard?

(3) How does SBA's process for determining affiliation (excessive control) of franchisors and franchisees

affect small businesses during and upon termination of the franchise agreement?

(4) Should 13 CFR 121.103(i) be modified to specifically address the provisions SBA has determined evidence excessive control by the franchisor?

(5) Should 13 CFR 121.103(i) be modified to incorporate a reference to "Loan Program Requirements, as defined in 13 CFR 120.10," because SBA's policies in this area are explained in the Loan Program Requirements, and more particularly in SBA's SOP 50 10?

(6) Should SBA develop a process to accept a certification of non-affiliation from a franchisor and/or its counsel, based on standards established by SBA, in lieu of SBA or lender review of the franchise agreement and related documents?

(7) If so, should that process be available only with respect to "renewal requests"—*i.e.*, only for franchisors that have had franchise agreements reviewed and approved by SBA in a prior year?

(8) If an applicant is not a franchisee but has an affiliate that is a franchisee, should SBA continue to review the affiliate's franchise agreement and related documents as part of the small business size determination of the applicant?

(9) Should SBA continue to list agreements on a central registry and, if so, where should that registry be maintained and by whom?

(10) If there is a cost associated with the maintenance of the registry, who should bear that cost? Should there be a charge for listing of agreements on a registry and, if so, who should bear the cost for such listing? SBA notes that there are statutory limitations on SBA's current authority to charge, retain and use fees.

(11) In light of the fact that SBA lists approved franchises on its Web site, is there a need to continue to post the Franchise Findings List as well?

(12) Should the franchise agreement review process be streamlined and/or simplified and, if so, in what way?

(13) Should the franchise appeal process be changed and, if so, in what way?

Dated: December 2, 2014.

Linda S. Rusche,

Director, Office of Financial Assistance.

[FR Doc. 2014–28698 Filed 12–5–14; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Supplemental Draft Environmental Impact Statement; Washington, DC

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Revised Notice of Intent (NOI).

SUMMARY: FHWA is issuing this revised NOI as a correction to advise agencies and the public that a Supplemental Draft Environmental Impact Statement (SDEIS) will be prepared for the South Capitol Street Project (the Project). The Project proposes to make major changes to the South Capitol Street Corridor from Firth Sterling Avenue SE. to Independence Avenue and the Suitland Parkway from Martin Luther King, Jr. Avenue SE. to South Capitol Street, including replacing the existing Frederick Douglass Memorial Bridge over the Anacostia River. This notice revises the NOI that was published in the **Federal Register** on July 28, 2014

FOR FURTHER INFORMATION CONTACT: Federal Highway Administration, District of Columbia Division: Mr. Michael Hicks, Environmental/Urban Engineer, 1990 K Street NW., Suite 510, Washington, DC 20006–1103, (202) 219–3513, email: *michael.hicks@dot.gov;* or the District of Columbia Department of Transportation: Mr. E.J. Simie, PE, Project Manager, 55 M Street SE., Suite 400, Washington, DC 20003, (202) 671–2800, email: *ej.simie@dc.gov.*

SUPPLEMENTARY INFORMATION: In March 2011, the FHWA in conjunction with the District Department of Transportation (DDOT) approved release of the Final Environmental Impact Statement (FEIS) for the Project. The availability of the FEIS was announced in the April 8, 2011 **Federal Register**. The alternatives examined in detail in the FEIS included a No Build Alternative and three build alternatives: Build Alternatives 1 and 2 and the Preferred Alternative, which was a modification of Build Alternative 2. A movable arched bascule was selected for the new Frederick Douglass Memorial Bridge. The alignment of the new bridge would be at an angle from the existing bridge to allow the swing span on the existing bridge to remain operational during construction, which meant that right-of-way would be needed from Joint Base Anacostia-Bolling (JBAB). Build Alternatives 1 and 2 were eliminated from consideration in the FEIS and, therefore, will not be considered in the SDEIS.

Since publication of the FEIS, FHWA and DDOT have considered major changes regarding the design of the FEIS Preferred Alternative. Most notably, DDOT reconsidered the need to obtain right-of-way from JBAB, which resulted in changing the alignment of the proposed new Frederick Douglass Memorial Bridge to a location immediately south of and parallel to the existing bridge. In addition, new information about current and planned navigation along the Anacostia River, including the navigation requirements of the U.S. Navy (USN), led to the decision to make the new bridge a fixed span structure instead of a movable span structure. Other notable design revisions made to the FEIS Preferred Alternative include the conversion of the east side traffic circle to a traffic oval similar in size to the proposed west traffic oval, and changes to the proposed ramps or ramp modifications between South Capitol Street and I–695, Suitland Parkway and I–295, and Martin Luther King, Jr. Avenue SE. and Suitland Parkway. Due to these and other design changes, a Revised Preferred Alternative was developed.

The SDEIS will be prepared in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4371, *et seq.*), Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500–1508), FHWA Code of Federal Regulations (23 CFR 771.101–771.137, *et seq.*), and all applicable Federal, State, and local government laws, regulations, and policies. The SDEIS will describe the revised preferred alternative, update the affected environment, and describe the anticipated environmental impacts of the Revised Preferred Alternative in comparison to the anticipated environmental impacts disclosed in the FEIS for the FEIS Preferred Alternative. The Purpose and Need of the Project did not change from the FEIS. The U.S. Navy; U.S. Army Corps of Engineers; U.S. Coast Guard; the National Park Service; and the District of Columbia Department of the Environment will continue to serve as Cooperating Agencies for the Project.

A 45-day review period will be provided following the Notice of Availability of the SDEIS in the **Federal Register**, and a public meeting will be held within this review period. The public meeting will be conducted by DDOT and announced a minimum of 15 days in advance of the meeting. DDOT will provide information for the public meeting, including date, time and location through a variety of means including the Project Web site (*http://www.southcapitoleis.com*) and by newspaper advertisement.

To ensure that the full range of issues is identified early in the process, comments are invited from all interested and/or potentially affected parties. Comments or questions concerning this Notice should be directed to the FHWA and DDOT at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205 Highway Planning and Construction. The regulations and implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: November 17, 2014.

Joseph C. Lawson,

Division Administrator, District of Columbia Division, Federal Highway Administration.

[FR Doc. 2014–28720 Filed 12–5–14; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0296]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 33 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). They are unable to meet the vision requirement in one eye for various reasons. The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions were granted October 31, 2014. The exemptions expire on October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, R.N., Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy*.

II. Background

On September 30, 2014, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (79 FR 58856). That notice listed 33 applicants' case histories. The 33 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the 33 applications on their merits and made a determination to grant exemptions to each of them.

III. Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely. The 33 exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, macular scar, histoplasmosis, retinal detachment, glaucoma, complete loss of vision, refractive amblyopia, central serous retinopathy, enucleation, macular scar, central suppression consistent with amblyopia, strabismic amblyopia, end stage maculopathy from toxoplasmosis, central retinal artery occlusion, exotropia, prosthetic eye, and a cataract. In most cases, their eye conditions were not recently developed. Twenty-three of the applicants were either born with their vision impairments or have had them since childhood.

The 10 individuals that sustained their vision conditions as adults have had it for a range of two to 42 years.

Although each applicant has one eye which does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All of these applicants satisfied the testing requirements for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL or non-CDL, these 33 drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision in careers ranging from 2.5 to 50 years. In the past three years, two of the drivers were involved in crashes and one was convicted of a moving violation in a CMV.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in

the September 30, 2014 notice (79 FR 58856).

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision requirement in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered the medical reports about the applicants' vision as well as their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA–1998–3637.

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., "Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process," Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 33 applicants, two of the drivers were involved in crashes and one was convicted of a moving violation in a CMV. All the applicants achieved a record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 33 applicants listed in the notice of September 30, 2014 (79 FR 58856).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 33 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirement in 49 CFR 391.41(b)(10) and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

V. Discussion of Comments

FMCSA received two comments in this proceeding. The comments are discussed below.

Rachel King is in favor of granting the drivers listed below an exemption from the vision standard.

Miller Keely does not believe anyone who has failed a vision test, regardless of whether they have been approved by an optometrist or ophthalmologist, should be granted an exemption from the vision standard.

IV. Conclusion

Based upon its evaluation of the 33 exemption applications, FMCSA exempts the following drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the

requirements cited above (49 CFR 391.64(b)):

Terry A. Adler (SD)
Richard J. Beck (IL)
Avis C. Bell (IN)
Jeffrey L. Bendix (SD)
Edward L. Bon (LA)
William L. Brady (KS)
Marty R. Brewster (OK)
John M. Brown (KY)
Robert M. Cassell, Jr. (NC)
Henry L. Chrestensen, Sr. (IA)
Charles D. Cohoon (FL)
Jack M. Conklin (NE)
Michael E. Cummins (IL)
Dave J. Eckert (CA)
Sanford L. Goodwin (TX)
Tonia L. Graves (AZ)
Gregory S. Hatten (LA)
Jason P. Jones (IN)
Jason R. King (MO)
Theodore J. Laycock (MA)
Thomas J. Long III (MD)
Marcus E. Manson (TX)
Thomas J. McClure (IA)
Steven W. Miller (PA)
Aaron F. Naylor (PA)
Billy R. O'Guynn (AL)
Walter B. Peltier (AZ)
Gregory S. Rasnic (OH)
Jimmy D. Renfroe (AR)
Sabahudin Sabic (IA)
Klifford N. Siemens (KS)
Aaron H. Walser (ID)
John A. Workman (IL)

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Dated: December 1, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–28689 Filed 12–5–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0287]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 10, 2015. Comments must be received on or before January 7, 2015.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–2010–0287], using any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Fax: 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy*.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, R.N., Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

II. Exemption Decision

This notice addresses 10 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Robert W. Blankenship (CA)
Bryan K. DeBorde (WA)
Michael K. Engemann (MO)
Pete R. Gonzalez (NM)
Perry D. Jensen (WI)
Joseph L. Jones (MD)
James G. Pitchford (OH)
Virgil R. Story (AR)
Richard L. Totels (TX)
James B. Woolwine (VA)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically

qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

III. Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (75 FR 69737; 76 FR 1499; 77 FR 74733). Each of these 10 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

IV. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2010–0287), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, got to *http://www.regulations.gov* and put the docket number, "FMCSA–2010–0287" in the "Keyword" box, and click "Search." When the new screen appears, click on "Comment Now!" button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may change this notice based on your comments.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* and in the search box insert the docket number, "FMCSA–2010–0287" in the "Keyword" box and click "Search." Next, click "Open Docket Folder" button choose the document listed to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Dated: December 1, 2014.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2014–28694 Filed 12–5–14; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1068 (Sub-No. 3X); Docket No. AB 1070 (Sub-No. 3X)]

Missouri Central Railroad Company—Abandonment Exemption—In Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, Mo.; Central Midland Railway Company—Discontinuance of Service Exemption—in Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, Mo.

Missouri Central Railroad Company (MCRR) and Central Midland Railway Company (CMR) (collectively, applicants) have jointly filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* for MCRR to abandon, and for CMR to discontinue service over, approximately 144.3 miles of rail line in two segments: (1) Between mileposts 263.5 and 262.906 near Pleasant Hill, in Cass County, Mo., and (2) between milepost 215.325 near Windsor, in Pettis County, Mo., and milepost 71.6 near Beaufort, in Franklin County, Mo. The line traverses United States Postal Service Zip Codes 64080, 65360, 65335, 65325, 65078, 65084, 65011, 65026, 65032, 65040, 65075, 65058, 65085, 65048, 65001, 65035, 65013, 65014, 65066, 63091, 63037, 63056, and 63013.

Applicants have certified that: (1) No local traffic has moved over the line for at least two years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to these exemptions, any employee adversely affected by the abandonment or discontinuance shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees,

a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on January 7, 2015, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 18, 2014. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by December 29, 2014, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to applicants' representatives: Sandra L. Brown, Thompson Hine LLP, 1919 M St. NW., Suite 700, Washington, DC 20036, and Lon Van Gemert, 21778 Highview Ave., Lakeville, MN 55044.

If the verified notice contains false or misleading information, the exemptions are void *ab initio.*

Applicants have filed a combined environmental and historic report which addresses the effects, if any, of the abandonment and discontinuance on the environment and historic resources. OEA will issue an environmental assessment (EA) by December 12, 2014. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), MCRR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by MCRR's filing of a notice of consummation by December 8, 2015, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *WWW.STB.DOT.GOV*

Decided: November 26, 2014.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2014–28658 Filed 12–5–14; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2 (f)(25).

FEDERAL REGISTER

Vol. 79 Monday,
No. 235 December 8, 2014

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 425

Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 425

[CMS–1461–P]

RIN 0938–AS06

Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule addresses changes to the Medicare Shared Savings Program (Shared Savings Program), including provisions relating to the payment of Accountable Care Organizations (ACOs) participating in the Shared Savings Program. Under the Shared Savings Program, providers of services and suppliers that participate in an ACO continue to receive traditional Medicare fee-for-service (FFS) payments under Parts A and B, but the ACO may be eligible to receive a shared savings payment if it meets specified quality and savings requirements.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on February 6, 2015.

ADDRESSES: In commenting, please refer to file code CMS–1461–P. 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–1461–P, P.O. Box 8013, Baltimore, MD 21244–8013.

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–1461–P, 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: Dr. Terri Postma or Rick Ensor, 410–786–8084, Email address: *aco@cms.hhs.gov.*

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 1–800–743–3951.

Table of Contents

To assist readers in referencing sections contained in this preamble, we are providing a table of contents.

Acronyms

ACO Accountable Care Organization
BIPA Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (Pub. L. 106–554)
CAHs Critical Access Hospitals
CCM Chronic Care Management
CEHRT Certified Electronic Health Record Technology
CG–CAHPS Clinician and Group Consumer Assessment of Health Providers and Systems
CHIP Children's Health Insurance Program
CMP Civil Monetary Penalties
CMS Centers for Medicare & Medicaid Services
CNM Certified Nurse Midwife
CMS–HCC CMS Hierarchal Condition Category
CPT [Physicians] Current Procedural Terminology (CPT codes, descriptions and other data only are copyright 2013 American Medical Association. All rights reserved.)
CWF Common Working File
DHHS Department of Health and Human Services
DOJ Department of Justice
DRA Deficit Reduction Act of 2005 (Pub. L. 109–171)
DSH Disproportionate Share Hospital
DUA Data Use Agreement

EHR Electronic Health Record
ESRD End Stage Renal Disease
ETA hospital Electing Teaching Amendment Hospital
FFS Fee-for-service
FQHCs Federally Qualified Health Centers
FTC Federal Trade Commission
GPCI Geographic Practice Cost Index
GPRO Group Practice Reporting Option
HCC Hierarchal Condition Category
HCPCS Healthcare Common Procedure Coding System
HICN Health Insurance Claim Number
HIPAA Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191)
HVBP Hospital Value-based Purchasing
IPA Independent Practice Association
IPPS Inpatient Prospective Payment System
IRS Internal Revenue Service
MA Medicare Advantage
MedPAC Medicare Payment Advisory Commission
MLR Minimum Loss Rate
MSP Medicare Secondary Payer
MSR Minimum Savings Rate
MU Meaningful Use
NCQA National Committee for Quality Assurance
NP Nurse Practitioner
NPI National Provider Identifier
NQF National Quality Forum
OIG Office of Inspector General
PA Physician Assistant
PACE Program of All Inclusive Care for the Elderly
PECOS Provider Enrollment, Chain, and Ownership System
PFS Physician Fee Schedule
PGP Physician Group Practice
PHI Protected Health Information
PPS Prospective Payment System
PQRS Physician Quality Reporting System
PRA Paperwork Reduction Act
PSA Primary Service Areas
RHCs Rural Health Clinics
RIA Regulatory Impact Analysis
SNFs Skilled Nursing Facilities
SSA Social Security Act
SSN Social Security Number
TIN Taxpayer Identification Number
VM Value Modifier

CPT (Current Procedural Terminology) Copyright Notice

Throughout this proposed rule, we use CPT codes and descriptions to refer to a variety of services. We note that CPT codes and descriptions are copyright 2013 American Medical Association. All Rights Reserved. CPT is a registered trademark of the American Medical Association (AMA). Applicable Federal Acquisition Regulations (FARs) and Defense Federal Acquisition Regulations (DFARs) apply.

I. Executive Summary and Background

A. Executive Summary

1. Purpose

Section 1899 of the Social Security Act (the Act) established the Medicare Shared Savings Program, which promotes accountability for a patient population, fosters coordination of items and services under parts A and B, and encourages investment in infrastructure and redesigned care processes for high quality and efficient health care service delivery. This proposed rule would make changes to the regulations that were promulgated in November 2011 to implement the Shared Savings Program in order to make refinements based on our experience with the program and to respond to concerns raised by stakeholders. Unless otherwise noted, these changes would be effective 60 days after publication of the final rule. Application or implementation dates may vary, depending on the nature of the policy; however, we anticipate all of the final policies and methodological changes would be applied for the 2016 performance year for all participating organizations unless otherwise noted.

2. Summary of the Major Provisions

This proposed rule is designed to codify existing guidance, reduce administrative burden and improve program function and transparency in the following areas: (1) Data-sharing requirements; (2) requirements for ACO participant agreements, the ACO application process, and our review of applications; (3) identification and reporting of ACO participants and ACO providers/suppliers, including managing changes to the list of ACO participants and ACO providers/suppliers; (4) eligibility requirements related to the ACO's number of beneficiaries, required processes, the ACO's legal structure and governing body, and its leadership and management structure; (5) modification to assignment methodology; (6) repayment mechanisms for ACOs in two-sided performance-based risk tracks; (7) alternatives to encourage participation in risk-based models; (8) ACO public reporting and transparency; (9) the ACO termination process; and (10) the reconsideration review process. To achieve these goals, we make the following proposed modifications to our current program rules:

- Clarify existing and establish new definitions of terms including an ACO participant, ACO provider/supplier, and ACO participation agreement.
- Add a process for ACOs to renew the participation agreement for an additional agreement period.
- Add, clarify, and revise the beneficiary assignment algorithm, including the following—
  - ++ Update the CPT codes that would be considered to be primary care services as well as changing the treatment of certain physician specialties in the assignment process;
  - ++ Include the claims for primary care services furnished by NP, PAs, and CNSs in Step 1 of the assignment algorithm; and
  - ++ Clarify how primary care services furnished in federally qualified health centers (FQHCs), rural health clinics (RHCs), and electing teaching amendment (ETA) hospitals will be considered in the assignment process.
- Expand the kinds of beneficiary-identifiable data that would be provided to ACOs in various reports under the Shared Savings Program as well as simplify the claims data sharing opt-out process to improve the timeliness of access to claims data.
- Add or change policies to encourage greater ACO participation in risk-based models by—
  - ++ Offering the opportunity for ACOs to continue participating under a one-sided participation agreement after their first 3-year agreement;
  - ++ Reducing risk under Track 2; and
  - ++ Adopting an alternative risk-based model referred to as Track 3 which includes proposals for a higher sharing rate and prospective assignment of beneficiaries.

In addition, we seek comment on a number of options that we have been considering in order to encourage ACOs to take on two-sided performance-based risk under the Shared Savings Program. We also seek comment on issues related to resetting the benchmark in a subsequent performance year and the use of statutory waiver authority to improve participation in two-sided risk models.

3. Summary of Costs and Benefits

We assume that our proposals to ease the transition to risk, reduce risk under Track 2, and adopt an alternative risk-based model (Track 3) would result in increased participation in the Shared Savings Program. As shown in our impact analysis, we expect the proposed changes to result in a significant increase in total shared savings, while shared losses would decrease. Moreover, as participation in the Shared Savings Program continues to expand, we anticipate there would be a broader focus on care coordination and quality improvement among providers and suppliers within the Medicare program that would lead to both increased efficiency in the provision of care and improved quality of the care provided to beneficiaries.

The proposed changes detailed in this rule would result in median estimated federal savings of $280 million greater than the $730 million median net

savings estimated at baseline for calendar years (CYs) 2016 through 2018. We estimate that the provisions of this proposed rule would result in a reduction in the median shared loss dollars by $140 million and an increase in the median shared savings payments by $320 million dollars relative to the baseline for CYs 2016 through 2018. The estimated aggregate average start up investment and 3 year operating costs if all proposals are finalized is approximately $441 million.

B. Background

On March 23, 2010, the Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted, followed by enactment of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) on March 30, 2010, which amended certain provisions of Public Law 111–148. Collectively known as the Affordable Care Act, these public laws include a number of provisions designed to improve the quality of Medicare services, support innovation and the establishment of new payment models, better align Medicare payments with provider costs, strengthen Medicare program integrity, and put Medicare on a firmer financial footing.

Section 3022 of the Affordable Care Act amended Title XVIII of the Act (42 U.S.C. 1395 *et seq.*) by adding new section 1899 to the Act to establish a Shared Savings Program. This program is a key component of the Medicare delivery system reform initiatives included in the Affordable Care Act and is a new approach to the delivery of health care. The purpose of the Shared Savings Program is to promote accountability for a population of Medicare beneficiaries, improve the coordination of FFS items and services, encourage investment in infrastructure and redesigned care processes for high quality and efficient service delivery, and promote higher value care. ACOs that successfully meet quality and savings requirements share a percentage of the achieved savings with Medicare. Under the Shared Savings Program, ACOs share in savings only if they meet both the quality performance standards and generate shareable savings. Consistent with the purpose of the Shared Savings Program, we focused on developing policies aimed at achieving the three-part aim consisting of: (1) Better care for individuals; (2) better health for populations; and (3) lower growth in expenditures.

In the November 2, 2011 **Federal Register** (76 FR 67802), we published the final rule entitled "Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations" (November 2011 final rule). We viewed this final rule as a starting point for the program, and because of the scope and scale of the program and our limited experience with shared savings initiatives under FFS Medicare, we built a great deal of flexibility into the program rules. We anticipated that subsequent rulemaking for the Shared Savings Program would be informed by lessons learned from our experience with the program as well as from testing through the Pioneer ACO Model and other initiatives conducted by the Center for Medicare and Medicaid Innovation (Innovation Center) under section 1115A of the Act.

Over 330 organizations are now participating in the Shared Savings Program. We are gratified by stakeholder interest in this program. In the November 2011 final rule (76 FR 67805), we stated that we intended to assess the policies for the Shared Savings Program and models being tested by the Innovation Center to determine how well they were working and if there were any modifications that would enhance them. As evidenced by the high degree of interest in participation in the Shared Savings Program, we believe that the policies adopted in the November 2011 final rule are generally well-accepted. However, we have identified several policy areas we would like to revisit in light of the additional experience we have gained during the first 2 years of program implementation.

We note that in developing the Shared Savings Program, and in response to stakeholder suggestions, we worked very closely with agencies across the federal government to develop policies to encourage participation in the program and to ensure a coordinated inter- and intra-agency program implementation. The result of this effort was the release of several documents regarding the application of other relevant laws and regulations to ACOs. These documents are described in more detail in section II.C.5. of the November 2011 final rule (76 FR 67840) and include: (1) A joint CMS and DHHS OIG interim final rule with comment period establishing waivers of the application of the physician self-referral law, the Federal anti-kickback statute, and certain civil monetary penalties (CMP) law provisions for specified arrangements involving ACOs participating in the Shared Savings Program (76 FR 67992); (2) an Internal Revenue Service (IRS) notice (Notice 2011–20) and fact sheet (FS–2011–11) issued in response to comments regarding the need for additional tax guidance for tax-exempt organizations, including tax-exempt hospitals, that may participate in the Shared Savings Program (see Notice 2011–20 at *www.irs.gov//pub/irs-drop/n-11–20.pdf* and FS–2011–11 at *www.irs.gov/pub/irs-news/fs-2011-11.pdf*); and (3) a final Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Shared Savings Program issued jointly by the FTC and DOJ (collectively, the Antitrust Agencies) and published in the October 28, 2011 **Federal Register** (76 FR 67026). We have continued working with these agencies as we have implemented this program and believe that these materials continue to offer valuable information regarding a number of issues of great importance both to our implementation of the Shared Savings Program and to the entities that participate in the program. We encourage ACOs and other stakeholders to review and comply with the referenced documents. Documents can be accessed through the links on our Web site at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Statutes_Regulations_Guidance.html.*

II. Provisions of This Proposed Rule

The purpose of this proposed rule is to propose revisions to some key policies adopted in the November 2011 final rule (76 FR 67802), to incorporate in our regulations certain guidance that we have issued since the Shared Savings Program was established, and to propose regulatory additions to support program compliance and growth. Our intent is to encourage continued and enhanced stakeholder participation, to reduce administrative burden for ACOs while facilitating their efforts to improve care outcomes, and to maintain excellence in program operations while bolstering program integrity.

A. Definitions

In the November 2011 final rule (76 FR 67802), we adopted definitions of key terms for purposes of the Shared Savings Program at § 425.20. These terms are used throughout this proposed rule. We encourage readers to review these definitions. Based on our experiences thus far with the Shared Savings Program and inquiries we received regarding the defined terms, we propose some additions to the definitions and a few revisions to the existing definitions.

1. Proposed Definitions

We propose to add several new terms to the definitions in § 425.20. First, we propose to add a definition of "participation agreement." Specifically,

we propose to define the term to mean the written agreement required under § 425.208(a) between the ACO and CMS that, along with the regulations at part 425, governs the ACO's participation in the Shared Savings Program. We further propose to make conforming changes throughout part 425, replacing references to an ACO's agreement with CMS with the defined term "participation agreement." In addition, we propose to make a conforming change in § 425.204(c)(1)(i) to remove the incorrect reference to "participation agreements" and replace it with "ACO participant agreements."

Second, we propose to add the related definition of "ACO participant agreement." Specifically, we propose to define "ACO participant agreement" to mean the written agreement between an ACO and an ACO participant required at § 425.116 in which the ACO participant agrees to participate in, and comply with, the requirements of the Shared Savings Program.

Third, as discussed in greater detail in section II.F. of this proposed rule, we propose to add a definition for "assignment window," to mean the 12-month period used to assign beneficiaries to an ACO.

2. Proposed Revisions to Existing Definitions

a. Definition of ACO Participant

The current definition of "ACO participant" states that an "ACO participant means an individual or group of ACO provider(s)/supplier(s), that is identified by a Medicare-enrolled TIN, that alone or together with one or more other ACO participants comprise(s) an ACO, and that is included on the list of ACO participants that is required under § 425.204(c)(5)." Based on inquiries we have received since the publication of November 2011 final rule, we believe that there has been some confusion as to the distinction between an ACO participant and an ACO provider/supplier. The key point is that an ACO participant is an entity, not a practitioner, identified by a Medicare-enrolled TIN (that is, a TIN that is used to bill Medicare for services furnished to Medicare fee-for-service beneficiaries). An ACO participant may be composed of one or more ACO providers/suppliers whose services are billed under a Medicare billing number assigned to the TIN of the ACO participant. Additionally, we emphasize that the ACO is responsible for ensuring that all individuals and entities that have reassigned the right to receive Medicare payment to the TIN of the ACO participant have also agreed to be ACO providers/suppliers.

We propose to revise the definition of "ACO participant" to clarify that an ACO participant is an entity identified by a Medicare-enrolled TIN. Additionally, we are correcting a grammatical error by revising the definition to indicate that one or more ACO participants "compose," rather than "comprise" an ACO. We note that a related grammatical error is corrected at § 425.204(c)(iv). These proposed changes to the definition of "ACO participant" are not intended to alter the way the Shared Savings Program currently operates.

b. Definition of ACO Professional

Under the current definition at § 425.20, an "ACO professional" means an ACO provider/supplier who is either of the following:

- A physician legally authorized to practice medicine and surgery by the State in which he performs such function or action.
- A practitioner who is one of the following:

++ A physician assistant (as defined at § 410.74(a)(2)).

++ A nurse practitioner (as defined at § 410.75(b)).

++ A clinical nurse specialist (as defined at § 410.76(b)).

We propose to revise the definition of ACO professional to remove the requirement that an ACO professional be an ACO provider/supplier. We also propose to revise the definition of ACO professional to indicate that an ACO professional is an individual who bills for items or services he or she furnishes to Medicare fee-for-service beneficiaries under a Medicare billing number assigned to the TIN of an ACO participant in accordance with Medicare regulations. We are proposing these modifications because there may be ACO professionals who furnished services billed through an ACO participant's TIN in the benchmarking years but are no longer affiliated with the ACO participant and therefore are not furnishing services billed through the TIN of the ACO participant during the performance years. These proposed changes to the definition of "ACO professional" are not intended to alter the way the Shared Savings Program currently operates.

c. Definition of ACO Provider/Supplier

Under the current definition at § 425.20, an "ACO provider/supplier" means an individual or entity that—(1) is a provider (as defined at § 400.202) or a supplier (as defined at § 400.202); (2) is enrolled in Medicare; (3) bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a Medicare billing number assigned to the TIN of an ACO participant in accordance with applicable Medicare regulations; and (4) is included on the certified list of ACO providers/suppliers that is submitted by the ACO. We propose to modify the definition to clarify that an individual or entity is an ACO provider/supplier only when it bills for items and services furnished to Medicare FFS beneficiaries during the agreement period under a Medicare billing number assigned to the TIN of an ACO participant and is included on the list of ACO providers/suppliers that is required under the proposed regulation at § 425.118. We do not believe that an individual or entity that may previously have reassigned the right to receive Medicare payment to an ACO participant, but that is not participating in the activities of the ACO by furnishing care to Medicare FFS beneficiaries that is billed through the TIN of an ACO participant during the ACO's agreement period, should be considered to be an ACO provider/supplier. Thus, this modification is intended to clarify that a provider or supplier must bill for items or services furnished to Medicare FFS beneficiaries through the TIN of an ACO participant during the ACO's agreement period in order to be an ACO provider/supplier.

d. Definition of Assignment

Under the current definition at § 425.20, "assignment" means "the operational process by which CMS determines whether a beneficiary has chosen to receive a sufficient level of the requisite primary care services from a physician who is an ACO provider/supplier so that the ACO may be appropriately designated as exercising basic responsibility for that beneficiary's care." As discussed previously in this section, we are proposing to modify the definition of "ACO professional" to remove the requirement that an ACO professional be an ACO provider/supplier. Similarly, we believe that for purposes of defining assignment, it is more appropriate to use the term "ACO professional," as revised, than the term "ACO provider/supplier" because a physician or other practitioner can only be an ACO provider/supplier if he or she bills for items and services through the TIN of an ACO participant during the ACO's agreement period and is included on the list of ACO providers/suppliers required under our regulations. However, as we discussed previously, there may be an ACO professional who furnished services billed through an ACO participant's TIN

in the benchmarking years but is no longer billing through the ACO participant's TIN during the performance years and therefore cannot be considered an ACO provider/supplier. For example, a practitioner that retired before the ACO entered into a participation agreement with CMS and is no longer billing through the TIN of an ACO participant, and therefore was not included on the ACO provider/supplier list is not an ACO provider/supplier. Nevertheless, the services furnished by this ACO professional and billed through the TIN of an ACO participant would be considered for purposes of determining beneficiary assignment to the ACO during the benchmarking period.

In the interests of clarity, we therefore propose to modify the definition of assignment to reflect that our assignment methodology takes into account claims for primary care services furnished by ACO professionals, not solely claims for primary care services furnished by physicians in the ACO. This revision will ensure consistency with program operations and alignment with the definition of "ACO professional" since it is the aggregation of the ACO professionals' claims that impacts assignment. Consistent with section 1899(c) of the Act, a beneficiary must have at least one primary care service furnished by a physician in the ACO in order to be eligible for assignment to the ACO, and this is reflected in the assignment methodology articulated under subpart E of the Shared Savings Program regulations. Once a beneficiary is determined to be eligible for assignment, the beneficiary is then assigned to the ACO if its ACO professionals have rendered the plurality of primary care services for the beneficiary as determined under the stepwise assignment methodology in § 425.402. Thus, we believe the proposed modification to the definition of "assignment" would more accurately reflect the use of claims for primary care services furnished by ACO professionals that are submitted through an ACO participant's TIN in determining beneficiary assignment in the ACO's benchmark and performance years.

Additionally, we propose to make conforming changes as necessary to the regulations governing the assignment methodology in subpart E of part 425, to revise the references to "ACO provider/supplier" to read "ACO professional."

e. Definition of Hospital

We are proposing a technical revision to the definition of "hospital" for purposes of the Shared Savings Program. Section 1899(h)(2) of the Act provides that, for purposes of the Shared Savings Program, the term "hospital" means a subsection (d) hospital as defined in section 1886(d)(1)(B) of the Act. In the November 2011 final rule (76 FR 67812), we stated that this statutory definition of hospital thus limits: ". . . the definition to include only acute care hospitals paid under the hospital inpatient prospective payment system (IPPS)." Consistent with this interpretation, we proposed and finalized the following definition of "hospital" for purposes of the Shared Savings Program at § 425.20: "Hospital means a hospital subject to the prospective payment system specified in § 412.1(a)(1) of this chapter."

Under this regulatory definition, Maryland acute care hospitals would not be considered to be hospitals for purposes of the Shared Savings Program because hospitals in the state of Maryland are subject to a waiver from the Medicare payment methodologies under which they would otherwise be paid. However, we have taken the position in other contexts, for example, for purposes of electronic health record (EHR) incentive payments (75 FR 44448) and in the FY 2014 IPPS final rule (78 FR 50623), that Maryland acute care hospitals remain subsection (d) hospitals. This is because these hospitals are "located in one of the fifty states or the District of Columbia" (as provided in the definition of subsection (d) hospitals at section 1886(d)(1)(B) of the Act) and are not hospitals that are specifically excluded from that category, such as cancer hospitals and psychiatric hospitals.

Therefore, we propose to revise the definition of "hospital" for purposes of the Shared Savings Program to provide that a "hospital" means a hospital as defined in section 1886(d)(1)(B) of the Act. The proposed regulation text is consistent with both the statutory definition of "hospital" for purposes of the Shared Savings Program in section 1899(h)(2) of the Act and the position we have taken in other contexts in referring to subsection (d) hospitals. The effect of this change is to clarify that a Maryland acute care hospital is a "hospital" for purposes of the Shared Savings Program.

f. Definition of Primary Care Services

We propose to modify the definition of "primary care services." We refer the reader to section II.E.3. of this proposed rule for a more detailed discussion of the proposed revision to this definition, which is relevant to the assignment of a Medicare beneficiary to an ACO.

g. Definitions of "Continuously Assigned Beneficiary" and "Newly Assigned Beneficiary"

As discussed in greater detail in section II.F.3.b. of this proposed rule, we propose revisions to the definitions of "continuously assigned beneficiary" and "newly assigned beneficiary." These definitions relate to risk adjustment for the assigned population and require minor modification to accommodate the newly proposed Track 3.

h. Definition of Agreement Period

In connection with our discussion of the applicability of certain changes that are made to program requirements during the agreement period, we propose revisions to the definition of "agreement period." Readers should refer to section II.C.4. of this proposed rule for a discussion of the proposed changes to the definition.

B. ACO Eligibility Requirements

1. Agreement Requirements

a. Overview

Section 1899(b)(2)(B) of the Act requires participating ACOs to "enter into an agreement with the Secretary to participate in the program for not less than a 3-year period." If the ACO is approved for participation in the Shared Savings Program, an executive who has the ability to legally bind the ACO must sign and submit a participation agreement to CMS (§ 425.208(a)(1)). Under the participation agreement with CMS, the ACO agrees to comply with the regulations governing the Shared Savings Program (§ 425.208(a)(2)). In addition, the ACO must require its ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to the ACO's activities to agree to comply with the Shared Savings Program regulations and all other applicable laws and regulations (§ 425.208(b) and § 425.210(b)). The ACO must provide a copy of its participation agreement with CMS to all ACO participants, ACO providers/suppliers, and other individuals and entities involved in ACO governance (§ 425.210(a)). As part of its application, we currently require each ACO to submit a sample of the agreement it executes with each of its ACO participants (the "ACO participant agreement"). Also, as part of its application and when requesting the addition of new ACO participants, we require an ACO to submit evidence that it has a signed written agreement with each of its ACO participants. (See guidance on our Web site at *http://*

www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Memo_Additional_Guidance_on_ACO_Participants.pdf.) An ACO's application to participate in the Shared Savings Program and any subsequent request to add new ACO participants will not be approved if the ACO does not have an agreement in place with each of its ACO participants in which each ACO participant agrees to participate in the Shared Savings Program and to comply with the requirements of the Shared Savings Program.

In our review of applications to participate in the Shared Savings Program, we received many ACO participant agreements that were not properly executed, were not between the correct parties, lacked the required provisions, contained incorrect information, or failed to comply with § 425.304(c) relating to the prohibition on certain required referrals and cost shifting. When we identified such agreements, ACOs experienced processing delays, and in some cases, we were unable to approve the ACO applicant and/or its ACO participant to participate in the Shared Savings Program. Consequently, we issued guidance for ACO applicants in which we reiterated the required elements for ACO participant agreements and strongly recommended that ACOs employ good contracting practices to ensure that each of their ACO participant agreements met our requirements (see *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Tips-ACO-Developing-Participant-Agreements.pdf*).

The ACO participant agreements are necessary for purposes of program transparency and to ensure an ACO's compliance with program requirements. Moreover, many important program operations (including calculation of shared savings, assignment of beneficiaries, and financial benchmarking), use claims and other information that are submitted to CMS by the ACO participant. Our guidance clarified that ACO participant agreements and any agreements with ACO providers/suppliers must contain the following:

- An explicit requirement that the ACO participant or the ACO provider/supplier will comply with the requirements and conditions of the Shared Savings Program (part 425), including, but not limited to, those specified in the participation agreement with CMS.
- A description of the ACO participants' and ACO providers'/suppliers' rights and obligations in and representation by the ACO.
- A description of how the opportunity to get shared savings or other financial arrangements will encourage ACO participants and ACO providers/suppliers to follow the quality assurance and improvement program and evidence-based clinical guidelines.
- Remedial measures that will apply to ACO participants and ACO providers/suppliers who do not comply with the requirements of their agreements with the ACO.

Our guidance also requires that the ACO participant agreements be made directly between the ACO and the ACO participant. We believe it is important that the parties entering into the agreement have a direct legal relationship to ensure that the requirements of the agreement are fully and directly enforceable by the ACO, including the ability of the ACO to terminate an agreement with an ACO participant that is not complying with the requirements of the Shared Savings Program. Additionally, a direct legal relationship ensures that the ACO participant may, if necessary, terminate the agreement with the ACO according to the terms of the agreement without interrupting other contracts or agreements with third parties. Therefore, the ACO and the ACO participant must be the only parties to an ACO participant agreement; the agreements may not include a third party to the agreement. For example, the agreement may not be between the ACO and another entity, such as an independent practice association (IPA) or management company that in turn has an agreement with one or more ACO participants. Similarly, existing contracts between ACOs and ACO participants that include third parties should not be used.

We recognize that there are existing contractual agreements between entities (for example, contracts that permit organizations like IPAs to negotiate contracts with health care payers on behalf of individual practitioners). However, because it is important to ensure that there is a direct legal relationship between the ACO and the ACO participant evidenced by a written agreement, and because ACO participants continue to bill and receive payments as usual under the Medicare FFS rules (that is, there is no negotiation for payment under the program) we believe that typical IPA contracts are generally inappropriate and unnecessary for purposes of participation in the Shared Savings Program. An ACO and ACO participant may use a contract unrelated to the Shared Savings Program as an ACO participant agreement only when it is between the two parties and is amended to satisfy the requirements for ACO participant agreements under the Shared Savings Program.

It is the ACO's responsibility to make sure that each ACO participant agreement identifies the parties entering into the agreement using their correct legal names, specifies the term of the agreement, and is signed by both parties to the agreement. We validate the legal names of the parties based on information the ACO submitted in its application and the legal name of the entity associated with the ACO participant's TIN in the Provider Enrollment Chain & Ownership System (PECOS). We reject an ACO participant agreement if the party names do not match our records. It may be necessary for the ACO to execute a new or amended ACO participant agreement.

Although the ACO participant must ensure that each of its ACO providers/suppliers (as identified by a National Provider Identifier (NPI)) has agreed to participate in the ACO and will comply with program rules, the ACO has the ultimate responsibility for ensuring that all the ACO providers/suppliers that bill through the TIN of the ACO participant (that is, reassign their right to receive Medicare payment to the ACO participant) have also agreed to participate in the Shared Savings Program and comply with our program regulations. The ACO may ensure this by directly contracting with each ACO provider/supplier (NPI) or by contractually requiring the ACO participant to ensure that all ACO providers/suppliers that bill through its TIN have agreed to participate in, and comply with the requirements of, the Shared Saving Program. If the ACO chooses to contract directly with the ACO providers/suppliers, the agreements must meet the same requirements as the agreements with ACO participants. We emphasize that even if an ACO chooses to contract directly with the ACO providers/suppliers (NPIs), it must still have the required ACO participant agreement. In other words, the ACO must be able to produce valid written agreements for each ACO participant and each ACO provider/supplier. Furthermore, since we use TINs (and not merely some of the NPIs that make up the entity identified by a TIN) as the basis for identifying ACO participants, and we use all claims submitted under an ACO participant's TIN for financial calculations and beneficiary assignment, an ACO may not include an entity as an ACO participant unless all Medicare

enrolled providers and suppliers billing under that entity's TIN have agreed to participate in the ACO as ACO providers/suppliers.

To illustrate the requirement that all ACO providers/suppliers must agree to participate in and comply with the terms of the Shared Savings Program before the ACO can include the ACO participant's TIN on its list of ACO participants, we offer the following scenarios that describe when an ACO participant's TIN may and may not be included on the applicant's ACO participant list:

Correct: A large group practice (Medicare-enrolled TIN) decides to participate in an ACO as an ACO participant. Its owner signs an agreement with the ACO on behalf of the practice to participate in the program and follow program regulations. Also, all practitioners that have reassigned their right to receive Medicare payments to the TIN of the large group practice have also agreed to participate and follow program regulations. Therefore, the ACO may include this group practice TIN on its list of ACO participants.

Incorrect: A large group practice (Medicare-enrolled TIN) decides to participate in an ACO as an ACO participant. Its owner signs an agreement to participate in the program and follow program regulations. However, not all practitioners that have reassigned their right to receive Medicare payment to the group practice TIN have agreed to participate in the ACO and follow Shared Savings Program regulations. Therefore, the ACO may not include this group practice TIN on its list of ACO participants.

Incorrect: Several practitioners in a large group practice (Medicare-enrolled TIN) decide to participate in an ACO. However, the group practice as a whole has not agreed to participate in the program. Therefore, the ACO may not include this group practice TIN on its list of ACO participants.

We propose to codify much of our guidance regarding the content of the ACO participant and ACO provider/supplier agreements.

b. Proposed Revisions

First, we propose to add new § 425.116 to set forth the requirements for agreements between an ACO and an ACO participant or ACO provider/supplier. We believe the new provision would promote a better general understanding of the Shared Savings Program and transparency for ACO participants and ACO providers/suppliers. It is our intent to provide requirements that would facilitate and enhance the relationships between ACOs and ACO participants, and reduce uncertainties and misunderstandings leading to rejection of ACO participant agreements during application review. Specifically, we propose to require that ACO participant agreements satisfy the following criteria:

- The ACO and the ACO participant are the only parties to the agreement.
- The agreement must be signed on behalf of the ACO and the ACO participant by individuals who are authorized to bind the ACO and the ACO participant, respectively.
- The agreement must expressly require the ACO participant to agree, and to ensure that each ACO provider/supplier billing through the TIN of the ACO participant agrees, to participate in the Shared Savings Program and to comply with the requirements of the Shared Savings Program and all other applicable laws and regulations (including, but not limited to, those specified at § 425.208(b)).
- The agreement must set forth the ACO participant's rights and obligations in, and representation by, the ACO, including without limitation, the quality reporting requirements set forth in Subpart F, the beneficiary notification requirements set forth at § 425.312, and how participation in the Shared Savings Program affects the ability of the ACO participant and its ACO providers/suppliers to participate in other Medicare demonstration projects or programs that involve shared savings.
- The agreement must describe how the opportunity to receive shared savings or other financial arrangements will encourage the ACO participant to adhere to the quality assurance and improvement program and evidence-based medicine guidelines established by the ACO.
- The agreement must require the ACO participant to update enrollment information with its Medicare contractor using the PECOS, including the addition and deletion of ACO professionals billing through the TIN of the ACO participant, on a timely basis in accordance with Medicare program requirements. The Agreement must also require ACO participants to notify the ACO within 30 days after any addition or deletion of an ACO provider/supplier.
- The agreement must permit the ACO to take remedial action against the ACO participant, and must require the ACO participant to take remedial action against its ACO providers/suppliers, including imposition of a corrective action plan, denial of shared savings payments (that is, the ability of the ACO participant or ACO provider/supplier to receive a distribution of the ACO's shared savings) and termination of the ACO participant agreement, to address noncompliance with the requirements of the Shared Savings Program and other program integrity issues, including those identified by CMS.
- The term of the agreement must be for at least 1 performance year and must articulate potential consequences for early termination from the ACO.
- The agreement must require completion of a close-out process upon the termination or expiration of the ACO's participation agreement that requires the ACO participant to furnish data necessary to complete the annual assessment of the ACO's quality of care and addresses other relevant matters.

Although we propose that the term of an ACO participant agreement be for at least 1 performance year, we do not intend to prohibit early termination of the agreement. We recognize that there may be legitimate reasons to terminate an ACO participant agreement. However, because care coordination and quality improvement requires commitment from ACO participants, we believe this requirement would improve the likelihood of success in the Shared Savings Program. We are also considering whether and how ACO participant agreements should encourage participation to continue for subsequent performance years. We seek comment on this issue.

In the case of an ACO that chooses to contract directly with its ACO providers/suppliers, we propose virtually identical requirements for its agreements with ACO providers/suppliers. We note that agreements with ACO providers/suppliers would not be required to be for a term of 1 year, because we do not want to impede individual practitioners from activities such as retirement, reassignment of billing rights, or changing employers. In the case of ACO providers/suppliers that do not have a contract directly with the ACO, we are considering requiring each ACO to ensure that its ACO participants contract with or otherwise arrange for the services of its ACO providers/suppliers on the same or similar terms as those required for contracts made directly between the ACO and ACO providers/suppliers.

In addition, we propose to add at § 425.204(c)(6) a requirement that, as part of the application process and upon request thereafter, the ACO must submit documents demonstrating that its ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities are required to comply

with the requirements of the Shared Savings Program. In the case of ACO participants, the evidence to be submitted must, consistent with our past guidance, include executed agreements or sample form agreements together with the first and last (signature) page of each form agreement that has been fully executed by the parties to the agreement. However, we reserve the right, to request all pages of an executed ACO participant agreement to confirm that it conforms to the sample form agreement submitted by the ACO. We further propose at § 425.116(c) that executed ACO participant agreements must also be submitted when an ACO seeks approval to add new ACO participants. The agreements may be submitted in the same form and manner as set forth in § 425.204(c)(6). Finally, although we would not routinely request an ACO to submit copies of executed agreements with its ACO providers/suppliers or other individuals or entities performing functions or services related to ACO activities as part of the ACO's application or continued participation in each performance year, we reserve our right to request this information during the application or renewal process and at any other time for audit or monitoring purposes in accordance with § 425.314 and § 425.316.

We believe that the proposed requirements regarding agreements between ACOs and ACO participants, together with our earlier guidance regarding good contracting practices, would enhance transparency between the ACO, ACO participants, and ACO professionals, reduce turnover among ACO participants, prevent misunderstandings related to participation in the Shared Savings Program, and assist prospective ACOs in submitting complete applications and requests for adding ACO participants. We believe that codifying these requirements would assist the ACO, ACO participants, and ACO providers/suppliers in better understanding the program and their rights and responsibilities while participating in the program. We solicit comment on the proposed new requirements and on whether there are additional elements that should be considered for inclusion in the agreements the ACO has with its ACO participants and ACO providers/suppliers.

2. Sufficient Number of Primary Care Providers and Beneficiaries

a. Overview

Section 1899(b)(2)(D) of the Act requires participating ACOs to "include primary care ACO professionals that are sufficient for the number of Medicare fee-for-service beneficiaries assigned to the ACO . . ." and that at a minimum, "the ACO must have at least 5,000 such beneficiaries assigned to it. . . ." Under § 425.110(a)(2) of the regulations, an ACO is deemed to have initially satisfied the requirement to have at least 5,000 assigned beneficiaries if the number of Medicare beneficiaries historically assigned to the ACO participants in each of the 3 years before the start of the agreement period is 5,000 or more.

Under the beneficiary assignment methodology set forth in the regulations at part 425, subpart E, the assignment of beneficiaries to a particular ACO for a calendar year is dependent upon a number of factors, including where the beneficiary elected to receive primary care services and whether the beneficiary received primary care services from ACO professionals participating in one or more Shared Savings Program ACOs. We note that to ensure no duplication in shared savings payments for care provided to the same beneficiaries, assignment of a beneficiary may also be dependent on whether the beneficiary has been assigned to another initiative involving shared savings, such as the Pioneer ACO Model (§ 425.114(c)). While a final assignment determination can be made for the first 2 benchmark years (BY1 and BY2, respectively) for an ACO applying to participate in the Shared Savings Program, it is not possible to determine the final assignment for the third benchmark year (BY3) (that is, the calendar year immediately prior to the start of the agreement period) because application review and determination of whether the ACO has met the required 5,000 assignment must take place during BY3 before all claims are submitted for the calendar year. Further, there is a lag period after the end of a calendar year during which additional claims for the year are billed and processed. Therefore, the final historical benchmark for the 3-year period and the preliminary prospective assignment for PY1 must be determined after the ACO's agreement period has already started. We note that we currently estimate the number of historically assigned beneficiaries for the third benchmark year for Tracks 1 and 2 by using claims with dates of service for the last 3 months of benchmark year 2 (October through December) and the first 9 months of benchmark year 3 (January through September, with up to 3 months claims run out, as available). We use this approach to calculate the number of assigned beneficiaries for BY3 in order to be as consistent as possible with the timeframes (that is, 12 month period) and claims run out used for the BY1 and BY2 calculations.

Section 425.110(b) provides that an ACO that falls below 5,000 assigned beneficiaries at any time during the agreement period will be allowed to continue in the program, but CMS must issue a warning letter and place the ACO on a CAP. The purpose of this provision is to ensure that the ACO is aware that its number of assigned beneficiaries is below 5,000, is notified of the consequences of remaining under 5,000, and that the ACO is taking appropriate steps to correct the deficiency.

Section 425.110(b)(1) provides that, while under the CAP, the ACO will remain eligible to share in savings for the performance year in which it fell below the 5,000, and the MSR will be adjusted according to the number of assigned beneficiaries determined at the time of reconciliation. For example, according to Table 6 in the November 2011 final rule (42 FR 67928), a Track 1 ACO with an assigned population of 5,000 would have an MSR of 3.9. If the ACO's number of assigned beneficiaries falls below 5,000, we would work with the CMS Office of the Actuary to determine the MSR for the number of beneficiaries below 5,000, set at the same 90 percent confidence interval that is used to determine an ACO's MSR when the ACO has a smaller assigned beneficiary population. If the number of beneficiaries assigned to the ACO remains less than 5,000 by the end of the next performance year, the ACO is terminated and is not be permitted to share in savings for that performance year (§ 425.110(b)(2)).

b. Proposed Revisions

First, we propose to revise § 425.110(a)(2) to clarify the data used during the application review process to estimate the number of beneficiaries historically assigned in each of the 3 years of the benchmarking period. Specifically, we propose that the number of assigned beneficiaries would be calculated for each benchmark year using the assignment methodology set forth in Subpart E of part 425, and in the case of BY3, we would use the most recent data available with up to a 3-month claims run out to estimate the number of assigned beneficiaries. This proposed revision would reflect current operational processes under which we assign beneficiaries to ACOs using complete claims data for BY1 and BY2 but must rely on incomplete claims data for BY3. We would likely continue to

estimate the number of historically assigned beneficiaries for the third benchmark year by using claims with dates of service for the last 3 months of BY2 and the first 9 months of BY3, with up to 3 months claims run out. However, that could vary from year to year depending on data availability during the application review process. As discussed previously, we believe that using this approach to calculate the number of assigned beneficiaries for BY3 is consistent with the timeframes and claims run out used for BY1 and BY2 calculations because we would be using a full 12 months of claims, rather than the only available claims for the calendar year, which would be less than 12 months.

The estimates of the number of assigned beneficiaries would be used during the ACO application review process to determine whether the ACO exceeds the 5,000 assigned beneficiary threshold for each year of the historical benchmark period. If based upon these estimates, we determine that an ACO had at least 5,000 assigned beneficiaries in each of the benchmark years, it would be deemed to have initially satisfied the eligibility requirement that the ACO have at least 5,000 assigned beneficiaries. The specific data to be used for computing these initial estimates during the ACO application review process would be designated through program instructions and guidance. Although unlikely, it is possible that when final benchmark year assignment numbers are generated after the ACO has been accepted into the program, the number of assigned beneficiaries could be below 5,000. In this event, the ACO will be allowed to continue in the program, but may be subject to the actions set forth in § 425.110(b).

Second, given our experience with the program and the timing of performance year determinations regarding beneficiary assignment provided during reconciliation, we wish to modify our rules to provide greater flexibility to address situations in which an ACO's assigned beneficiary population falls below 5,000 assigned beneficiaries. Specifically, we have concerns that in some cases it may be very difficult for an ACO to increase its number of assigned beneficiaries by the end of the next performance year, as currently required by § 425.110(b)(2). For example, assume an ACO with a start date of January 2013 were to get its third quarterly report for PY1 in November or December 2013, and the report indicated that the ACO's preliminary prospectively assigned beneficiary population had fallen below 5,000. Under our current regulations, we would send the ACO a warning letter and place the ACO on a CAP. If the ACO were to fail to increase its assigned beneficiary population to at least 5,000 by the end of the next performance year (PY2), it would be terminated. We note that increasing the number of assigned beneficiaries generally involves adding new ACO participants and/or ACO providers/suppliers. However, in the previous example, by the time the ACO had been notified that its assigned beneficiary population had fallen below 5,000 beneficiaries, it would have been too late for the ACO to add new ACO participants for PY2, leaving the ACO with more limited options for timely correction of the deficit. We believe that § 425.110(b) should be modified to provide ACOs with adequate time to successfully complete a CAP. Therefore, we propose to revise § 425.110(b)(2) to state that CMS will specify in its request for a CAP the performance year during which the ACO's assigned population must meet or exceed 5,000 beneficiaries. This modification would permit some flexibility for ACOs whose assigned populations fall below 5,000 late in a performance year to take appropriate actions to address the deficit.

Additionally, we do not believe it is necessary to request a CAP from every ACO whose assigned beneficiary population falls below 5,000. For example, we should have the discretion not to impose a CAP when the ACO has already submitted a request to add ACO participants effective at the beginning of the next performance year and CMS has a reasonable expectation that the addition of these new ACO participants would increase the assigned beneficiary population above the 5,000 minimum beneficiary threshold. Therefore, we propose to revise § 425.110(b) to indicate that we have the discretion whether to impose any remedial measures or to terminate an ACO for failure to satisfy the minimum assigned beneficiary threshold. Specifically, we propose to revise § 425.110(b) to state that the ACO "may" be subject to any of the actions described in § 425.216 (actions prior to termination, including a warning letter or request for CAP) and § 425.218 (termination). However, we note that although we are proposing to retain discretion as to whether to impose remedial measures or terminate an ACO whose assigned beneficiary population falls below 5,000, we recognize that the requirement that an ACO have at least 5,000 assigned beneficiaries is a condition of eligibility to participate in the Shared Savings Program under § 1899(b)(2)(D), and would exercise our discretion accordingly and consistently.

3. Identification and Required Reporting of ACO Participants and ACO Providers/Suppliers

a. Overview

For purposes of the Shared Savings Program, an ACO is an entity that is identified by a TIN and comprised of one or more Medicare-enrolled TINs associated with ACO participants (see § 425.20). The Medicare-enrolled TINs of ACO participants, in turn, are associated with Medicare enrolled individuals and entities that bill through the TIN of the ACO participant. (For example, in the case of a physician, the physician has reassigned to the TIN of the ACO participant his or her right to receive Medicare payments, and their services to Medicare beneficiaries are billed by the ACO participant under a billing number assigned to the TIN of the ACO participant).

As part of the application process and annually thereafter, the ACO must submit a certified list identifying all of its ACO participants and their Medicare-enrolled TINs (the "ACO participant list") (§ 425.204(c)(5)(i)). Additionally, for each ACO participant, the ACO must submit a list identifying all ACO providers/suppliers (including their NPIs or other provider identifiers) that bill Medicare during the agreement period under a billing number assigned to the TIN of an ACO participant (the "ACO provider/supplier list") (§ 425.204(c)(5)(i)(A)). Our regulations require the ACO to indicate on the ACO provider/supplier list whether an individual is a primary care physician as defined at § 425.20. All Medicare enrolled individuals and entities that bill through an ACO participant's TIN during the agreement period must be on the certified ACO provider/supplier list and agree to participate in the ACO. ACOs are required to maintain, update, and annually furnish the ACO participant and ACO provider/supplier lists to CMS at the beginning of each performance year and at such other times as may be specified by CMS (§ 425.304(d)).

We use TINs identified on the ACO participant list to identify claims billed to Medicare in order to support the assignment of Medicare fee-for-service beneficiaries to the ACO, the implementation of quality and other reporting requirements, and the determination of shared savings and losses (see section 1899(b)(2)(E) of the Act). We also use the ACO's initial (and annually updated) ACO participant list to: Identify parties subject to the

screenings under § 425.304(b); determine whether the ACO satisfies the requirement to have a minimum of 5,000 assigned beneficiaries; establish the historical benchmark; perform financial calculations associated with quarterly and annual reports; determine preliminary prospective assignment for and during the performance year; determine a sample of beneficiaries for quality reporting; and coordinate participation in the Physician Quality Reporting System (PQRS) under the Shared Savings Program. Both the ACO participant and ACO provider/supplier lists are used to ensure compliance with program requirements. We refer readers to our guidance at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Updating-ACO-Participant-List.html* for more information.

In this section, we discuss current policy and procedures regarding the identification and required reporting of ACO participants and ACO providers/suppliers. In addition, we propose revisions to our regulations to improve program transparency by ensuring that all ACO participants and ACO providers/suppliers are accurately identified.

b. Proposed Revisions

In order to administer the Shared Savings Program, we need to identify accurately the ACO participants and ACO providers/suppliers associated with each ACO that participates in the program. An accurate understanding of the ACO participants is critical for assignment of beneficiaries to the ACO as well as assessing the quality of care provided by the ACO to its assigned beneficiaries. An accurate understanding of the ACO providers/suppliers is also critical for ensuring compliance with program rules. We believe that this information is equally critical to the ACO for its own operational and compliance purposes. Thus, both CMS and the ACO need to have a common understanding of the individuals and entities that comprise the ACO participants and ACO providers/suppliers in the ACO. We obtain this common understanding by requiring the ACO to certify the accuracy of its ACO participant and ACO provider/supplier lists prior to the start of each performance year and to update the lists as changes occur during the performance year. Because we rely on these lists for both operational and program integrity purposes, we must have a transparent process that results in the accurate identification of all ACO participants and ACO providers/suppliers that compose each ACO in the Shared Savings Program.

We propose to add a new § 425.118 to reflect with more specificity the requirements for submitting ACO participant and ACO provider/supplier lists and the reporting of changes to those lists. In addition, we propose to revise § 425.204(c)(5) and to remove § 425.214(a) and § 425.304(d) because these provisions are addressed in new § 425.118.

(1) Certified Lists of ACO Participants and ACO Providers/Suppliers

We intend to continue to require ACOs to maintain, update and submit to CMS accurate and complete ACO participant and ACO provider/supplier lists, but are proposing to establish new § 425.118 to set forth the requirements and processes for maintaining, updating, and submitting the required ACO participant and ACO provider/supplier lists. New § 425.118 would consolidate and revise provisions at § 425.204(c)(5), § 425.214(a) and § 425.304(d) regarding the ACO participant and ACO provider/supplier lists. Specifically, we propose at § 425.118(a) that prior to the start of the agreement period and before each performance year thereafter, the ACO must provide CMS with a complete and certified list of its ACO participants and their Medicare-enrolled TINs. We would use this ACO participant list to identify the Medicare-enrolled individuals and entities that are affiliated with the ACO participant's TIN in PECOS, the CMS enrollment system. Because these individuals and entities are currently billing through the Medicare enrolled TIN identified by the ACO as an ACO participant, they must be included on the ACO provider/supplier list. We would provide the ACO with a list of all ACO providers/suppliers (NPIs) that we have identified as billing through each ACO participant's Medicare-enrolled TIN. In accordance with § 425.118(a), the ACO would be required to review the list, make any necessary corrections, and certify the lists of all of its ACO participants and ACO providers/suppliers (including their TINs and NPIs) as true, accurate, and complete. In addition, we propose that an ACO must submit certified ACO participant and ACO provider/supplier lists at any time upon CMS request. We note that all NPIs that reassign their right to receive Medicare payment to an ACO participant must be on the certified list of ACO providers/suppliers and must agree to be ACO providers/suppliers. We propose to clarify this point in regulations text at § 425.118(a)(4).

Finally, in accordance with developing and certifying the ACO participant and provider/supplier lists, we propose at § 425.118(d) to require the ACO to report changes in ACO participant and ACO provider/supplier enrollment status in PECOS within 30 days after such changes have occurred (for example, to report changes in an ACO provider's/supplier's reassignment of the right to receive Medicare payment or revocation of billing rights). This requirement corresponds with our longstanding policy that requires enrolled providers and suppliers to notify their Medicare contractors through PECOS within specified timeframes for certain reportable events. We recognize that PECOS is generally not accessible to ACOs to make these changes directly because most ACOs are not enrolled in Medicare. Therefore, an ACO may satisfy the requirement to update PECOS throughout the performance year by requiring its ACO participants to submit the required information directly in PECOS within 30 days after the change, provided that the ACO participant actually submits the required information within 30 days. We propose to require ACOs to include language in their ACO participant agreements (discussed in section II.B.1. of this proposed rule) to ensure compliance with this requirement. We are not proposing to change the current 30-day timeframe required for such reporting in PECOS. These changes are consistent with the current requirements regarding ACO participant and ACO provider/supplier list updates under § 425.304(d) and we believe that they would enhance transparency and accuracy within the Shared Savings Program. We further propose to remove § 425.304(d) because the requirements, although not modified, would be incorporated into new § 425.118(d).

This revised process should afford the ACO the opportunity to work with its ACO participants to identify its ACO providers/suppliers and to ensure compliance with Shared Savings Program requirements. Currently, we also require the ACO to indicate whether the ACO provider/supplier is a primary care physician as defined in § 425.20. Because this information is derived from the claims submitted under the ACO participant's TINs (FQHCs and RHCs being the exception), we have found this unnecessary to implement the program, so we are proposing to remove this requirement, which currently appears in § 425.204(c)(5)(i)(A).

(2) Managing Changes to ACO Participants

Except for rare instances, such as the cessation of ACO participant operations or exclusion from the Medicare program, we expect ACO participants to remain in the ACO for the entire 3 year agreement period. This is due to our belief that care coordination and quality improvement require the commitment of ACO participants. Moreover, as noted previously, we utilize the ACO participant list, among other things, for assigning beneficiaries to the ACO, determining the ACO's benchmark and performance year expenditures, and drawing the sample for ACO quality reporting. Nevertheless, we understand that there are legitimate reasons why an ACO may need to update its list of ACO participants during the 3-year agreement period. Thus, under current § 425.214(a), an ACO may add or remove ACO participants (identified by TINs) throughout a performance year, provided that it notifies CMS within 30 days of such addition or removal.

If such changes occur, we may, at our discretion, adjust the ACO's benchmark, risk scores, and preliminary prospective assignment (§ 425.214(a)(3)). We articulated the timing of these changes in our guidance (*http://cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Updating-ACO-Participant-List.html*), which states that we adjust the ACO's historical benchmark at the start of a performance year if the ACO participant list that the ACO certified at the start of that performance year differs from the one it certified at the start of the prior performance year. We use the updated certified ACO participant list to assign beneficiaries to the ACO in the benchmark period (the 3 years prior to the start of the ACO's agreement period) in order to determine the ACO's adjusted historical benchmark. Our guidance provides that, as a result of changes to the ACO's certified ACO participant list, we may adjust the historical benchmark upward or downward. We use the new annually certified list of ACO participants and the adjusted benchmark for the following program operations: The new performance year's assignment; quality measurement and sampling; reports for the new performance year; and financial reconciliation. We provide ACOs with the adjusted Historical Benchmark Report reflecting these changes.

However, our guidance stated that absent unusual circumstances, changes in ACO participants that occur in the middle of a performance year will not result in midyear changes to assignment, sampling for quality reporting, financial reconciliation, or other matters. As indicated in our guidance, the midyear removal of an entity from the ACO participant list due to program integrity issues is one unusual circumstance that could result in midyear changes to assignment and other matters. Finally, our guidance states that we do not make adjustments upon Medicare payment changes such as wage-index adjustments, or the addition or deletion of ACO participants during the course of the performance year made by the ACO and ACO participants.

We propose to add new provisions at § 425.118(b) to address the procedures for adding and removing ACO participants during the agreement period. These proposals revise the regulations to incorporate some of the important policies that we have implemented through our operational guidance as well as some additional proposals to ease the administrative burden generated by the magnitude of changes made to ACO participant lists to date.

First, we propose under § 425.118(b)(1) that an ACO must submit a request to add a new entity to its ACO participant list in the form and manner specified by CMS and that CMS must approve additions to the ACO participant list before they can become effective. We do not believe ACO participants should be admitted into the program if, for example, the screening conducted under § 425.304(b) reveals that the entity has a history of program integrity issues, or if the ACO participant agreement with the entity does not comply with program requirements, or if the entity is participating in another Medicare shared savings initiative (§ 425.114). If CMS denies the request to add an entity to the ACO participant list, then the entity is not eligible to participate in the ACO for the upcoming performance year.

Second, we propose that, if CMS approves the request, the entity will be added to the ACO participant list at the beginning of the following performance year. That is, entities that are approved for addition to the ACO participant list will not become ACO participants, and their claims would not be considered for purposes of benchmarking, assignment and other operational purposes, until the beginning of the next performance year. For example, if an ACO notifies CMS of the addition of an entity in June of the second performance year (PY2), the entity would not become an ACO participant and its claims would not be included in program operations until January 1 of PY3 if CMS approves the entity's addition.

Third, we propose that an ACO must notify CMS no later than 30 days after the date of termination of the entity's ACO participant agreement. The ACO may notify CMS in advance of such termination. The ACO must submit the notice of removal, which must include the date of termination, in the form and manner specified by CMS. We propose that the removal of the ACO participant from the ACO participant list would be effective on the date of termination of the ACO participation agreement.

We propose at § 425.118(b)(3)(i) that changes made by an ACO to its annually certified ACO participant list would result in adjustments to its historical benchmark, assignment, quality reporting sample, and the obligation of the ACO to report on behalf of eligible professionals for certain CMS quality initiatives. We would annually adjust the ACO's benchmark calculations to include (or exclude) the claims submitted during the benchmark years by the newly added (or removed) ACO participants. In other words, the annually certified ACO participant list is used under Subparts E (assignment of beneficiaries), F (quality performance assessment), and G (calculation of shared savings/losses) for the performance year. For example, if an ACO began program participation in 2013, the PY1 certified list generates an historical benchmark calculated from claims submitted by the TINs on the PY1 certified list during CY 2010, 2011, and 2012. If the ACO adds ACO participants during 2013 and certifies an updated list for PY2 reflecting those additions, we would adjust the historical benchmark to accommodate those changes by recalculating the benchmark using the claims submitted by the PY2 list of certified ACO participants during the ACO's same benchmark years (CYs 2010, 2011, and 2012). In this way, the ACO's benchmark continues to be based on the same 3 years prior to the start of the ACO's agreement, but ensures that the changes in ACO composition and performance year calculations retain a consistent comparison between benchmark and performance during the agreement period.

As noted previously, adjustment to the ACO's historical benchmark as a result of changes to the ACO's certified ACO participant list may move the benchmark upward or downward. We would use the annual certified ACO participant list and the adjusted benchmark for the new performance year's beneficiary assignment, quality measurement and other operations that

are dependent on the ACO participant list as outlined in our guidance. We would provide ACOs with an adjusted Historical Benchmark Report that reflects the new certified ACO participant list. We propose to add this requirement at § 425.118(b)(3).

We propose at § 425.118(b)(3)(ii) to codify the policy we established in guidance that, absent unusual circumstances, the removal of an ACO participant from the ACO participant list during the performance year must not affect certain program calculations for the remainder of the performance year in which the removal becomes effective. Namely, the removal of an entity from the ACO participant list during the performance year would not affect the ACO's beneficiary assignment or, by extension, such program operations as the calculation of the ACO's historical benchmark, financial calculations for quarterly and annual reporting, the sample of beneficiaries for quality reporting, or the obligation of the ACO to report on behalf of eligible professionals for certain quality initiatives. In other words, absent unusual circumstances, CMS uses only the ACO participant list that is certified at the beginning of a performance year to assign beneficiaries to the ACO under Subpart E and to determine the ACO's quality and financial performance for that performance year under Subparts F and G. Examples of unusual circumstances that might justify midyear changes include the midyear removal of an ACO participant due to avoidance of at-risk beneficiaries or another program integrity issue.

For example, if an ACO participant is on the ACO's certified list of ACO participants for the second performance year, and the ACO timely notifies CMS of the termination of the entity's ACO participant agreement effective June 30th of PY2, the ACO participant would be removed from the ACO participant list effective June 30th of PY2. However, the former ACO participant's TIN would still be used for purposes of calculating the quality reporting requirements, financial reports, benchmarking, assignment and reporting of PQRS, meaningful use of EHR, and the value-based modifier. The ACO participant list that was certified at the start of the performance year governs the assessment of the ACO's financial and quality performance for that year, regardless of changes to the list during the performance year. We believe this is necessary to help create some stability in the assessment of the ACO's quality and financial performance for each performance year. If CMS had to modify underlying program operations each time an ACO added or removed a TIN from its list of ACO participants, the ACO would not be able to rely on information (such as the calculation of the historical benchmark) that we provide before the beginning of the performance year. We would not make adjustments upon Medicare payment changes such as wage index adjustments.

We further believe it is important for ACOs to communicate effectively with ACO participants that seek to join an ACO so that they understand the potential impact to the ACO, the ACO participant, and the ACO providers/suppliers affiliated with the ACO participant when an ACO participant leaves during a performance year. For example, it is likely that the ACO would be required to report quality data for beneficiaries that were seen by the former ACO participant in the previous 12 months. The ACO must work with the former ACO participant to obtain the necessary quality reporting data. Additionally, the ACO participant would not be able to qualify for PQRS incentive payment or avoid the PQRS payment adjustment apart from the ACO for that performance year. Therefore, it is in the best interest of both parties to understand this in advance and to commit to working together to fulfill the obligations for the performance year. To assist ACO and ACO participants, we have proposed criteria for ACO participant agreements addressing this issue (see section II.B.1. of this proposed rule).

(3) Managing Changes to ACO Providers/Suppliers

We recognize that ACO providers/suppliers may terminate their affiliation with an ACO participant or affiliate with new or additional Medicare-enrolled TINs (which may or may not be ACO participants) on a frequent basis. Thus, the annual certified ACO provider/supplier list may quickly become outdated. In order to ensure that CMS and the ACO have a common understanding of which NPIs are part of the ACO at any particular point in time, our regulations at § 425.214 set forth requirements for managing changes to the ACO during the term of the participation agreement. Specifically, § 425.214(a)(2) and § 425.304(d)(2) require an ACO to notify CMS within 30 days of the addition or removal of an ACO provider/supplier from the ACO provider/supplier list.

We are proposing new § 425.118(c) on how to report changes to the ACO provider/supplier list that occur during the performance year. Under proposed § 425.118(c), ACOs will continue to be required to report these changes within 30 days. As discussed later in this section, we would require the ACO to ensure that changes in ACO participant and ACO provider/supplier enrollment status are reported in PECOS. However, because the lists of ACO providers/suppliers cannot be maintained in PECOS, we propose to require ACOs to notify CMS' Shared Savings Program separately, in the form and manner specified by CMS, of the addition or removal of an ACO provider/supplier. At this time, we anticipate that ACOs will be required to send such notifications via electronic mail; however, specific guidance regarding this notification process would be provided by the Secretary on the CMS Web site and/or through the ACO intranet portal.

We propose that an ACO may add an individual or entity to the ACO provider/supplier list if it notifies CMS within 30 days after the individual or entity became a Medicare-enrolled provider or supplier that bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant. If the ACO provides such notice by the 30-day deadline, the addition of an ACO provider/supplier would be effective on the date specified in the notice furnished to CMS but no earlier than 30 days before the date of notice. If the ACO fails to provide timely notice to CMS regarding the addition of an individual or entity to the ACO provider/supplier list, then the addition becomes effective on the date CMS receives notice from the ACO. However, we note that when an individual has begun billing through the TIN of an ACO participant but is not on the ACO provider/supplier list, the individual satisfies the definition of an ACO professional, in which case his or her claims for services furnished to Medicare fee-for-service beneficiaries are considered for assignment and other operational purposes previously described.

Each potential ACO provider/supplier that reassigns his or her billing rights under the TIN of an ACO participant is screened by CMS through the enrollment process and PECOS system. Additionally, the Shared Savings Program conducts additional screening on a biannual basis for each ACO provider/supplier through the CMS Fraud Prevention System. In spite of this, we are concerned that our proposed effective date for the addition of an individual or entity to the ACO provider/supplier list will prevent us from conducting a robust program integrity screening of such individuals

and entities. Therefore, we are considering whether to delay the effective date of any additions to the ACO provider/supplier list until after we have completed a program integrity screening of the individuals or entities that the ACO wishes to add to the list. For example, we are considering whether to delay the effective date of additions to the ACO provider/supplier list until the start of the next performance year, similar to the timing for adding TINs of ACO participants to the list of ACO participants. In this way, a complete yearly screening, including screening with the assistance of our law enforcement partners, could occur at one time for both the ACO participant list and the ACO provider/supplier list. As noted previously, until the individual or entity has been officially designated as an ACO provider/supplier, that individual or entity would be an ACO professional because of its billing relationship with the ACO participant. Thus, any claims billed by the ACO professional through the TIN of the ACO participant would be used for assignment and related activities during the performance year in which the change takes place, regardless of whether the individual or entity subsequently becomes an ACO provider/supplier. We seek comment on this proposal.

We propose that to remove an ACO provider/supplier from the ACO provider/supplier list, an ACO must notify CMS no later than 30 days after the individual or entity ceases to be a Medicare-enrolled provider or supplier that bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant. The individual or entity would be removed from the ACO provider/supplier list effective as of the date the individual or entity terminates its affiliation with the ACO participant.

(4) Update of Medicare Enrollment Information

We propose at § 425.118(d) to require the ACO to ensure that changes in ACO participant and ACO provider/supplier enrollment status are reported in PECOS consistent with § 424.516 (for example, changes in an ACO provider's/supplier's reassignment of the right to receive Medicare payment or revocation of billing rights). As previously discussed in detail, this requirement corresponds with our longstanding policy that requires enrolled providers and suppliers to notify their Medicare contractors through PECOS within specified timeframes for certain reportable events.

4. Significant Changes to an ACO

a. Overview

Section 425.214(b) requires an ACO to notify CMS within 30 days of any significant change. A significant change occurs when an ACO is no longer able to meet the Shared Savings Program eligibility or program requirements (§ 425.214(b)). Upon receiving an ACO's notice of a significant change, CMS reviews the ACO's eligibility to continue participating in the Shared Savings Program and, if necessary, may terminate the ACO's participation agreement (§ 425.214 (c)). In addition, § 425.214(c)(2) provides that CMS may determine that a significant change has caused the ACO's structure to be so different from what was approved in the ACO's initial application that it is no longer able to meet the eligibility or program requirements. Under such circumstances, CMS would terminate the ACO's participation agreement, and permit the ACO to submit a new application for program participation. In the November 2011 final rule (76 FR 67840), we noted that changes to an ACO participant list could constitute a significant change to an ACO if, for example, the removal of a large primary care practice from the list of ACO participants caused the number of assigned beneficiaries to fall below 5,000.

b. Proposed Revisions

In light of changes proposed in the previous section of this preamble, we propose to redesignate § 425.214(b) and (c) as § 425.214(a) and (b). Second, we propose to describe when certain changes to the ACO constitute a significant change to the ACO. We believe that a change in ownership of an ACO or the addition or deletion of ACO participants could affect an ACO's compliance with the governance requirements in § 425.106 or other eligibility requirements. We note that some changes to the ACO participant list may be of such a magnitude that the ACO is no longer the entity that was originally approved for program participation. In addition, depending on the nature of the change in ownership, the ACO would need to execute a new participation agreement with CMS if the existing participation agreement is no longer with the correct legal entity. We believe that such changes constitute significant changes and should be subject to the actions outlined under § 425.214(b).

Therefore, we are proposing to specify at § 425.214(a) that a significant change occurs when the ACO is no longer able to meet the eligibility or other requirements of the Shared Savings Program, or when the number or identity of ACO participants included on the ACO participant list, as updated in accordance with § 425.118, changes by 50 percent or more during an agreement period. For example, in the case of an ACO whose initial certified ACO participant list contained ten ACO participants, five of which gradually left the ACO and either were not replaced or were replaced with five different ACO participants, the ACO would have undergone a significant change because the number or identity of its ACO participants changed by 50 percent. Similarly, if an ACO's initial certified ACO participant list contains 20 ACO participants, and the ACO incrementally adds 10 new ACO participants for a total of 30 ACO participants, it would have undergone a significant change with the addition of the 10th new ACO participant.

Upon notice that an ACO has experienced a significant change, we would evaluate the ACO's eligibility to continue participating in the Shared Savings Program and make one of the determinations listed in the provision we propose to redesignate as § 425.214(b). We may request additional information to determine whether and under what terms the ACO may continue in the program. We note that a determination that a significant change has occurred would not necessarily result in the termination of the ACO's participation agreement. We further propose to modify § 425.214 to provide that an ACO's failure to notify CMS of a significant change must not preclude CMS from determining that the ACO has experienced a significant change.

In addition, we are seeking comment on whether we should consider amending our regulations to clarify that the ACO's notice of a significant change must be furnished prior to the occurrence of the significant change. We believe some significant changes could benefit from a longer notice period, particularly in the case of a change of ownership that causes the ACO to be unable to comply with program requirements. Therefore, we seek comment on whether ACOs should be required to provide 45 or 60 days' advance notice of a significant change. We also seek comment on what changes in the ACO participant list should constitute a significant change.

5. Consideration of Claims Billed by Merged/Acquired Medicare-Enrolled Entities

a. Overview

As discussed in the November 2011 final rule (76 FR 67843), we do not believe that mergers and acquisitions by ACO providers and suppliers are the only way for an entity to become an ACO. The statute and our regulations permit ACO participants that form an ACO to use a variety of collaborative organizational structures, including collaborations other than merger. We reject the proposition that an entity under single control, that is, an entity formed through a merger, would be more likely to meet the goals of improved health at a lower cost. However, we have received questions from industry stakeholders regarding how previous mergers and acquisitions of entities with Medicare enrolled billing TINs will be treated for purposes of the Shared Savings Program. In particular, some applicants have inquired whether the claims billed to Medicare in previous years by an entity that has since been merged with, or acquired by, a different entity could be used to determine whether an applicant meets the requirement to have at least 5,000 beneficiaries assigned to it in each of the benchmark years (§ 425.110) and to establish the ACO's historical benchmark and preliminary prospective assignment. To illustrate, suppose a large group practice that is a prospective ACO participant recently purchased two small primary care practices, and the primary care practitioners from those small practices have reassigned the right to receive Medicare payment to the larger group practice Medicare-enrolled TIN. In this instance, it is likely that the primary care providers will continue to serve the same patient population they served before the practices were purchased, and that their patients may appear on the ACO's list of assigned beneficiaries at the end of the performance year. Therefore, applicants and established ACOs have inquired whether there is a way to take into account the claims billed by the Medicare-enrolled TINs of practices acquired by sale or merger for purposes of meeting the minimum assigned beneficiary threshold and creating a more accurate benchmark and preliminary prospective list of assigned beneficiaries for the upcoming performance year. Similarly, an established ACO may request consideration of the claims billed by the Medicare-enrolled TINs of entities acquired during the course of a performance year for the same purposes.

In response to questions from industry stakeholders, we provided additional guidance on our Web site to all Shared Savings Program applicants about the requirements related to mergers and acquisitions (see *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Merger-Acquisitions-FAQ.pdf*). In this guidance, we indicated that under the following circumstances, we may take the claims billed under TINs of entities acquired through purchase or merger into account for purposes of beneficiary assignment and the ACO's historical benchmark:

- The ACO participant must have subsumed the acquired entity's TIN in its entirety, including all the providers and suppliers that reassigned the right to receive Medicare payment to that acquired entity's TIN.
- All the providers and suppliers that previously reassigned the right to receive Medicare payment to the acquired entity's TIN must reassign that right to the TIN of the acquiring ACO participant.
- The acquired entity's TIN must no longer be used to bill Medicare.

In order to attribute the billings of merged or acquired TINs to the ACO's benchmark, the ACO applicant must—

- Submit the acquired entity's TIN on the ACO participant list, along with an attestation stating that all providers and/suppliers that previously billed under the acquired entity's TIN have reassigned their right to receive Medicare payment to an ACO participant's TIN;
- Indicate the acquired entity's TIN and which ACO participant acquired it; and
- Submit supporting documentation demonstrating that the entity's TIN was acquired by an ACO participant through a sale or merger and submit a letter attesting that the acquired entity's TIN will no longer be used to bill Medicare.

We note that we require an applicant's list of ACO providers/suppliers to include all individuals who previously billed under the acquired entity's TIN to have reassigned their right to receive Medicare payment to an ACO participant's TIN.

We believe that these requirements are necessary to ensure that these entities have actually been completely merged or acquired and that it would be likely that the primary care providers will continue to serve the same patient population. In this way, the beneficiary assignments and the benchmarks would be more accurate for ACOs that include merged or acquired Medicare-enrolled TINs under which their ACO professionals billed during application or updates to the ACO participant list.

b. Proposal

We believe the current criteria and processes have been working well and have benefited both CMS (for example, by providing assurance that an entity's Medicare-enrolled billing TIN have actually been acquired through sale or merger) and the affected ACOs (for example, by allowing for an increase in the ACO's number of appropriately assigned beneficiaries and providing for a more accurate financial benchmark). To avoid uncertainty and to establish a clear and consistent process for the recognition of the claims previously billed by the TINs of acquired entities, we propose to codify the current operational guidance on this topic at § 425.204(g) with some minor revisions to more precisely and accurately describe our proposed policy. Proposed § 425.204(g) would add the option for ACOs to request consideration of claims submitted by the Medicare-enrolled TINs of acquired entities as part of their application, and would address the documentation requirements for such requests. Although this provision is added in a section regarding the content of the initial application, we propose to permit ACOs to annually request consideration of claims submitted by the TINs of entities acquired through sale or merger upon submission of the ACO's updated list of ACO participants.

6. Legal Structure and Governance

Section 1899(b)(1) of the Act requires ACO participants to have established a "mechanism for shared governance" in order to be eligible to participate as ACOs in the Shared Savings Program. In addition, section 1899(b)(2)(C) of the Act requires the ACO to have a formal legal structure that allows the organization to receive and distribute shared savings payments to ACO participants and ACO providers/suppliers. We believe this requirement is important because a formal legal structure can ensure the ACO is protected against improper influence. In this section, we propose clarifications to our rules related to the ACO's legal entity and governing body. The purpose of these changes is to clarify our regulations and to ensure that ACO decision making is governed by individuals who have a fiduciary duty, including a duty of loyalty, to the ACO alone and not to any other individuals or entities. We believe these clarifications are relatively minor and would not significantly impact the program as currently implemented.

a. Legal Entity and Governing Body

(1) Overview

As specified in the November 2011 final rule (76 FR 67816) and at § 425.104(a), an ACO must be a legal entity, formed under applicable state, federal, or tribal law, and authorized to conduct business in each state in which it operates for purposes of the following:

- Receiving and distributing shared savings.
- Repaying shared losses or other monies determined to be owed to CMS.
- Establishing, reporting, and ensuring provider compliance with health care quality criteria, including quality performance standards.
- Fulfilling other ACO functions identified in this part.

Additionally, under § 425.104(b), an ACO formed by two or more "otherwise independent" ACO participants must be a legal entity separate from any of its ACO participants. Our regulations at § 425.106(b)(4) further specify that when an ACO comprises "multiple, otherwise independent ACO participants," the governing body of the ACO must be "separate and unique to the ACO". In contrast, if the ACO is an "existing legal entity," the ACO governing body may be the same as the governing body of that existing legal entity, provided it satisfies all other requirements of § 425.106, including provisions regarding the fiduciary duties of governing body members, the composition of the governing body, and conflict of interest policies (§ 425.106(b)(5)).

Some applicants have questioned when an ACO needs to be formed as a separate legal entity, particularly the meaning in § 425.104(b) of "otherwise independent" ACO participants. Specifically, applicants have questioned whether multiple prospective ACO participants are "otherwise independent" when they have a prior relationship through, for example, an integrated health system. In addition, we received some questions regarding compliance with the governing body requirements set forth in § 425.106(b)(4) and (5). For example, we received questions from some IPAs, each of which wanted to apply to the Shared Savings Program as an ACO using its existing legal structure and governing body. In some cases, the IPA represented many group practices, but not every group practice represented by an IPA had agreed to be an ACO participant. We believe that such an IPA would need to organize its ACO as a separate legal entity with its own governing body to ensure that the governing body members would have a fiduciary duty to the ACO alone, as required by § 425.106(b)(3), and not to an entity comprised in part by entities that are not ACO participants.

(2) Proposed Revisions

We propose to clarify our regulation text regarding when an ACO must be formed as a separate legal entity. Specifically, we propose to remove the reference to "otherwise independent ACO participants" in § 425.104(b). The revised regulation would provide that an ACO formed by "two or more ACO participants, each of which is identified by a unique TIN," must be a legal entity separate from any of its ACO participants. For example, if an ACO is composed of three ACO participants, each of which belongs to the same health system or IPA, the ACO must be a legal entity separate and distinct from any one of the three ACO participants.

In addition, we propose to clarify § 425.106(a), which sets forth the general requirement that an ACO have an identifiable governing body with the authority to execute the functions of an ACO. Specifically, we propose that the governing body must satisfy three criteria. First, the governing body of the ACO must be the same as the governing body of the legal entity that is the ACO. Second, in the case of an ACO that comprises multiple ACO participants the governing body must be separate and unique to the ACO and must not be the same as the governing body of any ACO participant. Third, the governing body must satisfy all other requirements set forth in § 425.106, including the fiduciary duty requirement. We note that the second criterion incorporates the requirement that currently appears at § 425.106(b)(4), which provides that the governing body of the ACO must be separate and unique to the ACO in cases where there are multiple ACO participants. Accordingly, we propose to remove § 425.106(b)(4). We further propose to remove § 425.106(b)(5), which provides that if an ACO is an existing legal entity, its governing body may be the same as the governing body of that existing entity, provided that it satisfies the other requirements of § 425.106. In light of our proposed revision to § 425.106(a), we believe this provision is unnecessary and should be removed to avoid confusion.

In proposing that the governing body be the same as the governing body of the legal entity that is the ACO, we intend to preclude delegation of all ACO decision-making authority to a committee of the governing body or retention of ACO decision-making authority by a parent company; ultimate authority for the ACO must still reside with the governing body. We recognize that the governing body of the legal entity that is the ACO may wish to organize committees that address certain matters pertaining to the ACO, but we do not believe that such committees can constitute the governing body of the ACO. We also recognize that a parent organization may wish to retain certain authorities to protect the parent company and ensure the subsidiary's success; however, the ACO's governing body must retain the ultimate authority to execute the functions of an ACO. As stated in the regulations, we believe such functions include such things as developing and implementing the required processes under § 425.112 and holding leadership and management accountable for the ACO's activities. We also believe this authority extends to such activities including the appointment and removal of members of the governing body, leadership, and management, and determining how shared savings are used and distributed among ACO participants and ACO providers/suppliers. We seek comments on this proposal that the ultimate authority for the ACO to carry out its activities must reside with the governing body of the ACO.

The purpose of the new provision precluding the governing body of the ACO from being the same as the governing body of an ACO participant is to ensure that decisions made on behalf of the ACO are not improperly influenced by the interests of individuals and entities other than the ACO. In order to comply with the requirement that the governing body be separate and unique to the ACO, it must not be responsible for representing the interests of any entity participating in the ACO or any entity that is not participating in the ACO. Thus, we propose the requirement that an ACO's governing body must not be the same as the governing body of any of the ACO participants.

b. Fiduciary Duties of Governing Body Members

(1) Overview

Our current regulations at § 425.106(b)(3) require that the governing body members have a fiduciary duty to the ACO and must act consistent with that fiduciary duty. We have clarified in guidance that the governing body members cannot meet the fiduciary duty requirement if the governing body is also responsible for governing the activities of individuals or entities that are not part of the ACO (See "Additional Guidance for Medicare Shared Savings Program Accountable Care Organization (ACO) Applicants"

located online at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Memo_Additional_Guidance_on_ACO_Participants.pdf*). For example, in the case of an IPA that applies as an ACO to the Shared Savings Program, we believe it would be difficult for the members of the IPA's governing body to make decisions in the best interests of the ACO if only some of the group practices that compose the IPA are ACO participants; decisions affecting the ACO may be improperly influenced by the interests of group practices that are part of the IPA but are not ACO participants. For this reason, our regulations require the IPA to establish the ACO as a separate legal entity. This new legal entity must have a governing body whose members have a fiduciary responsibility to the ACO alone and not to any other individual or entity.

We wish to emphasize that the ACO's governing body decisions must be free from the influence of interests that may conflict with the ACO's interests.

(2) Proposed Revisions

We propose to clarify in § 425.106(b)(3) that the fiduciary duty owed to an ACO by its governing body members includes the duty of loyalty. This proposal does not represent a change in policy and is simply intended to emphasize that members of an ACO governing body must not have divided loyalties; they must act only in the best interests of the ACO and not another individual or entity, including the individual interests of ACO participants, ACO professionals, ACO providers/suppliers, or other individuals or entities.

c. Composition of the Governing Body

(1) Overview

Section 1899(b)(1) requires an ACO to have a "mechanism for shared governance" among ACO participants. Section 425.106(c)(1) of the regulations requires an ACO to provide for meaningful participation in the composition and control of the ACO's governing body for ACO participants or their designated representatives. As we explained in the November 2011 final rule (76 FR 67819), we believe that an ACO should be operated and directed by Medicare-enrolled entities that directly provide health care services to beneficiaries. However, we acknowledged, that small groups of providers often lack both the capital and infrastructure necessary to form an ACO and to administer the programmatic requirements of the Shared Savings Program and could benefit from partnerships with non-Medicare enrolled entities. For this reason, we proposed (76 FR 19541) that to be eligible for participation in the Shared Savings Program, the ACO participants must have at least 75 percent control of the ACO's governing body. In the November 2011 final rule, we explained that this requirement would ensure that ACOs remain provider-driven, but also leave room for nonproviders to participate in the program.

In addition, to provide for patient involvement in the ACO governing process, we specified at § 425.106(c)(2) that an ACO's governing body must include a Medicare beneficiary served by the ACO who does not have a conflict of interest with the ACO. We acknowledged that beneficiary representation on an ACO's governing body may not always be feasible. For example, commenters raised concerns that requiring a beneficiary on the governing body could conflict with State corporate practice of medicine laws or other local laws regarding governing body requirements for public health or higher education institutions (76 FR 67821). As a result, we believed it was appropriate to provide some flexibility for us to permit an ACO to adopt an alternative structure for its governing body, while still ensuring that ACO participants and Medicare FFS beneficiaries are involved in ACO governance.

Accordingly, the November 2011 final rule, offers some flexibility to permit an ACO to participate in the Shared Savings Program even if its governing body fails to include a beneficiary or satisfy the requirement that 75 percent of the governing body be controlled by ACO participants. Specifically, § 425.106(c)(5) provides that if an ACO's governing body does not meet either the 75 percent threshold or the requirement regarding beneficiary representation, it must describe in its application how the proposed structure of its governing body would involve ACO participants in innovative ways in ACO governance or provide a meaningful opportunity for beneficiaries to participate in the governance of the ACO. For example, under this provision, we anticipated that exceptions might be needed for ACOs that operate in states with Corporate Practice of Medicine restrictions to structure beneficiary representation accordingly. We contemplated that this provision could also be used by an existing entity to explain why it should not be required to reconfigure its board if it had other means of addressing the requirement to include a consumer perspective in governance (see 76 FR 67821).

(2) Proposed Revisions

We propose to revise § 425.106(c)(5) to remove the flexibility for ACOs to deviate from the requirement that at least 75 percent control of an ACO's governing body must be held by ACO participants. Based on our experience to date with implementing the program, we have learned that ACO applicants do not have difficulty meeting the requirement under § 425.106(c)(3) that ACO participants maintain 75 percent control of the governing body. We have not denied participation to any ACO applicants on the basis of failure to comply with this requirement, and it has not been necessary to grant any exceptions to this rule under § 425.106(c)(5). To the contrary, we have found the 75 percent control requirement to be necessary and protective of the ACO participant's interests. Accordingly, we believe there is no reason to continue to offer an exception to the rule.

We continue to believe it is important to maintain the flexibility for ACOs to request innovative ways to provide meaningful representation of Medicare beneficiaries on ACO governing bodies. Based on our experience, some ACOs have been unable to include a beneficiary on their governing body, and these entities have used the process under § 425.106(c)(5) to establish that they satisfy the requirement for meaningful beneficiary representation through the use of patient advisory bodies that report to the governing body of the ACO.

We also propose to revise § 425.106(c)(2) to explicitly prohibit an ACO provider/supplier from being the beneficiary representative on the governing body. Some ACO applicants have proposed that one of their ACO providers/suppliers would serve as the beneficiary representative on the governing body. We believe it would be very difficult for an ACO provider/supplier who is Medicare beneficiary to represent only the interests of beneficiaries, rather than his or her own interests as an ACO provider/supplier, the interests of other ACO providers/suppliers, or the interests of the ACO participant through which he or she bills Medicare. Finally, we are proposing to revise § 425.106(c)(1) to reiterate the statutory standard in section 1899(b)(1) of the Act requiring an ACO to have a "mechanism for shared governance" among ACO participants. Although we declined in the November 2011 final rule to promulgate a requirement that each

ACO participant be a member of the ACO's governing body (76 FR 67818), the governing body must nevertheless represent a mechanism for shared governance among ACO participants. To that end, the governing body of an ACO that is composed of more than one ACO participant should not, for example, include representatives from only one ACO participant. For ACOs that have extensive ACO participant lists, we would expect to see representatives from many different ACO participants on the governing body. Our proposal to reiterate the statutory standard for shared governance in our regulations at § 425.106(c)(1) does not constitute a substantive change to the program.

7. Leadership and Management Structure

a. Overview

Section 1899(b)(2)(F) of the Act requires an eligible ACO to "have in place a leadership and management structure that includes clinical and administrative systems." Under this authority, we incorporated certain leadership and management requirements into the Shared Savings Program, as part of the eligibility requirements for program participation. In the November 2011 final rule (76 FR 67822), we stated that we believed an ACO's leadership and management structure should align with and support the goals of the Shared Savings Program and the three-part aim of better care for individuals, better health for populations, and lower growth in expenditures.

In the November 2011 final rule (76 FR 67825), we established the requirement that the ACO's operations be managed by an executive, officer, manager, general partner, or similar party whose appointment and removal are under the control of the ACO's governing body and whose leadership team has demonstrated the ability to influence or direct clinical practice to improve efficiency, processes, and outcomes (see § 425.108(b)). In addition, under § 425.108(c), clinical management and oversight must be managed by a senior-level medical director who is one of the ACO providers/suppliers, who is physically present on a regular basis in an established ACO location (clinic, office or other location participating in the ACO), and who is a board-certified physician licensed in a State in which the ACO operates. In § 425.204(c)(1)(iii), we require ACO applicants to submit materials documenting the ACO's organization and management structure, including senior administrative and clinical leaders specified in § 425.108.

In the November 2011 final rule (76 FR 67825), we provided flexibility for ACOs to request an exception to the leadership and management requirements set forth under § 425.108(b) and (c). We believed that affording this flexibility was appropriate in order to encourage innovation in ACO leadership and management structures. In accordance with § 425.108(e), we reserve the right to give consideration to an innovative ACO leadership and management structure that does not comply with the requirements of § 425.108(b) and (c).

We continue to believe that having these key leaders (operational manager and clinical medical director) is necessary for a well-functioning and clinically integrated ACO. We have learned from our experience with the program, over four application cycles, that ACO applicants generally do not have difficulty in meeting the operational manager and clinical medical director requirements. Only one ACO has requested an exception to the medical director requirements. In that case, the ACO sought the exception in order to allow a physician, who had retired after a long tenure with the organization to serve as the medical director of the ACO. We approved this request because, although the retired physician was not an ACO provider/supplier because he was no longer billing for physician services furnished during the agreement period, he was closely associated with the clinical operations of the ACO, familiar with the ACO's organizational culture, and dedicated to this one ACO.

In addition, we have received a number of questions from ACO applicants regarding the other types of roles for which CMS requires documentation under § 425.204(c)(1)(iii) to evaluate whether an applicant has a ". . . leadership and management structure that includes clinical and administrative systems" that support the purposes of the Shared Savings Program and the aims of better care for individuals, better health for populations, and lower growth in expenditures, as articulated at § 425.108(a)). In response to such inquiries regard, we have indicated that we consider an ACO's ". . . leadership and management structure that includes clinical and administrative systems" to be comprised of the operational manager and clinical medical director (referenced under § 425.108(b) and (c)) as well as the qualified healthcare professional that is required under § 425.112(a) to be responsible for the ACO's quality assurance and improvement program.

b. Proposed Revisions

We propose to amend § 425.108 to provide some additional flexibility regarding the qualifications of the ACO medical director and to eliminate the provision permitting some ACOs to enter the program without satisfying the requirements at § 425.108(b) and (c) for operations and clinical management. In addition, we propose to amend § 425.204(c)(iii) to clarify that applicants must submit materials regarding the qualified health care professional responsible for the ACO's quality assurance and improvement program. We discuss each proposal later in this section.

We believe that it is appropriate to amend the medical director requirement at § 425.108(c) to allow some additional flexibility. Specifically, we propose to remove the requirement that the medical director be an ACO provider/supplier. This change would permit an ACO to have a medical director who was, for example, previously closely associated with an ACO participant but who is not an ACO provider/supplier because he or she does not bill through the TIN of an ACO participant and is not on the list of ACO providers/suppliers. Alternatively, we may retain the requirement that an ACO's medical director be an ACO provider/supplier, but permit ACOs to request CMS approval to designate as its medical director a physician who is not an ACO provider/supplier but who is closely associated with the ACO and satisfies all of the other medical director requirements. We seek comment on whether an ACO medical director who is not an ACO provider/supplier must have been closely associated with the ACO or an ACO participant in the recent past. In addition, we propose to clarify that the medical director must be physically present on a regular basis "at any clinic, office, or other location of the ACO, ACO participant or ACO provider/supplier." Currently, the provision incorrectly refers only to locations "participating in the ACO."

However, we continue to strongly believe that the medical director of the ACO should be directly associated with the ACO's clinical operations and familiar with the ACO's organizational culture. This is one purpose of the provision requiring medical directors to be physically present on a regular basis at any clinic, office, or other ACO location. A close working relationship with the ACO and its clinical operations is necessary in order for the medical director to lead the ACO's efforts to achieve quality improvement and cost efficiencies.

We propose to eliminate § 425.108(e), which permits us to approve applications from innovative ACOs that do not satisfy the leadership and management requirements related to operations management and clinical management and oversight set forth at § 425.108(b) and (c). Based on our experience with the program and the proposed change to the medical director requirement, we believe it is unnecessary to continue to allow ACOs the flexibility to request an exception to the leadership and management requirements related to operations management and clinical management and oversight (§ 425.108(b) and (c)). These requirements are broad and flexible and have not posed a barrier to participation in the Shared Savings Program; in fact, in only one instance has an ACO requested an exception to the operations management criterion (§ 425.108(b)). We are unaware of any alternative operations management structure that might be considered acceptable, and we have modified § 425.108(c) to accommodate the one exception we have granted to date. Accordingly, we propose to revise the regulations by striking § 425.108(e) to eliminate the flexibility for ACOs to request an exception to the leadership and management requirements at § 425.108(b) and (c).

Finally, to clarify questions that have been raised by ACO applicants and to reduce the need for application corrections, we propose to modify § 425.204(c)(1)(iii) to require a Shared Savings Program applicant to submit documentation regarding the qualified healthcare professional responsible for the ACO's quality assurance and improvement program (as required by § 425.112(a)).

We seek comment on these changes to the requirements for ACO leadership and management.

8. Required Process To Coordinate Care

a. Overview

Section 1899(b)(2)(G) of the Act requires an ACO to "define processes to . . . coordinate care, such as through the use of telehealth, remote patient monitoring, and other such enabling technologies." In the November 2011 final rule (76 FR 67829 through 67830), we established requirements under § 425.112(b)(4) that ACOs define their care coordination processes across and among primary care physicians, specialists, and acute and postacute providers. As part of this requirement, an ACO must define its methods and processes to coordinate care throughout an episode of care and during its transitions. In its application to participate in the Shared Savings Program, the ACO must submit a description of its individualized care program, along with a sample care plan, and explain how this program is used to promote improved outcomes for, at a minimum, its high-risk and multiple chronic condition patients. In addition, an ACO's application must describe target populations that would benefit from individualized care plans.

In developing these policies for the November 2011 final rule (76 FR 67819), we received comments acknowledging that requiring ACOs to define processes to promote coordination of care is vital to the success of the Shared Savings Program. Commenters stressed the importance of health information exchanges in coordination of care activities and recommended that CMS allow ACOs the flexibility to use any standards-based electronic care coordination tools that meet their needs. Other commenters suggested that the proposed rule anticipated a level of functional health information exchange and technology adoption that may be too aggressive.

As stated in § 425.204(c)(1)(ii), applicants to the Shared Savings Program must provide a description, or documents sufficient to describe, how the ACO will implement the required processes and patient-centeredness criteria under § 425.112, including descriptions of the remedial processes and penalties (including the potential for expulsion) that will apply if an ACO participant or an ACO provider/supplier fails to comply with and implement these processes. Under § 425.112(b), an ACO must establish processes to accomplish the following: promote evidence-based medicine; Promote patient engagement; develop an infrastructure to internally report on quality and cost metrics required for monitoring and feedback; and coordinate care across and among primary care physicians, specialists and acute and postacute providers and suppliers.

In addition to the processes described previously, we believe it is important for applicants to explain how they will develop the health information technology tools and infrastructure to accomplish care coordination across and among physicians and providers Adoption of health information technology is important for supporting care coordination by ACO participants and other providers outside the ACO in the following ways: Secure, private sharing of patient information; reporting on quality data and aggregating data across providers and sites to track quality measures; and deploying clinical decision support tools that provide access to alerts and evidence based-guidelines. As ACOs establish more mature processes for risk management, information technology infrastructure allows ACOs and providers to conduct robust financial management of beneficiary populations, deliver cost and quality feedback reporting to individual providers, and streamline the administration of risk based contracts across multiple payers. We believe that requiring ACOs to address health information technology infrastructure in their application to the Shared Savings program would support more careful planning and increased focus on this issue.

b. Accelerating Health Information Technology

HHS believes all patients, their families, and their healthcare providers should have consistent and timely access to their health information in a standardized format that can be securely exchanged between the patient, providers, and others involved in the patient's care. (HHS August 2013 Statement, "Principles and Strategies for Accelerating Health Information Exchange") HHS is committed to accelerating health information exchange (HIE) through the use of EHRs and other types of health information technology (HIT) across the broader care continuum through a number of initiatives including: (1) Alignment of incentives and payment adjustments to encourage provider adoption and optimization of HIT and HIE services through Medicare and Medicaid payment policies; (2) adoption of common standards and certification requirements for interoperable HIT; (3) support for privacy and security of patient information across all HIE-focused initiatives; and (4) governance of health information networks. These initiatives are designed to encourage HIE among health care providers, including professionals and hospitals eligible for the Medicare and Medicaid EHR Incentive Programs and those who are not eligible for the EHR Incentive programs as well as those providers that are participating in the Medicare Shared Savings Program as an ACO and those that are not, and are designed to improve care delivery and coordination across the entire care continuum. For example, the Transition of Care Measure #2 in Stage 2 of the Medicare and Medicaid EHR Incentive Programs requires HIE to share summary records for at least 10 percent of care transitions.

We believe that HIE and the use of certified EHRs can effectively and

efficiently help ACOs and participating providers improve internal care delivery practices, support management of patient care across the continuum, and support the reporting of electronically specified clinical quality measures (eCQMs).

c. Proposed Revisions

We continue to believe that ACOs should coordinate care between all types of providers and across all services, and that the secure, electronic exchange of health information across all providers in a community is of the utmost importance for both effective care coordination activities and the success of the Shared Savings Program. We understand that ACOs will differ in their ability to adopt the appropriate health information exchange technologies, but we continue to underscore the importance of robust health information exchange tools in effective care coordination.

ACOs have reported how important access to real time data is for providers to improve care coordination across all sites of care, including outpatient, acute, and postacute sites of care. We believe that providers across the continuum of care are essential partners to physicians in the management of patient care. ACOs participating in the program indicate that they are actively developing the necessary infrastructure and have been encouraging the use of technologies that enable real time data sharing among and between sites of care. We believe having a process and plan in place to coordinate a beneficiary's care by electronically sharing health information improves care, and that this helps all clinicians involved in the care of a patient to securely access the necessary health information in a timely manner. It also can also be used to engage beneficiaries in their own care. We further believe that Shared Savings Program applicants should provide, as part of the application, their plans for improving care coordination by developing, encouraging, and using enabling technologies and electronic health records to make health information electronically available to all practitioners involved in a beneficiary's care.

Therefore, we propose to add a new requirement to the eligibility requirements under § 425.112(b)(4)(ii)(C) which would require an ACO to describe in its application how it will encourage and promote the use of enabling technologies for improving care coordination for beneficiaries. Such enabling technologies and services may include electronic health records and other health IT tools (such as population health management and data aggregation and analytic tools), telehealth services (including remote patient monitoring), health information exchange services, or other electronic tools to engage patients in their care. We also propose to add a new provision at § 425.112(b)(4)(ii)(D) to require the applicant to describe how the ACO intends to partner with long-term and postacute care providers to improve care coordination for the ACO's assigned beneficiaries. Finally, we propose to add a provision under § 425.112(b)(4)(ii)(E) to require that an ACO define and submit major milestones or performance targets it will use in each performance year to assess the progress of its ACO participants in implementing the elements required under § 425.112(b)(4). For instance, providers would be required to submit milestones and targets such as: Projected dates for implementation of an electronic quality reporting infrastructure for participants; the number of providers expected to be connected to health information exchange services by year; or the projected dates for implementing elements of their care coordination approach, such as alert notifications on emergency department and hospital visits or e-care plan tools for virtual care teams. We believe this information would allow us to better understand and support ACOs' plans to put into place the systems and processes needed to deliver high quality care to beneficiaries.

We also note that ACOs have flexibility to use telehealth services as they deem appropriate for their efforts to improve care and avoid unnecessary costs. Some ACOs have already reported that they are actively using telehealth services to improve care for their beneficiaries. We welcome information from ACOs and other stakeholders about the use of such technologies. We seek comment on the specific services and functions of this technology that might be appropriately adopted by ACOs. For example, does the use of telehealth services and other technologies necessitate any additional protections for beneficiaries? Are these technologies necessary for care coordination or could other methods be used for care coordination? If a particular technology is necessary, under what circumstances?

9. Transition of Pioneer ACOs Into the Shared Savings Program

a. Overview

The Center for Medicare and Medicaid Innovation (the Innovation Center) at CMS was established by section 1115A of the Act (as added by section 3021 of the Affordable Care Act) for the purpose of testing "innovative payment and service delivery models to reduce program expenditures . . . while preserving or enhancing the quality of care" for those individuals who receive Medicare, Medicaid, or Children's Health Insurance Program (CHIP) benefits. The Pioneer ACO Model is an Innovation Center initiative designed for organizations with experience operating as ACOs or in similar arrangements. The Pioneer ACO Model is testing the impact of using different payment arrangements in helping these experienced organizations achieve the goals of providing better care to patients, and reducing Medicare costs. Under section 1899(b)(4) of the Act, to be eligible to participate in the Shared Savings Program, a provider of services or supplier may not also be participating in a program or demonstration project that involves shared savings, such as the Pioneer ACO Model. Thus, Pioneer ACOs are not permitted to participate concurrently in the Shared Savings Program. As Pioneer ACOs complete the model test (the agreement is for a minimum of 3 years with an option to participate for an additional 2 years), they would have an opportunity to transition to the Shared Savings Program. We believe it would be appropriate to establish an efficient process to facilitate this transition in a way that minimizes any unnecessary burdens on these ACOs and on CMS.

b. Proposed Revisions

In order to do this, we propose to use a transition process that is similar to the transition process we established previously for Physician Group Practice (PGP) demonstration participants applying to participate in the Shared Savings Program. The PGP demonstration, authorized under section 1866A of the Act, was our first experience with a shared savings program in Medicare and served as a model for many aspects of the Shared Savings Program.

In the November 2011 final rule (76 FR 67834), we finalized § 425.202(b), which provides that PGP sites applying for participation in the Shared Savings Program will be given the opportunity to complete a condensed application form. This condensed application form requires a PGP site to provide the information that was required for the standard Shared Savings Program application but that was not already obtained through its application for or via its participation in the PGP demonstration. Also, a PGP participant

would be required to update any information contained in its application for the PGP demonstration that was also required on the standard Shared Savings Program application. Former PGP participants qualified to use a condensed application form if their ACO legal entity and TINs of ACO participant were the same as those that participated under the PGP demonstration.

As we continue to implement the Shared Savings program, we will likely have a similar situation with regard to Pioneer ACOs that have completed their current agreement and wish to transition to the Shared Savings Program. Given that we have been working with and have a level of familiarity with these organizations similar to that with the PGP participants, we believe it is also appropriate to consider offering some latitude with regard to the process for applying to the Shared Savings Program for these ACOs.

Thus, we propose to revise § 425.202(b) to offer Pioneer ACOs the opportunity to apply to the Shared Savings Program using a condensed application if three criteria are satisfied. First, the applicant ACO must be the same legal entity as the Pioneer ACO. Second, all of the TINs on the applicant's ACO participant list must have appeared on the "Confirmed Annual TIN/NPI List" (as defined in the Pioneer ACO Model Innovation Agreement with CMS) for the applicant ACO's last full performance year in the Pioneer ACO Model. Third, the applicant must be applying to participate in a two-sided model. We note that, consistent with the statute and our regulation at § 425.114, any Pioneer ACO transitioning to the Shared Savings Program must apply to participate in the Shared Savings Program for an agreement period that would start after its participation in the Pioneer ACO Model has ceased. We further note that Pioneer ACOs transitioning to the Shared Savings Program would be subject to the standard program integrity screening and an evaluation of their history of compliance with the requirements of the Pioneer ACO Model.

Regarding the second criterion, we recognize there are differences between the Pioneer ACO Model and the Shared Savings Program, and that only some of the NPIs within a TIN might have participated in the Pioneer ACO. Therefore, for purposes of determining whether a condensed application will be appropriate under the Shared Savings Program, we will only compare the TINs and not NPIs. We also recognize that some TINs may not be able to obtain the consent of all NPIs billing through the TIN to participate in the Shared Savings Program, which disqualifies the TIN from participating in the program. Therefore, unlike with the PGP demonstration sites, we propose to allow the ACO applicant to complete a condensed application form even if it drops TINs that participated in its Pioneer ACO. However, if the applicant ACO includes TINs that were not on the Pioneer ACO's Confirmed Annual TIN/NPI List for its last full performance year in the Pioneer ACO Model, the applicant must use the standard application for the Shared Savings Program. A Pioneer ACO applying to the Shared Savings Program using a condensed application form will be required to include a narrative description of the modifications they need to make to fulfill our requirements (for example, making changes to the governing body and obtaining or revising agreements with ACO participants and ACO providers/suppliers).

Because the Pioneer ACO Model is a risk-bearing model designed for more experienced organizations, the third proposed criterion would permit Pioneer ACOs to use the condensed application only if they apply to participate in the Shared Savings Program under a two-sided model. We established Track 1 of the Shared Savings Program as an on-ramp for ACOs while they gain experience and become ready to accept risk. In this case, the Pioneer ACOs are already experienced and will have already accepted significant financial risk. Therefore, under this proposal, former Pioneer ACOs would not be permitted to enter the Shared Savings Program under Track 1. We further note that the rules and methodologies used under the Pioneer ACO Model to assess performance-based risk are different than under the Shared Savings Program. Therefore, we encourage former Pioneer Model ACOs to carefully consider the risk-based track to which they apply under the Shared Savings Program, and to be cognizant of the differences in rules and methodologies.

We seek comments on this proposal to establish a condensed application process for Pioneer ACOs applying to participate in the Shared Savings Program and to require such Pioneer ACOs to participate under a track that includes performance-based risk. Pioneer ACOs that do not meet criteria for the condensed application would have to apply through the regular application process.

C. Establishing and Maintaining the Participation Agreement With the Secretary

1. Background

The November 2011 final rule established procedures for applying to participate in the Shared Savings Program, including the need to submit a complete application, the content of the application, and CMS's criteria for evaluating applications (see § 425.202 through § 425.206). In addition, § 425.212 specifies which changes to program requirements will apply during the term of an ACO's participation agreement. In this section we discuss our proposals to clarify and to supplement the rules related to these requirements.

In addition, while the current regulations address certain issues with respect to ACOs that wish to reapply after termination or experiencing a loss during their initial agreement period (§ 425.222 and § 425.600(c), respectively). The regulations are generally silent with respect to the procedures that apply to ACOs that successfully complete a 3-year agreement and would like to reapply for a subsequent agreement period in the Shared Savings Program. In this section, we discuss our proposal to establish the procedure for an ACO to renew its participation agreement for a subsequent agreement period.

2. Application Deadlines

a. Overview

To obtain a determination on whether a prospective ACO meets the requirements to participate in the Shared Savings Program, our rules at § 425.202(a) require that an ACO submit a complete application in the form and manner required by CMS by the deadline established by CMS. Information on the required content of applications can be found in § 425.204, as well as in guidance published at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Application.html*. Among other requirements, applications must include certain information such as an ACO's prior participation in or termination from the program (§ 425.204(b)); documents such as participation agreements, employment contracts and operating policies (§ 425.204(c)(1)(i)); and a list of all ACO participants and their Medicare-enrolled TINs (§ 425.204(c)(5)(i)).

We determine and publish in advance on our Web site the relevant due dates for the initial submission of applications

for each application cycle. While ACOs must submit a completed application by the initial application due date specified on our Web site, we recognize that there may be portions of the application where additional information is necessary for CMS to make a determination. Therefore, according to § 425.206(a)(2), we notify an applicant when its application is incomplete and provide an opportunity to submit information to complete the application by the deadline specified by CMS.

As stated in § 425.206(a), CMS evaluates an ACO's application on the basis of the information contained in and submitted with the application. Applications that remain incomplete after the deadline specified by CMS are denied. It is incumbent upon the ACO applicant to submit the information that is required for CMS to decide whether the applicant is eligible to participate in the program.

b. Proposed Revisions

In implementing the Shared Savings Program, we found that some applicants misunderstood our application process and the need to submit all required information by the specified deadline for submission of applications and supporting information. Thus, we propose to revise our application review process set forth at § 425.206(a) to better reflect our review procedures.

First, we propose to consolidate at § 425.206 two similar provisions regarding application review. Currently, § 425.202(c)(1) regarding application review provides that CMS determines whether an applicant satisfies the requirements of Part 425 and is qualified to participate in the Shared Savings Program, and § 425.202(c)(2) provides that CMS approves or denies applications accordingly. We propose to amend § 425.206(a)(1) to address the concept of application review currently set forth at § 425.202(c)(1), and we propose to amend § 425.202(c) by replacing the existing text with language clarifying that CMS reviews applications in accordance with § 425.206.

Second, we propose to revise § 425.206(a) to better reflect our application review process and the meaning of the reference to "application due date." Specifically, we propose to revise § 425.206(a)(1) to clarify that CMS approves or denies an application on the basis of the following: Information contained in and submitted with the application by the deadline specified by CMS; any supplemental information submitted by a deadline specified by CMS in response to CMS' request for information; and other information available to CMS (including information on the ACO's program integrity history). In addition, we propose to amend § 425.206(a)(2) to clarify our process for requesting supplemental information and to add a new paragraph (a)(3) to specify that CMS may deny an application if an ACO applicant fails to submit information by the deadlines specified by CMS. We believe that additional clarity may result in more timely submission of the information necessary to evaluate applications. Moreover, it is critical that ACOs submit information on a timely basis so that we can perform other necessary operational processes before the start of the approved ACO's first performance year (for example, determining the number of beneficiaries assigned to the ACO, screening prospective ACO participants and ACO providers or suppliers, identifying the preliminary prospective list of assigned beneficiaries, and calculating the ACO's historical benchmark).

These proposed changes are consistent with our current regulations and practice. For example, as part of the application review process, CMS provides feedback to the ACO applicant regarding its list of ACO participants, and the number of assigned beneficiaries is determined using this list of ACO participants. If the number of assigned beneficiaries based on the list of ACO participants submitted with the application is under 5,000, which is the threshold for eligibility under § 425.110(a), we give the ACO applicant an opportunity to add ACO participant TINs. However, the ACO applicant must do so by the deadline indicated by CMS or the application is denied. Similarly, CMS denies an application if an ACO applicant fails to timely submit additional information that is required for CMS to determine whether the ACO applicant meets program requirements.

3. Renewal of Participation Agreements

a. Overview

For ACOs that would like to continue participating in the Shared Savings Program after the expiration of their current agreement period, we propose a process for renewing their existing participation agreements, rather than requiring submission of a new or condensed application for continued program participation. Therefore, we propose to add new § 425.224 to establish procedures for renewing the participation agreements of ACOs. In addition, we propose to modify the definition of "agreement period" at § 425.20 to clarify its meaning in the context of participation agreement renewals.

b. Proposed Revisions

Under proposed § 425.224(a), an ACO would be permitted to request renewal of its participation agreement prior to its expiration in a form and manner and by the deadline specified by CMS in guidance. An ACO executive who has the authority to legally bind the ACO must certify that the information contained in the renewal request is accurate, complete, and truthful. Further, an ACO that seeks renewal of its participation agreement and was newly formed after March 23, 2010, as defined in the Antitrust Policy Statement, must agree that CMS can share a copy of its renewal request with the Antitrust Agencies. We anticipate that our operational guidance will outline a process permitting renewal requests during the last performance year of an ACO's participation agreement. For example, an ACO with a participation agreement ending on December 31, 2015 would be offered the opportunity to renew its participation agreement sometime during the 2015 calendar year in preparation to begin a new 3-year agreement period on January 1, 2016. To streamline program operations, we anticipate specifying a timeframe for submission and supplementation of renewal requests that would generally coincide with the deadlines applicable to submission and supplementation of applications by new ACO applicants under § 425.202.

Under proposed § 425.224(b), we propose to determine whether to renew a participation agreement based on an evaluation of all of the following factors:

- Whether the ACO satisfies the criteria for operating under the selected risk model.
- The ACO's history of compliance with the requirements of the Shared Savings Program.
- Whether the ACO has established that it is in compliance with the eligibility and other requirements of the Shared Savings Program, including the ability to repay losses, if applicable.
- Whether the ACO met the quality performance standards during at least 1 of the first 2 years of the previous agreement period.
- Whether an ACO under a two-sided model has repaid losses owed to the program that it generated during the first 2 years of the previous agreement period.
- The results of a program integrity screening of the ACO, its ACO participants, and its ACO providers/suppliers (conducted in accordance with § 425.304(b)).

We solicit comments on these criteria and any additional criteria that would help ensure the success of the program.

We further propose to approve or deny a renewal request based on the information submitted in the request and other information available to CMS. We propose to notify the ACO when the request is incomplete or inadequate and to provide an opportunity for the ACO to submit supplemental information to correct the deficiency. The ACO must submit both the renewal request and any additional information needed to evaluate the request in the form and manner and by the deadlines specified by CMS.

Under § 425.224(c), we propose to notify each ACO in writing of our determination to approve or deny the ACO's renewal request. If we deny the renewal request, the notice would specify the reasons for the denial and inform the ACO of any rights to request reconsideration review in accordance with the procedures specified in part 425 subpart I.

We believe that a simple renewal process would reduce the burden for ACOs that wish to continue in the program and minimize the administrative burden on CMS, which would allow us to focus our attention on new applicants that have not yet established their eligibility to participate. We intend to establish the deadlines and other operational details for this renewal process through guidance and instructions. Finally, we note that under our proposal to modify the definition of the participation "agreement period" (section II.C.4 of this proposed rule), a new agreement period would begin upon the start of the first performance year of the renewed participation agreement.

4. Changes to Program Requirements During the 3-Year Agreement

a. Overview

In the November 2011 final rule (76 FR 67838), we recognized that we might promulgate changes to the Shared Savings Program regulations that would become effective while participating ACOs are in the middle of an agreement period. Therefore, we promulgated a rule to specify under what conditions an ACO would be subject to regulatory changes that become effective after the start of its agreement period. Specifically, we finalized § 425.212(a)(2), which provides that ACOs are subject to all regulatory changes with the exception of changes to the eligibility requirements concerning ACO structure and governance, the calculation of the sharing rate, and the assignment of beneficiaries (§ 425.212(a)(2)). We did not exempt ACOs from becoming immediately subject to other regulatory changes. For example, we did not exempt changes such as those related to quality measures because we believed that requiring ACOs to adhere to changes related to quality measures would ensure that they keep pace with changes in clinical practices and developments in evidence-based medicine.

The November 2011 final rule did not require ACOs to be subject to any regulatory changes regarding beneficiary assignment that become effective during an agreement period because we recognized that changes in the beneficiary assignment methodology could necessitate changes to ACOs' financial benchmarks. At the time we published the November 2011 final rule (76 FR 67838), we had not developed a methodology for adjusting an ACO's benchmark to reflect changes in the beneficiary assignment methodology during an agreement period. We anticipated that ACOs would complete their 3-year agreement period with a relatively stable set of ACO participants, and therefore they would all have stable benchmarks during the 3-year agreement period that would require updates only to reflect annual national FFS trends and changes in beneficiary characteristics, consistent with statutory requirements. Without a methodology for adjusting benchmarks to reflect changes in the beneficiary assignment methodology during the agreement period, we were reluctant to subject ACOs to immediate regulatory changes that could impact their benchmarks during the term of a participation agreement. However, in light of the extensive changes that ACOs have made to their lists of ACO participants during the first two performance years, the significant effect that these changes have had upon beneficiary assignment, and our subsequent development of additional policies regarding benchmark adjustment at the start of each performance year to reflect such changes (see *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Updating-ACO-Participant-List.html*), we wish to revisit the types of regulatory changes an ACO would become subject to during its agreement period. We also propose to clarify § 425.212(a) regarding the applicability of certain regulatory changes and to clarify the definition of "agreement period" under § 425.20.

b. Proposed Revisions

First, we propose to modify § 425.212(a) to provide that ACOs are subject to all regulatory changes "that become effective during the agreement period," except for regulations regarding certain specified program areas, "unless otherwise required by statute." This proposed revision corrects the omission of temporal language in the requirement regarding regulatory changes. In addition, it clarifies that ACOs would be subject to regulatory changes regarding ACO structure and governance, and calculation of the sharing rate during an agreement period if CMS is mandated by statute to implement such changes by regulation in the middle of a performance year.

Second, we propose to modify the definition of "agreement period" at § 425.20. The term "agreement period" is currently defined at § 425.20 to mean "the term of the participation agreement which begins at the start of the first performance year and concludes at the end of the final performance year." However, the reference to "final performance year" in the existing definition is ambiguous in light of our proposal to renew participation agreements (see section II.C.4. of this proposed rule). For example, if the "final performance year" of the agreement period includes the last performance year of a renewed participation agreement, an ACO would never be subject to regulatory changes regarding ACO structure and governance or calculation of the sharing rate. Therefore, we propose to amend the definition to provide that the agreement period would be 3 performance years, unless otherwise specified in the participation agreement. Thus, an ACO whose participation agreement is renewed for a second or subsequent agreement period would be subject, beginning at the start of that second or subsequent agreement period, to any regulatory changes regarding ACO structure and governance that became effective during the previous 3 years (that is, during the preceding agreement period).

Third, we propose to require ACOs to be subject to any regulatory changes regarding beneficiary assignment that become effective during an agreement period. Specifically, we propose to remove beneficiary assignment as an exception under § 425.212(a). Consistent with our authority under section 1899(d)(1)(B)(ii) of the Act to adjust the benchmark "for beneficiary characteristics and other factors as the Secretary determines appropriate," we have now developed operational

policies under which we are able to adjust the benchmark on a yearly basis to account for changes in beneficiary assignment resulting from changes in the ACO's list of ACO participants. For more detailed information on these policies see *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Updating-ACO-Participant-List.html.* Given that these operational policies enable annual adjustments to ACO benchmarks to account for changes in beneficiary assignment resulting from changes in ACO participants, we believe we would also be able to adjust an ACO's benchmark to account for regulatory changes regarding beneficiary assignment methodology that become effective during an agreement period. Accordingly, we do not believe our proposal to make regulatory changes regarding beneficiary assignment applicable to ACOs during an agreement period would inappropriately affect the calculation of an ACO's benchmark or shared savings for a given performance year. Rather, our adjustment methodology would ensure continued and appropriate comparison between benchmark and performance year expenditures.

Under this proposal, regulatory changes regarding beneficiary assignment would apply to all ACOs, including those ACOs that are in the middle of an agreement period. However, as discussed in section II.E.6. of this proposed rule, we also propose that any final policies that affect beneficiary assignment would not be applicable until the start of the next performance year. We believe that implementing any revisions to the assignment methodology at the beginning of a performance year is reasonable and appropriate because it would permit time for us to make the necessary programming changes and would not disrupt the assessment of ACOs for the current performance year. Moreover, we would adjust all benchmarks at the start of the first performance year in which the new assignment rules are applied so that the benchmark for an ACO reflects the use of the same assignment rules that would apply in the performance year.

We also note that we carefully consider the timing and effect on both current and future ACOs of any new regulatory proposal, and when promulgating new regulatory changes, we intend to solicit comment on these matters. Additionally, when implementing a final rule that changes our processes and methodologies, we intend to alert current and prospective ACOs of such changes via CMS communications and updates to guidance. We request comment on this proposed change to § 425.212(a).

D. Provision of Aggregate and Beneficiary Identifiable Data

1. Background

Under section 1899(b)(2)(A) of the Act, an ACO must "be willing to become accountable for the quality, cost, and overall care of the Medicare fee-for-service beneficiaries assigned to it." Further, in order to be eligible to participate in the Shared Savings Program, section 1899(b)(2)(G) of the Act states an "ACO shall define processes to . . . report on quality and cost measures, and coordinate care. . . ." However, section 1899 of the Act does not address what data, if any, we should make available to ACOs on their assigned beneficiary populations to support them in evaluating the performance of ACO participants and ACO providers/suppliers, conducting quality assessment and improvement activities, or conducting population-based activities relating to improved health.

As we explained in the November 2011 final rule (76 FR 67844), in agreeing to become accountable for a group of Medicare beneficiaries, and as a condition of participation in the Shared Savings Program, we expect that ACOs will have, or are working towards having, processes in place to independently identify and produce the data they believe are necessary to best evaluate the health needs of their patient population, improve health outcomes, monitor provider/supplier quality of care and patient experience of care, and produce efficiencies in utilization of services. Therefore, it is our expectation that ACOs are actively working on developing and refining these processes. Moreover, we continue to believe this ability to independently identify and produce data for evaluating, improving, and monitoring the health of their patient population is a critical skill for each ACO to develop, leading to an understanding of the patient population that it serves. Once the ACO achieves an understanding of its patient population, it can work toward redesigning appropriate care processes to address the specific needs of its patient population.

However, as we noted previously (76 FR 67844), while an ACO typically should have, or at least be moving towards having complete information for the services its ACO providers/suppliers furnish to Medicare FFS beneficiaries, we recognize that the ACO may not have access to information about services provided to its assigned beneficiaries by health care providers and suppliers outside the ACO—information that may be key to the ACO's coordination of care efforts. Therefore, during the original rulemaking process for the Shared Savings Program, we proposed and made final a policy: (1) To distribute aggregate-level data reports to ACOs; (2) upon request from the ACO, to share limited identifying information about beneficiaries who are preliminarily prospectively assigned to the ACO and whose information serves as the basis for the aggregate reports; and (3) upon request from the ACO, to share certain beneficiary identifiable claims data with the ACO to enable it to conduct quality assessment and improvement activities and/or conduct care coordination, on its own behalf as a covered entity, or on behalf of its ACO participants and ACO providers/suppliers that are covered entities, unless the beneficiary chooses to decline to share his or her claims data.

As we stated in the November 2011 final rule (76 FR 67844), we believe that access to beneficiary identifiable information would provide ACOs with a more complete picture about the care their assigned beneficiaries receive, both within and outside the ACO. Further, it is our view that this information would help ACOs evaluate providers'/suppliers' performance, conduct quality assessment and improvement activities, perform care coordination activities, and conduct population-based activities relating to improved health.

In the April 2011 proposed rule (76 FR 19558), we described the circumstances under which we believed that the HIPAA Privacy Rule would permit our disclosure of certain Medicare Part A and B data to ACOs participating in the Shared Savings Program. Specifically, under the Shared Savings Program statute and regulations, ACOs are tasked with working with their ACO participants and ACO providers/suppliers to evaluate their performance, conduct quality assessment and improvement activities, perform care coordination activities, and conduct population-based activities relating to improved health for their assigned beneficiary population. When done by or on behalf of a covered entity, these are functions and activities that would qualify as "health care operations" under the first and second paragraphs of the definition of health care operations at 45 CFR 164.501. As such, these activities can be done by an ACO either on its own behalf, if it is itself a covered entity, or on behalf of its covered entity ACO participants and

ACO providers/suppliers, in which case the ACO would be acting as the business associate of its covered entity ACO participants and ACO providers/suppliers. Accordingly we concluded that the disclosure of Part A and B claims data would be permitted by the HIPAA Privacy Rule provisions governing disclosures for "health care operations," provided certain conditions are met.

As we also discussed, upon receipt of a request for protected health information (PHI), a covered entity or its business associate is permitted to disclose PHI to another covered entity or its business associate for the requestor's health care operations if both entities have or had a relationship with the subject of the records to be disclosed (which is true in the Shared Savings Program), the records pertain to that relationship (which is also true in the Shared Savings Program), and the recipient asserts in its request for the data that it plans to use the records for a "health care operations" function that falls within the first two paragraphs of the definition of "health care operations" in the HIPAA Privacy Rule and that the data requested are the "minimum necessary" to carry out those health care operations. (See, the HIPAA Privacy Rule at 45 CFR 164.502(b) and 164.506(c)(4)). The first two paragraphs of the definition of health care operations under 45 CFR 164.501 include evaluating a provider's or supplier's performance, conducting quality assessment and improvement activities, care coordination activities, and conducting population-based activities relating to improved health.

With respect to the relationship requirements in 45 CFR 164.506(c)(4), we have a relationship with the individuals who are the subjects of the requested PHI because they are Medicare beneficiaries. The ACO has a relationship with such individuals, either as a covered entity itself or on behalf of its covered entity ACO participants and ACO providers/suppliers as a business associate, because the individuals are either preliminarily prospectively assigned to the ACO or have received a primary care service during the past 12 month period from an ACO participant upon whom assignment is based. In addition, the requested PHI pertains to the individuals' relationship with both CMS and the ACO, in that we provide health care coverage for Medicare FFS beneficiaries and have an interest in ensuring that they receive high quality and efficient care, and the ACO is responsible for managing and coordinating the care of these individuals, who are part of the ACO's assigned beneficiary population.

Beneficiary identifiable Medicare prescription drug information could also be used by ACOs to improve the care coordination of their patient populations. Accordingly, consistent with the regulations governing the release of Part D data, in the April 2011 proposed rule (76 FR 19559), we also proposed to make available the minimum Part D data necessary to allow for the evaluation of the performance of ACO participants and ACO providers/suppliers, to conduct quality assessment and improvement, to perform care coordination, and to conduct population-based activities relating to improved health.

In the November 2011 final rule (76 FR 67846 and 67851), we adopted a policy that defined when we would share beneficiary identifiable information (including Part A and B claims data and Part D prescription drug event data) for preliminarily prospectively assigned beneficiaries and those beneficiaries who have a primary care visit with an ACO participant that is used to assign beneficiaries to the ACO. As a basic requirement, in order to receive such data an ACO that chooses to access beneficiary identifiable data is required under 42 CFR 425.704 to request the minimum data necessary for the ACO to conduct health care operations work, either as a HIPAA-covered entity in its own right, or as the business associate of one or more HIPAA-covered entities (where such covered entities are the ACO participants and ACO providers/suppliers), for "health care operations" activities that fall within the first or second paragraph of the definition of health care operations at 45 CFR 164.501. We note that as part of their application to participate in the Shared Savings Program, ACOs certify whether they intend to request beneficiary identifiable information, and that the requested data reflects the minimum necessary for the ACO to conduct health care operations either on its own behalf or on behalf of its covered entity ACO participants and ACO provider/suppliers. Thus, the ACO's formal request to receive data is accomplished at the time of its application to the Shared Savings Program. The ACO must also enter into a data use agreement (DUA) with CMS. If all of these conditions are satisfied, CMS makes available certain limited PHI regarding the preliminarily prospectively assigned beneficiaries whose data were used to generate the aggregate data reports provided to the ACO under § 425.702(b) and other beneficiaries who have a primary care visit during the performance year with an ACO participant upon whom assignment is based. In order to enhance transparency and beneficiary engagement, we also finalized a policy that before ACOs may start receiving PHI in the form of beneficiary identifiable claims data, they must give beneficiaries the opportunity to decline sharing of their claims data as required under § 425.708.

Since the publication of the November 2011 final rule, we have gained further experience with sharing data with ACOs participating in the Shared Savings Program. We continue to believe that distributing aggregate reports, paired with making available certain beneficiary identifiable information related to preliminarily prospectively assigned beneficiaries, as well as making available the claims data for preliminarily prospectively assigned FFS beneficiaries and other FFS beneficiaries that have primary care service visits with ACO participants that submit claims for primary care services that are used to determine the ACO's assigned population, is worthwhile and consistent with the goals of the Shared Savings Program. The aggregate data reports and the beneficiary identifiable information related to preliminarily prospectively assigned beneficiaries give ACOs valuable information that can be used to better understand their patient population, redesign care processes, and better coordinate the care of their beneficiaries. ACOs participating in the Shared Savings Program have reported that the beneficiary identifiable claims data that they receive from us are being used effectively to better understand the FFS beneficiaries that are served by their ACO participants and ACO providers/suppliers. These data give ACOs valuable insight into patterns of care for their beneficiary population; enable them to improve care coordination among and across providers and suppliers and sites of care, including providers and suppliers and sites of care not affiliated with the ACO; and allow them to identify and address gaps in patient care.

However, based upon our experiences administering the Shared Savings Program and feedback from stakeholders, we believe that we can improve our data sharing policies and processes to streamline access to such data to better support program and ACO function and goals and better serve Medicare beneficiaries. It is with this in mind that we propose the following modifications to our data sharing policies and procedures under the Shared Savings Program.

2. Aggregate Data Reports and Limited Identifiable Data

a. Overview

Under § 425.702, we share aggregate reports with ACOs at the beginning of the agreement period based on beneficiary claims used to calculate the benchmark, at each quarter thereafter on a rolling 12-month basis, and in conjunction with the annual reconciliation. The aggregate reports provided under § 425.702(a) and (b) contain certain de-identified beneficiary information including all of the following:

- Aggregated metrics on the ACO's preliminarily prospectively assigned beneficiary population, including characteristics of the assigned beneficiary population, the number of primary care services provided to the assigned beneficiary population by the ACO, and the proportion of primary care services provided to the assigned beneficiary population by ACO participants upon whom assignment is based.
- Expenditure data for the ACO's assigned beneficiary population by Medicare enrollment type (ESRD, disabled, aged/dual eligible, aged/non-dual eligible) and type of service (for example, inpatient hospital, physician, etc.).
- Utilization data on select metrics for the assigned population, such as ambulatory care sensitive conditions discharge rates per 1,000 beneficiaries for conditions such as congestive heart failure (CHF) or uncontrolled diabetes, and utilization rates for imaging, emergency department visits, hospitalizations, and primary care services.

In addition, under § 425.702(c), we also provide a report that includes certain beneficiary identifiable information about the beneficiaries who are preliminarily prospectively assigned to the ACO and whose data were used to generate the de-identified aggregate data reports. The information currently contained in this assignment report includes the beneficiary name, date of birth, HICN, and sex. These beneficiary identifiable data are made available to an ACO that has met the conditions previously discussed in detail for purposes of carrying out population-based activities related to improving health or reducing growth in health care costs, process development (such as care coordination processes), case management, and care coordination for the beneficiary population assigned to the ACO. Under § 425.708(d) these data points are not subject to the requirement that an ACO give beneficiaries an opportunity to decline claims data sharing.

Feedback we have received since the November 2011 final rule was issued and during implementation of the Shared Savings Program, confirms there is a strong desire among ACOs and their ACO participants and ACO providers/suppliers to have as much information about their patients as is possible, in as timely a manner as possible, to better coordinate care and target care strategies toward individual beneficiaries. Moreover, ACOs are actively using the reports provided under § 425.702 to conduct their health care operations work with the expectation that it will result in higher quality and more efficient care for their assigned beneficiary populations. However, ACOs and their ACO participants and ACO providers/suppliers also report that the four data elements currently made available on the assignment reports under § 425.702(c)—that is, beneficiary name, date of birth, HICN, and sex—severely limit their care redesign efforts. They assert that additional data elements are necessary in order to conduct health care operations work under the first or second paragraph of the definition of health care operations at 45 CFR 164.501. For example, an ACO reported that having data not only on the frequency of hospitalizations but also on which specific beneficiaries were hospitalized and in which specific hospitals would better enable it to identify the effectiveness and outcomes of its post-hospitalization care coordination processes. Some stakeholders have made suggestions for beneficiary identifiable data that should be included in the quarterly reports in addition to the current four data elements, such as risk profiles or information on whether the beneficiary had a hospital visit in the past year. Some stakeholders suggested that the report be expanded to include information not only for the beneficiaries that received a plurality of their primary care services from ACO professionals, but also for all FFS beneficiaries that received a primary care service from an ACO participant in the past year. These stakeholders argue that understanding the entire FFS patient population served by the ACO and its ACO participants would improve their ability to redesign care, and reduce the uncertainty associated with a list of preliminarily prospectively assigned beneficiaries that fluctuates from quarter to quarter, based on the population's use of primary care services.

b. Proposed Revisions

We considered what additional beneficiary identifiable data might be the minimum necessary to support the ACOs' health care operations work. Based on our discussions with ACOs and ACO participants and ACO providers/suppliers, we believe that making additional information available to ACOs about the FFS beneficiaries they serve, including for example, on whether a beneficiary visited an emergency room or was hospitalized, would help support such efforts. Thus, we propose to expand the information made available to ACOs under § 425.702(c) to include certain additional beneficiary identifiable data subject to the existing requirements of § 425.702(c)(2), which incorporates the requirements under HIPAA governing the disclosure of PHI. Specifically, in addition to the four data elements (name, date of birth, HICN, and sex) which are currently made available for preliminarily prospectively assigned beneficiaries, we propose to expand the beneficiary identifiable information that is made available under § 425.702(c)(1) to include these data elements (name, date of birth, HICN, and sex) for each beneficiary that has a primary care service visit with an ACO participant that bills for primary care services that are considered in the assignment process in the most recent 12-month period.

Additionally, we propose to expand the beneficiary identifiable information made available for preliminarily prospectively assigned beneficiaries to include additional data points. The information would be derived from the same claims used to determine the preliminary prospective assigned beneficiary list. Specifically, we propose that we would make available the minimum data set necessary for purposes of the ACO's population-based activities related to improving health or reducing health care costs, required process development (under § 425.112), care management, and care coordination for its preliminarily prospectively assigned beneficiary population, at the following times: (1) At the beginning of the agreement period; (2) at the beginning of each performance year and quarterly thereafter; and (3) in conjunction with the annual reconciliation. We would articulate the data elements associated with the minimum data set in operational guidance, and update as needed to reflect changes in the minimum data necessary for ACOs to perform these activities. The information would fall under the following categories:

- Demographic data such as enrollment status.
- Health status information such as risk profile, and chronic condition subgroup.
- Utilization rates of Medicare services such as the use of evaluation and management, hospital, emergency, and post-acute services, including dates and place of service.
- Expenditure information related to utilization of services.

We believe that under this approach the data made available in the aggregate data reports under § 425.702(c) would generally constitute the minimum data necessary for covered entity ACOs or for ACOs serving as the business associate of their covered entity ACO participants and ACO providers/suppliers, to evaluate providers' and suppliers' performance, conduct quality assessment and improvement activities, and conduct population-based activities relating to improved health.

Finally, we note that these proposals for expansion of the data reports provided under § 425.702(c) to include each FFS beneficiary that has a primary care visit with an ACO participant that submits claims for primary care services that are considered in the assignment process, would apply only to ACOs participating in Tracks 1 and 2, where beneficiaries are assigned in a preliminarily prospective manner with retrospective reconciliation. This is because ACOs in Tracks 1 and 2 have an incentive to redesign care processes for all FFS beneficiaries that receive care from their ACO participants, due to the nature of the preliminarily prospective assignment methodology with retrospective reconciliation. Under our proposed Track 3, which is discussed in detail in section II.F.3.a. of this proposed rule, we believe that the minimum data necessary for ACOs to perform health care operations as defined under the first and second paragraphs of the definition of health care operations at 45 CFR 164.501, would not extend beyond data needed for health operations related to the prospective list of assigned beneficiaries. We believe a prospective assignment approach incentivizes targeting of the specific FFS beneficiaries on the list for care improvement, rather than redesigning care processes for all FFS beneficiaries seen by the ACO participants. As such, the minimum data necessary required for Track 3 ACOs to perform health care operations work would be limited to the data for beneficiaries that are prospectively assigned for a performance year. Thus, for Track 3, we propose to limit the beneficiary identifiable data included in the reports made available under § 425.702(c) to only those beneficiaries that appear on the ACO's prospective list of beneficiaries at the beginning of a performance year. Specifically, Track 3 ACOs would have access to beneficiary identifiable data elements associated with the list of categories under § 425.702(c) for beneficiaries prospectively assigned to the ACO but would not be able to request any information related to other Medicare FFS beneficiaries who receive primary care services that are considered in the assignment process from ACO participants. We believe this limitation is reasonable because, under Track 3, the prospectively assigned beneficiary list would encompass all beneficiaries for whom the ACO would be held accountable in a given performance year, in contrast to ACOs in Tracks 1 and 2 that would be held accountable for any FFS beneficiaries that choose to receive a plurality of their primary care services from ACO professionals billing through the TINs of ACO participants.

We seek comment on our proposal to expand the data set made available to ACOs under § 425.702(c). We seek comment on the categories of information that we have proposed to include and on any other beneficiary identifiable information that should be offered in the aggregate reports provided under § 425.702(c) in order to allow ACOs as covered entities or as the business associate of their covered entity ACO participants and ACO providers/suppliers to conduct health care operations work under paragraphs one or two of the definition of health care operations at 45 CFR 164.501. We also specifically seek comment on our proposal to expand the list of beneficiaries for which data are made available under § 425.702(c) to ACOs participating in Track 1 and Track 2 to include all beneficiaries that had a primary care service visit with an ACO participant that submits claims for primary care services that are considered in the assignment process.

3. Claims Data Sharing and Beneficiary Opt-Out

a. Overview

Because Medicare FFS beneficiaries have the freedom to choose their health care providers and suppliers, and are not required to receive services from providers and suppliers participating in the ACO, the patients of ACO participants and ACO providers/suppliers often receive care from other providers and suppliers that are not affiliated with the ACO. As a result, ACOs and their ACO participants and ACO providers/suppliers may not be aware of all of the services an assigned beneficiary is receiving. Furthermore, under Tracks 1 and 2, we perform a retrospective reconciliation at the end of each performance year to determine an ACO's assigned beneficiary population based on beneficiaries' use of primary care services using the assignment algorithm described at § 425.402 of the regulations. Therefore, under Tracks 1 and 2, it is possible that an ACO's preliminary prospective assigned beneficiary list would not be complete and would not include all the beneficiaries that would ultimately be assigned to the ACO at the end of the performance year—that is, all of the beneficiaries for which the ACO ultimately would be held accountable. As we discussed in the April 2011 proposed rule (76 FR 19558) and in the November 2011 final rule (76 FR 67844), we were concerned about ACOs' ability to do their work in the absence of information about services delivered outside of the ACO. As we stated at that time, we believed that it would be important to give ACOs appropriate access to a beneficiary's identifiable claims data when the beneficiary has received a primary care service billed through the TIN of an ACO participant, and is thus a candidate for assignment at the time of retrospective reconciliation for the performance year. We believed that sharing beneficiary identifiable claims data would enable ACOs to better coordinate and target care strategies towards the individual beneficiaries seen by ACO participants and ACO providers/suppliers.

We ultimately concluded that the bases for disclosure under the HIPAA Privacy Rule were broad enough to cover CMS's disclosure of Medicare Parts A and B claims data to ACOs for health care operations work when certain conditions are met. Similarly, we concluded that the Part D regulations governing the release of Part D data on prescription drug use would permit the release of Part D prescription drug event data to ACOs for purposes of supporting care coordination, quality improvement, and performance measurement activities. Thus, we concluded that we are permitted to disclose the minimum Medicare Parts A, B, and D data necessary to allow ACOs to conduct the health care operations activities that fall into the first or second paragraph of the definition of health care operations under the HIPAA Privacy Rule when such data is requested by the ACO as a covered entity or as the business

associate of its covered entity ACO participants and ACO providers/suppliers. Accordingly, in the November 2011 final rule (76 FR 67851), we adopted a policy under which an ACO may request Part A and Part B claims data and Part D prescription drug event data for preliminarily prospectively assigned beneficiaries and other beneficiaries who receive primary care services from an ACO participant upon whom assignment is based. In accordance with the terms of the DUA that the ACO must enter into with CMS, data received from CMS under the data sharing provisions of the Shared Savings Program may only be used for the purposes of clinical treatment, care management and coordination, quality improvement activities, and provider incentive design and implementation. In providing the claims data subject to these limitations, we believed that we would ensure compliance with the requirements of the HIPAA Privacy Rule and the regulations governing the release of Part D data.

While the disclosure of claims data in this manner is within the bounds of the applicable laws, we also noted concerns about beneficiaries' interests in controlling access to their individually identifiable health information. Thus, even though we believed that we had legal authority to make the contemplated disclosures without the consent of beneficiaries, in the November 2011 final rule (76 FR 67849) we implemented the additional requirement at § 425.708 that ACOs offer beneficiaries an opportunity to decline to have their claims data shared with the ACO. As such, before requesting access to the beneficiary's data and as part of its broader activities to notify patients that their health care provider or supplier is participating in an ACO, the ACO is required to inform beneficiaries that the ACO may request access to their claims data, and give beneficiaries an opportunity to decline such claims data sharing.

Under the current opt-out system, once the ACO formally requests beneficiary identifiable claims data through the application process, enters into a DUA with CMS, and begins its first performance year, the ACO must supply beneficiaries with a written notification explaining their opportunity to decline claims data sharing. Offering beneficiaries the opportunity to decline claims data sharing may take two forms under current § 425.708. First, if the ACO has formally requested beneficiary identifiable claims data as part of the application process, the ACO must notify each FFS beneficiary of the opportunity to decline data sharing when the beneficiary has his or her first visit with an ACO participant upon whom assignment is based. During this visit, the beneficiary must be provided with written notification informing him or her of the ACO provider/supplier's participation in the ACO and that the ACO may request claims information from CMS in order to better coordinate the beneficiary's care and for other health operations activities. This written notification contains template language created by CMS with the assistance of the Medicare Ombudsman's office and with input from beneficiaries, and explains the beneficiary's option to decline claims data sharing. Once the beneficiary has expressed a preference at the point of care, the ACO may immediately inform CMS of the beneficiary's data sharing preference. If the beneficiary has not declined data sharing, CMS makes that beneficiary's data available to the ACO.

We recognized, however, that beneficiaries may not seek primary care services until later in the performance year. Because of this, we offered an alternative option to ACOs who met requirements for receiving beneficiary identifiable claims data. Under the alternative option, ACOs may contact beneficiaries via a mailed notification that is sent to all preliminarily prospectively assigned beneficiaries to notify them of their health care provider's participation in an ACO under the Shared Savings Program, and the ACO's intent to request beneficiary identifiable claims data. The mailed notification contains template language that was developed in conjunction with the Medicare Ombudsman's office with input from beneficiaries. If the beneficiary wishes to decline claims data sharing, the beneficiary is instructed to sign the mailed notification and return it to the ACO or call 1–800–MEDICARE directly. If the ACO chooses to contact beneficiaries via a mailed notification, rather than waiting to notify them at the point of care, the ACO must wait 30 days before submitting the beneficiary's preference and receiving access to the data for those beneficiaries that have chosen not to decline claims data sharing. The 30-day waiting period provides beneficiaries with an opportunity to mail back the notification or to call 1–800–MEDICARE before the ACO receives access to their claims data. In addition, in order to ensure transparency, beneficiary engagement and meaningful choice, the notification and opportunity to decline claims data sharing must be repeated at the beneficiary's first primary care visit with an ACO participant upon whom assignment is based (76 FR 67850 and 67851). Finally, in addition to the point of care and mailed notifications provided by ACOs, all Medicare FFS beneficiaries are notified through the Medicare & You Handbook about ACOs and the opportunity to decline claims data sharing by contacting CMS directly at 1–800–MEDICARE.

Once the ACO has notified the beneficiaries according to program rules, and any applicable wait periods are over, the ACO submits the beneficiaries' preferences to CMS. Beneficiary preferences submitted by ACOs are combined with preferences received by CMS through 1–800–MEDICARE. Based on these beneficiary preferences, we generate a claims file containing the beneficiary identifiable claims data of beneficiaries that have not declined data sharing. These claims files are then made available for ACO access on a monthly basis.

Once a beneficiary has declined data sharing, the beneficiary may choose to reverse the decision by signing another form and sending it to the ACO (who in turn notifies CMS of the beneficiary's updated preference) or by calling 1–800–MEDICARE directly. We then include the beneficiary's claims data in the claims file provided to the ACO the following month.

In the November 2011 final rule (76 FR 67849), we acknowledged that it is possible that a beneficiary may decline to have his or her claims data shared with an ACO but would choose to continue to receive care from ACO participants and ACO providers/suppliers. In such a case, the ACO would still be responsible for that beneficiary's care, and, as such, although the beneficiary's claims data would not be shared with the ACO, CMS would continue to use the beneficiary's claims data in its assessment of the ACO's quality and financial performance.

In the November 2011 final rule (76 FR 67849 through 67850) we expressed our view that beneficiaries should be notified of their health care provider's participation in an ACO in order to have some control over who has access to their health information for purposes of the Shared Savings Program. Further, we indicated that the requirement that an ACO provider/supplier engage patients in a discussion about the inherent benefits, as well as the potential risks, of claims data sharing provided an opportunity for true patient-centered care and would create incentives for ACOs, ACO participants, and ACO providers/suppliers to develop

positive relationships with each beneficiary under their care. Additionally, we stated that this policy would provide ACO participants and ACO providers/suppliers the opportunity to engage with beneficiaries by explaining the Shared Savings Program and its potential benefits for both the beneficiaries and the health care system as a whole.

Since implementation of the Shared Savings Program, we have shared claims data on over 5 million beneficiaries with over 300 Shared Savings Program ACOs. We have received informal feedback from ACOs that are putting the opt-out requirement into practice, and from beneficiaries who have received notifications from an ACO that wanted to request access to their claims data. We have learned the following from this feedback:

- The option for ACOs to mail notifications and then conduct in-office follow-up adds to ACOs' financial costs and delays their ability to access claims data in a timely manner. ACOs must wait until January 1 of the first performance year to send out mailings. After waiting the requisite 30 days, the earliest the ACO may submit beneficiary preferences to CMS is in February. The first set of claims data is then available in mid-March. In addition, some ACOs struggle with obtaining current mailing information for preliminarily prospectively assigned beneficiaries, which can delay the mailing of notifications to later in the performance year. Thus, the earliest opportunity for ACOs to receive claims data is mid-February, and that is only the claims data for beneficiaries who visited primary care providers in early January and were given the opportunity to decline claims data sharing at the point of care.
- Stakeholders, including ACOs, ACO participants, and ACO providers/suppliers, continually confuse the notification regarding the ACO's intent to request access to claims data with the separate requirement that all FFS beneficiaries must be notified of ACO participants' and ACO providers/suppliers' participation in the program. Beneficiaries must be notified at the point of care of the ACO participants' and ACO providers/suppliers' participation in an ACO, regardless of whether the ACO has or intends to request access to claims data.
- ACOs have commented that beneficiaries are confused about why their providers do not already have access to information regarding other care they may receive, which potentially erodes rather than strengthens the patient-provider relationship. Beneficiaries often assume their providers have all the information they need to care for them. However, as noted previously, the ACO, its ACO participants, and ACO providers/suppliers would not have claims data for services rendered outside the ACO, and would not necessarily have knowledge about that care.
- Beneficiaries can choose to receive care from providers outside an ACO, so beneficiaries may receive notices regarding data sharing from more than one ACO. This is most likely to occur in markets with high ACO penetration where a beneficiary may receive primary care services from several different ACO professionals, each participating in different ACOs. Beneficiaries report confusion, concern, and annoyance over receiving multiple mailings from ACOs, and question why their health care providers do not already have the information they need to appropriately coordinate their care.
- Beneficiaries receiving the notifications giving them the opportunity to decline claims data sharing may mistakenly believe they are being asked to "opt-out" of ACO care and/or Medicare FFS, or that they have been placed in a managed care plan without their consent.
- Beneficiaries that receive the letters in the mail notifying them of their provider's participation in an ACO and offering them the opportunity to decline claims data sharing often mistakenly believe that these letters are fraudulent and do not know what to do. Many ACOs are entities that have been newly formed by providers and suppliers for purposes of participating in the Shared Savings Program. While the beneficiary may have a strong relationship with his or her primary care provider, the beneficiary may not recognize the name of the newly formed ACO and therefore may have concerns and question the legitimacy of the notification.
- Our data indicate that approximately 2 percent of beneficiaries have declined claims data sharing. This is consistent with other CMS initiatives that have included data sharing, such as the Medicare Health Support demonstration, the Multi-Payer Advanced Primary Care Practice demonstration, the Physician Group Practice demonstration, and the Physician Group Practice Transition demonstration.

As discussed previously, beneficiaries currently have the opportunity to decline claims data sharing by responding to the letters that ACOs send to their preliminarily prospectively assigned beneficiaries, by informing an ACO provider/supplier during a face-to-face primary care service visit, or by contacting 1–800–MEDICARE directly. We continue to be committed to offering beneficiaries some control over ACO access to their beneficiary identifiable information for purposes of the Shared Savings Program. However, in light of the feedback we have received, we were motivated to review our claims data sharing policies and processes to determine what refinements could be made to mitigate the concerns raised by stakeholders regarding the burden imposed on both beneficiaries and those entities participating in the Shared Savings Program. We considered several aspects of our claims data sharing policies, including the use of various formats to communicate with beneficiaries regarding claims data sharing under the program such as: Mailed notifications to the list of preliminarily prospectively assigned beneficiaries by the ACO; face-to-face discussions with healthcare providers during primary care visits; and CMS's use of 1–800–MEDICARE and the Medicare & You Handbook. As discussed in the April 2011 proposed rule (76 FR 19558) and the November 2011 final rule (76 FR 67846), we are convinced by stakeholders that Medicare claims data provide an important supplement to the data to which the ACO and its ACO participants and ACO providers/suppliers already have access. Current law allows CMS to share certain beneficiary identifiable claims data with ACOs when those data are necessary for purposes of certain health care operations. HIPAA does not require that beneficiaries be presented with an opportunity to decline claims data sharing before their PHI can be shared. Moreover, several other CMS initiatives, including the Medicare Health Support demonstration, the Multi-Payer Advanced Primary Care Practice demonstration, the Physician Group Practice demonstration, and the Physician Group Practice Transition demonstration, have successfully shared claims data with providers in the absence of an opportunity for beneficiaries to decline claims data sharing. Therefore, we considered how to retain meaningful beneficiary choice in claims data sharing while reducing the confusion and burden caused by our current claims data sharing policies. We believe meaningful beneficiary choice in claims data sharing is maintained when the purpose and rationale for such claims data sharing are transparent and communicated to beneficiaries, and there is a mechanism in place for beneficiaries to decline claims data

sharing. Thus, in revisiting our claims data sharing policies, we sought to maintain claims data sharing transparency and a mechanism for beneficiaries to decline claims data sharing.

b. Proposed Revisions

Based on our experiences with data sharing under the Shared Savings Program to date, we are proposing to modify our processes and policy for claims data sharing while remaining committed to retaining meaningful beneficiary choice over claims data sharing with ACOs. First, we propose to provide beneficiaries with the opportunity to decline claims data sharing directly through 1–800–MEDICARE, rather than through the ACO. We note that 1–800–MEDICARE has the capability for beneficiaries to use accessible alternative or appropriate assistive technology, if needed. We would continue to maintain a list of beneficiaries that have declined data sharing and ensure that their claims information is not included in the claims files shared with ACOs. Second, we propose to provide advance notification to all FFS beneficiaries about the opportunity to decline claims data sharing with ACOs participating in the Shared Savings Program through CMS materials such as the Medicare & You Handbook. The Handbook would include information about the purpose of the program, describe the opportunity for ACOs to request beneficiary identifiable claims data for health care operations purposes, and provide instructions on how beneficiaries may decline claims data sharing by contacting CMS directly through 1–800–MEDICARE. The Handbook would also contain instructions on how a beneficiary may reverse his or her preference to decline claims data sharing by contacting 1–800–MEDICARE. Third, to reduce burden for both beneficiaries and ACOs, we propose to remove the option for ACOs to mail notifications to beneficiaries and for beneficiaries to sign and return the forms to the ACO in order to decline claims data sharing. This process would be replaced by a simpler, direct process through notification at the point of care and through 1–800–MEDICARE as described previously.

We also propose to continue to require that ACO participants notify beneficiaries in writing at the point of care that their providers and suppliers are participating in the Shared Savings Program as required under § 425.312(a). We propose that ACO participants would continue to be required to post signs in their facilities using required template language. Rather than requiring ACO participants furnishing primary care services to provide a written form regarding claims data sharing to all beneficiaries who have a primary care service office visit, we propose to update the required notification template language for these signs to include information regarding claims data sharing. We would update the template language with the assistance of the Medicare Ombudsman's Office and beneficiary input to inform beneficiaries about both the Shared Savings Program and also that the ACO may request access to beneficiary identifiable claims data from CMS in order to perform health care operations as defined under the first and second paragraphs of the definition of health care operations at 45 CFR 164.501. The signs would also provide beneficiaries with information about their opportunity to decline this data sharing and instructions to call 1–800–MEDICARE if they would prefer that we not share their claims data with an ACO and its ACO participants and ACO providers/suppliers. The signs would likewise include instructions for how beneficiaries may reverse their opt-outs through 1–800–MEDICARE, if they determine in the future they would prefer to have their claims data made available to ACOs and their ACO participants and ACO providers/suppliers. Because ACO participants are required to post these signs in their facilities at all times, this written notification through the signs would occur at each visit, including the first visit the beneficiary has with an ACO participant during a performance year.

We also anticipate that some beneficiaries may continue to want to have the ability to take the information home or into their visit with their primary care provider for further discussion. Therefore, in addition to the signs, we propose to retain our policy that ACO participants that submit claims for primary care services used to determine the ACO's assigned beneficiary population be required to make a separate written notification form available to the beneficiary upon request.

We propose to modify § 425.312 and § 425.708 for clarity and to reflect these revised notification policies.

Finally, under Tracks 1 and 2, we propose to make beneficiary identifiable claims data available in accordance with applicable law on a monthly basis for beneficiaries that are either preliminarily prospectively assigned to the ACO or who have received a primary care service during the past 12-month period from an ACO participant upon whom assignment is based. Because Tracks 1 and 2 use a preliminary prospective assignment methodology with retrospective reconciliation, we believe that ACOs, ACO participants, and ACO providers/suppliers in Tracks 1 and 2 would benefit from access to beneficiary identifiable claims information for all FFS beneficiaries that may be assigned to the ACO at the end of the performance year. In contrast, under Track 3, we propose to make beneficiary identifiable claims data available only for beneficiaries that are prospectively assigned to an ACO, because the beneficiaries on the prospective assignment list are the only beneficiaries for whom the ACO would be held accountable at the end of the performance year. Consistent with the existing requirements at § 425.704, in order to request beneficiary identifiable claims data, and regardless of track, an ACO must: (1) Certify that it is a covered entity or the business associate of a covered entity that has provided a primary care service to the beneficiary in the previous 12 months (2) enter into a DUA with CMS prior to the receipt of these beneficiary identifiable data; (3) submit a formal request to receive beneficiary identifiable claims data for such beneficiaries at the time of application to the Shared Savings Program; and (4) certify that the request reflects the minimum data necessary for the ACO to conduct either its own health care operations work that falls within the first or second paragraph of the definition of health care operations at 45 CFR 164.501 or health care operations work on behalf of its ACO participants and ACO providers/suppliers that are covered entities (as the business associate of these covered entities) that falls within the first or second paragraph of the definition of health care operations at 45 CFR 164.501.

We believe these proposed modifications to our data sharing rules would significantly improve the claims data sharing process. First, we believe the modified process would reduce burden for beneficiaries who would no longer have to mail back forms. In addition, it would minimize beneficiary confusion in situations where an ACO may be newly formed and may not yet have established a relationship with the beneficiary. Instead, the beneficiary would be able decline claims data sharing, and reverse a decision to decline claims sharing, by contacting CMS directly using 1–800–MEDICARE. We believe beneficiaries would be more comfortable expressing their claims data

sharing preferences directly through CMS, an agency with which beneficiaries have an existing relationship. Moreover, we believe our proposals would streamline ACO operations and would allow ACOs to access beneficiary identifiable claims data earlier in the performance year than is possible under our current policies. Beneficiary identifiable claims data would still be available on a monthly basis, but the new process would be operationally more efficient and less expensive for ACOs. By removing the 30-day delay before ACOs may request beneficiary identifiable claims data for their preliminarily prospectively assigned beneficiaries under Tracks 1 and 2 and prospectively assigned beneficiaries under Track 3, and reducing operational complexities associated with providing these data, ACOs would have access to beneficiary identifiable claims data in a more timely fashion. This may allow ACOs to intervene in the care of beneficiaries earlier during the performance year. In addition, as discussed previously, while we initially believed that requiring ACOs to notify beneficiaries of the opportunity to decline claims data sharing would improve engagement between ACO providers/suppliers that furnish primary care services and their patients, we now realize that this policy unintentionally created burden and confusion for both ACOs and beneficiaries, as many beneficiaries assume that their health care providers already have the information needed to optimally coordinate their care, even though this is not always the case. We believe that the proposed revisions to our claims data sharing policy would reduce beneficiary confusion about the Shared Savings Program and the role an ACO plays in assisting the beneficiary's health care providers to improve their health and health care experience, while still retaining a beneficiary's meaningful opportunity to decline claims data sharing.

We note that, since implementation of the program, a small percentage of FFS beneficiaries have requested that their identifiable claims data not be shared and have done so either by notifying the ACO or by contacting 1–800–MEDICARE to decline claims data sharing. None of our proposed revisions would have any effect on any existing beneficiary preferences. Previously recorded beneficiary preferences would continue to be honored, unless and until a beneficiary changes his or her preference by contacting 1–800–MEDICARE. Accordingly, our proposal not only preserves the beneficiary's ability to decline claims data sharing by directly contacting CMS, but also has no effect on existing beneficiary claims data sharing preferences, unless the beneficiary subsequently amends his or her preferences to allow claims data sharing.

In summary, we propose to amend § 425.704 to reflect our proposal to begin sharing beneficiary identifiable claims data with ACOs participating under Tracks 1 and 2 that request claims data on beneficiaries that are included on their preliminary prospective assigned beneficiary list or that have received a primary care service from an ACO participant upon whom assignment is based during the most recent 12-month period, at the start of the ACO's agreement period, provided all other requirements for claims data sharing under the Shared Savings Program and HIPAA regulations are met. We also propose to share beneficiary identifiable claims data with ACOs participating under Track 3 that request beneficiary identifiable claims data on beneficiaries that are included on their prospectively assigned beneficiary list. We also propose to revise § 425.312(a) and § 425.708 to reflect our policy that ACO participants use CMS approved template language to notify beneficiaries regarding participation in an ACO and the opportunity to decline claims data sharing. In addition, we propose to modify § 425.708 to reflect the streamlined process by which beneficiaries may decline claims data sharing. We also propose to add a new paragraph (c) to § 425.708 to reflect our proposal to honor any beneficiary request to decline claims data sharing that is received under § 425.708 until such time as the beneficiary may reverse his or her claims data sharing preference to allow data sharing.

We note that the beneficiary identifiable information that is made available under § 425.704 would include Parts A, B and D data, but would exclude any information related to the diagnosis and treatment of alcohol or substance abuse. As we discussed in the April 2011 proposed rule (76 FR 19557), 42 U.S.C. 290dd–2 and the implementing regulations at 42 CFR part 2 restrict the disclosure of patient records by federally conducted or assisted substance abuse programs. Such data may be disclosed only with the prior written consent of the patient, or as otherwise provided in the statute and regulations. We note that we may revisit this approach as technology in the area of consent management advances.

We seek comment on these proposals. We also seek comment on other specific modifications that could be made to our existing policies on data sharing to improve the ability of ACOs to access beneficiary identifiable claims data, and to reduce burden and confusion for ACOs, ACO participants, ACO providers/suppliers, and beneficiaries.

E. Assignment of Medicare FFS Beneficiaries

1. Background

Section 1899(c) of the Act requires the Secretary to "determine an appropriate method to assign Medicare fee-for-service beneficiaries to an ACO based on their utilization of primary care services provided under this title by an ACO professional described in paragraph (h)(1)(A)." Section 1899(h)(1)(A) of the Act constitutes one element of the definition of the term "ACO professional." Specifically, this provision establishes that "a physician (as defined in section 1861(r)(1) of the Act)" is an "ACO professional" for purposes of the Shared Savings Program. Section 1861(r)(1) of the Act in turn defines the term physician as ". . . a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function or action . . ." In addition, section 1899(h)(1)(B) of the Act defines "ACO professional" to include practitioners described in section 1842(b)(18)(C)(i) of the Act, such as physician assistants (PAs) and nurse practitioners (NPs).

As we explained in the November 2011 final rule (76 FR 67851) the term "assignment" refers only to an operational process by which Medicare determines whether a beneficiary has chosen to receive a sufficient level of the requisite primary care services from physicians associated with a specific ACO so that the ACO may be appropriately designated as exercising basic responsibility for that beneficiary's care. Consistent with section 1899(b)(2)(A) of the Act, an ACO is held accountable "for the quality, cost, and overall care of the Medicare fee-for service beneficiaries assigned to it." The ACO may also qualify to receive a share of any savings that are realized in the care of these assigned beneficiaries due to appropriate efficiencies and quality improvements that the ACO may be able to achieve. The term "assignment" for purposes of the Shared Savings Program in no way implies any limits, restrictions, or diminishment of the rights of Medicare FFS beneficiaries to exercise freedom of choice in the physicians and other health care

providers and suppliers from whom they receive their services.

In developing the process for assigning Medicare beneficiaries to ACOs, we considered several other elements in addition to the definition of an ACO professional (76 FR 67851): (1) The operational definition of an ACO (see the discussion of the formal and operational definitions of an ACO in section II.B. of this proposed rule) so that ACOs can be efficiently identified, distinguished, and associated with the beneficiaries for whom they are providing services; (2) the definition of primary care services for purposes of determining the appropriate assignment of beneficiaries; (3) whether to assign beneficiaries to ACOs prospectively, at the beginning of a performance year on the basis of services rendered prior to the performance year, or retrospectively, on the basis of services actually rendered by the ACO during the performance year; and (4) the proportion of primary care services that is necessary for a beneficiary to receive from an ACO in order to be assigned to that ACO for purposes of this program.

In the November 2011 final rule (76 FR 67851 through 67870), we finalized the methodology that we currently use to assign beneficiaries to ACOs for purposes of the Shared Savings Program. Beneficiaries are assigned to a participating ACO using the assignment methodology in Part 425, subpart E of our regulations. In addition, since the final rule was issued, we have provided additional guidance and more detailed specifications regarding the beneficiary assignment process in operational instructions which are available to the public on the CMS Web site. (*http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Financial-and-Assignment-Specifications.html*)

In this section of this proposed rule, we summarize several key policies and methodological issues to provide background for several revisions to the assignment methodology that we are proposing based on our initial experiences with the program and questions from stakeholders.

2. Basic Criteria for a Beneficiary To Be Assigned to an ACO

In order to develop operational procedures needed to implement the Shared Savings Program, and to respond to inquiries from ACOs and other stakeholders, we developed specific criteria to govern beneficiary eligibility for assignment to an ACO which we propose to codify in a new provision at § 425.401. We believe that revising the regulations to include these eligibility criteria would help promote understanding of the assignment methodology. The proposed criteria in new § 425.401 are consistent with the current assignment methodology under § 425.400 and § 425.402 as well as the discussion of the assignment methodology in the preamble to the November 2011 final rule and operational instructions that we have issued since the publication of the final rule (76 FR 67851).

First, to determine whether a beneficiary is eligible to be assigned to an ACO, we must have information about the beneficiary's Medicare enrollment status. As required by section 1899(h)(3) of the Act, and consistent with the definition of Medicare FFS beneficiary in § 425.20, only beneficiaries enrolled in traditional Medicare FFS under Parts A and B are eligible to be assigned to an ACO participating in the Shared Savings Program. Because of this statutory definition and because an important objective of this program is to help align incentives between Part A and Part B, beneficiaries who have coverage under only one of these parts are not eligible to be assigned to an ACO. Beneficiaries enrolled in a group health plan—including beneficiaries enrolled in Medicare Advantage (MA) plans under Part C, eligible organizations under section 1876 of the Act, and Programs of All Inclusive Care for the Elderly (PACE) under section 1894 of the Act—are also not eligible to be assigned. However, we note that Medicare Secondary Payer (MSP) status does not exclude a beneficiary from assignment to an ACO.

The statute includes a provision that precludes duplication in participation in initiatives involving shared savings. Section 1899(b)(4) of the Act states that providers of services or suppliers that participate in certain programs that involve shared savings are not eligible to participate in the Shared Savings Program. In the November 2011 final rule (76 FR 67830 through 67833), we finalized a proposal to implement this requirement and to adopt a process for ensuring that providers and suppliers participating in the Shared Savings Program do not concurrently participate in another Medicare program or demonstration involving shared savings at § 425.114. Specifically, applications for participation in the Shared Savings Program are reviewed to assess for overlapping ACO participant TINs. ACO participants that are already participating in another Medicare program, model or demonstration involving shared savings are prohibited from participating in the Medicare Shared Savings Program. An ACO application that contains ACO participants that are already participating in another Medicare program or demonstration involving shared savings is rejected.

The statutory prohibition against providers and suppliers participating in multiple programs and initiatives that involve shared savings limits but does not prevent the possibility for a beneficiary to be assigned to more than one shared savings initiative. However, we believe it is important that beneficiaries are not assigned to more than one initiative involving shared savings because we do not believe it is appropriate to make multiple shared savings payments for the same beneficiaries. Therefore, at § 425.114(c), we provide that if the other program or demonstration involving shared savings does not assign beneficiaries based upon the TINs of the health care providers from whom they receive care, but uses an alternate beneficiary assignment methodology, we will work with the developers of the respective demonstrations and initiatives to devise an appropriate method to ensure no duplication in shared savings payments. For example, beneficiaries cannot be assigned to a Shared Savings Program ACO for a performance year if they are associated with another Medicare shared savings initiative at the start of the Shared Savings Program ACO's performance year.

We have also implemented procedures to exclude beneficiaries whose residence is outside the United States, U.S. territories or possessions from assignment to an ACO. We make this determination based on the most recent available data in our beneficiary records regarding the beneficiary's residence at the end of the assignment window. We do not believe it is appropriate to expect ACOs to be responsible for coordinating the care provided to beneficiaries that reside outside the United States, as required under the Shared Savings Program, or to hold ACOs accountable for the care provided to beneficiaries that reside outside the United States because ACOs may have limited ability to interact with overseas providers and suppliers. In most situations, Medicare does not pay for health care or supplies furnished outside the United States. (Additional guidance about this policy is available at *http://www.medicare.gov/Pubs/pdf/11037.pdf.*) As a result, claims information regarding services received in other countries is not available to ACOs. United States (U.S.) residence includes the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin

Islands, Guam, American Samoa, and the Northern Marianas. (See guidance at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Shared-Savings-Losses-Assignment-Spec-v2.pdf.*) We believe it is appropriate to amend the regulations governing the assignment process to incorporate these limitations. Thus, we propose to add a new provision at § 425.401(a) of the regulations to outline the criteria that a beneficiary must meet in order to be eligible to be assigned to an ACO. Specifically, a beneficiary would be eligible to be assigned to a participating ACO, for a performance year or benchmark year, if the beneficiary meets all of the following criteria during the assignment window (defined in section II.F. of this proposed rule as the 12-month period used for assignment):

- Has at least 1 month of Part A and Part B enrollment and does not have any months of Part A only or Part B only enrollment.
- Does not have any months of Medicare group (private) health plan enrollment.
- Is not assigned to any other Medicare shared savings initiative.
- Lives in the U.S. or U.S. territories and possessions as determined based on the most recent available data in our beneficiary records regarding the beneficiary's residence at the end of the assignment window.

If a beneficiary meets all of the criteria in § 425.401(a), then the beneficiary would be eligible to be assigned to an ACO in accordance with the two-step beneficiary assignment methodology in § 425.402 and § 425.404. We also propose to make a conforming change to § 425.400 to reflect the addition of this new provision.

We request comment on this proposal to amend the regulations to address specifically the criteria that would be used to determine whether a beneficiary is eligible to be assigned to an ACO.

3. Definition of Primary Care Services

a. Overview

Section 1899(c) of the Act requires the Secretary to assign beneficiaries to an ACO "based on their utilization of primary care services" provided by a physician. However, the statute does not specify which kinds of services may be considered "primary care services" for this purpose, nor the amount of those services that would be an appropriate basis for making assignments. In this section of this proposed rule, we summarize how we currently identify the appropriate primary care services on which we base assignment. In addition, we propose several revisions to our current policies for defining primary care services for this purpose, consistent with our statement in the November 2011 final rule (76 FR 67853), that we intended to monitor this issue and would consider making changes to the definition of primary care services to add or delete codes, if there is sufficient evidence that revisions are warranted.

We currently define "primary care services" for purposes of the Shared Savings Program in § 425.20 as the set of services identified by the following HCPCS/CPT codes: 99201 through 99215, 99304 through 99340, 99341 through 99350, the Welcome to Medicare visit (G0402), and the annual wellness visits (G0438 and G0439). In addition, as we will discuss later in this section, we have established a crosswalk for these codes to certain revenue center codes used by FQHCs (prior to January 1, 2011) and RHCs so that their services can be included in the beneficiary assignment process.

In the November 2011 final rule (76 FR 67853), we established the current list of codes that constitute primary care services for several reasons. First, we believed the listed codes represented a reasonable approximation of the kinds of services that are described by the statutory language which refers to assignment of "Medicare fee-for-service beneficiaries to an ACO based on their utilization of primary care services" furnished by physicians. Because the statute requires that assignment be based upon the utilization of primary care services furnished by physicians, only primary care services can be considered in the assignment process. In addition, we selected this list to be largely consistent with the definition of "primary care services" in section 5501 of the Affordable Care Act. That section establishes the Primary Care Incentive Payment Program (PCIP) to expand access to primary care services, and thus its definition of "primary care services" provides a compelling precedent for adopting a similar list of codes for purposes of the beneficiary assignment process under the Shared Savings Program. We slightly expanded the list of codes found in section 5501 of the Affordable Care Act to include the Welcome to Medicare visit (HCPCS code G0402) and the annual wellness visits (HCPCS codes G0438 and G0439) as primary care services for purposes of the Shared Savings Program. These codes clearly represent primary care services frequently received by Medicare beneficiaries, and in the absence of the special G codes the services provided during these visits would be described by one or more of the regular office visit codes that are included in the list under section 5501 of the Affordable Care Act.

Since the publication of the November 2011 final rule, we have received several suggestions from ACOs and others regarding specific codes that we would consider adding to the definition of primary care services so that they could be considered when assigning beneficiaries to ACOs. For example, commenters have noted that effective January 1, 2013, Medicare pays for two CPT codes (99495 and 99496) that are used to report physician or qualifying non-physician practitioner transitional care management (TCM) services for a patient following a patient's discharge to a community setting from an inpatient hospital or SNF or from outpatient observation status in a hospital or partial hospitalization. These codes were established to pay a patient's physician or practitioner to coordinate the patient's care in the 30 days following a hospital or skilled nursing facility (SNF) stay. We believe that providing separate payment for the work of community physicians and practitioners in treating a patient following discharge from a hospital or nursing facility would ensure better continuity of care for these patients and help reduce avoidable readmissions. We discussed this policy in the CY 2013 Physician Fee Schedule (PFS) final rule with comment period that appeared in the November 16, 2012 **Federal Register** (77 FR 68978 through 68994).

Further, in the CY 2014 PFS final rule with comment period that appeared in the December 10, 2013 **Federal Register** (78 FR 74414 through 74427), we indicated that for CY 2015, we planned to establish a separate payment for HCPCS code GXXX1 under the PFS for chronic care management (CCM) services furnished to patients with multiple (two or more) chronic conditions. Subsequently, in the CY 2015 PFS final rule with comment period that appeared in the November 13, 2014 **Federal Register**, we provided more details relating to the implementation of the new PFS policy, including coding, elements of service, and payment rates (79 FR 67715 through 67728). Chronic care management services generally include regular development and revision of a plan of care, communication with other treating health professionals, and medication management.

Accordingly, as part of our broader multiyear strategy to appropriately recognize and value primary care and care management services, effective January 1, 2015, we will make a separate

payment for CCM services under the PFS. We believe that successful efforts to improve chronic care management for these patients could improve the quality of care while simultaneously decreasing costs, such as through reductions in hospitalizations, use of post-acute care services and emergency department visits.

We have also received a few suggestions from hospitalists and others that certain evaluation and management codes used for services furnished in SNFs and other nursing facility settings (CPT codes 99304 through 99318) should be excluded from the definition of primary care services. In some cases, hospitalists that perform evaluation and management services in SNFs requested this change so that their ACO participant TIN need not be exclusive to only one ACO based on the exclusivity policy established in the November 2011 final rule (76 FR 67810 through 67811). The requirement under § 425.306(b) that an ACO participant TIN be exclusive to a single ACO applies when the ACO participant TIN submits claims for primary care services that are considered in the assignment process. However, ACO participant TINs upon which beneficiary assignment is not dependent (that is, ACO participant TINs that do not submit claims for primary care services that are considered in the assignment process) are not required to be exclusive to a single ACO.

These requests from hospitalists and others were based on drawing a distinction between evaluation and management services performed in SNFs and those that are performed in other nursing facilities. Specifically, these commenters believe that evaluation and management services furnished in SNFs are more likely to be acute in nature and should not be considered primary care services. In contrast, the evaluation and management services performed in other nursing facilities, where patients tend to stay for longer periods, are arguably more likely to include primary care services. We have also received comments, however, from others who support the inclusion of these services in the definition of primary care for the Shared Savings Program. They suggest that including the codes for evaluation and management services furnished in SNFs in the assignment process could help provide important incentives for ACOs to manage and coordinate the care of these vulnerable patients because ACOs would be held accountable for these patients if they receive the plurality of their primary care services from ACO professionals during a performance year.

In the November 2011 final rule, we discussed comments both for and against including the codes for SNF visits in the definition of primary care services (76 FR 67852 through 67853). However, we ultimately concluded that it was appropriate to include these codes. We continue to believe that including the codes for SNF and other nursing facility visits in the list of codes that constitute primary care services for purposes of assignment to an ACO is appropriate for a number of reasons. As we stated in the November 2011 final rule (76 FR 67853), beneficiaries often stay for long periods of time in SNFs (Medicare covers up to 100 days of SNF services in each benefit period) and it is reasonable to conclude that these codes represent basic evaluation and management services that would ordinarily be provided in physician offices if the beneficiaries were not residing in nursing homes. If these services are performed by ACO professionals, we continue to believe that it is reasonable to hold the ACO accountable for the care of these beneficiaries. In addition, as we noted previously, the PCIP program established under section 5501 of the Affordable Care Act was established to expand access to "primary care services". Under this program, beginning January 1, 2011 and continuing through December 31, 2015, we pay an incentive payment of 10 percent of Medicare program payments to qualifying primary care physicians and certain non-physician practitioners who furnish specified primary care services. We believe it is compelling that these SNF codes are included in the definition of "primary care services" in section 5501 of the Affordable Care Act, which established this incentive program. We would also note that CPT codes 99304 through 99318 do not differentiate between evaluation and management services performed in SNFs and other nursing facilities. Thus, services furnished in SNFs and other nursing facilities are included in the definition of "primary care services" for purposes of section 5501. Finally, in the CY 2015 PFS final rule with comment period (79 FR 67910 through 67911), we added the Skilled Nursing Facility 30-Day All-Cause Readmission Measure (SNFRM) to the quality performance measure set used to evaluate the quality of the care furnished by ACOs. We believe the addition of this measure helps to fill a gap in the current Shared Savings Program measure set and provides a focus on an area where ACOs are targeting redesign. Therefore, we continue to believe that it is reasonable to conclude that services provided in SNFs with CPT codes 99304 through 99318 represent basic evaluation and management services that would ordinarily be provided in physician offices if the beneficiaries were not residing in nursing homes and should continue to be included in the definition of primary care services used for purposes of beneficiary assignment to an ACO participating in the Shared Savings Program. Although we are not making a proposal at this time regarding CPT codes 99304 through 99318, we welcome comment from stakeholders on the implications of retaining these codes in the definition of primary care services.

b. Proposed Revisions

We believe that the TCM services represented by CPT codes 99495 and 99496 represent primary care services that should be considered in the beneficiary assignment methodology under the Shared Savings Program. In order to receive payment for these codes, the physician or non-physician practitioner is required to accept care of the beneficiary post-discharge from an inpatient hospital or SNF without a gap and must take responsibility for the beneficiary's overall care for a period of 30 days following the discharge. Likewise, we believe that the CCM services represented by HCPCS code GXXX1 are primary care services that should also be considered in the beneficiary assignment methodology under the Shared Savings Program. The CCM service includes continuity of care with a designated practitioner or member of the care team with whom the patient is able to get successive routine appointments. The CCM service also includes access to care management services 24-hours-a-day, 7-days-a-week, which means providing beneficiaries with a means to make timely contact with health care providers to address the patient's urgent chronic care needs regardless of the time-of-day or day of the week. Additional explanation of these and the other required elements for billing CCM services can be found in the CY 2015 PFS final rule with comment period (79 FR 67715 through 67728). Therefore, we propose to update the definition of primary care services at § 425.20 to include both TCM codes (CPT codes 99495 and 99496) and the CCM code (HCPCS code GXXX1) and to include these codes in our beneficiary assignment methodology under § 425.402.

Further, in order to promote flexibility for the Shared Savings

Program and to allow the definition of primary care services used in the Shared Savings Program to respond more quickly to HCPCS/CPT coding changes made in the annual PFS rulemaking process, we propose to make any future revisions to the definition of primary care service codes through the annual PFS rulemaking process. If we intend to add any proposed new HCPCS/CPT or revenue center codes to the definition of primary care services for purposes of the Shared Savings Program, we would include a discussion of the proposed addition in the preamble to the PFS proposed rule to allow an opportunity for comment before we announce our final decision in the PFS final rule. Such an approach would enable the Shared Savings Program to be more flexible and responsive to incorporate any changes to primary care oriented codes that are made through the PFS rulemaking process. We believe this process for making changes to the Shared Savings Program's definition of primary care services under § 425.20 would help to ensure that the definition of primary care services used under the Shared Savings Program properly reflects the full range of primary care services that beneficiaries may receive under Medicare and that the assignment methodology accurately aligns beneficiaries with the entities that are responsible for managing their overall care. In addition, revising the definition of primary care services for purposes of the Shared Savings Program through the annual rulemaking for the PFS would enable us to efficiently update and revise primary care service codes used for purposes of beneficiary assignment under the Shared Savings Program to reflect any administrative HCPCS/CPT coding changes, such as changes to reflect successive coding changes. Accordingly, we also propose to amend the definition of primary care services at § 425.20 to include additional codes designated by CMS as primary care services for purposes of the Shared Savings Program, including new HCPCS/CPT codes or revenue codes and any subsequently modified or replacement codes.

We seek comments on these proposals. In addition, we seek comments as to whether there are any additional existing HCPCS/CPT codes that we should consider adding to the definition of primary care services in future rulemaking for purposes of assignment of beneficiaries to ACOs under the Shared Savings Program. It would be most helpful if such comments include a detailed discussion of the basis for such an addition.

4. Consideration of Physician Specialties and Non-Physician Practitioners in the Assignment Process

a. Overview

Primary care services can generally be defined based on the type of service provided, the type of provider specialty that provides the service, or both. In the November 2011 final rule establishing the Shared Savings Program (76 FR 67853 through 67856), we adopted a balanced assignment process that simultaneously maintains the requirement to focus on primary care services in beneficiary assignment, while recognizing the necessary and appropriate role of specialists in providing primary care services, such as in areas with primary care physician shortages.

Under § 425.402, after identifying all patients that had a primary care service with a physician who is an ACO professional (and who are thus eligible for assignment to the ACO under the statutory requirement to base assignment on "utilization of primary care services" furnished by physicians), we employ a step-wise approach as the basic assignment methodology. This step-wise assignment process takes into account two particular decisions that we described in the November 2011 final rule (76 FR 67853 through 67858): (1) Our decision to base assignment on the primary care services of specialist physicians in the second step of the assignment process; and (2) our decision also to take into account the plurality of all primary care services provided by ACO professionals, including both primary care and specialist physicians and certain non-physician practitioners, in determining which ACO is truly responsible for a beneficiary's primary care in the second step of the assignment process. Our current step-wise assignment process thus occurs in the following two steps:

Step 1: In this step, the beneficiary would be assigned to the ACO if the allowed charges for primary care services furnished to the beneficiary by primary care physicians who are ACO professionals are greater than the allowed charges for primary care services furnished by primary care physicians who are ACO professionals in any other ACOs, and greater than the allowed charges for primary care services billed to Medicare by any other solo practice/group containing primary care physicians, identified by a Medicare-enrolled TIN, that is unaffiliated with any ACO. In other words, first we add up the allowed charges for primary care services billed by primary care physicians through the TINs of ACO participants in the ACO. Next, we add up the allowed charges for primary care services furnished by primary care physicians that are billed through other Medicare-enrolled TINs (or through a collection of ACO participant TINs in the case of another ACO). If the allowed charges for the services furnished by ACO participants are greater than the allowed charges for services furnished by the participants in any other ACO or by any non-ACO participating Medicare-enrolled TIN, then the beneficiary is assigned to the ACO in the first step of the assignment process.

Step 2: This step applies only for beneficiaries who have not received any primary care services from a primary care physician. We assign a beneficiary to an ACO in this step if the beneficiary received at least one primary care service from a physician participating in the ACO, and more primary care services (measured by Medicare allowed charges) from ACO professionals (physician regardless of specialty, nurse practitioner, physician assistant or clinical nurse specialist) at the ACO than from ACO professionals in any other ACO or solo practice/group of practitioners identified by a Medicare-enrolled TIN or other unique identifier, as appropriate, that is unaffiliated with any ACO.

Since publication of the November 2011 final rule (76 FR 67853 through 67858), we have gained further experience with this assignment methodology. We have learned from its application for the first 220 ACOs participating in the program that, on average, about 92 percent of the beneficiaries assigned to ACOs are assigned in step 1, with only about 8 percent of the beneficiaries being assigned in step 2.

We have adopted a similar beneficiary assignment approach for some other programs, such as the PQRS Group Practice Reporting Option via the GPRO web interface (77 FR 69195 through 69196). We would note that in the CY 2015 PFS final rule with comment period that appeared in the November 13, 2014 **Federal Register**, we revised the Value Modifier (VM) beneficiary attribution methodology and the PQRS GPRO web interface beneficiary assignment methodology to make them slightly different from the Medicare Shared Savings Program assignment methodology, namely—(1) eliminating the primary care service pre-step that is statutorily required for the Shared Savings Program; and (2) including NPs, PAs, and CNSs in step 1 rather than in step 2 of the attribution process (see 79 FR 67790 and 79 FR 67962).

b. Proposed Revisions

We continue to believe that the current step-wise assignment methodology generally provides a balance between maintaining a strong emphasis on primary care while ultimately allowing for assignment of beneficiaries on the basis of how they actually receive their primary care services. However, we have received several suggestions for possible improvements to the assignment methodology for consideration.

Some stakeholders have suggested that primary care services by non-physician practitioners (NPs, PAs, and CNSs) should be included in step 1 of the assignment methodology rather than only in step 2 as they are under the current process. These stakeholders have indicated that non-physician practitioners very often serve as a beneficiary's sole primary care provider, based on beneficiary preferences or other factors, especially in rural areas and other areas where there is a shortage of primary care physicians. We considered this recommendation for a number of reasons.

As previously explained in the November 2011 final rule (76 FR 67853 through 67858), in establishing the Shared Savings Program, we adopted certain key features of the Shared Savings Program (for example, the decision not to include physician specialties in step 1 of the assignment methodology and the definition of primary care physician under § 425.20) to align with other Affordable Care Act provisions that place a strong emphasis on primary care. In particular, we referred to section 5501 of the Affordable Care Act which established the PCIP. For purposes of section 5501 of the Affordable Care Act, a "primary care practitioner" is defined as a physician who has a primary specialty designation of family medicine, internal medicine, geriatric medicine, or pediatric medicine or as a "nurse practitioner, clinical nurse specialist, or physician assistant." Therefore, we believe it would be appropriate to better align the assignment methodology under the Shared Savings Program with the primary care emphasis in other provisions of the Affordable Care Act by including these non-physician practitioners in step 1 of the assignment process. Further, we believe that including these non-physician practitioners in step 1 would be supported by the statute as long as we continue under § 425.402 to first identify all patients that have received a primary care service from a physician who is an ACO professional and who are thus eligible for assignment to the ACO under the statutory requirement to base assignment on "utilization of primary care services" furnished by physicians. Finally, we believe that it would be appropriate to include primary services furnished by NPs, PAs, and CNSs in step 1 of the beneficiary assignment methodology (after satisfying the statutory criterion that assignment be based on primary care services by physicians). Under section 1899(b)(2)(D), the ACO is required to have sufficient primary care ACO professionals to care for the number of FFS beneficiaries assigned to the ACO. The statute includes NPs, PAs, and CNSs in its definition of ACO professional; thus recognizing the important role played by these non-physician practitioners in managing and coordinating the care of Medicare FFS beneficiaries.

We believe including these practitioners in step one of the assignment process could also further strengthen our current assignment process, which we designed to simultaneously maintain a primary care centric approach to beneficiary assignment, by including services furnished by physicians from all of the primary care specialties in step 1, while also recognizing the necessary and appropriate role of specialists in providing primary care services by including services furnished by specialist physicians in step 2. Including services furnished by NPs, PAs, and CNSs in determining the plurality of primary care services in step 1 of the assignment process may help ensure that beneficiaries are assigned to the ACO (or non-ACO entity) that is actually providing the plurality of primary care for that beneficiary and thus, should be responsible for managing the patient's overall care. In this way, all primary care services furnished by ACO professionals, including the entire primary care physician and practitioner team (including NPs, PAs, and CNSs working in clinical teams in collaboration with or under the supervision of physicians), would be considered for purposes of determining where a beneficiary received the plurality of primary care services under step 1 of the assignment methodology. Accordingly, we are proposing to amend the assignment methodology to include primary care services furnished by NPs, PAs, and CNSs in step 1 of the assignment process.

However, we would note that there could also be some concerns about adding NPs, PAs, and CNSs to step 1 of the assignment methodology. Unlike for physicians, the CMS self-reported specialty codes reported on claims for NPs, PAs, and CNSs are not further broken down by specific specialty areas and therefore do not allow practitioners to indicate whether they are typically functioning as primary care providers or as specialists. Therefore, we are concerned that by considering services furnished by NPs, PAs, and CNSs in step 1, we may ultimately assign some beneficiaries to an ACO inappropriately based on specialty care over true primary care. Thus, while we invite comments on our proposal to include primary care services furnished by NPs, PAs, and CNSs in step 1 of the assignment methodology, we also seek comment on the extent to which these non-physician practitioners provide non-primary care services and whether there are ways to distinguish between primary care services and non-primary care services billed by these non-physician practitioners.

Some other stakeholders have suggested that certain physician specialties are inappropriately included in the assignment process and therefore request that we exclude certain physician specialties from step 2 of the assignment process. These stakeholders are concerned that by being included in step 2 of the assignment process, the ACO participants that submit claims for services furnished by these specialists are inappropriately limited to participating in only one ACO because of the exclusivity requirement under § 425.306(b) of the regulations. This requirement is discussed in the November 2011 final rule (76 FR 67810 through 67811). Further, some stakeholders have indicated that they are confused by the current exclusivity requirement and inappropriately believe that an ACO participant can participate in more than one ACO as long as none of the beneficiaries for whom the ACO participant has submitted claims for primary care services have been assigned to the ACO.

We would like to emphasize that under § 425.306(b), the requirement that an ACO participant must be exclusive to a single ACO applies whenever primary care service claims submitted by the ACO participant are considered in the beneficiary assignment process. The application of the current exclusivity requirement to an ACO participant is not affected by whether or not a FFS beneficiary for whom an ACO participant has submitted claims for primary care services is ultimately assigned to the ACO. Rather, an ACO participant that submits claims to Medicare for primary care services must be exclusive to a single ACO because

the claims for primary care services submitted by the ACO participant are used to determine beneficiary assignment to the ACO. Additionally, the current exclusivity requirement is not affected by whether or not the primary care services for which the ACO participant submits claims are services furnished by primary care physicians, specialist physicians, or NPs, PAs, and CNSs. Furthermore, this exclusivity requirement applies only to the ACO participant and not to individual practitioners. Individual practitioners are free to participate in multiple ACOs, provided they are billing under a different Medicare-enrolled TIN for each ACO in which they participate. (See 76 FR 67810 through 67811). For example, there may be practitioners who work in multiple settings and bill Medicare for primary care services through several different TINs, depending on the setting. If each of these TINs represents an ACO participant in a different ACO, then the practitioner would be an ACO professional in more than one ACO.

Some stakeholders have argued that certain specialties that bill for some of the evaluation and management services designated as primary care services under § 425.20 do not actually perform primary care services. This is because most of the CPT and other HCPCS codes that are included in the definition of primary care services under § 425.20 are actually more general purpose codes used for a wide variety of clinical practices that are not specific to primary care, such as CPT office visit codes. For example, cataract surgeons bill for some of the office visit codes included in the definition of "primary care" but in actual practice these surgeons do not perform primary care when they report these codes. These commenters believe that the wide spread use of these codes is the reason that for purposes of PCIP, the CPT code-based definition of "primary care services" is paired with the definition of "primary care practitioners" under that statute. In other words, to identify true primary care services, the CPT codes for primary care services must be billed by practitioners that render primary care services.

We agree that although some specialties such as surgeons and certain others bill Medicare for some of the Shared Savings Program "primary care" codes, in actual practice the services such specialists perform when reporting these codes do not typically represent primary care services because the definitions of HCPCS/CPT codes for office visits and most other evaluation and management services are not based on whether primary care is provided as part of the service. Accordingly, we agree that to identify primary care services more accurately, the CPT codes for primary care services should be paired with the specialties of the practitioners that render those services and that it would be appropriate to exclude services provided by certain physician specialties from the beneficiary assignment process.

Therefore, we are proposing to exclude services provided by certain CMS physician specialties from the beneficiary assignment process. The net effect of this proposal would be to exclude certain claims from determining the ACO's assigned population. The proposed lists of physician specialties that would be included in and excluded from the assignment process (provided in Tables 1 through 4 of this proposed rule) are based on recommendations by CMS medical officers knowledgeable about the services typically performed by physicians and non-physician practitioners. However, we note that given the many requests and comments from specialists and specialty societies asking to have their services included in the assignment methodology that we received during the original rulemaking to establish the Shared Savings Program, we attempted to limit the list of physician specialty types that would be excluded from the assignment process to those physician specialties that would very rarely, if ever, provide primary care to beneficiaries. As a general rule, for example, we expect that physicians with an internal medicine subspecialty such as nephrology, oncology, rheumatology, endocrinology, pulmonology, and cardiology would frequently be providing primary care to their patients. Especially for beneficiaries with certain chronic conditions (for example, certain heart conditions, cancer or diabetes) but who are otherwise healthy, we expect that these specialist physicians often take the role of primary care physicians in the overall treatment of the beneficiaries if there is no family practitioner or other primary care physician serving in that role. In contrast we expect that most surgeons, radiologists, and some other types of specialists would not typically provide a significant amount of primary care, if any, and therefore we propose to exclude their services from the assignment process.

More specifically, the following 4 tables display the specific CMS physician specialty codes that we are proposing to include and exclude for beneficiary assignment purposes under the Shared Savings Program.

- Table 1 shows the CMS physician specialty codes that would continue to be included in step 1.
- Table 2 lists the physician specialties that we are proposing would continue to be included in step 2.
- Table 3 lists the physician specialties that we are proposing to exclude from the beneficiary assignment methodology under step 2. Under this proposal, services furnished by these physician specialties would also be excluded for purposes of determining if a beneficiary has received a primary care service from a physician who is an ACO professional, which under § 425.402(a) is a precondition for assignment to an ACO.
- Table 4 shows the CMS specialty codes for NPs, PAs, and CNSs that under our proposal would be included in beneficiary assignment step 1.

TABLE 1—CMS PHYSICIAN SPECIALTY CODES THAT WOULD CONTINUE TO BE INCLUDED IN ASSIGNMENT STEP 1

Code	Specialty name
01	General Practice.
08	Family Practice.
11	Internal Medicine.
38	Geriatric Medicine.

TABLE 2—CMS PHYSICIAN SPECIALTY CODES THAT WOULD CONTINUE TO BE INCLUDED IN ASSIGNMENT STEP 2

Code	Specialty name
03	Allergy/immunology.
06	Cardiology.
10	Gastroenterology.
13	Neurology.
16	Obstetrics/gynecology.
17	Hospice and palliative care.
23	Sports medicine.
25	Physical medicine and rehabilitation.
29	Pulmonary disease.
37	Pediatric medicine.
39	Nephrology.
44	Infectious disease.
46	Endocrinology.
66	Rheumatology.
70	Multispecialty clinic or group practice.
82	Hematology.
83	Hematology/oncology.
84	Preventive medicine.
90	Medical oncology.
98	Gynecology/oncology.

TABLE 3—CMS PHYSICIAN SPECIALTY CODES THAT WE PROPOSE TO EXCLUDE FROM ASSIGNMENT STEP 2

Code	Specialty name
02	General surgery.
04	Otolaryngology.
05	Anesthesiology.
07	Dermatology.
09	Interventional pain management.
12	Osteopathic manipulative therapy.
14	Neurosurgery.
18	Ophthalmology.
20	Orthopedic surgery.
21	Cardiac electrophysiology.
22	Pathology.
24	Plastic and reconstructive surgery.
26	Psychiatry.
27	Geriatric psychiatry.
28	Colorectal surgery.
30	Diagnostic radiology.
33	Thoracic surgery.
34	Urology.
36	Nuclear medicine.
40	Hand surgery.
72	Pain management.
76	Peripheral vascular disease.
77	Vascular surgery.
78	Cardiac surgery.
79	Addiction medicine.
81	Critical care (intensivists).
85	Maxillofacial surgery.
86	Neuro-psychiatry.
91	Surgical oncology.
92	Radiation oncology.
93	Emergency medicine.
94	Interventional radiology.
99	Unknown physician specialty.
C0	Sleep medicine.

TABLE 4—CMS NON-PHYSICIAN SPECIALTY CODES THAT WOULD BE INCLUDED IN ASSIGNMENT STEP 1

Code	Specialty name
50	Nurse practitioner.
89	Clinical nurse specialist.
97	Physician assistant.

The primary benefit of this proposal is that it could help ensure that beneficiaries are correctly assigned to the ACO or other entity that is actually providing primary care and managing the patient's overall care. Otherwise, for example, a beneficiary could inadvertently be assigned to an ACO based on services furnished by a surgeon who had not provided primary care but had provided a number of consultations for a specific clinical condition. Another important benefit of this proposal is that the ACO participants that submit claims solely for services performed by the categories of specialists that we are proposing to exclude from the assignment process would have greater flexibility to participate in more than one ACO if the ACO participant does not submit claims for any primary care services performed by other physicians or non-physician practitioners that are included in the assignment process. This could especially be the case for small physician practices which only submit claims for specialty services. Allowing such ACO participants that are composed solely of excluded specialists to participate in more than one ACO would support our goal of facilitating competition among ACOs by increasing the number of specialists that can participate in more than one ACO. This proposal would not be expected to have a significant impact on the overall number of beneficiaries assigned to each ACO because we believe most of the specialties that we propose to exclude from the assignment methodology provide a relatively modest number of services under the codes included in the definition of primary care services or are not typically the only physician that a beneficiary sees. For example, patients that are furnished consultations by a thoracic surgeon would typically also concurrently receive care from a primary care physician, cardiologist or other medical specialist.

We propose to amend § 425.402 to reflect these proposed changes to the assignment methodology. Specifically, we propose to revise § 425.402(a) to include NPs, PAs, and CNSs as ACO professionals that would be considered in step 1 of the assignment process. In addition, we propose to amend § 425.402 by adding a new paragraph (b) to identify the physician specialty designations that would be considered in step 2 of the assignment process. We also propose to modify the exclusivity requirement at § 425.306(b) to clarify how the exclusivity rules would be affected by this proposal to exclude certain specialists from step 2 of the assignment methodology. Specifically, we propose to revise § 425.306(b) to indicate that each ACO participant that submits claims for primary care services used to determine the ACO's assigned population (that is, services rendered by the primary care physicians or ACO professionals listed in Tables 1, 2, and 4) must be exclusive to one Medicare Shared Savings Program ACO.

In addition, we propose to make several conforming and technical changes to § 425.402(a). First, we propose a modification to provide that for purposes of determining whether a beneficiary has received a primary care service from a physician who is an ACO professional, we would consider only services furnished by primary care physicians or physicians with a specialty listed in new paragraph (b). Second, we propose to make modifications to conform with changes in the definitions of "assignment", "ACO professional", and "ACO provider/supplier" in addition to our proposal to adopt a prospective assignment approach under proposed Track 3 in section II.F. of this proposed rule. We seek comment on these proposals.

Finally, as part of our process of reviewing both recommendations discussed previously, we considered another alternative approach to assignment. We considered whether it might be preferable, after excluding the specialties listed in Table 3 from step 2 of the assignment process, to further simplify beneficiary assignment by establishing an assignment process that involves only a single step. More specifically, we considered whether we should replace the current two step assignment methodology with a new one step assignment process in which the plurality of primary care services provided by the physicians listed in Tables 1 and 2, and the non-physician practitioners in Table 4, would all be considered in a single step. Arguably, this approach could at least partially address the comments we have received about the current assignment methodology and also help further simplify the assignment process.

However, while it has some attractive features, we also have some important concerns about this approach. For example, beneficiaries receiving concurrent care from both primary care physicians and specialists could inappropriately be assigned to an ACO or other entity that is not responsible for managing their overall care. To illustrate, under an assignment process with only one step, if a beneficiary has a long term, continuing relationship with a family practitioner who is an ACO professional but also requires specialty care for a chronic allergy condition from an allergist who is not participating in an ACO, then in any given performance year the beneficiary could be assigned to the ACO or not depending merely on the allowed charges for primary care services furnished by the family practitioner versus the allowed charges for services furnished by the allergist. Under our current two step assignment methodology, this beneficiary would be consistently and appropriately assigned to the ACO in which the beneficiary's family practitioner participates. We believe this result would be appropriate because, in this example, the family practitioner is responsible for managing the overall care of this patient whereas

the allergist is providing more specialized care. A similar problem would exist for some other beneficiaries, such as those who temporarily require specialty care for an acute condition during a performance year. Therefore, we are concerned that by establishing an assignment methodology based on a single step, we may reduce our focus on primary care and ultimately assign some beneficiaries to an ACO inappropriately based on specialty care over true primary care. A one-step assignment methodology could also introduce additional instability into the assignment process. Therefore, we are not proposing to combine the two steps used under the current assignment methodology.

Although we are not proposing this change at this time, we seek comments as to whether it would be preferable, after excluding the physician specialties listed in Table 3 from the assignment process, to further simplify the assignment methodology by establishing an assignment process that involves only a single step. We will consider comments on this issue during the development of the final rule.

We also welcome any comments about the possible impact these potential changes to the assignment methodology might have on other CMS programs that use an assignment methodology that is generally aligned with the Shared Savings Program, such as PQRS GPRO reporting via the GPRO web interface and VM. We note that as previously discussed, we revised the assignment methodology for PQRS GPRO reporting via the GPRO web interface and VM in the CY 2015 PFS final rule with comment period that appeared in the November 13, 2014 **Federal Register** (79 FR 67790 and 79 FR 67962).

5. Assignment of Beneficiaries to ACOs That Include FQHCs, RHCs, CAHs, or ETA Hospitals

In this section, we summarize the regulatory policies in § 425.404 for assignment of beneficiaries to ACOs that include FQHCs and RHCs as ACO participants and subsequent operational procedures and instructions that we have established in order to allow FQHCs and RHCs as well as CAHs billing under section 1834(g)(2) of the Act (referred to as Method II), and ETA hospitals to fully participate in the Shared Savings Program. These types of providers may submit claims for physician and other professional services when certain requirements are met, but they do not submit their claims through the standard Part B claims payment system. Accordingly, we have established operational processes so that we can consider claims for professional services submitted by these providers in the process for assigning beneficiaries to ACOs. However, each of these four provider types (that is, FQHCs, RHCs, CAHs, ETA hospitals) generally have differing circumstances with respect to their provider and medical service code reporting requirements, claims forms used, and the payment methodology that applies to professional services. Although there are important differences between the payment policy and claims processing for FQHCs and RHCs, they do share some key characteristics. Therefore, we will discuss FQHCs and RHCs jointly, and then address CAHs and ETA hospitals separately.

a. Assignment of Beneficiaries to ACOs That Include FQHCs and RHCs

(1) Overview

FQHCs and RHCs are facilities that furnish services that are typically furnished in an outpatient clinic setting. They are currently paid an all-inclusive rate (AIR) per visit for qualified primary and preventive health services furnished to Medicare beneficiaries. On October 1, 2014, FQHCs began to transition to a new FQHC prospective payment system (PPS). FQHCs have been required to use HCPCS coding on all their claims since January 1, 2011, to inform the development of the PPS and for limited other purposes, and would be required to use HCPCS coding for payment purposes under the FQHC PPS. Under the current payment methodology, FQHCs and RHCs submit claims for each encounter with a beneficiary and receive an interim payment based on their AIR for qualifying visits. The claims contain revenue codes that distinguish general classes of services (for example, clinic visit, home visit or mental health service). Claims submitted by FQHCs and RHCs also identify the beneficiary to whom the service was provided, and include other information relevant to determining whether the AIR can be paid for the service. The claims contain very limited information regarding the individual practitioner, or the type of health professional (for example, physician, PA or NP) who provided the service.

Based on detailed comments from some FQHC and RHC representatives, in the November 2011 final rule, we established a beneficiary assignment process that allows primary care services furnished in FQHCs and RHCs to be considered in the assignment process for any ACO that includes an FQHC or RHC as an ACO participant. This process is codified in the regulations at § 425.404. (This assignment process also enables FQHCs and RHCs to form ACOs independently, without the participation of other types of eligible entities, provided they meet all other eligibility requirements (76 FR 67814)). Operationally we assign beneficiaries to ACOs that include FQHCs or RHCs in a manner generally consistent with how we assign beneficiaries to other ACOs based on primary care services performed by physicians as described previously. However, to address the requirement under section 1899(c) of the Act that beneficiaries be assigned to an ACO based on their use of primary care services furnished by physicians, we require ACOs that include FQHCs or RHCs to identify, through an attestation (see § 425.404(a)), the physicians that provide direct patient primary care services in their ACO participant FQHCs or RHCs. This additional step is not necessary in the case of other types of ACO participants that bill Medicare for primary care services because the claims clearly identify the practitioner furnishing the service. The attestation must be submitted to CMS as part of the application process for all ACOs that include FQHCs or RHCs as ACO participants and must include the NPIs and other identifying information for the physicians that directly provide primary care services in the ACO participant FQHCs or RHCs (see § 425.204(c)(5)(iii)(A)). Subsequently, we use the combination of the FQHC or RHC ACO participant TIN (and other unique identifier such as CCN, where appropriate) and the NPIs of the FQHC or RHC physicians provided to us through the attestation process to identify those beneficiaries that received a primary care service from a physician in the FQHC or RHC and who are therefore eligible to be assigned to the ACO as provided under § 425.402(a)(1). Then, we assign those beneficiaries to the ACO, using the step-wise assignment methodology under § 425.402(a)(3) and (4), if they received the plurality of their primary care services, as determined based on allowed charges for the HCPCS codes and revenue center codes included in the definition of primary care services at § 425.20, from ACO professionals.

We are able to crosswalk the revenue center codes reported by RHCs (and FQHCs for services performed prior to January 1, 2011) to comparable "primary care" HCPCS codes based on their code definitions. For example, CPT codes 99201 through 99215 (office/

outpatient visits) are cross-walked to revenue center code 0521. Because the focus of FQHCs and RHCs is on primary care, we continue to believe these revenue center codes, when reported by FQHCs/RHCs, represent primary care services and not more specialized care. This crosswalk allows us to use the available revenue center codes as part of the beneficiary assignment process for RHC services (and for FQHC services furnished prior to January 1, 2011, when FQHCs were required to start submitting HCPCS codes) in place of the HCPCS codes which are used more generally. We established and have updated this crosswalk through contractor instructions. For claims submitted by FQHCs on or after January 1, 2011, we use the HCPCS codes which are included on the claims to identify the service provided.

To summarize, the special procedures that we have established in the November 2011 final rule and through operational program instructions (see program specifications on our Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Shared-Savings-Losses-Assignment-Spec-v2.pdf*) for processing FQHC and RHC claims in order to allow these services to be considered in the beneficiary assignment process for the Shared Savings Program are as follows:

- FQHC and RHC services are billed on an institutional claim form and require special handling to incorporate them into the beneficiary assignment process. In general, ACO participants are identified through their TIN(s). However, the TINs for FQHCs and RHCs are not included in the CMS claims files. Therefore, we require that the CCNs also be reported for FQHCs and RHCs that are ACO participants. We use the CCN as the unique identifier for an individual FQHC or RHC. We require ACOs to include the CCN, the TIN, and the organizational NPI for FQHCs and RHCs that are participating in the ACO on their ACO participant lists. For example, the instructions for entities applying to the Shared Savings Program for 2015 were provided on our Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/HowTo-Participant-List-Template.pdf.*
- For FQHCs/RHCs that are ACO participants, we treat a FQHC or RHC service reported on an institutional claim as a primary care service performed by a primary care physician if the claim includes a HCPCS or revenue center code that is included in the definition of a primary care service at § 425.20 and the service was furnished by a physician that was identified as providing direct primary care services in the attestation submitted as part of the ACO's application. All such physicians are considered primary care physicians for purposes of the assignment methodology and no specialty code is required for these claims.
- A primary care physician is any physician NPI included in the attestation provided as part of the application submitted by an ACO that includes an FQHC or RHC as an ACO participant.
- For FQHCs/RHCs that are ACO participants, if the claim is for a primary care service furnished by someone other than a physician listed on the attestation, we treat the service as a primary care service furnished by a non-physician ACO professional. We established this operational policy in order to be able to include these FQHC/RHC primary care services in step 2 of the current beneficiary assignment methodology, as long as all other assignment requirements are met. We believe this is a reasonable assumption because FQHC/RHC covered services represented by the primary care HCPCS or revenue center codes would primarily represent services furnished by a non-physician ACO professional, if not by a primary care physician. We would note that covered services in RHCs or FQHCs include services furnished by certain other professionals who are not ACO professionals (that is, a certified nurse midwife, clinical psychologist, clinical social worker or, in very limited situations, a visiting nurse). However, such services are not reported under the HCPCS codes and revenue center codes that we have defined as being primary care services at § 425.20 for purposes of the Shared Savings Program. (See RHC/FQHC general billing requirements in the Medicare Claims Processing Manual, Chapter 9—Rural Health Clinics/Federally Qualified Health Centers, section 100 at *http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c09.pdf*).
- For FQHCs/RHCs that are not ACO participants, we treat a FQHC or RHC service reported on an institutional claim as a primary care service performed by a primary care physician if the claim includes a HCPCS or revenue center code that meets the definition of a primary care service at § 425.20. That is, for non-ACO participant FQHCs and RHCs, we assume a primary care physician performed all primary care services. As we explained previously in the November 2011 final rule (76 FR 67860), FQHC/RHC claims contain limited information as to the type of practitioner providing a service because such information is not necessary to determine payment rates for services in FQHCs/RHCs. Further, the attestation requirement at § 425.404(a) does not, of course, apply to FQHCs/RHCs that are not participating in an ACO. As a result, for non-ACO participant FQHCs/RHCs we are not able to determine whether a primary care service was furnished by a primary care physician, and thus should be considered in step 1, or was furnished by a specialist physician or NP/PA/CNS, and thus should be considered under step 2 of the assignment methodology. We chose to assume such primary care services were furnished by primary care physicians so that these services would be considered in step 1 of the assignment methodology. We established this operational procedure to help make sure we do not disrupt established relationships between beneficiaries and their care providers in non-ACO participant FQHCs and RHCs, by inappropriately assigning beneficiaries to ACOs that are not primarily responsible for coordinating their overall care.

To illustrate, we offer the following example: Assume Medicare is billed for five primary care services (all with equal allowable charges) for a particular beneficiary during a given performance year. One of those primary care services was provided by a primary care physician who is an ACO provider/supplier not affiliated with an FQHC. Four of the services were provided by an FQHC that is not an ACO participant. In this case, if we had assumed that the FQHC services were performed by NPs/PAs/CNSs, then the beneficiary would have been assigned to the ACO under step 1 of the assignment methodology and not the FQHC. Instead, by assuming the non-ACO participant FQHC services were performed by primary care physicians, this beneficiary would be assigned to the FQHC under step 1 and not to the ACO. In this scenario we believe it would be more appropriate for the beneficiary to be assigned to the FQHC since the FQHC is the entity that is primarily responsible for overseeing the care for this beneficiary. Also, we do not believe it would be appropriate to hold the ACO accountable for the beneficiary in this example given that the ACO is not providing the plurality of primary care.

(2) Proposed Revisions

As currently drafted, § 425.404(b) conflates the question of whether a service billed by an FQHC or RHC is

provided by a physician with the question of whether the service is a primary care service. As a consequence, the provision arguably does not address situations where the FQHC/RHC claim is for a primary care service as defined under § 425.20, but the NPI reported on the claim is not the NPI of a physician included in the attestation submitted under § 425.404(a). As with other types of ACO participants, under the step-wise assignment methodology we believe it is appropriate to separately address the questions of whether the service is a primary care service, whether the service is a primary care service provided by an ACO professional who is a primary care physician, and whether the service is a primary care service provided by another ACO professional. Therefore, we propose to revise § 425.404(b) to better reflect the program rules and operational practices as previously outlined. In addition, we propose to revise § 425.404(b) to reflect the proposal discussed earlier to revise § 425.402(a)(1) to include services furnished by NPs, PAs, and CNSs as services that will be considered in step 1 of the assignment process. Under these proposals, we would assign beneficiaries to ACOs that include FQHCs and RHCs in the following manner.

To address the requirement under section 1899(c) of the Act that beneficiaries be assigned to an ACO based on their use of primary care services furnished by physicians, we would continue to require ACOs that include FQHCs and RHCs to identify, through an attestation (see § 425.404(a)), the physicians that provide direct patient primary care services in their ACO participant FQHCs or RHCs. Previously, we used this attestation information both for purposes of determining whether a beneficiary was "assignable" to an ACO and also for purposes of assigning beneficiaries to the ACO under step 1. However, we now propose to use this attestation information only for purposes of determining whether a beneficiary is assignable to an ACO. We refer to this determination under § 425.402(a)(1) as being the assignment "pre-step". If a beneficiary is identified as an "assignable" beneficiary in the assignment pre-step, then we would use claims for primary care services furnished by all ACO professionals submitted by the FQHC or RHC to determine whether the beneficiary received a plurality of his or her primary care services from the ACO under Step 1. We propose to make revisions to § 425.404(b) to reflect these policies. To illustrate the assignment methodology for an ACO that includes FQHCs/RHCs we offer the following example. Assume Medicare is billed for five primary care services (all with equal allowable charges) for a particular beneficiary during a given performance year. One of those primary care services was provided by a specialist physician who is an ACO professional not affiliated with the FQHC. Two of the services were provided in an FQHC that is an ACO participant in the same ACO. Under the presumption discussed previously, these services are assumed to have been provided by NPs, PAs, or CNSs in the FQHC. The remaining two services were provided by specialist physicians billing under a common TIN but unaffiliated with the ACO. In this case, the beneficiary would be assignable to the ACO because the beneficiary had at least one primary care service with a physician who is an ACO professional. The beneficiary would be assigned to the ACO in Step 1 because two of the beneficiary's five primary care services during the performance year were provided by NPs, PAs, or CNSs who are ACO professionals in the ACO. These two services would be considered in step 1, consistent with the proposal to include NP, PA, and CNS primary care services in step 1 of the assignment methodology. In this hypothetical example, if we did not consider the FQHC claims for the services performed by NPs, PAs, or CNSs, the beneficiary would appear to have had only three valid claims to be used for assignment and would be assigned outside the ACO under Step 2 because there is only one claim for primary care services furnished by the specialist physician who is an ACO professional in the ACO but two of the claims were for services furnished by specialist physicians outside the ACO. However, by considering the FQHC claims, the beneficiary would have five claims for primary care services and would be assigned to the ACO under step 1 because two of the services were rendered by NPs, PAs, or CNSs who are ACO professionals, in contrast to the two claims for primary care services furnished by specialist physicians outside the ACO.

We have also encountered instances where an assignable beneficiary has received primary care services from FQHCs or RHCs that are not participants in an ACO. For non-ACO participant FQHCs and RHCs, we have previously assumed that all of their primary care services are performed by primary care physicians. We believe that this assumption, which we established in operational guidance as noted previously, has helped to assure that while beneficiaries are appropriately assigned to ACOs, we do not disrupt established relationships between beneficiaries and their care providers in FQHCs and RHCs that are not ACO participants. However, we note that this special assumption for non-ACO FQHCs/RHCs would no longer be necessary under the proposed revision to the assignment methodology at § 425.402 to consider primary care services furnished by NPs, PAs, and CNSs in step 1 of the assignment methodology rather than step 2 because: (1) As indicated earlier we believe that when a physician provides a service in an FQHC or RHC, the physician is functioning as a primary care physician, regardless of his or her specialty designation in the CMS enrollment records, and (2) there is no need to differentiate between primary care services performed by physicians and primary care services furnished by NPs, PAs, and CNSs for non-ACO FQHCs/RHCs because the requirement under section 1899(c) of the Act that beneficiaries be assigned to an ACO based on their use of primary care services furnished by physicians does not apply to entities that are not participating in an ACO. Instead, for all FQHCs/RHCs regardless of whether or not they are ACO participants, we would we treat all such claims for primary care services that are furnished by someone other than a physician listed on the attestation submitted by the ACO under § 425.404(a) as a service furnished by an NP, PA or CNS. Therefore, all primary care services furnished by non-ACO FQHCs/RHCs would be considered in step 1 of the assignment methodology, and there would no longer be a need to assume such primary care services were provided by primary care physicians in order to achieve this result.

We recognize the unique needs and challenges of rural communities and the importance of rural providers in assuring access to health care. FQHCs, RHCs and other rural providers play an important role in the nation's health care delivery system by serving as safety net providers of primary care and other health care services in rural and other underserved areas and for low-income beneficiaries. We have attempted to develop and implement regulatory and operational policies to facilitate full participation of rural providers in the Shared Savings Program, within the statutory requirements for the program. We welcome comments on our

proposed revisions to § 425.404(b) and our current procedures for using claims submitted by FQHCs and RHCs in the assignment methodology and suggestions on how we might further support participation of FQHCs and RHCs in the Shared Savings Program in a manner that is consistent with the statutory requirements.

b. Assignment of Beneficiaries to ACOs That Include CAHs

We briefly addressed certain issues regarding ACOs that include CAHs in both the proposed rule (76 FR 19538 through 19539) and final rule (76 FR 67812 through 67814) establishing the Shared Savings Program. We indicated that we determined that current Medicare payment and billing policies could generally support the participation of CAHs in ACOs. However, we explained that the situation is somewhat complicated with regard to CAHs because section 1834(g) of the Act provides for two different payment methods for outpatient CAH services.

CAHs billing under section 1834(g)(1) of the Act (referred to as method I) can participate in the Shared Savings Program by establishing partnerships or joint venture arrangements with ACO professionals, just like other hospitals. CAHs billing under section 1834(g)(2) of the Act (referred to as method II) may form independent ACOs if they meet the eligibility requirements specified in the regulations. Professional services billed by method II CAHs are reported using HCPCS/CPT codes and are paid using a methodology based on the PFS. As a result, it is possible to use claims submitted by method II CAHs in the assignment methodology under § 425.402. However, method II CAH claims that include professional services require special processing because they are submitted as part of institutional claims. Therefore, we have developed operational procedures that allow these claims to be considered in the assignment process under § 425.402. Although we are not making any proposals at this time regarding the use of services billed by method II CAHs in the assignment process, we note that our procedures for incorporating claims billed by method II CAHs into the assignment methodology are available on our Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Shared-Savings-Losses-Assignment-Spec-v2.pdf* (see section 3.3.) These technical specifications allow interested parties to understand how these claims are considered in the assignment methodology under § 425.402 and to compare the manner in which claims submitted by method II CAHs are processed with the processing of claims submitted by other providers that also require special processing before they can be considered in the assignment process. We believe this additional information in the technical specifications allows for a better understanding of the differences in our procedures, and the reasons for these differences.

One question we frequently receive from ACO applicants is about the identification numbers we use for different provider types. In general, ACO participants are identified by Medicare-enrolled TINs. However, the TINs for method II CAHs are not included in the CMS claims files. Therefore, in accordance with § 425.204(c)(5)(ii), we require that as part of their application, ACO applicants also include the CCNs for any CAHs that are included as ACO participants. In the assignment methodology under § 425.402, we use the CCN as the unique identifier for an individual method II CAH.

c. Assignment of Beneficiaries to ACOs That Include ETA Hospitals

After finalizing the beneficiary assignment rules established at § 425.400 through § 425.404 in the November 2011 final rule (76 FR 67851 through 76 FR 67870), we received inquiries regarding whether primary care services performed by physicians at ETA hospitals would be included in the assignment of beneficiaries to ACOs. ETA hospitals are hospitals that, under section 1861(b)(7) of the Act and § 415.160 of our regulations, have voluntarily elected to receive payment on a reasonable cost basis for the direct medical and surgical services of their physicians in lieu of Medicare PFS payments that might otherwise be made for these services. As a result of this election, we do not receive separate claims for such physician services furnished in ETA hospitals. However, ETA hospitals do bill separately for their outpatient hospital facility services, and these bills include the information needed to assign beneficiaries to an ACO. Therefore, we have developed operational instructions and processes (available at Section 3.5 of the specification document available on our Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/Shared-Savings-Losses-Assignment-Spec-v2.pdf)* that enable us to include primary care services performed by physicians at ETA hospitals in the assignment of beneficiaries to ACOs under § 425.402.

- We include TINs and other identifiers (including the hospital CCN) for ETA hospitals in the assignment algorithm in both steps 1 and 2 of the assignment process using claims from the outpatient (institutional) file.
- It is necessary for us to use institutional claims submitted by ETA hospitals in the assignment process because ETA hospitals are paid for physician professional services on a reasonable cost basis through their cost reports and no other claim is submitted for such services. However, ETA hospitals bill us for their separate facility services when physicians and other practitioners provide services in the ETA hospital and the institutional claims submitted by ETA hospitals include the HCPCS code for the services provided. We use the HCPCS code included on this institutional claim to identify whether a primary care service was rendered to a beneficiary in the same way as for any other claim.
- To determine the rendering physician for ETA institutional claims, we use the NPI listed in the "other provider" NPI field.
- Then we use PECOS to obtain the CMS specialty for the NPI listed on the ETA institutional claim.
- These institutional claims do not include allowed charges, which are necessary to determine where a beneficiary received the plurality of primary care services as part of the assignment process. Accordingly, we use the amount that would otherwise be payable under the PFS for the applicable HCPCS code, in the applicable geographic area as a proxy for the allowed charges for the service.

We believe it is appropriate to use ETA institutional claims for purposes of identifying primary care services furnished by physicians in ETA hospitals in order to allow these services to be included in the stepwise methodology for assigning beneficiaries to ACOs. We believe including these claims increases the accuracy of the assignment process by helping ensure that beneficiaries are assigned to the ACO or other entity that is actually managing the beneficiary's care. ETA hospitals are often located in underserved areas and serve as providers of primary care for the beneficiaries they serve. We believe it is appropriate that their patients benefit from the opportunity for ETA hospitals to fully participate in the Shared Savings Program. Therefore, we propose to revise § 425.402 by adding a new paragraph (c) to provide that when considering services furnished by

physicians in ETA hospitals in the assignment methodology, we would use the amount payable under the PFS for the specified HCPCS code as a proxy for the amount of the allowed charges for the service. In addition, because we are able to consider claims submitted by ETA hospitals as part of the assignment process, we also propose to amend § 425.102(a) to add ETA hospitals to the list of ACO participants that are eligible to form an ACO that may apply to participate in the Shared Savings Program.

We invite comments on the use of institutional claims submitted by ETA hospitals for purposes of identifying primary care services furnished by physicians in order to allow these services to be considered in the assignment of beneficiaries to ACOs. We also invite comments on whether there are any other types of potential ACO participants that submit claims representing primary care services that CMS should also consider including in (or excluding from) its methodology for assigning beneficiaries to ACOs participating in the Shared Savings Program.

6. Effective Date for Finalization of Proposals Affecting Beneficiary Assignment

As indicated in section II.A. of this proposed rule, the effective date for the final rule would be 60 days after the final rule is published. However, we propose that any final policies that affect beneficiary assignment would be applicable starting at the beginning of the next performance year. We believe that implementing any revisions to the assignment methodology at the beginning of a performance year is reasonable and appropriate because it would permit time for us to make the necessary programming changes and would not disrupt the assessment of ACOs for the current performance year. Moreover, we propose to adjust all benchmarks at the start of the first performance year in which the new assignment rules are applied so that the benchmark for the ACO reflects the use of the same assignment rules as would apply in the performance year. For example, any new beneficiary assignment policies that might be included in a final rule issued in early 2015 would apply to beneficiary assignment starting at the beginning of the following performance year, which in this example would be January 1, 2016. In this hypothetical example, we would also adjust performance benchmarks that apply for the 2016 and subsequent performance years, as applicable, to reflect changes in our assignment methodology.

In addition, we would not retroactively apply any new beneficiary assignment policies to a previous performance year. For example, if the assignment methodology is applied beginning in 2016, we would not use it in mid-2016 to reconcile the 2015 performance year. In other words, the assignment methodology used at the start of a performance year would also be used to conduct the final reconciliation for that performance year.

F. Shared Savings and Losses

1. Background

Section 1899(d) of the Act establishes the general requirements for payments to participating ACOs. Specifically, section 1899(d)(1)(A) of the Act provides that ACO participants will continue to receive payment "under the original Medicare fee-for-service program under parts A and B in the same manner as they would otherwise be made," and that an ACO is eligible to receive payment for shared Medicare savings provided that the ACO meets both the quality performance standards established by the Secretary, and demonstrates that it has achieved savings against a benchmark of expected average per capita Medicare FFS expenditures. Additionally, section 1899(i)(3) of the Act authorizes the Secretary to use other payment models in place of the one-sided model outlined in section 1899(d) of the Act as long as the Secretary determines these other payment models will improve the quality and efficiency of items and services furnished to Medicare beneficiaries without additional program expenditures.

In our November 2011 final rule (76 FR 67904 through 67909) establishing the Shared Savings Program, we considered a number of options for using this authority. For example, commenters suggested we consider such options as blended FFS payments, prospective payments, episode/case rate payments, bundled payments, patient centered medical homes or surgical homes payment models, payments based on global budgets, full or partial capitation, and enhanced FFS payments for care management. However, in the November 2011 final rule (76 FR 67905), we opted not to use our authority under section 1899(i) of the Act to integrate these kinds of alternative payment models at that time, noting that many of the suggested payment models were untested. We expressed concern that immediately adopting untested and/or unproven models with which we had little experience on a national scale could lead to unintended consequences for the FFS beneficiaries we serve or for the health care system more broadly. We also noted that the Affordable Care Act had established a new Center for Medicare and Medicaid Innovation (Innovation Center) at CMS. The Innovation Center is charged with developing, testing, and evaluating innovative payment and service delivery models in accordance with the requirements of section 1115A of the Act. Many of the approaches suggested by stakeholders and commenters on the Shared Savings Program rule are the subject of ongoing testing and evaluation by the Innovation Center. In the November 2011 final rule (76 FR 67905), we noted that while we did not yet have enough experience with novel payment models to be comfortable integrating them into the Shared Savings Program at the time, we anticipated that what we learned from these models might be incorporated into the program in the future.

In the November 2011 final rule establishing the Shared Savings Program (76 FR 67909), we created two tracks from which ACOs could choose to participate: A one-sided risk model (Track 1) that incorporates the statutory payment methodology under section 1899(d) of the Act and a two-sided model (Track 2) that is also based on the payment methodology under section 1899(d) of the Act, but incorporates performance-based risk using the authority under section 1899(i)(3) of the Act to use other payment models. Under the one-sided model, ACOs qualify to share in savings but are not responsible for losses. Under the two-sided model, ACOs qualify to share in savings with an increased sharing rate, but also must take on risk for sharing in losses.

In the November 2011 final rule (76 FR 67904), we discussed our belief that offering these two tracks would create an on ramp for the program to attract both providers and suppliers that are new to value-based purchasing as well as more experienced entities that are ready to share in losses. We expressed our belief that a one-sided model would have the potential to attract a large number of participants to the program and introduce value-based purchasing broadly to providers and suppliers, many of whom may never have participated in a value-based purchasing initiative before. Another reason we included the option for a one-sided track with no downside risk was our belief that this model would be accessible to and attract smaller group participation. Indeed, commenters persuaded us that ACOs new to the

accountable care model—particularly small, rural, safety net, and physician-only ACOs—would benefit from spending time under a one-sided model before being required to accept performance-based risk (76 FR 67907).

We also noted, however, that while a one-sided model could provide incentives for participants to improve quality, it might not be sufficient incentive for participants to improve the efficiency and cost of health care delivery (76 FR 67904). Therefore, we used our authority under section 1899(i)(3) of the Act to create a performance-based risk option, Track 2, where ACOs would not only be eligible to share in savings, but also must share in losses. We believed a performance-based risk option would have the advantage of providing more experienced ACOs an opportunity to enter a sharing arrangement that provides greater reward for greater responsibility. Commenters supported our belief that models where ACOs bear a degree of financial risk hold the potential to induce more meaningful systematic change. This input from commenters underscored our own views regarding the importance of offering a pathway for ACOs to transition from the one-sided model to risk-based arrangements. These comments persuaded us that having Track 1 as a shared savings only option, while offering Track 2 as a shared savings/losses model, would be the most appropriate means to achieve our objectives. Thus, we made final these two tracks which offered the two-sided model under Track 2 to ACOs willing and able to take on performance-based risk in exchange for a greater share of any savings, and also a shared savings only model under Track 1 for the duration of an ACO's first 3-year agreement period for entities needing more experience before taking on risk. In the final rule, we required that ACOs that participate in Track 1 during their first agreement period must transition to Track 2 for all subsequent agreement periods. We noted our belief that offering the two tracks, but requiring a transition to Track 2 in subsequent agreement periods, would increase interest in the Shared Savings Program by providing a gentler "on ramp" while maintaining the flexibility for more advanced ACOs to take on greater performance-based risk in return for a greater share of savings immediately upon entering the program (76 FR 67907). Therefore, as specified in the November 2011 final rule (76 FR 67909), ACOs may enter the program in one of two tracks:

Track 1: Under Track 1, the ACO operates under the one-sided shared savings only model for its initial 3-year agreement period.

Track 2: Under Track 2, the ACO operates under the two-sided shared savings/losses model for the 3-year agreement period.

Although most of the program requirements that apply to ACOs in Track 1 and Track 2 are the same, the financial reconciliation methodology was designed so that ACOs that accept performance-based risk under Track 2 would have the opportunity to earn a greater share of savings. Thus, the same eligibility criteria, beneficiary assignment methodology, benchmark and update methodology, quality performance standards, data reporting requirements, data sharing provisions, monitoring for avoidance of at-risk beneficiaries, provider screening, and transparency requirements apply to ACOs under both models. However, the financial reconciliation methodology was modified for Track 2 in order to allow an opportunity for ACOs to earn a greater share of savings, in exchange for their willingness to accept performance-based risk. Specific differences between the two tracks include the minimum savings rate (MSR), the sharing rate based on quality performance, and the performance payment limit. Table 7 summarizes the differences between the existing one-sided and two-sided models.

In this section, we discuss various proposals for modifications to the program tracks and the financial model based on our experience to date, and propose to offer organizations an additional two-sided model (Track 3) as a further option for participation.

2. Modifications to the Existing Payment Tracks

a. Overview

Because we believe that payment models where ACOs bear a degree of financial risk have the potential to induce more meaningful systematic change in the behavior of providers and suppliers, it was our intent in the November 2011 final rule to establish the Shared Savings Program to encourage ACOs not only to enter the program, but also to progress to increased risk. Therefore, as discussed previously, we established a requirement that an ACO entering the program under Track 1 may only operate under the one-sided model for its first agreement period. For subsequent agreement periods, an ACO would not be permitted to operate under the one-sided model (§ 425.600(b)). If the ACO wishes to participate in the program for a second agreement period, it must do so under Track 2 (shared savings/losses). Additionally, an ACO experiencing a net loss during its initial agreement period may reapply to participate in the program, but the ACO must identify in its application the cause(s) for the net loss and specify what safeguards are in place to enable the ACO to potentially achieve savings in its next agreement period (§ 425.600(c)). In our view, this allowance for a full first agreement period under the one-sided model and required transition to performance-based risk in the subsequent agreement period struck a balance between our intent to encourage program participation by small, rural, or physician-only ACOs with the need to ensure that ACOs quickly transition to taking downside risk.

We are encouraged by the popularity of the Shared Savings Program, particularly the popularity of the one-sided model. Over 98 percent of ACOs participating in the Shared Savings Program (over 330 ACOs) have chosen Track 1, with only 5 ACOs participating under Track 2 as a starting option. About half of the ACOs participating in the program are small, provider-based, or rural ACOs, each having less than 10,000 assigned beneficiaries. We continue to believe that one 3-year agreement period under Track 1 is sufficient for many organizations to progress along the on-ramp to performance-based risk. We also continue to believe, as discussed in the November 2011 final rule (76 FR 67907), that payment models where ACOs bear a degree of financial risk have the potential to induce more meaningful systematic change in providers' and suppliers' behavior, so it remains our intent to continue to encourage forward movement up the ramp. However, based on our experience with the program, we recognize that many of the organizations that are currently participating in the program are risk averse and lack the infrastructure and readiness to manage increased performance-based risk. Given the short time period between finalization of the November 2011 final rule and the first application cycles, is it our impression that many ACOs, particularly smaller ACOs, focused initially on developing their operational capacities rather than on the implementation of care redesign processes. Therefore, we have some concerns about the slope of the on-ramp to performance-based risk created by the two existing tracks and the policy that requires ACOs in Track 1 (shared

savings only) to transition to Track 2 (shared savings/losses) for their second agreement period. We are particularly concerned that the current transition from one- to two-sided risk may be too steep for some organizations, putting them into a situation where they must choose between taking on more risk than they can manage or dropping out of program participation altogether. For instance, we believe that some smaller and less experienced ACOs are likely to drop out of the program when faced with this choice, because the smaller an ACO's assigned beneficiary population, the greater the chances that shared losses could result from normal variation. Also, we are aware of the concern among some stakeholders that one agreement period under the one-sided model may be not be a sufficient amount of time for some ACOs to gain the level of experience with population management or program participation needed for them to be comfortable taking on performance-based risk. For some organizations, having additional experience in the Shared Savings Program under Track 1 could help them be in a better position to take on performance-based risk over time. We are also concerned that the existing features of Track 2 may not be sufficiently attractive to ACOs contemplating entering a risk-based arrangement. Finally, some ACOs have reported that establishing the repayment mechanism required to participate under the two-sided model is difficult and ties up capital that otherwise could be used to implement the care processes necessary to succeed in the program. We continue to believe the requirement that ACOs entering the two-sided model demonstrate an adequate repayment mechanism is important for protecting the Medicare program. However, as discussed in more detail later in this section, we are proposing certain modifications to the repayment mechanism requirements applicable to ACOs under the program's two-sided model(s) (Track 2 and proposed Track 3). These proposed modifications are based on our experience with the repayment mechanism requirements and are intended to reduce the burden of these requirements on ACOs.

Hence, we are revisiting our policies related to Tracks 1 and 2 in order to smooth the on ramp for organizations participating in the Shared Savings Program. First, we propose to remove the requirement at § 425.600(b) for Track 1 ACOs to transition to Track 2 after their first agreement period. Second, we propose to modify the financial thresholds under Track 2 to reduce the level of risk that ACOs must be willing to accept. Taken together, we believe there are a number of advantages to smoothing the on ramp by implementing these proposed policies. We believe that removing the requirement that ACOs transition to a two-sided model in their second agreement period will provide organizations, especially newly formed, less experienced, and smaller organizations, more time to gain experience in the program before accepting performance-based risk. In particular, we believe the proposed changes would encourage continued participation in the program by potentially successful ACOs that would otherwise drop out because of the requirement to transition to the two-sided model in their second agreement period. We further believe the proposal to allow organizations to gain more experience under a one-sided model before moving forward to a two-sided model would encourage earlier adoption of the shared savings model by organizations concerned about being required to transition to performance-based risk before realizing savings under a one-sided model. We believe incorporating the opportunity for ACOs to remain in Track 1 beyond their first agreement period could have a beneficial effect with respect to the care that beneficiaries receive. Specifically, to the extent that more ACOs are able to remain in the program, a potentially broader group of beneficiaries will have access to better coordinated care through an ACO. In addition, allowing ACOs additional time to make the transition to performance-based risk would reduce the chances that a high-performing ACO, which believes that it is not yet ready to assume greater financial risk, will either cease to participate in the program to avoid risk or find it necessary to engage in behaviors primarily intended to minimize that risk rather than improve patient care.

Further, we believe that ACOs that accept financial responsibility for the care of beneficiaries have the greatest beneficial effects for the Medicare program and its beneficiaries. Therefore, we expect that ACOs participating in the Shared Savings Program move in the direction of accepting performance-based risk. Thus, while we believe it is appropriate to offer additional time for ACOs under a one-sided model, we also believe there should be incentives for participants to voluntarily take on additional financial risk. There should also be disincentives to discourage organizations from persisting in a shared savings only risk track indefinitely. Therefore, we believe that distinguishing the financial attractiveness of the one-sided model from the two-sided model by dropping the sharing rate in Track 1 for ACOs participating in Track 1 for a subsequent agreement period and modifying the risk inherent in Track 2 would signal to ACOs the importance of moving toward performance-based risk and encourage ACOs to voluntarily enter the two-sided model as soon as they are able. Finally, we believe that adopting restrictions to prevent organizations that have not achieved certain minimum performance requirements with respect to cost and quality of care, based on their experience to date, from obtaining additional agreement periods under Track 1 can serve as an appropriate program safeguard against entities remaining in the program that are not fully committed to improving the quality and efficiency of health care service delivery.

b. Proposals Related to Transition From the One-Sided to Two-Sided Model

We considered several options to better balance both our intent to encourage continued participation by ACOs that entered the program under the one-sided model but that are not ready to accept performance-based risk after 3 years of program participation with our concern that allowing a shared savings only option will discourage ACOs capable of taking risk from moving to a two-sided model. We considered the following options: (1) Revising the regulations to allow ACOs that enter the program under the one-sided model to continue participation in Track 1 for more than one agreement period; (2) extending the initial 3-year agreement period for an additional 2 years for ACOs that enter the program under Track 1, but that do not believe that they are ready to advance to a risk-based track; and (3) allowing ACOs to continue participation in Track 1 for more than one agreement period, but revising the one-sided model to decrease the financial attractiveness of the model, so as to encourage ACOs ready to accept performance-based risk to transition to a two-sided model.

Among these options, we believe the third option offers a good balance of encouraging continued participation in addition to encouraging progression along the on-ramp to performance-based risk. Therefore, we propose to remove the requirement at § 425.600(b) that ACOs that enter the program under Track 1 (one-sided model) must transition to Track 2 (two-sided model) after one agreement period, if they wish

to continue participating in the Shared Savings Program. Instead, we propose to revise the regulation to permit ACOs that have completed a 3-year agreement under Track 1 to enter into one additional 3-year agreement under Track 1. We believe that continued participation in the Shared Savings Program, generally, should be made available to ACOs that demonstrate they have been compliant with the program requirements, or are working through corrective action plans to CMS' satisfaction, with safeguards in place to ensure they will meet program requirements in the future. In section II.C.3. of this proposed rule, we proposed criteria for determining whether to allow ACOs that are currently participating in the program to renew their participation agreements for subsequent agreement periods. We seek to encourage the continued participation of ACOs that are successful and have the potential to move toward accepting greater responsibility for the care of their beneficiaries, but also encourage their progression along the risk continuum. Thus, we propose to make the option of participating in Track 1 for a second agreement period available to only those Track 1 ACOs that—(1) meet the criteria established for ACOs seeking to renew their agreements (as proposed in section II.C.3 of this proposed rule, including demonstrating to CMS that they satisfied the quality performance requirements under Subpart F such that they were eligible to share in savings in at least one of the first two performance years of the previous agreement period) and (2) in at least one of the first two performance years of the previous agreement period, they did not generate losses in excess of the negative MSR. For example, assume a Track 1 ACO has 15,000 assigned beneficiaries with an MSR of 2.7 percent. If we calculate that this ACO's expenditures exceeded the ACO's benchmark by 2.7 percent or more in both of the first two performance years, then CMS would not accept this ACO's request to renew its agreement under the one-sided model. If the ACO's financial performance results in expenditures in excess of the negative MSR in only one of the first two performance years, then we would accept this ACO's request to renew its participation agreement under the one-sided model, provided all other requirements for renewal were satisfied.

We believe that requiring ACOs to meet these requirements in order to remain in Track 1 will prevent consistently poor performers from being able to seamlessly continue in program participation under the one-sided model while permitting some leeway for ACOs that are new to the program and may have had some difficulty in cost or quality performance in one of the two first performance years. We also believe that these additional eligibility criteria serve as an important safeguard to reduce the potential for ACOs to participate in the program for reasons other than a commitment to improving the value of health care services. We recognize that because our assessment would be based on only 2 years of data, we would not have a complete picture of the ACO's performance during the agreement period. That is, an ACO may financially perform very poorly, exceeding the negative MSR in its first and second performance years, but demonstrate a trend in a direction that could ultimately lead to better performance in the third year. Under our proposal this ACO would not be permitted to renew its agreement under Track 1 for a second agreement period. However, an argument could be made that this ACO simply needed the additional time under a one-sided model to gain experience and start improving. We therefore seek comment on whether we should also consider the direction the ACO's performance is trending when determining whether to permit renewal of an ACO's participation agreement under Track 1. We also seek comment on whether other options for such ACOs, short of refusing their participation in a second agreement period under Track 1, would better serve program goals. We note that such ACOs would not be precluded from renewing their participation agreement in order to participate under a two-sided risk track, consistent with § 425.600(c). We also emphasize that in addition to meeting the specific criteria to be eligible to continue in Track 1, the ACO must also demonstrate that it meets the requirements to renew its agreement under proposed § 425.224, which would include the requirement that the ACO establish that it is in compliance with the eligibility and other requirements of the Shared Savings Program.

In addition, as part of our proposal to allow ACOs to participate in a second agreement period under the one-sided model, we propose to reduce the sharing rate by 10 percentage points for ACOs in a second agreement period under Track 1 to make staying in the one-sided model less attractive than moving forward along the risk continuum. As a result, the maximum sharing rate for an ACO in a second agreement period under Track 1 would be 40 percent.

Accordingly, in addition to our proposed change to § 425.600(b) to allow ACOs to participate under Track 1 for a second agreement period, we propose to modify § 425.604(d) to provide that the maximum sharing rate during a second agreement period under Track 1 will be 40 percent. As a result, ACOs that continue to participate under the one-sided model and are eligible for shared savings will receive a smaller share of those savings compared to ACOs participating under the one-sided model in their first agreement period and ACOs participating under a two-sided model. We believe permitting one additional agreement period under Track 1, but at a reduced sharing rate, will encourage the continued participation of ACOs that are successful and have the potential to move toward accepting greater responsibility for the care of their beneficiaries, but also encourage their progression along the risk continuum. However, as discussed later in this section, we also recognize that limiting ACOs to only two agreement periods under Track 1 may encourage ACOs to progress along the on-ramp to risk earlier than they otherwise might if they were permitted to remain under the one-sided model for several agreement periods.

We further note that this option to participate under the one-sided model agreement in a subsequent agreement period is only available to ACOs that have completed or are in the process of completing an agreement under the one-sided model. That is, we will not permit an ACO under a two-sided model to subsequently participate under a one-sided model.

We seek comment on this proposal. In particular, we request input on whether a 40 percent sharing rate in a second agreement period under the one-sided model is sufficient to incentivize an ACO that may need more time to prepare to take on two-sided performance-based risk while also encouraging ACOs that are ready to take on performance-based risk to choose to continue participation in the Shared Savings Program under a two-sided model.

We also considered other variations and options for allowing ACOs additional time in the one-sided model. For example, we considered allowing ACOs to continue under Track 1 for a second agreement period without any changes to the sharing rate (that is, retaining the 50 percent sharing rate in the second agreement period); however, we do not believe this approach would provide sufficient incentive for ACOs to be moving in the direction of adopting

performance-based risk. We continue to believe that participating in a model with two-sided risk offers stronger incentives for ACOs to improve the quality of care and reduce costs. Currently, ACOs in their first agreement period under Track 1 may share in up to 50 percent of the savings generated for the Medicare program. We are concerned that if ACOs are able to continue to receive up to 50 percent of savings in a second agreement period there may be insufficient incentive for many ACOs that may be ready to take on two-sided risk to move to a track with two-sided risk after their first agreement period. As a result, under our proposal we would reduce the sharing rate for ACOs participating in Track 1 for a second agreement period in order to discourage prolonged participation under Track 1 and encourage progression along the on ramp to risk where an ACO may qualify for a higher sharing rate.

We also considered permitting ACOs to participate in multiple agreement periods under Track 1 and reducing the maximum sharing rate by 10 percentage points for each subsequent agreement. Such a policy may encourage more ACOs to continue to participate in the program, but also may reduce the urgency for ACOs to progress quickly along the on-ramp to risk if they are permitted to remain under the one-sided model for several agreement periods.

We also considered offering the opportunity to ACOs participating under Track 1 to extend their initial 3-year participation agreement under Track 1 by an additional 2 years. However, we note that under this option, we would not be able to rebase the benchmark, making it more likely that organizations would achieve savings without further improvements in care redesign; yet at the same time, it would be more difficult for ACOs with losses to turn around their performance. Moreover, we are concerned that limiting ACOs to only 2 additional years under Track 1 may not be sufficient for all ACOs to take the steps necessary to prepare to move to performance-based risk.

We seek comment on our proposal to permit ACOs to participate under Track 1 for a second agreement period and to reduce the maximum sharing rate to 40 percent for ACOs participating under Track 1 for a second agreement period. We also specifically seek comments on the other options we considered, including extending an ACO's Track 1 agreement period for an additional 2-years rather than permitting two 3-year agreement periods under Track 1, permitting ACOs to participate in a second agreement period under Track 1 with no change to the sharing rate, and offering multiple agreement periods under Track 1 while reducing the sharing rate by 10 percentage points for each subsequent agreement.

In the November 2011 final rule, we also addressed the possibility that an ACO may terminate or be terminated from participation in the Shared Savings Program, and the consequences for the ACO's choice of tracks in the event it reapplies to the program. We finalized a policy that would permit such ACOs to reapply to participate in the program again only after the date on which the term of their original participation agreement would have expired if the ACO had not been terminated (§ 425.222(a)). Under § 425.222(b), to be eligible to participate in the Shared Savings Program after a previous termination, the ACO must demonstrate in its application that it has corrected the deficiencies that caused it to be terminated and that it has processes in place to ensure it will remain in compliance with the terms of the new participation agreement. We note that, all applicants undergo screening with regard to their program integrity history that may result in denial of the application (§ 425.304(b)). We also provided that an ACO under the one-sided model whose participation agreement was previously terminated may reenter the program only under the two-sided model, unless it was terminated less than half–way through its agreement period under the one-sided model, in which case the ACO would be allowed to reenter the one-sided model (§ 425.222(c)). An ACO under Track 2 whose agreement was terminated may only re-apply to participate in Track 2 (§ 425.222(c)).

In light of our proposed revisions to § 425.600 to permit an ACO to participate under Track 1 for a second agreement period, we are proposing to make conforming changes to § 425.222(c) to permit previously terminated Track 1 ACOs to reapply under the one-sided model. We propose that, consistent with our existing policy under § 425.222(c), an ACO whose agreement was terminated less than half way through the term of its participation agreement under Track 1 would be permitted to reapply to the one-sided model as if it were applying for its first agreement period. If the ACO is accepted to reenter the program, the maximum sharing rate would be 50 percent. However, in the case of an ACO that was terminated more than half way through its initial agreement under the one-sided model, we propose to revise § 425.222(c) to permit this ACO to reapply for participation under the one-sided model, but to provide that the ACO would be treated as if it were applying for a second agreement period under Track 1. Thus, if the ACO is approved to participate in the program again, the reduced sharing rate of 40 percent would apply. An ACO whose prior agreement under Track 2 was terminated would still be precluded from applying to participate under Track 1.

We seek comment on this proposal.

c. Proposals for Modifications to the Track 2 Financial Model

To complement the proposals to smooth the on ramp to risk, we are also proposing to modify the financial model under Track 2 for ACOs choosing this two-sided option to further encourage ACOs to accept increased performance-based risk. Specifically, we are proposing to modify the threshold that Track 2 ACOs must meet or exceed in order to share in savings (minimum savings rate (MSR)) or losses (minimum loss rate (MLR)). We believe this modification would improve the track's attractiveness for ACOs, particularly for ACOs that may be cautious about entering a performance-based payment arrangement such as some ACOs with smaller assigned beneficiary populations or those with less experience with managing the health of populations across sites of care.

Track 2 was designed to allow more advanced ACOs the opportunity to take on greater performance-based risk in exchange for greater reward immediately, as early as their first agreement period. In the November 2011 final rule (76 FR 67904 through 67905), we discussed concerns that had been raised about allowing ACOs to participate immediately in a risk-based arrangement. Specifically, ACOs might try to avoid at-risk beneficiaries in order to minimize the possibility of realizing losses against their benchmarks or might be unable to repay the Medicare program if they have losses. We explained our belief that the use of retrospective beneficiary assignment for financial reconciliation and the program's beneficiary notification requirements would be sufficient safeguards against the prospect that ACOs participating in the two-sided model might try to avoid at-risk beneficiaries (76 FR 67904). Further, the requirement that ACOs participating in Track 2 establish an adequate repayment mechanism provides further assurance about their ability to repay shared losses to the Medicare program.

Currently, ACOs participating in Track 2 are eligible to share in a greater

percentage of savings than ACOs participating in Track 1, but are also accountable for a share of losses compared to their benchmark. ACOs may elect to enter Track 2 in their first 3-year agreement period, or after completing one agreement period under Track 1. Under the Track 2 financial model, an ACO must have savings that meet or exceed a 2 percent threshold to be eligible to share in savings or additional expenditures that meet or exceed a 2 percent threshold to be held accountable for sharing in losses (§ 425.606(b)). As compared to the MSR used for Track 1, this fixed percentage generally offers a lower savings threshold for Track 2 ACOs to meet in order to share in savings, and was established in recognition of the Track 2 ACOs' willingness to assume the risk of incurring shared losses (76 FR 67929). In contrast, although organizations participating under the Track 1 financial model must also meet or exceed a MSR in order to be eligible to share in savings (§ 425.604(b)), the MSR under the one-sided model is established for each ACO using increasing nominal confidence intervals (CI) based on the size of the beneficiary population assigned to the ACO. Thus, an ACO with the minimum 5,000 assigned beneficiaries would have a MSR based on a 90 percent CI; an ACO with 20,000 assigned beneficiaries would have a MSR based on a 95 percent CI and an ACO with 50,000 assigned beneficiaries would have an MSR based on a 99 percent CI. In addition, the MSR under the one-sided model is not allowed to fall under 2 percent for larger ACOs. Table 5 displays the MSR an ACO participating under Track 1 would have to achieve before savings could be shared based on its number of assigned beneficiaries.

TABLE 5—MINIMUM SAVINGS RATE FOR TRACK 1

Number of beneficiaries	MSR (low end of assigned beneficiaries) (percent)	MSR (high end of assigned beneficiaries) (percent)
5,000–5,999	3.9	3.6
6,000–6,999	3.6	3.4
7,000–7,999	3.4	3.2
8,000–8,999	3.2	3.1
9,000–9,999	3.1	3.0
10,000–14,999	3.0	2.7
15,000–19,999	2.7	2.5
20,000–49,999	2.5	2.2
50,000–59,999	2.2	2.0
60,000 +	2.0	

As we described in the rulemaking establishing the Shared Savings Program (76 FR 67927), the MSR thresholds that apply under Track 1 were established on the basis of standard inferential statistics and provide confidence that, once the savings achieved by the ACO meet or exceed the MSR, the change in expenditures represents actual performance improvements by the ACO as opposed to normal variations.

Our experience with the program suggests that some ACOs, particularly ACOs with small assigned populations or those with less experience, are hesitant to elect Track 2 given the risk of losses and their inexperience with population management. Therefore, we have explored ways to reduce financial risk for ACOs participating under Track 2. One way to reduce financial risk under Track 2 would be to modify the current MSR and MLR under this track. By increasing the MSR and MLR thresholds beyond the current 2 percent, financial risk would be reduced for Track 2 ACOs because they would have to incur higher losses in order to be held accountable for shared losses. However, an ACO would also have to achieve a greater level of savings under a higher MSR in order to share in savings. In exploring potential modifications to the MSR and MLR under Track 2, we also considered increasing them using a fixed percent. For example, we considered using an MSR and MLR threshold of 3 or 4 percent that would apply to all ACOs participating in Track 2.

After considering these options, we concluded that using the same methodology currently used to establish the MSR under the one-sided model, which is based upon the size of the beneficiary population assigned to the ACO, to establish both the MSR and MLR under Track 2, would serve two purposes. Specifically, in comparison with the existing fixed 2 percent MSR and MLR that currently apply to ACOs in Track 2, it would further protect ACOs against the risk of losses likely due to normal variation while offering further protection to the Medicare program from paying for shared savings likely due to normal variation. The methodology that we used to establish the MSRs for Track 1 based upon the size of the assigned beneficiary population was intended to provide confidence that shared savings would not be earned by random chance alone (76 FR 67928). Similarly, basing the MLR under Track 2 on the size of an ACO's assigned beneficiary population would serve to statistically protect ACOs with smaller assigned populations from losses that result from normal variation, and we believe this change would make it more likely that such ACOs will be willing to take on performance-based risk under Track 2.

Therefore, we are proposing to retain the existing features of Track 2 with the exception of revising § 425.606(b) to allow the MSR and MLR to vary based on the ACO's number of assigned beneficiaries according to the methodology outlined for setting the MSR under the one-sided model in § 425.604(b) as shown in Table 6. We believe that by building in greater downside protection, this proposal may help smooth the on-ramp to performance-based risk for ACOs, particularly ACOs with smaller assigned populations, making the transition to a two-sided model more attractive.

TABLE 6—PROPOSED MINIMUM SAVINGS RATE AND MINIMUM LOSS RATE FOR TRACK 2

Number of beneficiaries	MSR/MLR (low end of assigned beneficiaries) (percent)	MSR/MLR (high end of assigned beneficiaries) (percent)
5,000–5,999	3.9	3.6
6,000–6,999	3.6	3.4
7,000–7,999	3.4	3.2
8,000–8,999	3.2	3.1
9,000–9,999	3.1	3.0
10,000–14,999	3.0	2.7
15,000–19,999	2.7	2.5
20,000–49,999	2.5	2.2
50,000–59,999	2.2	2.0
60,000 +	2.0	

With the proposed addition of Track 3 to the program, discussed later in this section, Track 2 can be viewed as a first step for some organizations to accepting performance-based risk. As such, providing an MLR that is more protective of ACOs may attract greater participation in performance-based risk under Track 2, particularly by ACOs with smaller assigned populations or those with less experience managing populations.

We seek comments on this proposal as well as other options that could potentially make Track 2 more financially attractive to ACOs. We request that commenters indicate why they believe an alternative option would be more attractive to ACOs than the one proposed and the specific reason why the option would be beneficial. We also request that commenters consider whether additional safeguards should be implemented to appropriately protect the Medicare Trust Fund, if an alternative approach were to be adopted. We also seek comment on whether we should consider implementing the prospective assignment approach proposed for Track 3 under Track 2 and whether doing so would enhance or erode the incentives for organizations to take on risk.

3. Creating Options for ACOs That Participate in Risk-Based Arrangements

a. Overview

As noted previously, we are pleased with the overall interest in the Shared Savings Program. However, we would also like to increase interest in the program by expanding the range of opportunities and models for organizations to improve the cost and quality of care delivered to Medicare FFS beneficiaries by assuming greater financial risk for their assigned beneficiaries.

In January 2012, the Innovation Center began testing the Pioneer ACO Model. The Shared Savings Program and the Pioneer ACO Model incorporate the same fundamental structure with a group of healthcare providers and suppliers coming together to form an ACO that agrees to be accountable for the care provided to a population of Medicare FFS beneficiaries. The quality reporting requirements are the same for Shared Savings Program ACOs and Pioneer ACOs. However, the Pioneer ACO Model and Shared Savings Program differ on several key elements, including the methodologies used for benchmarking, payment reconciliation, and assignment. For instance, the Pioneer ACO Model offers ACOs a greater sharing rate (up to 70 percent based on quality performance in performance year 2 of the model) compared to the Shared Savings Program, which currently offers a maximum sharing rate of 60 percent for ACOs choosing Track 2. Under the Pioneer ACO Model, beneficiaries are aligned to a Pioneer ACO prospectively at the start of each performance year and can only be removed from the list of aligned beneficiaries retrospectively based on certain exclusion criteria. In contrast, under the Shared Savings Program, beneficiaries are assigned to an ACO under Track 1 or Track 2 based upon a preliminary prospective assignment methodology with retrospective reconciliation after the end of the performance year that ultimately assigns a beneficiary to the ACO based on whether ACO professionals provided the plurality of primary care services to that beneficiary during the performance year. All Pioneer ACOs must agree to accept performance-based risk, and the financial risk increases over the course of their agreement period, whereas ACOs participating in the Shared Savings Program have an option to participate in a shared savings only model (Track 1) and for those ACOs that choose to accept performance-based risk (Track 2), the shared loss rate for which the ACO is at risk remains same throughout the agreement period. There are also a number of other differences between the two initiatives. Key features of the Pioneer ACO Model are explained in the Request for Application available online at *http://innovation.cms.gov/Files/x/Pioneer-ACO-Model-Request-For-Applications-document.pdf*, and an updated table on payment arrangements is available online at *http://innovation.cms.gov/Files/x/Pioneer-ACO-Model-Alternative-Payment-Arrangements-document.pdf*.

In the November 2011 final rule (76 FR 67907), we expressed our intent to gain experience with alternative payment models through the Innovation Center before potentially adopting them more widely in the Shared Savings Program. Currently, testing of the Pioneer ACO Model is still underway, and we do not yet have a completed evaluation of that test. However, we have heard from stakeholders that there are certain aspects of the Pioneer ACO Model that may be appealing to some organizations and that we might consider incorporating into the Shared Savings Program. Therefore, in light of our experience with the Shared Savings Program, comments from stakeholders, and early responses to the Pioneer ACO Model, we have considered certain modifications to the financial models and arrangements available under the Shared Savings Program that might encourage organizations to take on increasing financial risk in order to motivate even greater improvements in care, and also minimize the barriers faced by some ACOs that limit their willingness to accept performance-based risk.

In evaluating what features might encourage ACOs to take on increasing financial risk, we considered several

options, including modifying Track 1, modifying or eliminating Track 2, adding a Track 3 to supplement the existing ones, or a combination of these options. After reviewing these options, we are proposing to use our authority under section 1899(i)(3) of the Act to create an additional risk-based option for ACOs ready to take on increased performance-based risk.

To exercise our authority under section 1899(i)(3) of the Act, we must demonstrate that this policy; (1) " . . . does not result in spending more for such ACO for such beneficiaries than would otherwise be expended . . . if the model were not implemented . . . ." and (2) "will improve the quality and efficiency of items and services furnished under this title." We applied this authority when proposing a two-sided risk-based model in our April 2011 proposed rule (76 FR 19603), which was modified and made final in in our November 2011 final rule (76 FR 67909). As discussed in our final rule (76 FR 67904), we believed that Track 2 would provide an opportunity for organizations more experienced with care coordination and risk models that are ready to accept performance-based risk to enter a sharing arrangement that provides greater reward for greater responsibility. We believe that proposed Track 3 would offer an additional opportunity for ACOs to accept greater responsibility for beneficiary care in exchange for the possibility of greater reward. Moreover, we do not believe that adding a second two-sided risk model would result in an increase in spending beyond what would otherwise occur. To the contrary, as discussed later in our Regulatory Impact Analysis, our initial estimates suggest that the inclusion of Track 3 along with the other proposals made in this rule would improve savings for the Trust Funds resulting from this program. Further, we believe that adding Track 3 would improve the quality of care furnished to Medicare FFS beneficiaries because ACOs participating under Track 3 would have an even greater incentive to perform well on the quality measures in order to maximize the percentage of savings they may receive, while limiting their liability for any losses that might be incurred.

Hence, we are proposing to develop a new risk-based Track 3 under § 425.610, which would be based on the current payment methodology under Track 2, but would also incorporate some different elements that may make it more attractive for entities to accept increased performance-based risk.

In general, unless otherwise stated, we are proposing to model Track 3 off the current provisions governing Track 2, which in turn are modeled on Track 1, to have the same general eligibility requirements, quality performance standards, data sharing requirements, monitoring rules, and transparency requirements. However, as we discuss later in this section, we are proposing certain discrete features for Track 3 that will differentiate it from Track 2. Specifically, we propose to make modifications to the beneficiary assignment methodology, sharing rate, MSR and MLR, and performance payment and loss sharing limits. These proposals are discussed in detail in the following sections.

b. Proposals for Assignment of Beneficiaries Under Track 3

(1) Background

Currently, beneficiaries are assigned to Shared Savings Program ACOs participating under Track 1 and Track 2 based on the assignment methodology that is described in detail in the November 2011 final rule and in section II.E. of this proposed rule. Beneficiary assignment is based on the certified ACO participant list and drives a variety of program operations described in more detail in section II.B. of this proposed rule. An assigned beneficiary population is determined for each of the benchmark years as well as each performance year and used to determine the average per capita costs of the ACO's assigned FFS population in each of those years. Additionally, when an ACO enters the program, and on a quarterly basis thereafter, we perform a preliminary prospective assignment, based on the most recent 12 months of available claims data, to provide the ACO with information about the FFS population it has served in the past and that is likely to be assigned to the ACO at the end of the performance year. After the end of each performance year, we perform a final retrospective reconciliation to generate the final list of beneficiaries that chose to receive the plurality of their primary care services from ACO professionals applying the assignment methodology established under Subpart E of the regulations. Under this methodology, in developing the final list of assigned beneficiaries for the performance year, beneficiaries are both added to and removed from the preliminary prospectively assigned beneficiary lists provided to ACOs. This final list of assigned beneficiaries becomes the basis for calculating the average per capita expenditures for the performance year, and is used for financial reconciliation.

In this section, we discuss our proposals to apply a methodology to assign beneficiaries prospectively to Track 3 ACOs. However, since the program's operations currently center on retrospective assignment, we also considered a number of issues important to implementing prospective assignment for Track 3 ACOs. Specifically, we discuss our proposals for: (1) A prospective assignment methodology; (2) the timing for performing prospective assignment; (3) exclusion criteria to be applied to the prospective list at the end of the benchmark or performance year; and (4) addressing overlap and interactions between prospective assignment for Track 3 ACOs and the preliminary prospective assignment and retrospective reconciliation for Track 1 and Track 2 ACOs.

(2) Proposal for prospective assignment under Track 3

In the November 2011 final rule that established the Shared Savings Program, we adopted a preliminary prospective assignment model with retrospective reconciliation because we believed it would provide ACOs with adequate information to redesign their care processes while also encouraging ACOs to standardize these care processes for all Medicare FFS beneficiaries instead of focusing care management activities on a small subset of their FFS population. Further, we expressed our view that this approach would provide sufficient incentives for each ACO to provide quality care to its entire beneficiary population (76 FR 67864).

We continue to believe that the current Shared Savings Program assignment methodology offers strong incentives for health system redesign to impact the care for all FFS beneficiaries that receive care from ACO professionals. As a result, we believe the assignment methodology currently used for the Shared Savings Program limits the potential for gaming and reduces the motivation to target beneficiaries for avoidance. This methodology may also improve care for beneficiaries who are newly diagnosed with high cost health problems during a performance year. For example, a FFS beneficiary diagnosed with cancer during a performance year would benefit from interacting with ACO providers/suppliers that have incentives to be vigilant for beneficiaries who are likely to be assigned to their ACO retrospectively. Intervening early in the care of such patients may improve the quality and coordination of their care and reduce the cost of that care compared to what it might have been

without the early intervention by the ACO and its ACO providers/suppliers.

On the other hand, while many beneficiaries routinely see the same providers and suppliers from year to year, FFS beneficiaries that are assigned to an ACO have freedom to choose their healthcare providers and, unlike patients enrolled in many managed care plans, are not locked into seeing only ACO providers/suppliers. As a result, there is no absolute certainty that preliminarily prospectively assigned beneficiaries will continue to receive the plurality of their primary care services from ACO professionals during the performance year. Thus, there can potentially be differences between the preliminary assigned beneficiary list that the ACO receives at the start of the performance year, and every quarter thereafter, and the final assigned beneficiary list that is generated at the time of retrospective reconciliation, which is based on the actual utilization of primary care services by beneficiaries during the performance year. Given our experience with the Shared Savings Program and Physician Group Practice Demonstration before it, this is not an unexpected or unanticipated result of the methodology used to assign FFS beneficiaries who retain their freedom to choose providers under traditional FFS Medicare. That being said, the need to account for both the ebb and flow of assigned beneficiaries under the preliminary prospective assignment methodology with retrospective reconciliation used in the Shared Savings Program may discourage participation in risk-based arrangements by ACOs that seek greater certainty about the population on whom they will be assessed.

As an alternative, beneficiaries could be prospectively assigned to an ACO prior to the start of the performance year. An example of prospective alignment can be found in the Pioneer ACO Model, where beneficiaries are aligned to Pioneer ACOs prior to the start of each performance year. Under the Pioneer ACO Model, the list of prospectively aligned beneficiaries is reconciled at the end of the year to exclude certain beneficiaries from the list, for example, beneficiaries who were not eligible for alignment during the performance year; however, no new beneficiaries are added to the list. This alternative assignment methodology arguably provides Pioneer ACOs with a more targeted set of FFS beneficiaries on whom to focus their care redesign efforts during the performance year. The beneficiary alignment methodology used under the Pioneer Model can be reviewed in more detail on the Innovation Center Web site: *http://innovation.cms.gov/initiatives/Pioneer-ACO-Model/*

A prospective assignment methodology may offer ACOs a more narrowly defined target population and greater certainty about where to focus their care redesign processes. This improved certainty may be an important factor in an ACO's willingness to take on greater performance-based risk because the ACO may be better positioned to make decisions regarding where to make investments in infrastructure to deliver enhanced services. Given the higher levels of performance-based risk associated with the Pioneer ACO Model, the Innovation Center elected to use a prospective assignment methodology specifically to provide participating ACOs with greater certainty regarding their assigned beneficiary populations in order to allow them to better target their care coordination efforts to those patients.

Potential disadvantages of a prospective assignment methodology, such as the one used under the Pioneer ACO Model, are that it may encourage ACOs to narrowly focus on a subset of FFS beneficiaries in the care of their ACO providers/suppliers while not doing as much to incentivize organizations to broadly redesign care processes to improve the care for all FFS beneficiaries under the care of providers and suppliers participating in the ACO. These incentives arise because ACOs know in advance the subset of their patients for which their performance will be measured.

However, despite these concerns, we acknowledge that a prospective assignment methodology may offer greater certainty and a more narrowly defined target population for some ACOs, and these may be important factors in an ACO's willingness to take on greater performance-based risk where the ACO must make decisions regarding where to make investments in infrastructure to deliver enhanced services. We further believe that ACOs will have strong incentives to provide their prospectively assigned beneficiaries high-quality, low-cost care in order to discourage them from seeking care outside of the ACO and that beneficiaries that are prospectively assigned to an ACO will continue to be protected from concerns related to inappropriate limitations on care under traditional FFS Medicare because of their ability to choose their providers. Under the Shared Savings Program, there is no lock in for beneficiaries, therefore, we believe a prospective assignment methodology under the Shared Savings Program presents limited risks to FFS beneficiaries. Thus, having considered the relative advantages and disadvantages of prospective and retrospective assignment methodologies for FFS beneficiaries, we are proposing to implement a prospective assignment methodology for Track 3 ACOs. This prospective assignment methodology would use the same stepwise assignment methodology under § 425.402 to assign beneficiaries to ACOs in Track 3 as is currently used to assign beneficiaries to ACOs participating under Track 1 and Track 2. The major difference would be that beneficiaries would be assigned to Track 3 ACOs prospectively, at the start of the performance year, and there would be no retrospective reconciliation resulting in the addition of new beneficiaries at the end of the performance year. The only adjustments that would be made at the end of the performance year would be to exclude beneficiaries that appeared on the prospective assignment list provided to the ACO at the start of the performance year that no longer meet eligibility criteria. For the reasons discussed in the November 2011 final rule (76 FR 67851), we believe that this proposed prospective assignment methodology meets the requirement under section 1899(c) of the Act that assignment be based on the "utilization of primary care services" provided by physicians that are ACO professionals. We propose to codify this methodology in the regulations at § 425.400(a)(3).

In summary, while we have concerns that prospective assignment may inadvertently increase incentives for gaming and avoidance of at-risk beneficiaries, we have taken steps to minimize these incentives by retaining other Shared Savings Program policies and procedures such as risk-adjusting expenditures and monitoring ACOs to ensure they are not engaging in gaming or avoidance of at-risk beneficiaries. Moreover, our proposal to exclude only those beneficiaries that no longer meet the eligibility criteria for assignment to an ACO should reduce the probability that attempts by the ACO to "cherry pick" or avoid at-risk beneficiaries during the performance year would succeed. Therefore, we believe the concerns associated with a prospective assignment methodology are balanced by the potential that establishing a new Track 3 has to encourage ACOs to accept greater responsibility and financial risk for the care provided to their patients in return for the possibility of achieving greater rewards. We seek comment on these proposals. In particular, we seek comment on ways to

mitigate concerns regarding gaming and avoidance of at-risk beneficiaries under a prospective assignment methodology, whether implementing a prospective approach to assignment will dilute the program goals of delivery system redesign, and whether there are additional programmatic considerations that should be taken into account as a result of our proposal to apply a prospective assignment methodology in Track 3.

Because of the differences between the Shared Savings Program and the Pioneer ACO Model, we emphasize that the proposed prospective assignment methodology under Track 3 is not identical to the methodology used under the Pioneer ACO Model, but is tailored to the Shared Savings Program. Specifically, we propose to assign beneficiaries to an ACO participating under Track 3 using the assignment algorithm that is specified in Subpart E of the Shared Savings Program regulations, and described in more detail in section II.E. of this proposed rule.

c. Proposed Exclusion Criteria for Prospectively Assigned Beneficiaries

Next we considered how to reconcile the prospective beneficiary assignment list at the conclusion of the performance year. We recognize that changes in circumstances may cause prospectively assigned beneficiaries to no longer be eligible for assignment to an ACO at the end of a performance year. For instance, during the course of a benchmark or performance year a beneficiary may fall under one of the assignment exclusion criteria specified in proposed § 425.401(b). The proposed exclusion criteria, found at § 425.401(b), mirror the proposed eligibility criteria under § 425.401(a) with the exception of assignment to another Medicare initiative involving shared savings. This is because we believe it is appropriate to exclude only those prospectively assigned beneficiaries that are no longer eligible to be assigned to an ACO. We do not believe, however, that it will be necessary to exclude beneficiaries that are assigned to another shared savings initiative because we intend to adopt procedures to ensure that a beneficiary who is prospectively assigned to an ACO participating under Track 3 would not be assigned to another Medicare initiative involving shared savings. Therefore, we propose to perform a limited reconciliation where beneficiaries would only be removed from the prospective assignment list at the end of the year if they were not eligible for assignment at that time under the criteria in proposed § 425.401(b). For example, if a prospectively assigned beneficiary chose to enroll in Medicare Advantage (MA) at the beginning of the performance year, that beneficiary would be removed from the beneficiary assignment list at the end of the year and the beneficiary's expenditures would not be used in determining the ACO's financial performance for that year. We note that under this proposal, beneficiaries would be removed from the prospective list, but would not be added as they are in the retrospective reconciliation used under Tracks 1 and 2. Additionally, unlike the preliminary prospective assignment methodology with retrospective reconciliation used in Tracks 1 and 2, we note that under this proposal, similar to the methodology used under the Pioneer ACO Model, beneficiaries would not be removed from the prospective beneficiary assignment list because the beneficiary chose to receive primary care services during the performance year from practitioners other than those participating in the ACO. In other words, the ACO will be held accountable for all beneficiaries that appear on the prospective assignment list, with the narrow exception of those beneficiaries who are not eligible for assignment at the time of reconciliation based on the limited set of proposed exclusion criteria under proposed § 425.401(b). We believe that this methodology will help to mitigate concerns that ACOs may attempt to avoid caring for high risk beneficiaries that appear on their prospective beneficiary assignment list because the ACO will continue to be held accountable for the quality and cost of the care furnished to these beneficiaries even if the ACO providers/suppliers are not directly involved in their care. However, we note that this may mean that ACOs will be held accountable for beneficiaries with whom their ACO providers/suppliers have had little contact during the year, and therefore may have limited opportunity to affect their care. We seek comment on our proposal to assign FFS beneficiaries prospectively to ACOs and to apply limited exclusion criteria to reconcile the beneficiary assignment list at the end of the performance year.

d. Proposed Timing of Prospective Assignment

We believe it is important to provide Track 3 ACOs with their lists of prospectively assigned beneficiaries close to the start of each performance year so that these ACOs may begin to target their care coordination processes and to support ACO operations. Ideally, the prospective list of assigned beneficiaries would be generated based on the 12 months immediately preceding the performance year. However, we need a certain amount of time to generate and validate assignment lists and provide the information to the ACOs. Therefore, we must find a balance between allowing time to produce and deliver prospective assignment lists to Track 3 ACOs as near as possible to the start of each performance year with our desire to base prospective assignment on the most recent available data. For Tracks 1 and 2, we assign beneficiaries based on a 12 month period. We similarly propose to use a 12-month assignment period for Track 3. Under Tracks 1 and 2, we use the most recent available 12 months of data to determine the list of preliminarily prospectively assigned beneficiaries and data from the 12 months of the performance year to determine final assignment at the time of reconciliation. Ideally, under Track 3, we would determine prospective assignment for an ACO's performance year based on complete data for the most recent prior calendar year, for example, the third benchmark year or the previous performance year. For instance, in prospectively assigning beneficiaries to a Track 3 ACO for the performance year that begins in January 1, 2016, we would ideally have complete claims data for 2015. However, if we were to wait to obtain complete claims data for the prior calendar year, we would not be able to produce and deliver lists of prospectively assigned beneficiaries to Track 3 ACOs before the start of the performance year. In performing beneficiary assignment, we determine whether ACO professionals participating in an ACO have provided the plurality of a beneficiary's primary care services as compared to ACO professionals in all other ACOs and individual practitioners or groups of practitioners identified by TINs that are not participating in an ACO. We treat ACOs as a collection of TINs for the purpose of determining whether the ACO provided the plurality of the beneficiary's primary care services. Further, we accept new ACOs into the Shared Savings Program annually, with a participation agreement start date of January 1 of the following year. To most accurately and fairly prospectively assign beneficiaries, it is important to perform assignment by taking into consideration existing ACOs as well as new entrants to the program. Therefore, to assure that we can accurately prospectively assign beneficiaries to

ACOs under Track 3, our timeline for producing the prospective assignment lists for Track 3 ACOs must factor in the time frames associated with the program's application cycle (which typically concludes in late November/early December of each calendar year).

We considered several options for establishing the 12-month period for prospective assignment under Track 3. One option would be to use the most recent 12-month period prior to the relevant performance year for which data are available. That is, we would use a 12-month assignment window that is offset from the calendar year. For instance, to establish the assignment list for the performance year beginning January 1, 2016, we could use an assignment window from October 1, 2014 through September 30, 2015. We also considered the option of using complete claims data for the calendar year prior to the performance year (this would synchronize with the timing of the financial calculations for setting the ACO's benchmark, as discussed in more detail in II.F.3.f. of this section); however, under these parameters Track 3 ACOs would receive their prospective assignment lists well into the first quarter of each performance year. We believe Track 3 ACOs would find such a delay in their receipt of their prospective assignment list burdensome for carrying out the ACO's health care operations, including care coordination processes and data analysis. We believe the first option best balances the availability of claims data with our belief that it is important to produce and deliver these prospective beneficiary assignment lists near the start of each performance year. Therefore, we are proposing to base prospective assignment on a 12-month assignment window (off-set from the calendar year) prior to the start of the performance year. We further propose to define an "assignment window" at § 425.20 as the 12-month period used to assign beneficiaries to an ACO. The assignment window for Tracks 1 and 2 would be based on a calendar year while the assignment window for Track 3 would be based on the most recent 12 months for which data are available, and which would be off-set from the calendar year. We propose to make conforming changes to the regulations to refer to the assignment window where appropriate.

e. Proposals for Addressing Interactions Between Prospective and Retrospective Assignment Models

Because there are markets in which there are multiple ACOs, we anticipate that there will be interactions between prospective assignment for Track 3 ACOs and preliminary prospective assignment with retrospective reconciliation for Track 1 and Track 2 ACOs. Under the Shared Savings Program, a beneficiary may only be assigned to a single ACO for purposes of determining the ACO's financial and quality performance during a performance year. Accordingly, a beneficiary that is prospectively assigned to a Track 3 ACO would remain assigned to the Track 3 ACO for the performance year even if the beneficiary chose to receive a plurality of his or her care outside the ACO. Furthermore, we propose that the beneficiary would remain assigned to the Track 3 ACO even if we determine as part of the retrospective reconciliation for Track 1 and Track 2 ACOs that the beneficiary actually received the plurality of his or her care from ACO professionals in another ACO. Similarly, a beneficiary prospectively assigned to a Track 3 ACO would remain assigned to that ACO even if we subsequently determine the beneficiary actually received the plurality of his or her primary care from ACO professionals participating in another Track 3 ACO. In other words, we propose that once a beneficiary is prospectively assigned to a Track 3 ACO, the beneficiary will not be eligible for assignment to a different ACO, even if the beneficiary chose to receive a plurality of his or her primary care services from ACO professionals in that ACO during the relevant performance year. As an aside, we note that it is unlikely that such a beneficiary would be assigned prospectively to that same Track 3 ACO for the next performance year.

f. Proposals for Determining Benchmark and Performance Year Expenditures Under Track 3

As specified in the November 2011 final rule, we establish the historical benchmark for ACOs in Tracks 1 and 2 by determining the per capita Parts A and B fee-for-service expenditures for beneficiaries that would have been assigned to the ACO in any of the 3 most recent years prior to the start of the agreement period using the ACO participant TINs identified at the start of the agreement period (§ 425.602(a)). For each benchmark year that corresponds to a calendar year, this includes calculating the payment amounts included in Parts A and B fee-for-service claims using claims received within 3 months following the end of the calendar year (referred to as a "3 month claims run out") with a completion factor, excluding IME and DSH payments and considering individually beneficiary-identifiable payments made under a demonstration, pilot or time limited program (§ 425.602(a)(1)). Similarly in determining shared savings and losses for Tracks 1 and 2 (under § 425.604 and § 425.606), we use a 3-month claims run out with a completion factor to calculate an ACO's per capita expenditures for each performance year. Calculations of the ACO's performance year expenditures include the payment amounts of Part A and B fee-for-service claims. These calculations similarly exclude IME and DSH payments, and take into consideration individually beneficiary identifiable payments made under a demonstration, pilot or time limited program. We believe this approach is well accepted and therefore propose to use the same general methodology for determining benchmark and performance year expenditures under Track 3. We also propose to add a new regulation at § 425.610 to address the calculation of shared savings and losses under Track 3.

In establishing the historical benchmark for Track 3 ACOs, we propose to determine the beneficiaries that would have been prospectively assigned to the ACO during each of the 3 most recent years prior to the start of the agreement period; basing benchmark year assignment on a 12-month assignment window offset from the calendar year prior to the start of each benchmark year. However, we propose that we would still determine the Parts A and B fee-for-service expenditures for each calendar year, whether it is a benchmark year or a performance year, using a 3-month claims run out with a completion factor for these prospectively assigned beneficiaries. We would exclude IME and DSH payments and account for individually beneficiary-identifiable payments made under a demonstration, pilot or time limited program during the calendar year that corresponds to the benchmark or performance year. For example, for an ACO entering Track 3 beginning January 1, 2016, we would determine the benchmark based on CYs 2013, 2014, and 2015. We would determine a prospective list of beneficiaries using the assignment window for each year (based on an off-set 12 month period such as October 1, 2011 through September 30, 2012 for BY1) as discussed previously. However, the claims used to determine the per capita expenditures for BY1 would be based on claims submitted during the calendar year from January 1, 2013 through December 31, 2013. The same pattern would be used to determine the

assignment and per capita expenditures for BY2 and BY3. We would apply the same pattern going forward to calculate per capita expenditures for the performance years.

We believe this methodology is advantageous for several reasons. First, this methodology would remove actuarial bias between the benchmarking and performance years for assignment and financial calculations, since the same method would be used to determine the assignment and financial calculations for each benchmark and performance year. Second, basing the financial calculations on the calendar year is necessary to align with actuarial analyses with respect to risk score calculations and data inputs based on national FFS expenditures used in program financial calculations that depend on the calendar year (for example, national FFS trend factors for the historical benchmark, national FFS growth factors used in creating the updated benchmark, and truncation points).

We note that the timing of the generation of historical benchmark reports for Track 3 ACOs would also be consistent with the current schedule for generating these reports for ACOs in Tracks 1 and 2. That is, for an ACO that begins Track 3 in 2016, the prospective beneficiary assignment list would be available immediately at the beginning of the performance year and the historical benchmark report would be available following the 3 month claims run out, sometime after the first quarter of 2016.

g. Proposals for Risk Adjusting the Updated Benchmark for Track 3 ACOs

Another aspect of the financial models used under the Shared Savings Program that we considered when developing Track 3 is our methodology for risk adjusting an ACO's updated benchmark expenditures to account for changes in severity and case mix for beneficiaries assigned in the current performance year. Currently, under Track 1 and Track 2, the risk adjustment methodology differentiates between newly and continuously assigned beneficiaries, as defined under § 425.20. A newly assigned beneficiary is a beneficiary assigned in the current performance year who was neither assigned to nor received a primary care service from any of the ACO participants during the most recent prior calendar year. A continuously assigned beneficiary is a beneficiary assigned to the ACO in the current performance year who was either assigned to or received a primary care service from any of the ACO participants during the most recent prior calendar year. As specified under § 425.604(a), and § 425.606(a), we use updated CMS–HCC prospective risk scores to account for changes in severity and case mix for newly-assigned beneficiaries. We use demographic factors to adjust for these changes in severity and case mix for continuously assigned beneficiaries. However, if the CMS–HCC prospective risk scores for the continuously assigned population show a decline, we use the lower risk score to adjust for changes in severity and case mix for this population. As we explained in the November 2011 final rule (76 FR 67918), we believe that this approach to risk adjustment strikes a fair balance between accounting for changes in the health status of an ACO's population while not encouraging changes in coding practices for care provided to beneficiaries who remain continuously assigned to the ACO or avoidance of high risk beneficiaries. We believe that the existing risk adjustment methodology has been effective in achieving this balance under Tracks 1 and 2, which use a retrospective assignment methodology for purposes of financial reconciliation, and that it would be appropriate to apply a similar approach to risk adjusting the updated benchmark for Track 3 ACOs, even though we are proposing a prospective beneficiary assignment methodology. We believe that this risk adjustment methodology is relevant to updating ACO benchmarks under both a retrospective assignment model and a prospective assignment model. We believe that as in the existing Tracks, it is important to ensure that ACOs participating under the proposed Track 3 are not encouraged to modify their coding practices in order to increase the likelihood of earning shared savings; rather, shared savings should result from actual reductions in Medicare expenditures for assigned beneficiaries.

Therefore, we carefully considered the risk adjustment methodology in the context of our proposal to use a prospective assignment methodology under Track 3. We determined that while the same general risk adjustment methodology could be used, there are certain minor modifications that must be made to accommodate the prospective assignment approach. Specifically, we determined that the existing definitions of newly and continuously assigned beneficiaries must be adjusted for Track 3 ACOs.

Both definitions refer to determining whether the beneficiary was assigned to the ACO or received primary care services from an ACO participant in the "prior calendar year". However, our proposal for Track 3 assignment does not correspond to the 12 months in a calendar year. Instead, as proposed in the section, we would use an off-set 12-month period prior to the relevant performance or benchmark year to prospectively assign beneficiaries. If we continue to use a calendar year as the basis for determining continuously and newly assigned beneficiaries, very few beneficiaries would be designated as newly assigned for each performance year and we would expect that the majority of assigned beneficiaries would be designated as continuously assigned. As a consequence, the major risk adjustment applied under Track 3 would be based on demographic factors only. We do not believe this policy would strike the same balance achieved when applied under a model with retrospective assignment (Track 1 and Track 2).

Therefore, we propose refining our definitions of newly and continuously assigned beneficiaries at § 425.20 to also be consistent with our proposed prospective assignment approach for Track 3. Specifically, we propose to replace the reference to "most recent prior calendar year" with a reference to "the assignment window for the most recent prior benchmark or performance year." Thus, for Track 3 the reference period for determining whether a beneficiary is newly or continuously assigned will be most recent prior prospective assignment window (the off-set 12 months) before the assignment window for the current performance year and the reference period for determining whether a Track 1 or 2 beneficiary is newly or continuously assigned will continue to be the most recent prior assignment window (the most recent calendar year). Our proposed risk adjustment methodology for Track 3 is reflected in the proposed new regulation at § 425.610(a).

h. Proposals for Final Sharing/Loss Rate and Performance Payment/Loss Recoupment Limit under Track 3

Currently, an ACO that meets all the requirements for receiving shared savings payments under the one-sided (Track 1) model can qualify to receive a shared savings payment of up to 50 percent of all savings under its updated benchmark, not to exceed 10 percent of its updated benchmark, as determined on the basis of its quality performance. Likewise, a Track 2 ACO can potentially receive a shared savings payment of up to 60 percent of all savings under its updated benchmark, not to exceed 15 percent of its updated benchmark. The higher sharing rate and performance

payment limit under Track 2 were established as incentives for ACOs to accept greater financial risk for their assigned beneficiaries in exchange for potentially higher financial rewards. Additionally, a Track 2 ACO is accountable for between 40 to 60 percent of all losses under its updated benchmark, depending on the ACO's quality performance. The amount of shared losses for which an ACO is liable, however, may not exceed 5 percent of its updated benchmark in the first performance year, 7.5 percent in the second performance year, and 10 percent in the third performance year and any subsequent performance year (§ 425.606(g)). In the November 2011 final rule (76 FR 67937), we stated that we believe these progressively higher caps on losses "achieve an appropriate balance between providing ACOs with security about the limit of their accountability for losses while encouraging ACOs to take increasing responsibility for their costs and protecting the Medicare Trust Funds." We note that under one of the payment arrangements available under the Pioneer ACO Model, a Pioneer ACO can qualify to receive up to 75 percent of shared savings, not to exceed 15 percent of its benchmark. Under this payment arrangement, Pioneer ACOs may also be responsible for shared losses of up to 15 percent of their benchmark.

Currently, only five of the ACOs participating in the Medicare Shared Savings Program are participating under Track 2. Given this level of ACO participation under this model, we considered options for improving the attractiveness of the final sharing rate and performance payment limit in a risk model. For example, we considered whether the current sharing rate under Track 2 is insufficient to encourage ACO participation under a risk-based model and whether increasing the sharing rate would better attract organizations to take on performance-based risk. We also observed that the higher sharing rates available under the Pioneer ACO model have appeared to be helpful in encouraging ACO participation. Further, we believe it is important to draw a distinction between the sharing rates available under Track 2 and the proposed Track 3. As discussed later in this section, we are proposing that ACOs participating in Track 3 would be subject to a fixed 2 percent MLR (compared to the proposed revisions that would allow the MSR and MLR under Track 2 to vary between 2.0 percent and 3.9 percent). Thus, we believe it is important to reward Track 3 ACOs with a greater level of savings for taking on this greater level of risk. Accordingly, we are proposing to set the sharing rate under Track 3 at 75 percent. Likewise, we considered whether the current 15 percent performance payment limit for Track 2 ACOs may discourage participation under a risk-based model. In our November 2011 final rule (76 FR 67935 through 67936), we noted a range of commenters had urged us either to eliminate the limits on shared savings or to apply higher payment limits for both models, with limits as high as 25 percent. We explained that retaining the performance payment limits is necessary to comply with the statute and important for ensuring against providing an overly large incentive that may encourage ACOs to generate savings through inappropriate limits on necessary care. As was the case when we issued that rule, we continue to believe that retaining a performance payment limit is necessary. However, we believe that a modest increase in the performance payment limit for ACOs willing to take on the greater level of risk under Track 3 may balance our concerns while increasing the attractiveness of the model. Accordingly, for Track 3 ACOs, we are proposing a performance payment limit not to exceed 20 percent of the ACO's updated benchmark. We note that the shared loss rate would similarly increase to a maximum of 75 percent to retain symmetry within the model which is comparable to the approach we used to establish the shared loss rate for Track 2 ACOs.

To establish even stronger incentives for encouraging ACOs to assume greater responsibility for the quality and cost of the care furnished to their assigned beneficiaries, we are also considering variations on the previous proposals. Currently, under the two-sided model, an ACO's quality score is taken into account when calculating the ACO's final sharing rate. Under Track 2, an ACO with poor quality performance may be responsible for repaying Medicare up to 60 percent of losses while an ACO with very high quality performance may be responsible for repaying Medicare only 40 percent of the losses incurred (see § 425.606(f)). If we retain symmetry between the shared savings and shared losses methodologies under Track 3, an ACO with very low quality performance could be responsible for repaying Medicare up to 75 percent of losses while a Track 3 ACO with very high quality performance would only be responsible for 25 percent of losses.

However, it may not be desirable under Track 3 to allow such a broad range for shared losses, which could be viewed as increasing the potential reward without similarly increasing risk. Therefore, we considered other options for increasing potential shared savings while also increasing risk, or holding risk constant compared to Track 2. Under one option we considered, Track 3 ACOs would be responsible for the maximum percentage of losses, that is, 75 percent, but quality performance would only protect them to the same extent it protects Track 2 ACOs, such that ACOs with very high quality scores would limit their percentage of losses to 40 percent. Alternatively, we could retain the minimum and maximum shared loss rates found under Track 2 (that is, the range of 40 percent to 60 percent, depending on quality performance) but the maximum shared savings rate would be increased to 75 percent in order to encourage participation in a model with increased risk.

After considering these options, in § 425.610(d) and (f) we are proposing to increase the sharing rate for Track 3 ACOs so that they may qualify for up to 75 percent of all savings under their updated benchmark in conjunction with accepting risk for up to 75 percent of all losses, depending on the quality performance of the organization for the reasons articulated previously. We are also proposing under new § 425.610(e)(2) to increase the performance payment limit to 20 percent of an ACO's updated benchmark. Additionally, rather than gradually increasing the cap on shared losses for Track 3 ACOs (as is done under Track 2), in § 425.610(g), we are proposing that the amount of shared losses for which an ACO may be liable may not exceed 15 percent of its updated benchmark in each year of the ACO's 3-year agreement period. We believe that capping losses at 15 percent would provide adequate protection to the Medicare Trust Funds while limiting risk to ACOs, thereby encouraging them to progress along the risk continuum. We also propose that ACOs with high quality performance would not be permitted to reduce the percentage of shared losses for which they would be responsible for each year of the agreement period below 40 percent. We believe it is important for Track 3 ACOs to be held responsible for at least the same amount of downside risk as Track 2 ACOs. We seek comment on whether this percentage is high enough to protect the Trust Funds or whether it should be increased, for example, to 50 percent or 60 percent. We also seek comment on whether our

proposal to establish a range of 40 percent to 75 percent for shared losses should, in turn, impact the amount of shared savings available to Track 3 ACOs. For example, should we permit Track 3 ACOs to earn a parallel range of 40 percent to 75 percent of shared savings. In other words, once the ACO has met criteria for sharing in savings, the minimum guaranteed amount of shared savings would be 40 percent with a maximum of 75 percent.

We seek comments on these proposals and the proposed new regulation at § 425.610. In particular, we request comment on the appropriate minimum percentage of shared losses under Track 3. We also seek comment on the appropriate percentage for the performance payment limit and loss recoupment limit and whether there are reasons to set these at 15 percent and 10 percent respectively, rather than our proposal of 20 percent and 15 percent respectively.

Finally, we are also proposing to make certain technical, conforming changes to § 425.606, which governs the calculation of shared savings and losses under Track 2, to reflect our proposal to incorporate a second two-sided risk model into the Shared Savings Program. We seek comments on these proposed changes and on any other technical changes to our regulations that may be necessary in order to reflect the proposal to add a new Track 3.

i. Proposals for Minimum Savings Rate and Minimum Loss Rate in Track 3

In this proposed rule, we are proposing to replace the current fixed 2 percent minimum savings rate (MSR) and minimum loss rate (MLR) under Track 2 with a MSR and MLR that will vary based on the number of beneficiaries assigned to the ACO, mirroring the methodology currently used to determine the MSR under Track 1. We proposed this change as a way to reduce financial risk and thereby increase the attractiveness of Track 2 to prospective ACOs and ACOs continuing in the program for a second or subsequent agreement period. Specifically, we believe it is important to offer a risk-based option attractive to smaller ACOs that may be hesitant to take on performance-based risk. Under the proposed modifications to Track 2, smaller ACOs would have an MLR greater than 2 percent, which would provide additional protection to these ACOs against incurring losses as a result of normal variations in expenditures. Moreover, while reducing financial risk for Track 2 ACOs, the proposal would also offer greater protection to the Medicare program by raising the savings threshold that must be achieved before an ACO would be eligible to share in savings for all but the largest ACOs.

As discussed previously in this section, we are proposing to establish a new Track 3 as an additional option for participation in the Shared Savings Program with stronger incentives to encourage ACOs to accept greater responsibility and risk for their beneficiaries. Hence, for Track 3 ACOs, we are proposing to apply the same fixed 2 percent MSR and MLR that currently apply to Track 2 ACOs. As we discussed in the November 2011 final rule (76 FR 67929), establishing the Shared Savings Program, the use of an MSR and MLR remains important under a two-sided risk model to guard against normal variations in costs, so that ACOs share savings or losses with the program only under those circumstances in which we can be confident that those savings and losses are the result of the ACOs' actions rather than normal variation. As we noted in that final rule, it is more appropriate to employ a fixed MSR under a two-sided model than under the one-sided model. First, given the potential for shared loss, the greater predictability of a fixed MSR is more likely to attract organizations to participate under the model. Second, there is greater protection for the Medicare Trust Fund from normal variation under a two-sided model because ACOs accept the risk of repaying the Medicare program for shared losses. Therefore, in the November 2011 final rule (76 FR 67929), we adopted a fixed 2 percent MSR and MLR for ACOs participating under Track 2. We selected 2 percent because this is the lowest MSR under the one-side model and was also the MSR that was used in the PGP demonstration. As discussed previously in this section, we are now proposing to modify the MSR and MLR under Track 2 to vary based upon the size of the ACO. We believe this change would improve the attractiveness of Track 2 by offering ACOs that may be less experienced with performance-based risk greater protection against shared losses. However, because Track 3 is intended for ACOs that are willing to accept a greater degree of risk in exchange for the opportunity to share in a greater percentage of shared savings, we believe it is appropriate to use a fixed 2 percent MSR and MLR under this track. We believe that setting the MSR and MLR at this level would offer greater predictability, which may attract more ACOs to participate in Track 3. In addition, as we discussed in the November 2011 final rule (76 FR 67929), the requirement that ACOs repay shared losses offers additional protection to the Medicare Trust Funds, which allows for the application of a lower, fixed MSR. Accordingly, we propose to apply the same fixed 2 percent MSR and MLR that currently apply to Track 2 ACOs to ACOs that elect to participate in Track 3. This proposal is reflected in paragraph (b) of the proposed new regulation at § 425.610. We seek comments on this proposal.

Although we are proposing to apply a fixed MSR and MLR of 2 percent under Track 3, we also considered other options for establishing the MSR and MLR for Track 3 ACOs, including an option that would remove the MSR and MLR entirely. Under this option, ACOs would be subject to normal variation around their benchmark so that they would be held responsible for all losses when performance year expenditures were above the benchmark in addition to sharing in any savings if performance year expenditures fell below the benchmark. Another option could be to set both the MSR and MLR to 1 percent instead of 2 percent. This would serve to increase both risk of sharing losses and savings, but not as much as doing away with the MSR and MLR entirely. We specifically seek comment on whether it would be desirable to remove the MSR and MLR entirely under Track 3 as well as alternative levels at which to set the MSR and MLR for ACOs participating under Track 3. We will consider comments that are received regarding these alternatives in determining the final MSR and MLR that would apply under Track 3.

4. Seeking Comment on Ways To Encourage ACO Participation in Performance-Based Risk Arrangements

We are encouraged by stakeholder interest in the Shared Savings Program. Since implementation of the Shared Savings Program in 2012, there are now more than 330 organizations participating. Based on the initial experience we have gained with the Shared Savings Program, however, we believe ACOs are very reluctant to accept two-sided performance-based risk arrangements in which ACOs would share in both Medicare savings and losses because only a small number of ACOs have agreed to participate in the Shared Savings Program under Track 2, which provides for two-sided performance-based risk. Ninety-eight percent of the ACOs participating in the Shared Savings Program have elected to participate under Track 1 (shared savings only). We believe that under a two-sided performance-based risk model, ACOs have much stronger

incentives to achieve high quality and to avoid unnecessary costs, which is why we are proposing Track 3 as a possibly more attractive alternative to Track 2. The incentive for ACOs to achieve high quality and avoid unnecessary costs under a two-sided performance-based risk model is supported by the impact analyses performed by the CMS actuary provided in section V. of this proposed rule. Accordingly, in order for the Shared Savings Program to be effective and sustainable over the long term, we believe we may need to further strengthen our efforts to transition the Shared Savings Program to a two-sided performance-based risk program in which ACOs would share in both Medicare savings and losses.

We received a wide range of suggestions from ACOs, the Brookings Institution, MedPAC, and other stakeholders of ways to improve the Shared Savings Program and to address ACO concerns that they believe are essential to the longer term success of the program. The Brookings Institution has identified a number of critical issues that warrant further discussion and consideration for ensuring the continued success of ACOs in the Medicare Program. See "Issue Brief: How to Improve the Medicare Accountable Care Organization (ACO) Program" at: *http://www.brookings.edu/~/media/research/files/papers/2014/06/16%20medicare%20aco%20challenges%20and%20alternatives/2%20mcclellan%20et%20al%20%20medicare%20aco%20program%2062014.pdf.*

In a June 16, 2014 letter to CMS (*http://www.medpac.gov/documents/06162014_ACO_issue_letter_2014_COMMENT.pdf*), MedPAC raises several issues for consideration in connection with CMS ACO models in the short and long term. MedPAC indicates that ACOs represent an opportunity to transform the delivery system, but MedPAC believes that realizing that opportunity would require providers to change their practices and take a risk on this new payment system, and that we would need to be flexible and responsive as the program evolves. MedPAC's recommendations are based on discussions with representatives from many ACOs, structured interviews and case studies with Pioneer ACOs, analysis of early data on ACO performance, and reviewing progress with CMS staff. MedPAC reports that many ACO providers/suppliers who they have spoken with have patients in both MA plans and FFS Medicare. Under MA, providers can furnish services and use techniques that are not available under FFS Medicare or, by extension, under the current rules governing the Shared Savings Program. For example, pursuant to section 1861(i) of the Act, FFS Medicare requires a 3-day inpatient hospital stay before a SNF services will be covered under Medicare Part A, but MA plans can offer a waiver of the 3 day prior inpatient hospitalization requirement as a supplemental benefit. ACOs have indicated that they like the flexibility that capitated payments would give them to redesign care and benefits to meet the needs of their patient populations.

Under the current Medicare FFS system, providers have a financial incentive to increase their volume of services. As a result, many current Medicare regulations are designed to prevent overuse of services and the resulting increase in Medicare spending in this context. In brief, MedPAC believes that moving to two-sided performance-based risk under the Shared Savings Program would provide strong incentives for organizations to control costs, which should, in turn, open up the opportunity for regulatory relief across a broad range of issues. Removing certain regulatory requirements may provide ACOs with additional flexibility to innovate further, which could in turn lead to even greater cost savings. These views are supported by analyses performed by CMS actuaries that suggest two-sided performance-based risk provides stronger incentives for ACOs to achieve savings. Thus, ACOs and MedPAC have encouraged us to consider relaxing certain specific FFS Medicare payment and other rules under two-sided performance-based risk models in the Shared Savings Program.

In the sections that follow, we solicit comment on several options that are currently under consideration for inclusion in the Shared Savings Program. We first consider options that would implicate the waiver authority under section 1899(f) of the Act and then consider other options that could be implemented independent of waiver authority. Although we are not specifically proposing these options at this time, we will consider the comments that are received regarding these options during the development of the final rule, and may consider adopting one or more of these options in the final rule.

a. Payment Requirements and Other Program Requirements That May Need To Be Waived in Order To Carry Out the Shared Savings Program

As noted previously, few organizations have chosen to participate in the Shared Savings Program under two-sided performance-based risk. In addition to the elements designed to enhance participation in a two-sided performance-based risk track under the proposed new Track 3, we believe it may be necessary and appropriate to provide for additional program flexibilities to increase ACOs' willingness to participate in the Shared Savings Program under two-sided performance-based risk arrangements to increase quality and decrease cost growth. These possible additional flexibilities could include use of our waiver authority to waive certain Medicare Program rules under section 1899(f) of the Act, which provides authority for the Secretary to waive "such requirements of . . . title XVIII of this Act as may be necessary to carry out the provisions of this section." This provision affords broad authority for the Secretary to waive statutory program requirements as necessary to carry out the provisions of section 1899 of the Act. In order to waive FFS payment or other program rules, the waiver must be determined to be necessary for CMS to carry out the provisions of section 1899 of the Act, which govern the Shared Savings Program. (The authority at section 1899(f) of the Act has been used by the Office of Inspector General and CMS to issue an interim final rule with comment period setting forth waivers of certain fraud and abuse authorities (76 FR 67992), which was published concurrently with the November 2011 final rule establishing the Shared Savings Program. This rulemaking does not address fraud and abuse waivers, and we are not soliciting comment on such waivers.)

As noted previously, we are encouraged by the robust participation of organizations under the one-sided model of the Shared Savings Program. However, we continue to believe that the long term effectiveness and sustainability of the program depend on encouraging ACOs to progress along the performance-based risk continuum. Given the very limited ACO interest thus far in two-sided performance-based risk, and the comments and suggestions by stakeholders, we now believe that the authority under section 1899(f) of the Act to waive certain payment or other program requirements may be necessary to carry out the provisions of the Shared Savings Program and to permit effective implementation of two-sided performance-based risk tracks under the program. As discussed previously, on the April 2011 proposed rule, both we and many commenters believe that models where ACOs bear a degree of financial risk hold the potential to

induce more meaningful systematic change than one-sided models. We believe that ACOs that bear financial risk would have a heightened incentive to restrain wasteful spending by their ACO participants and ACO providers/suppliers. This, in turn, may reduce the likelihood of over-utilization. In these circumstances, waiver of certain payment and other programmatic rules for ACOs with two-sided risk may be appropriate to give providers more flexibility under FFS Medicare to provide appropriate care for beneficiaries.

We would point out that while we are considering these waiver issues under the Shared Savings Program, we are also actively moving forward with testing certain payment rule and other waivers as part of models tested by the Innovation Center under section 1115A of the Act, including the Pioneer ACO Model. For example, as explained below, we already have a few months of data from our initial test of the waiver of the SNF 3-day rule under the Pioneer ACO Model, and we are in the process of testing beneficiary attestation under the Pioneer ACO Model. In addition, under the demonstration authority in section 402 of Public Law 90–248, as amended (42 U.S.C. 1395b–1), we granted Massachusetts General Hospital (MGH) the ability to admit certain patients enrolled in its Care Management for High Cost Beneficiaries Demonstration directly into a SNF without a 3-day prior inpatient hospitalization, and we intend to release a report evaluating this waiver later this year. Based on our experience with the waiver of the SNF 3-day rule in the MA program, and an initial, limited assessment of the MGH waiver performed by CMS actuaries, we expect that the waiver of the SNF 3-day rule under the Pioneer ACO Model will result in savings for the Medicare Trust Funds.

We are learning from these tests and would seek to refine our policies as we move forward. Through such testing we frequently identify issues that neither we nor stakeholders had previously identified. Developing and implementing such policies in a test environment provides an opportunity for us to better understand the effects on providers, beneficiaries, and Medicare as well as to further fine tune the operations.

We welcome comments on possible waivers under section 1899(f) of the Act of certain Medicare payment or other program requirements suggested by stakeholders that might be necessary to permit effective implementation of two-sided performance-based risk in the Shared Savings Program. As noted previously, we will consider the comments that are received during the development of the final rule, and in the final rule may consider waiving certain requirements if we conclude that such a waiver is necessary in order to carry out the Shared Savings Program. We are especially interested in comments explaining how such waivers may be necessary to encourage ACOs to accept performance-based risk arrangements under the Shared Savings Program, and how such waivers could provide ACOs with additional ways to increase quality of care and reduce unnecessary costs that are not permitted under FFS Medicare, but that could be appropriately used in the context of an ACO model that incorporates two-sided performance-based risk. What program integrity and beneficiary protection risks could be introduced by waivers of the payment and program rules described later in this section of this proposed rule and how could we mitigate those risks? Would a waiver of these requirements impact notification to beneficiaries of participation in the Shared Savings Program as required under § 425.312? What operational issues do ACOs and CMS need to consider and what processes would ACOs need to have in place to implement these alternative payment and other program policies? What implications would there be for ACO infrastructure including IT and other systems and processes? What provider education would be needed? What other issues should be considered when making use of waiver authority with respect to payment and program rules? Should any waivers apply to all two-sided performance-based risk tracks or should they be limited to a specific two-sided risk track? Should waivers be available only for those organizations willing to take on the greatest performance-based risk under the Shared Savings Program? For example, should waivers be limited to the use of organizations participating in Track 3 because participants in Track 3 would agree to be held accountable for up to 75 percent of shared losses compared to participants in Track 2 who would agree to be held accountable for up to 60 percent of shared losses? Should the waivers be made available to all organizations participating in the applicable risk tracks or only to those ACOs that have successfully participated in the Shared Savings Program or another ACO model previously?

We also note that the ability to implement any waivers of payment or program rules may vary for ACOs participating under Track 2 and Track 3 because of the differences in how beneficiaries are assigned to ACOs under those Tracks. We are considering whether a waiver that applies only to beneficiaries assigned to the ACO would perhaps be more appropriately implemented under a model in which there is prospective assignment of beneficiaries, such as proposed Track 3. Under prospective assignment, beneficiaries would be assigned to the ACO for the entire performance year, and it would thus be clear as to which beneficiaries the waiver applied. Having clarity as to the beneficiary to which a waiver applies may be important for the ACO to comply with the conditions of the waiver and could also improve CMS' ability to monitor waivers for misuse. Another option would be to apply the waivers to any FFS beneficiary cared for by an eligible ACO. Then the waiver could be available to all ACOs participating in a two-sided risk track, regardless of whether the assignment is prospective or retrospective. Another option would be to apply such waivers to beneficiaries that appear on the quarterly lists of preliminarily prospectively assigned beneficiaries. Under this approach, the population for whom the waiver is available would likely change from quarter to quarter. We seek comment on whether any waivers of payment or program rules would be more viable under proposed Track 3, which includes prospective beneficiary assignment, versus Track 2 in which beneficiaries are assigned using a preliminary prospective assignment methodology with final retrospective reconciliation. Specifically, would a waiver require a fully prospective list of assigned beneficiaries for the performance year or would it be feasible to use a preliminary prospective list of beneficiaries that is likely to change at the end of the performance year? What are the other operational issues we should consider?

Specific payment and program rules for which we believe waivers could be necessary under the Shared Savings Program to support ACO efforts to increase quality and decrease costs under two-sided performance-based risk arrangements and for which we invite comments are as follows:

(1) SNF 3-Day Rule

The Medicare SNF benefit is for beneficiaries who require a short-term intensive stay in a SNF, requiring skilled nursing and/or skilled rehabilitation care. Pursuant to section 1861(i) of the Act, beneficiaries must have a prior inpatient hospital stay of no

fewer than 3 consecutive days in order to be eligible for Medicare coverage of inpatient SNF care. We refer to this as the SNF 3-day rule. As discussed previously, we believe that the long term effectiveness and sustainability of the Shared Savings Program depend on encouraging ACOs to progress along the performance-based risk continuum. Given the very limited ACO interest thus far in two-sided performance-based risk, and the comments and suggestions by stakeholders, we now believe that the authority under section 1899(f) of the Act to waive certain payment or other program requirements may be necessary to carry out the provisions of the Shared Savings Program and to permit effective implementation of two-sided performance-based risk tracks under the program. Models where ACOs bear a degree of financial risk hold the potential to induce more meaningful systematic change. We believe that under a two-sided performance-based risk ACO model it could be medically appropriate and more efficient for some patients to receive skilled nursing care and or skilled rehabilitation services provided at SNFs without a prior inpatient hospitalization or with an inpatient hospital length of stay of less than 3 days. A waiver of this requirement could allow ACOs to realize cost savings and improve care coordination, such that they could be more willing to accept two-sided risk, which we believe is required to promote the long term effectiveness and sustainability of the Shared Savings Program.

We note that the SNF 3-day rule has been waived or is not a requirement for Medicare SNF coverage under a few CMS models or programs. For instance, the Pioneer ACO Model has recently started testing whether a tailored waiver of the SNF 3-day rule will enable the Pioneer ACOs to improve quality of care for a subset of beneficiaries requiring skilled nursing and/or skilled rehabilitation care while also reducing expenditures. ACOs under the Pioneer Model are accountable for the total costs of care furnished to their assigned beneficiary population, and must accept performance-based risk in the event that costs exceed their benchmark. This type of performance-based risk arrangement has the potential to mitigate the incentive to overuse SNF benefits. MA plans already have the flexibility not to apply the SNF 3-day rule, and we believe this flexibility is appropriate because of the financial incentives for MA plans, which operate under a capitated payment arrangement, to control total cost of patient care. As in the case of the MA program, the Pioneer ACO Model's use of shared risk arrangements is expected to deter unnecessary referral of patients to SNFs, as Pioneer ACOs are accountable for the total cost of care furnished to their assigned beneficiaries. While the financial incentive to control total cost of care in a shared savings model is not as great as in a capitated model, all Pioneer ACOs are at significant performance-based risk for exceeding their expenditure benchmarks and are clearly focused on reducing total cost of care.

The waiver of the SNF 3-day rule under the Pioneer ACO Model went into effect on April 7, 2014, for Pioneer ACOs that demonstrate through an application process that they have the capacity and infrastructure to identify and manage clinically eligible beneficiaries prospectively assigned to Pioneer ACOs who may be admitted to a SNF without the required 3-day inpatient hospital stay. All other requirements for coverage of the Medicare SNF benefit remain unchanged under the Pioneer ACO Model. Only beneficiaries that require skilled nursing and/or skilled rehabilitation care are eligible for SNF coverage without a prior 3-day inpatient hospitalization under the Pioneer ACO Model waiver. All Pioneer ACOs are eligible to apply for a waiver of the SNF 3-day rule for their prospectively assigned beneficiaries, but must demonstrate that they have the capacity to identify and manage patients who would be either directly admitted to a SNF or admitted to a SNF after an inpatient hospitalization of fewer than 3 days, by describing the staff and processes involved in the clinical management of these beneficiaries.

Further, patients eligible for coverage of SNF admissions under the terms of the waiver include only FFS Medicare beneficiaries prospectively aligned to a Pioneer ACO who do not reside in nursing homes for long-term custodial care at the time of the decision to admit to a SNF. Patients must be medically stable, have certain and confirmed diagnoses and thus not require additional diagnostic testing, not require an inpatient evaluation or treatment, and have a skilled nursing or rehabilitation need that could not be provided as an outpatient. Eligible beneficiaries must be admitted to SNFs at the direction of admitting Pioneer providers/suppliers and not at the direction of SNFs or non-Pioneer providers/suppliers. Pioneer ACOs are required to submit to CMS for approval a SNF or group of SNFs with which they wish to partner for purposes of this waiver. The designated SNFs must have the appropriate staff capacity and necessary infrastructure to carry out the activities proposed in the Pioneer ACO's application. The SNF may be, but is not required to be, a Pioneer provider/supplier. The SNF must also have, at the time of application submission, a quality rating of 3 or more stars under the CMS 5-Star Quality Rating System as reported on the Nursing Home Compare Web site. Commenters suggest that a similar waiver of the SNF 3-day rule would be appropriate for certain ACOs under the Shared Savings Program. When Congress enacted the original Medicare legislation in 1965, it created SNF coverage as a less expensive alternative to what would otherwise be the final, convalescent portion of a beneficiary's inpatient hospital stay. Accordingly, the Medicare SNF benefit was narrowly focused on "post-hospital extended care" to serve as a relatively brief and skilled "extension" of an acute care stay in a hospital. Thus, the requirement for a prior 3-day qualifying stay in an inpatient hospital was included to effectively target the limited population that the SNF benefit was designed to cover: Beneficiaries who require a short-term, intensive stay in a SNF, requiring skilled care.

Because of changes in medical care over the half century since enactment of the original Medicare legislation, it may now be medically appropriate for some patients to receive skilled nursing care and or rehabilitation services provided by SNFs without a prior inpatient hospitalization, or with an inpatient hospital length of stay of less than 3 days. It may be medically appropriate for patients to go to SNFs earlier, due to changes in medical care, given that hospital lengths of stay are shorter than they were decades ago, and the types of patients that were staying 3 days in an inpatient hospital in 1965 are no longer staying 3 days in an inpatient hospital now. Because of this, over time, we have repeatedly expressed interest in testing alternatives to the SNF 3-day rule. We have found that financial incentives need to properly align so that the appropriate patients receive SNF care. That is, we believe care must be coordinated in a manner that allows for control of total patient cost and mitigates the incentive to overutilize the SNF benefit. If alternatives to the SNF 3-day rule were to be implemented, we believe that most treatment would continue to be appropriately furnished in a hospital, either on an inpatient or outpatient basis, rather than furnished at a SNF. Therefore, we do not believe

that application of such a waiver should result in overutilization of SNF care at the expense of appropriate acute hospital care. We would also note that under a model of accountability for total costs of care for assigned beneficiaries such as the Pioneer ACO Model or a two-sided risk track under the Shared Savings Program, the greatest savings would most likely be achieved by permitting the elimination, where appropriate, of the entire prior hospital stay (and therefore the hospital DRG payment) and improving quality of care for patients who can instead receive appropriate care through direct admission to a SNF. Permitting a shortened (less than 3 days) inpatient hospital stay prior to SNF admission would not necessarily produce significant savings to the Medicare Trust Funds, as Medicare would still pay the applicable MS–DRG amount to the hospital. Commenters, however, suggested that allowing ACOs to carefully identify beneficiaries with a prior hospital stay of less than 3 days, for whom SNF care would be clinically appropriate, could still produce cost savings for hospitals that improve their financial performance, and could contribute to ACOs' success and continued participation in the Shared Savings Program.

We believe it could be necessary to waive the SNF 3-day rule for ACOs participating under a two-sided risk track in the Shared Savings Program because the financial incentives for such ACOs to control total patient costs for their prospectively assigned beneficiaries are arguably similar to certain incentives that currently exist for MA plans and Pioneer ACOs. If we were to conclude that a waiver of the requirement for a prior 3-day qualifying stay in an inpatient hospital under waiver authority in section 1899(f) of the Act is necessary for purposes of implementing two-sided performance-based risk models under the Shared Savings Program, we would likely initially limit this waiver to ACO participants and ACO providers/suppliers under proposed Track 3. Under Track 3 beneficiaries would be prospectively assigned to the ACO for the entire year and it would thus be clear as to which beneficiaries the waiver applied. In addition, under Track 3 as proposed, organizations would agree to be held accountable for up to 75 percent of any losses compared to organizations participating under Track 2 who agree to be held accountable for up to 60 percent of any losses. Since a few organizations have been willing to participant under Track 2 without waivers, this may represent the limit of risk organizations are willing to take on without waiving the SNF 3-day rule. As mentioned previously, we believe a prospective assignment approach creates a potential pathway for improving the appropriate use of waivers by ACOs and a method for CMS to monitor its use, in addition to offering a higher sharing rate. For these reasons, we believe Track 3 may make it a better candidate for these waivers than Track 2. However, we seek comment on whether such a waiver should apply to all performance-based risk tracks. Another option would be to allow the waiver to apply to any FFS beneficiary cared for by the ACO and then the waiver could be available to all ACOs participating in a two-sided risk track, regardless of whether assignment is prospective or retrospective. Another option would be to apply any waiver to beneficiaries that appear on the quarterly lists of preliminarily prospectively assigned beneficiaries. In this case, the beneficiaries to whom the waiver applies would likely change from quarter to quarter. We anticipate that we would offer the opportunity to apply for such a waiver to ACOs using a framework similar to the one currently being tested under the Pioneer ACO Model, with appropriate revisions as necessary to accommodate the differences in beneficiary assignment methodology, as needed.

Under such a waiver, ACOs would be required to submit to CMS for approval of a SNF or group of SNFs with which they wish to partner. The designated SNFs must have the appropriate staff capacity and necessary infrastructure to carry out the activities described in the ACO's application for the waiver. The SNF would likely be required to be an ACO participant or ACO provider/supplier. We believe it would be appropriate to limit such a waiver to SNFs that are ACO participants or ACO providers/suppliers, because we believe these entities would have incentives that are most directly aligned with those of the ACO. ACOs also have stronger control and oversight over such entities because such entities are subject to Shared Savings Program requirements.

Under such a waiver, we would anticipate establishing additional requirements to ensure program transparency and help reduce the possibility for abuse of the waiver. For example, we would anticipate requiring ACOs to indicate their intent to use the waiver as part of their applications or requests for renewal of their participation agreement, and remain in compliance with program rules. To further substantiate an ACO's intent to use the waiver, we anticipate requiring that the ACO submits as part of its application documentation showing that its governing body has made and duly authorized a bona fide determination that the ACO will use the waiver (if approved by CMS) and will comply with all requirements of the waiver. As part of its application for the waiver, we would require the ACO to submit a written plan describing how it would use the waiver to meet the clinical needs of its assigned beneficiaries. We would reserve the right to deny or revoke a waiver to an ACO if it is not in compliance with requirements under the Shared Savings Program, if it does not use the waiver as described in its application, or if it does not successfully meet the quality reporting standard. ACOs with approved waivers would be required to post their use of the waivers as part of public reporting (see § 425.308) on the dedicated ACO Web page. Use of the waiver and its authorization by the governing body would be required to be documented and the documentation retained, consistent with § 425.314. We would anticipate that any waiver would be effective on the start date of the ACO's participation agreement and would not extend beyond the end of the ACO's participation in the Shared Savings Program. However, if CMS terminates the participation agreement, then the waiver would end on the date of the termination notice. We also reserve the authority to withdraw the waiver in the event we determine that there has been an abuse of the waiver. The proposed payment waivers would not protect financial arrangements between ACOs, ACO participants, ACOs providers/suppliers, or other individuals or entities providing services to ACO patients from liability under the fraud and abuse laws or any other applicable laws.

We note that we would retain the right to monitor and audit the use of such waivers. We would anticipate implementing heightened monitoring of entities that bill under payment waivers to help reduce the possibility for abuse of the waiver. We seek comment on what specific activities should be monitored to ensure that items and services are properly delivered to eligible patients, that patients are not being discharged prematurely to SNFs, and that patients are able to exercise freedom of choice and are not being steered inappropriately. We would also likely consider monitoring ACOs' marketing of services subject to payment waivers to prevent coercive or

misleading marketing and to assess the effect on the delivery of care.

We invite comments on whether it is necessary to provide for a waiver of the SNF 3-day rule using our authority under Section 1899(f) of the Act for ACOs that choose to participate in the Shared Savings Program under two-sided performance-based risk financial arrangements. If so, what criteria would be appropriate to determine waiver eligibility under the Shared Savings Program? We note that any waiver under the Shared Savings Program for this purpose would have to be implemented consistently across all eligible ACOs. In other words, application of the waiver would be uniformly applied, and there would not be customization of the waiver or conditions for the waiver for particular eligible ACOs. With this in mind, would it be appropriate to apply the same criteria discussed earlier that are currently being used under the Pioneer ACO Model? If not, how would the criteria have to be modified? What assurances should ACOs have to make in order to be eligible to use the waiver? Are there current Shared Savings Program rules and requirements that would have to be modified to permit this waiver? Should we require that a beneficiary be admitted to a SNF that is an ACO participant or ACO provider/supplier in order for the waiver to apply? We invite comment on whether or not the SNF should be required to be an ACO provider/supplier. Would a waiver under certain conditions create any unexpected concerns about access to SNF services for the patients who need them most (that is, those beneficiaries admitted following a 3-day or longer hospital stay). Would a waiver of the SNF 3-day rule align with our policy of including primary care services furnished in SNFs in the beneficiary assignment process? Would the ACO quality measures such as the new Skilled Nursing Facility 30-Day All-Cause Readmission Measure (79 FR 67910) and the other measures used in establishing the quality performance standards that ACOs must meet in order to be eligible for shared savings provide sufficient beneficiary protections from inappropriate care or withheld care? Are there other quality standards that should apply to ACOs or post-acute care facilities that use this waiver? What other monitoring activities should be considered to guard against unintended consequences of a waiver of the SNF 3-day rule? What other criteria, operational issues or other concerns should we consider? We invite comment on these issues.

(2) Billing and Payment for Telehealth Services

Under section 1834(m) of the Act, Medicare pays for telehealth services furnished by a physician or practitioner under certain conditions even though the physician or practitioner is not in the same location as the beneficiary. The telehealth services must be furnished to a beneficiary located in one of the eight types of originating sites specified in section 1834(m)(4)(C)(ii) of the Act and the site must satisfy at least one of the requirements of section 1834(m)(4)(C)(i)(I) through (III) of the Act. Generally, for Medicare payment to be made for telehealth services under the Physician Fee Schedule several conditions must be met (§ 410.78(b)). Specifically, the service must be on the Medicare list of telehealth services and meet all of the following other requirements for payment:

- The service must be furnished via an interactive telecommunications system.
- The service must be furnished to an eligible telehealth individual.
- The individual receiving the services must be in an eligible originating site.

When all of these conditions are met, Medicare pays a facility fee to the originating site and provides separate payment to the distant site practitioner for the service.

Section 1834(m)(4)(F)(i) of the Act defines Medicare telehealth services to include professional consultations, office visits, office psychiatry services, and any additional service specified by the Secretary, when furnished via a telecommunications system. For the list of Medicare telehealth services, see the CMS Web site at *www.cms.gov/teleheath/*. Under section 1834(m)(4)(F)(ii) of the Act, CMS has an annual process to consider additions to and deletions from the list of telehealth services. CMS does not include any services as telehealth services when Medicare does not otherwise make a separate payment for them.

We also note that a number of CMS demonstrations include or have included testing of interventions that use electronic health records, remote monitoring, and mobile diagnostic technology as part of strategies to increase quality of care and decrease costs. For example, for the Medicare Health Support Programs (see *https://www.cms.gov/Medicare/Medicare-General-Information/CCIP/index.html*), participants utilized a variety of telephonic care management services and related interventions. These services included nurse-based health advice for the management and monitoring of symptoms, health education (via health information, videos, online information), health coaching to encourage self-care and self-management of chronic health conditions and medications, and health promotion and disease prevention coaching. Likewise, under the Independence at Home Demonstration, physician and nurse practitioner directed home-based primary care teams use electronic health records, remote monitoring, and mobile diagnostic technology to help reduce expenditures and improve health outcomes for Medicare beneficiaries with multiple chronic conditions (see CMS Web site at *http://www.cms.gov/Medicare/Demonstration-Projects/DemoProjectsEvalRpts/Medicare-Demonstrations-Items/CMS1240082.html*).

As discussed previously in section II.B.8.a of this proposed rule, section 1899(b)(2)(G) of the Act requires a Shared Savings Program ACO to "define processes to . . . coordinate care, such as through the use of telehealth, remote patient monitoring, and other such enabling technologies." Commenters suggest that technologies that enable health care providers to deliver care to patients in locations remote from providers are being increasingly used to complement face-to-face patient-provider encounters in both urban and rural areas. In these cases, the use of remote access technologies may improve the accessibility and timeliness of needed care, increase communication between providers and patients, enhance care coordination, and improve the efficiency of care. ACOs and other commenters have suggested that a waiver of certain Medicare telemedicine payment requirements would help encourage a broader range of ACOs to more fully utilize telehealth, remote patient monitoring, and other such enabling technologies.

We note that certain professional services that are commonly furnished remotely using telecommunications technology are paid under the same conditions as in-person physicians' services, and thus do not require a waiver. Such services that do not require the patient to be present in person with the practitioner when they are furnished are covered and paid in the same way as services delivered without the use of telecommunications technology when the practitioner is in-person at the medical facility furnishing care to the patient. Such services typically involve circumstances where a practitioner is able to visualize some aspect of the patient's condition without

the patient being present and without the interposition of a third person's judgment. Visualization by the practitioner can be possible by means of x-rays, electrocardiogram or electroencephalogram tracings, tissue samples, etc. For example, the interpretation by a physician of an actual electrocardiogram or electroencephalogram tracing that has been transmitted via telephone (that is, electronically, rather than by means of a verbal description) is a covered physician's service. These remote services are not Medicare telehealth services as defined under section 1834(m)(4)(F)(i) of the Act. Rather, these remote services that utilize telecommunications technology are considered physicians' services in the same way as services that are furnished in person without the use of telecommunications technology, and they are paid under the same conditions as in-person physicians' services, with no requirements regarding permissible originating sites.

A waiver of certain Medicare telehealth requirements could be supported by section 1899(b)(2)(G) of the Act in that it gives the use of enabling technologies, such as telehealth, as an example of a process to coordinate care, and the statute does not limit ACOs to being in rural or shortage areas where Medicare payment is available for telehealth services. As we indicated in section II.B.8.a. of this proposed rule, we welcome information from ACOs and other stakeholders about the use of such technologies to coordinate care for assigned beneficiaries. If we conclude that a waiver of certain telehealth requirements under section 1899(f) of the Act is necessary in order to carry out the Shared Savings Program, we would likely provide for a waiver of the originating site requirements of section 1834(m)(4)(C)(i)(I) through (III) of the Act that limit telehealth payment to services furnished within specific types of geographic areas or in an entity participating in a Federal telemedicine demonstration project approved as of December 31, 2000, and would also likely provide for a waiver of the originating site requirements of section 1834(m)(4)(C)(ii)(I) through (VIII) of the Act that specify the particular sites at which the eligible telehealth individual must be located at the time the service is furnished via a telecommunications system. Waiver of this requirement could allow ACOs to realize cost savings and improve care coordination, such that they would more willing to take on two-sided risk which we believe is required to promote the long term effectiveness and sustainability of the Shared Savings Program.

If we were to implement a waiver then we believe it would be appropriate to limit the use of such waivers to beneficiaries that are assigned to the ACO during the applicable performance year. We believe this would be best accomplished by permitting ACOs to use these waivers when they have a prospectively assigned population. In other words, the waivers would be limited to ACOs participating in Track 3. Prospectively assigned beneficiaries under Track 3 would be assigned to the ACO for the entire year and it would thus be clear to ACOs and CMS as to the beneficiaries for which a waiver applied. As mentioned previously, we believe a prospective assignment approach creates a potential pathway for improving the appropriate use of waivers by ACOs and a method for CMS to monitor its use. In addition, under Track 3 there would be greater opportunity for risk. For these reasons, we believe that Track 3 is potentially a better candidate for such a waiver than Track 2. However, we seek comment on whether these waivers should apply to all two-sided performance-based risk tracks. Another option would be for the waivers would apply to any FFS beneficiary cared for by an ACO and then the waiver could be available to ACOs participating in any two-sided risk track, regardless of whether the assignment is prospective or retrospective. Another option would be to apply such waivers to beneficiaries that appear on the quarterly lists of preliminarily prospectively assigned beneficiaries. Under this approach, the population for whom the waiver is available would likely change from quarter to quarter.

Under a waiver of the telehealth requirements, we would anticipate establishing additional requirements to ensure program transparency and help reduce the possibility for abuse of the waiver. For example, we would anticipate requiring ACOs to indicate their intent to use the waiver in a form and manner specified by CMS, as part of either their applications or requests for renewal of their participation agreement, and to remain in compliance with program rules. To further substantiate an ACO's intent to use the waiver, we anticipate requiring that the ACO submit as part of its application documentation showing that its governing body has made and duly authorized a bona fide determination that the ACO will use the waiver (if approved by CMS) and will comply with all requirements of the waiver. As part of its application for the waiver, we would require the ACO to submit a written plan describing how it would use the waiver to meet the clinical needs of its assigned beneficiaries. We would reserve the right to deny or revoke a waiver to an ACO if it is not in compliance with requirements under the Shared Savings Program, if it does not use the waiver as described in its application, or if it does not successfully meet the quality reporting standard. ACOs with approved waivers would be required to post their use of the waivers as part of public reporting (see § 425.308) on the dedicated ACO Web page. Use of the waiver and its authorization by the governing body would be required to be documented, and the documentation retained, consistent with § 425.314. We would anticipate that any waiver would be effective on the start date of the ACO's participation agreement and would not extend beyond the end of the ACO's participation in the Shared Savings Program. However, if CMS terminates the participation agreement, then the waiver would end on the date of the termination notice. We also reserve the authority to withdraw the waiver in the event we determine that there has been an abuse of the waiver. The proposed payment waivers would not protect financial arrangements between ACOs, ACO participants, ACOs providers/suppliers, or other individuals or entities providing services to ACO patients from liability under the fraud and abuse laws or any other applicable laws.

We note that we would retain the right to monitor and audit the use of such waivers. We would anticipate implementing heightened monitoring of entities that bill under payment waivers to help reduce the possibility for abuse of the waiver. We seek comment on what specific activities should be monitored to ensure that items and services are properly delivered to eligible patients. We would also likely consider monitoring ACOs' marketing of services subject to payment waivers to prevent coercive or misleading marketing and to assess the effect on the delivery of care.

In addition to welcoming comments related to the questions we raised in section II.B.8.a of this proposed rule, we also welcome specific comments on whether it is necessary to use our authority under Section 1899(f) of the Act to provide for a waiver for ACOs participating in the Shared Savings Program of any Medicare telehealth rules, especially for those ACOs that have elected to participate under a two-sided performance-based risk

arrangement. We seek comment on the telehealth rules that would require a waiver and the circumstances under which a waiver would be necessary. Specifically, what aspects of current Medicare telehealth payment and other rules would it be necessary to waive in order to effectively incorporate two-sided performance-based risk into the Shared Savings Program? What factors should CMS consider if it were to provide for such a waiver to allow ACOs additional flexibility to provide a broader range of telehealth services or services in a broader range of geographic areas? Also, how should telehealth be defined? While "telehealth" is not consistently defined across payers, "telehealth" typically refers to a broader set of services, including "store and forward" services, which are not currently covered by Medicare outside of demonstration projects. Under what circumstances should payment for telehealth and related services be made? What types of services should be included—remote monitoring, remote visits and/or e-consults? What capabilities or additional criteria should ACOs meet in order to qualify for payments for telehealth services under such a waiver? In your comments, please consider quality and outcomes metrics, other requirements to ensure protection of beneficiaries and the Medicare Trust Funds, and any other design factors you think may be important.

(3) Homebound Requirement Under the Home Health Benefit

In order for Medicare to pay for home health services, a beneficiary must be determined to be "home-bound." Specifically, sections 1835(a) and 1814(a) of the Act require that a physician certify (and recertify) that in the case of home health services under the Medicare home health benefit, such services are or were required because the individual is or was "confined to the home" and needs or needed skilled nursing care on an intermittent basis, or physical or speech therapy or has or had a continuing need for occupational therapy. A beneficiary is considered to be confined to the home if the beneficiary has a condition, due to an illness or injury, that restricts his or her ability to leave home except with the assistance of another individual or the aid of a supportive device (such as crutches, a cane, a wheelchair, or a walker), or if the beneficiary has a condition such that leaving his or her home is medically contraindicated. While a beneficiary does not have to be bedridden to be considered confined to the home, the condition of the beneficiary must be such that there exists a normal inability to leave home and leaving home requires a considerable and taxing effort by the beneficiary. Absent this condition, it would be expected that the beneficiary could typically get the same services in an outpatient or other setting. Thus, the homebound requirement provides a way to help differentiate between patients that require medical care at home versus patients who could more appropriately receive care in a less costly outpatient setting. Additional information regarding the homebound requirement is available in the Medicare Benefit Manual (Pub 100–02); Chapter 7, "Home Health Services", Section 30.1.1, "Patient Confined to the Home".

Some ACOs and other commenters have suggested that a waiver of this requirement would be appropriate under the Shared Savings Program, especially for ACOs that have elected to participate under a two-sided performance-based risk arrangement. They suggest that home health care would be appropriate for additional beneficiaries and could result in lower overall costs of care in some instances. For example, commenters suggest, based on their experiences outside of the Medicare FFS program, that if a beneficiary is allowed to have home health care visits, even if the beneficiary is not considered home-bound, the beneficiary may avoid a hospital admission.

If we conclude that a waiver of the homebound requirement under section 1899(f) of the Act is necessary in order to carry out the Shared Savings Program, we would expect to offer the opportunity to provide home health services to additional beneficiaries to ACOs participating under Track 3 using a process similar to the approach we discussed above for a waiver of the SNF 3-day rule for ACOs in Track 3. Specifically, ACOs participating under Track 3 have a significant financial incentive to control total patient costs. In addition, under Track 3 beneficiaries would be prospectively assigned to the ACO for the entire year, and it would thus be clear as to which beneficiaries the waiver applied. As mentioned previously, we believe a prospective assignment approach creates a potential pathway for improving the appropriate use of waivers by ACOs and a method for CMS to monitor its use. In addition, under Track 3 there would be greater opportunity for risk. For these reasons, we believe that Track 3 is potentially making a better candidate for such a waiver than Track 2. All ACOs participating under Track 3 would be eligible to apply for a waiver of the home-bound requirement for their prospectively assigned beneficiaries; however, we seek comment on whether these waivers should apply to all performance-based risk tracks. Another option would be that the waivers would apply to any FFS beneficiary cared for by the ACO and then the waiver could be available to all ACOs participating in a two-sided risk track, regardless of whether assignment is prospective or retrospective. Another option would be to apply any waiver to beneficiaries that appear on the quarterly lists of preliminarily prospectively assigned beneficiaries. In this case, the beneficiaries to whom the waiver applies would likely change from quarter to quarter. We believe we could authorize waiver of the homebound requirement under the home health benefit for those ACOs that demonstrate through the application process or in a request for renewal of their participation agreement that they have the capacity and infrastructure to identify and manage clinically beneficiaries who are not homebound, but are otherwise eligible for services under the home health benefit, and would benefit from receiving these services. As part of the application for the waiver, we would expect to require ACOs to describe the staff and processes that would be involved in the clinical management of beneficiaries receiving services pursuant to the waiver. All other requirements for the Medicare home health benefit would remain unchanged. Thus, under such a waiver, only beneficiaries that otherwise meet all program requirements to receive home health services would be eligible for coverage of home health services without being homebound.

In addition, we would require that home health services provide pursuant to the waiver at the direction of an ACO provider/supplier that is not a home health agency, to help ensure that the waiver is used appropriately. The home health agency would also likely be required to be an ACO provider/supplier. We believe it would be appropriate to limit such a waiver to home health agencies that are ACO participants or ACO providers/suppliers, because we believe these entities would have incentives that are most directly aligned with those of the ACO. ACOs also have stronger control and oversight over such entities and such entities are subject to Shared Savings Program requirements. We invite comment on whether or not the home health agency should be required to be an ACO provider/supplier. In either case, an ACO would be required to submit to CMS for approval the home

health agency or group of home health agencies with which it wishes to partner in providing services pursuant to this waiver. The designated home health agency or agencies would be required to have the appropriate staff capacity and necessary infrastructure to carry out the processes described in the ACO's application for the waiver. In addition, a designated home health agency would be required to have, at the time of application submission, a quality rating of 3 or more stars under the CMS 5-Star Quality Rating System as reported on the Home Health Compare Web site. (For detailed information, see *http://blog.cms.gov/2014/06/18/star-quality-ratings-coming-soon-to-compare-sites-on-medicare-gov/.*)

Under such a waiver, we would anticipate establishing additional requirements to ensure program transparency and help reduce the possibility for abuse of the waiver. For example, we would anticipate requiring ACOs to indicate their intent to use the waiver in a form and manner specified by CMS, as part of either their applications or requests for renewal of their participation agreement, and to remain in compliance with program rules. To further substantiate an ACO's intent to use the waiver, we anticipate requiring that the ACO submit as part of its application documentation showing that its governing body has made and duly authorized a bona fide determination that the ACO will use the waiver (if approved by CMS) and will comply with all requirements of the waiver. As part of its application for the waiver, we would require the ACO to submit a written plan describing how it would use the waiver to meet the clinical needs of its assigned beneficiaries. We would reserve the right to deny or revoke a waiver to an ACO if it is not in compliance with requirements under the Shared Savings Program or if it does not successfully meet the quality reporting standard. ACOs with approved waivers would be required to post their use of the waivers as part of public reporting (see § 425.308) on the dedicated ACO Web page. Use of the waiver and its authorization by the governing body would be required to be documented, and documentation retained, consistent with § 425.314. We would anticipate that any waiver would be effective on the start date of the ACO's participation agreement and would not extend beyond the end of the ACO's participation in the Shared Savings Program. However, if CMS terminates the participation agreement, then the waiver would end on the date of the termination notice. We would also reserve the authority to withdraw the waiver in the event we determine that there has been an abuse of the waiver. The proposed payment waivers would not protect financial arrangements between ACOs, ACO participants, ACOs providers/suppliers, or other individuals or entities providing services to ACO patients from liability under the fraud and abuse laws or any other applicable laws.

We note that we would retain the right to monitor and audit the use of such waivers. We would anticipate implementing heightened monitoring of entities that bill under payment waivers to help reduce the possibility for abuse of the waiver. We seek comment on what specific activities should be monitored to ensure that items and services are properly delivered to eligible patients, and that patients are able to exercise freedom of choice and are not being steered inappropriately. We would also likely consider monitoring ACOs' marketing of services subject to payment waivers to prevent coercive or misleading marketing and to assess the effect on the delivery of care.

We invite comments on whether it is necessary to waive the homebound requirement under the home health benefit using our authority under Section 1899(f) of the Act for ACOs that choose to participate in the Shared Savings Program under two-sided performance risk financial arrangements. We also welcome comments on the potential waiver requirements discussed previously. For example, what criteria would be appropriate to determine eligibility for such a waiver under the Shared Savings Program? Are there specific categories of providers or beneficiaries to whom the waiver should (or should not) apply? If implemented under a two-sided performance-based risk model, are there additional protections for the Medicare Trust Funds or for beneficiaries that should be considered? How would a waiver complement Medicare payment for physician home visits for medically complex patients? What considerations, if any, should we take into account when adapting current 60-day episode payment amounts that require patients to be homebound in applying them to services furnished to a non-homebound population? What quality metrics should be incorporated into the quality measure framework for ACOs and our monitoring program to measure the quality of care for non-homebound home health recipients? When should the waiver be applied? Would there be specific circumstances when home health services should be available at any point without first being triggered by some health event? If so, what criteria would be necessary to differentiate these circumstances from non-covered custodial care? What other criteria or operational issues or other concerns should we also consider? We are also concerned that under a homebound waiver, beneficiaries may, in effect, be steered toward those agencies that can provide enhanced home health services to patients who are not homebound. Any such homebound waiver would not override Medicare patients' freedom of choice and that beneficiaries would remain free to select any eligible home health agency. We seek comments on ways to ensure that beneficiaries retain their freedom of choice in practice under a waiver.

We would also note that the Independence at Home (IAH) Demonstration builds on existing Medicare benefits by providing chronically ill patients with a complete range of primary care services in the home setting. Medical practices led by physicians or nurse practitioners provide primary care home visits tailored to the needs of beneficiaries with multiple chronic conditions and functional limitations. See the CMS Web site at *http://innovation.cms.gov/initiatives/independence-at-home/.* How could the findings from Independence at Home demonstration apply to the population of beneficiaries assigned to ACOs or receiving care furnished by ACO providers/suppliers?

(4) Waivers for Referrals to Postacute Care Settings

As a condition of participation (CoP) in Medicare, a hospital must have in effect a discharge planning process that applies to all patients, as required under § 482.43. The Interpretative Guidelines for this requirement found in the State Operations Manual, Publication 100–07, Appendix A—Survey Protocol, Regulations and Interpretive Guidelines for Hospitals, section A–0799, define hospital discharge planning as a process that involves determining the appropriate post-hospital discharge destination for a patient; identifying what the patient requires for a smooth and safe transition from the hospital to his or her discharge destination; and beginning the process of meeting the patient's identified postdischarge needs. Alternative terminology, such as "transition planning" or "community care transitions" is preferred by some, since it moves away from a focus primarily on a patient's hospital stay to consideration of transitions among the multiple types of patient care settings

that may be involved at various points in the treatment of a given patient. This approach recognizes the shared responsibility of health care professionals and facilities as well as patients and their support persons throughout the continuum of care, and the need to foster better communication among the various groups. At the same time, the term "discharge planning" is used both in section 1861(ee) of the Act as well as in § 482.43.

The discharge planning CoP specifically addresses the role of the patient, or the patient's representative, by requiring the hospital to develop a discharge planning evaluation at the patient's request and to discuss the evaluation and plan with the patient. This is consistent with the hospital patient's rights CoP regulations at § 482.13(b)(1) and (2), which provide that the patient has the right to participate in the development and implementation of his or her plan of care, and to make informed decisions regarding his or her care. Accordingly, hospitals must actively involve patients or their representatives throughout the discharge planning process. Further, the specific discharge planning evaluation requirement to assess a patient's capability for post-discharge self-care requires the hospital, as needed, to actively solicit information not only from the patient or the patient's representative, but also from family, friends, or other support persons. The hospital must include in the discharge plan, when applicable in terms of the types of post-discharge care needs identified, a list of home health agencies (HHAs) or SNFs that are available to the patient, that are participating in the Medicare program and that serve the geographic area (as defined by the HHA) in which the patient resides, or in the case of a SNF, in the geographic area requested by the patient. HHAs must request to be listed by the hospital as available (see § 482.43(c)(6)) for further details). Further, under the CoP regulations at § 482.43(c)(7), a hospital, as part of the discharge planning process, must inform the patient or the patient's family of their freedom to choose among participating Medicare providers of post-hospital care services and must, when possible, respect patient and family preferences when they are expressed. The hospital must not specify or otherwise limit the qualified providers that are available to the patient. The discharge plan must identify any HHA or SNF to which the patient is referred in which the hospital has a disclosable financial interest, as specified by the Secretary, and any HHA or SNF that has a disclosable financial interest in a hospital under Medicare (See § 482.43(c)(8)).

The State Operations Manual (SOM), Appendix A at Section A–0823, provides additional guidance for these requirements. During the discharge planning process the hospital must inform the patient of his or her freedom to choose among Medicare-participating post-hospital providers and must not direct the patient to specific provider(s) or otherwise limit which qualified providers the patient may choose among. Hospitals have the flexibility either to develop their own lists or to print a list of skilled nursing facilities and home health agencies in the applicable geographic areas from the CMS Web sites, Nursing Home Compare (*www.medicare.gov/NHcompare*) and Home Health Compare (*www.medicare.gov/homehealthcompare*). If hospitals develop their own lists, they are expected to update them at least annually (69 FR 49226). Hospitals may also refer patients and their families to the Nursing Home Compare and Home Health Compare Web sites for additional information regarding Medicare-certified SNFs and HHAs, as well as Medicaid-participating nursing facilities. The data on the Nursing Home Compare Web site include an overall performance rating, nursing home characteristics, performance on quality measures, inspection results, and nursing staff information.

Home Health Compare provides details about every Medicare-certified home health agency in the country. Included on the Web site are quality indicators such as managing daily activities, managing pain and treating symptoms, treating wounds and preventing pressure sores, preventing harm, and preventing unplanned hospital admissions. The hospital might also refer the patient and his or her representatives to individual State agency Web sites, the Long-Term Care Ombudsman Program, Protection and Advocacy Organizations, Citizen Advocacy Groups, Area Agencies on Aging, Centers for Independent Living, and Aging and Disability Resource Centers for additional information on long term care facilities and other types of providers of post-hospital care. Having access to the information found at these sources may assist beneficiaries and their families and other caregivers in the decision making process regarding post-hospital care options. When the patient or the patient's family has expressed a preference, the hospital must attempt to arrange post-hospital care with an HHA or SNF, as applicable, consistent with that preference. If the hospital is unable to make the preferred arrangement, (for example, if there is no bed available in the preferred SNF), it must document the reason the patient's preference could not be fulfilled and explain that reason to the patient.

ACOs and MedPAC have indicated that as ACOs have started to analyze claims data on their beneficiaries, they are recognizing that certain providers may deliver higher-quality and lower-cost care than others. For example, some SNFs may deliver higher-quality care and thus appropriately lower rates of readmissions to hospitals. ACOs have indicated that they would like to have the ability to recommend high-quality SNF and HHA providers with whom they have established relationships, rather than presenting all options equally. In particular, ACOs and their ACO providers/suppliers would like to have the ability to clearly state to beneficiaries which providers they believe are best and why. However, it is not clear to them that they have the authority to do so, especially for referrals to post-acute care. ACOs suggest that the ability to make more specific recommendations would enable them to build robust networks across the continuum of care, and thus help them to give beneficiaries as much continuity as possible as they move across sites of care. Therefore, ACOs have asked that we provide clear direction on how preferred providers can be presented to beneficiaries and what represents clear notification of the beneficiary's freedom to choose among participating Medicare providers.

Based on these comments from ACOs and MedPAC, we have reviewed the relevant statutory provisions, regulations, and guidance. While we believe these materials make clear the requirements regarding how preferred providers can be represented to beneficiaries and what represents clear notification of beneficiary freedom of choice of providers, we believe we have identified one requirement that might be need to be waived. Specifically, we are considering whether it might be necessary to waive the requirement under section 1861(ee)(2)(H) of the Act that a hospital "not specify or otherwise limit the qualified provider which may provide post-hospital home services" and the portions of the hospital discharge planning CoP at § 482.43 that implement this requirement, using our waiver authority under Section 1899(f) of the Act for ACOs participating in two-sided risk tracks under the Shared Savings Program. If we were to implement such a waiver, we would anticipate making it a very narrow

waiver. In addition, we are considering whether such a waiver would be most appropriately implemented under Track 3 in which there is prospective assignment of beneficiaries. Under Track 3 beneficiaries would be prospectively assigned to the ACO for the entire year and it would thus be clear as to which beneficiaries the waiver applied. As mentioned previously, we believe a prospective assignment approach creates a potential pathway for improving the appropriate use of waivers by ACOs and a method for CMS to monitor its use. In addition, under Track 3 there would be greater opportunity for risk. For these reasons, we believe that Track 3 is potentially a better candidate for such a waiver than Track 2. Another option is that the waiver would apply to any FFS beneficiary cared for by the ACO and then the waiver could be available to all ACOs participating in a two-sided risk track, regardless of whether the assignment is prospective or retrospective. Another option would be to apply any waiver to beneficiaries that appear on the quarterly lists of preliminarily prospectively assigned beneficiaries. In this case, the beneficiaries to whom the waiver applies would likely change from quarter to quarter. We would also anticipate imposing additional documentation requirements upon those ACOs that seek to use the waiver. Specifically, because the Shared Savings Program is built on FFS Medicare, and because we continue to support and protect beneficiaries' right to choose their providers under FFS Medicare, we are not considering a complete waiver of the requirement that a hospital, as part of the discharge planning process, not specify or otherwise limit the qualified providers that are available to the patient. This requirement is reflected in the hospital CoPs at § 482.43(c)(7). In other words, under the terms of any waiver, hospitals still would be required to inform the patient or the patient's family of their freedom to choose among participating Medicare providers of post-hospital care services and must, when possible, respect patient and family preferences when they are expressed. In addition, the hospital must also present a complete list and may not limit the qualified providers that are available to the patient. However, under a waiver of the prohibition on the specification of qualified providers, discharge planners in hospitals that are ACO participants or ACO providers/suppliers would have the flexibility to recommend high quality post-acute providers with whom they have relationships (either financial and/or clinical) for the purpose of improving continuity of care across sites of care. Such a waiver would not cover a situation in which a post-acute provider paid the ACO participant or ACO provider/supplier to be included as a recommended post-acute provider. We believe it would be appropriate to limit such a waiver to hospitals that are ACO participants or ACO providers/suppliers because we believe these entities would have incentives that are most directly aligned with those of the ACO. ACOs also have stronger control and oversight over such entities and such entities are subject to Shared Savings Program requirements. We anticipate that under a such waiver discharge planners would be required to document that the patient or the patient's family was informed of their freedom to choose a provider of post-hospital services and presented with a complete list of participating Medicare providers of post-hospital care services as well as information regarding the Medicare provider of post-hospital care services recommended by the discharge planner. We also anticipate that under such a waiver discharge planners would be required to document the data and the rationale they used as the basis for recommending any specific provider of post-hospital services. If implemented across all risk tracks, we anticipate it would apply to all FFS beneficiaries receiving services from hospitals participating in the ACO. We would additionally anticipate requiring the use of certain quality criteria for recommended providers (such as requiring that SNFs meet a minimum Star rating of 3 or more stars under the CMS 5-Star Quality Rating System as reported on the Home Health Compare Web site. For detailed information, see *http://blog.cms.gov/2014/06/18/star-quality-ratings-coming-soon-to-compare-sites-on-medicare-gov/.*) and documentation that the patient or the patient's family was informed of the recommended provider's quality of care, the clinical and/or financial relationship that the ACO has with the recommended provider, and any other reasons why the provider is being recommended. Furthermore, we would continue to require that the ACO respect the patient or the patient's family's preference regarding the choice of post-acute provider. Under such a waiver, we would anticipate establishing additional requirements to ensure program transparency and help reduce the possibility for abuse of the waiver. For example, we would anticipate requiring ACOs to indicate their intent to use the waiver in a form and manner specified by CMS, as part of either their applications or requests for renewal of their participation agreement, and to remain in compliance with program rules. To further substantiate an ACO's intent to use the waiver, we anticipate requiring that the ACO submit as part of its application documentation showing that its governing body has made and duly authorized a bona fide determination that the ACO will use the waiver (if approved by CMS) and will comply with all requirements of the waiver. As part of its application for the waiver, we would require the ACO to submit a written plan describing how it would use the waiver to meet the clinical needs of its assigned beneficiaries. We would reserve the right to deny or revoke a waiver to an ACO if it is not in compliance with other requirements under the Shared Savings Program, if it does not use the waiver as described in its application, or if it does not successfully meet the quality reporting standard. ACOs with approved waivers would be required to post their use of the waivers as part of public reporting (see § 425.308) on the dedicated ACO Web page. Use of the waiver and its authorization by the governing body would be required to be documented, and the documentation retained, consistent with § 425.314. We would anticipate that any waiver would be effective on the start date of the ACO's participation agreement and would not extend beyond the end of the ACO's participation in the Shared Savings Program. However, if CMS terminates the participation agreement, then the waiver would end on the date of the termination notice. We also reserve the authority to withdraw the waiver in the event we determine that there has been an abuse of the waiver. The proposed payment waivers would not protect financial arrangements between ACOs, ACO participants, ACOs providers/suppliers, or other individuals or entities providing services to ACO patients from liability under the fraud and abuse laws or any other applicable laws.

We would retain the right to monitor and audit the use of such waivers. We would implement heightened monitoring of entities that bill under payment waivers to help reduce the possibility for abuse of the waiver. We seek comment on what specific activities should be monitored to ensure that items and services are properly delivered to eligible patients, and that patients are able to exercise freedom of choice and are not being steered inappropriately. We would also likely

consider monitoring ACOs' marketing of services subject to payment waivers to prevent coercive or misleading marketing and to assess the effect on the delivery of care.

We seek comment on this potential approach to using our waiver authority to permit ACOs flexibility in specifying certain Medicare providers of post-hospital care services to patients and their families. We further seek comment on the criteria discussed above. Are there other cost and quality criteria that should be considered? Specifically to what hospitals and post-hospital providers should the waiver apply? For example, as discussed above, should the ability to recommend a post-hospital provider be available only to those hospitals that are ACO participants or ACO provider/suppliers, since these entities would have incentives that are most directly aligned with those of the ACO? Should a hospital be permitted to recommend any post-hospital provider or only post-hospital providers that are ACO participants or ACO provider/suppliers? We anticipate that if a waiver is found to be necessary, we would establish a waiver that would apply to all hospitals that are ACO participants or ACO providers/suppliers and that these hospitals would have the ability to recommend any post-hospital provider; however, we would be interested to receive comments on alternative approaches.

Overall, we are supportive of hospitals recommending certain post-hospital providers based on quality and a beneficiary's specific needs, as long as the beneficiaries understand their other options and retain their freedom of choice. In the event a waiver is found to be necessary, are there other parameters that should be established around how hospitals formulate their lists of post-acute providers and what information would be shared with beneficiaries? Under such a waiver would it be appropriate for hospitals to share only information on quality that is publically reported, such as on Home Health Compare, or would it be appropriate for hospitals to also share information that they have generated internally? We would be concerned if hospitals might steer beneficiaries to providers based on quality information that has not been properly vetted. Also, we would be concerned if hospitals recommended only their partnering providers, when there may be other providers of equal or better quality. Since the CoP requirements apply to all patients of a participating hospital regardless of their insurer or insured status, we are also seeking comment on whether it would be feasible to implement a system where the CoP requirement to not make recommendations is waived for the ACO participating hospitals only in the case of certain Medicare FFS beneficiaries. We are further seeking comments on whether it might be necessary for purposes of carrying out the Shared Savings Program and what benefits and risks might arise for non-Medicare inpatients if we were to waive this portion of the regulation for ACO participating hospitals with respect to all of their patients. We welcome comments on whether it would be appropriate to limit any such a waiver to ACOs participating under two-sided risk financial arrangements, or whether such a waiver should be available more broadly to all ACOs participating in the Shared Savings Program. Alternatively, should the waiver apply only to beneficiaries that are prospectively assigned to ACOs participating in Track 3? What operational considerations/concerns would implementation of such a waiver raise? What additional beneficiary protections and safeguards should be considered and put in place to prevent abuse of such a waiver?

(5) Waiver of Other Payment Rules

We welcome suggestions on whether there are any additional Medicare FFS payment rules that it may be necessary to waive using our authority under section 1899(f) of the Act in order to effectively implement two-sided risk financial arrangements under the Shared Savings Program by providing additional mechanisms for ACOs to increase quality and decrease costs. We would establish any such waivers through the rulemaking process. As a result, any suggestions submitted by commenters would be helpful to CMS in developing future proposals regarding the waiver of any Medicare FFS rules that might be necessary to carry out the provisions of the Shared Savings Program, and in particular to implement two-sided risk models under the program.

b. Other Options for Improving the Transition to Two-Sided Performance-Based Risk Arrangements

(1) Beneficiary Attestation

Under 1899(c) of the Act, beneficiaries are required to be assigned to an ACO participating in the Shared Savings Program based on the beneficiary's utilization of primary care services rendered by physicians. Thus, beneficiary choice, as indicated by their utilization of primary care service furnished by physicians, must determine beneficiary assignment to an ACO under the Shared Savings Program. Therefore, we developed a methodology for assigning beneficiaries based on whether the ACO provided the plurality of the beneficiary's primary care during a particular performance year. In the November 2011 final rule (76 FR 67851 through 67870), we outlined the major considerations in beneficiary assignment to an ACO.

First, we emphasized that unlike managed care programs, Medicare FFS beneficiaries do not enroll in the Shared Savings Program, and they retain the right to seek treatment from any Medicare-enrolled provider of their choosing. Thus, the "assignment" methodology in no way implies a lock-in or enrollment process. To the contrary, the statutory term "assignment" in this context refers only to an operational process by which we determine whether a beneficiary has chosen to receive a sufficient level of the requisite primary care services from a specific ACO so that the ACO may be appropriately designated as being accountable for that beneficiary's care, and we can measure its quality and financial performance on patients for whom it is in the best position to direct and influence their care. No exclusions or restrictions based on health conditions or similar factors are applied in the assignment of Medicare FFS beneficiaries.

Additionally, we noted that the statute requires that assignment be based on beneficiary utilization of primary care services furnished by physicians. We explored several options for assigning beneficiaries to an ACO based on whether the beneficiary received the plurality of primary care services from providers and suppliers participating in the ACO. The primary options we considered were whether to assign beneficiaries to an ACO prospectively, at the beginning of the performance year, or whether to assign beneficiaries to an ACO retrospectively, at the end of the performance year.

Under the retrospective approach, the ACO would be held accountable for beneficiaries that chose to receive the plurality of their primary care services from practitioners in the ACO during the course of the performance year. These beneficiaries necessarily would be identified at the end of the performance year. The advantage of this approach is that the ACO is assessed based on beneficiaries with whom its providers and suppliers had visits with during the performance year and had the greatest opportunity to impact care. Another advantage is that this methodology encourages organizations to improve care for all Medicare FFS

patients seen by ACO professionals during a performance year. The disadvantage that some ACOs have articulated is that retrospective assignment can pose challenges when an organization has limited resources. Such organizations may prefer to target specific FFS beneficiaries for enhanced care improvement activities, and be confident that those specific beneficiaries will be the population used to determine the ACO's performance on cost and quality at the end of the year.

Under a prospective assignment approach, a beneficiary's utilization of primary care services during a timeframe prior to the start of the performance year would be used to assign a list of beneficiaries to the ACO at the beginning of a particular performance year (as we have proposed under Track 3). The total cost and quality of the care furnished to beneficiaries on the prospective assignment list would be used at the end of the performance year to determine the ACO's performance. As some ACOs have articulated, an advantage to this approach is that the organization can target its resources and care coordination activities to the specific FFS beneficiaries that appear on the prospective assignment list, confident that these are the beneficiaries that will determine the ACO's quality and efficiency performance at the end of the year. However, in the November 2011 final rule, we discussed several disadvantages to this approach. First, we believed that such an approach would erode the incentive for ACOs to improve their care processes to benefit the broader Medicare FFS population served by the ACO and its ACO participants and ACO providers/suppliers. We stated that since the goal of the Shared Savings Program is to change the care experience for all FFS beneficiaries, ACO participants and ACO provider/suppliers should have incentives to treat all patients equally; using standardized evidence-based care processes, to improve the quality and efficiency of the care they provide to all FFS beneficiaries (76 FR 67861). Second, we noted that since FFS beneficiaries retain the freedom to choose their providers, it was likely that some prospectively assigned beneficiaries would choose not to obtain the plurality of their primary care services from ACO professionals during the performance year; however, the ACO would still be held accountable for the total cost and quality of the care furnished to those beneficiaries.

After considering stakeholder comments on these main approaches, we finalized a hybrid policy that provided for a preliminary prospective assignment methodology with final retrospective reconciliation (76 FR 67867). We finalized this hybrid approach in an effort to realize the most positive aspects of both prospective and retrospective assignment and avoid, to the extent possible, the major disadvantages of each. Therefore, we finalized a policy in which we prospectively assign beneficiaries to ACOs in a preliminary manner at the beginning of a performance year based on most recent 12 months of data. We then update this information quarterly, based on a rolling 12 months of data. Final assignment is determined after the end of each performance year based on the 12 months of data from the performance year. This policy determines assignment to an ACO under the Shared Savings Program based on a statistical determination of a beneficiary's utilization of primary care services, rather than on a process of enrollment or "voluntary selection" by beneficiaries. Beneficiaries are assigned to no more than one ACO, and the specific methodology (the "step-wise" approach) is described in § 425.402. We finalized this policy because we believed that the methodology would balance beneficiary freedom to choose providers under FFS Medicare with the ACO's desire to have information about the FFS beneficiaries that were likely to be assigned at the end of the performance year. We also felt this approach would provide adequate incentives for each ACO to redesign care processes for and provide high quality care to its entire FFS beneficiary population instead of just focusing on a subset of patients. Finally, the ACO's performance would be assessed on the basis of the care furnished to those beneficiaries that chose to receive the plurality of primary care services from ACO professionals during the performance year, and for whom the ACO had the greatest opportunity to impact care.

A retrospective claims-based assignment methodology necessarily creates more year-to-year variability or "churn" in the list of assigned beneficiaries compared to managed care programs where patients enroll in and are locked in at the beginning of the year. Based on our experience and the data generated from the Physician Group Practice Demonstration (which used a similar retrospective assignment methodology), approximately 75 percent of beneficiaries assigned at the end of one performance year remained assigned at the end of the next performance year. The other 25 percent of beneficiaries were no longer assigned to the PGP site because they either were no longer eligible to be assigned or chose not to receive the plurality of their primary care services from the PGP practitioners. This statistic was recently confirmed when evaluating "churn" in the Shared Savings Program context. On average, 76 percent (range = 58 percent to 88 percent) of beneficiaries assigned to a Shared Savings Program ACO at the end of one year are assigned to the same ACO at the end of the subsequent performance year. In other words, ACOs experience a "churn rate" of 24 percent on average. However, when combined with the information provided on quarterly updates to the assigned beneficiary list, "churn" from quarter to quarter decreases to an average of 10 percent. In other words, on average, 91 percent of the beneficiaries assigned in one quarter appear on the next quarter's assignment list (range = 77 percent to 95 percent). These data indicate that "churn" varies from ACO to ACO, and that our hybrid assignment methodology performed according to expectations, that is, the quarterly assignment reports provide the ACO with relevant information during the performance year about its patient population for purposes of more effectively planning and coordinating care.

As in the PGP demonstration, the 24 percent "churn rate" found in the Shared Savings Program reflects beneficiaries that either became ineligible to be assigned or chose not to receive the plurality of their primary care services from ACO professionals. Beneficiaries who were assigned in one performance year, but fall off the assignment list at the end of the subsequent performance year may do so for a variety of reasons including:

- Beneficiary did not seek primary care services from any Medicare-enrolled physicians during the subsequent performance year.
- Beneficiary chose to receive all primary care services or the plurality of his or her primary care services from providers outside the ACO during the subsequent performance year. Reasons for this could include:

++ The beneficiary received short term care (for example, referral care, SNF care) from ACO professionals during the earlier performance year but did not continue the relationships in the subsequent year.

++ Beneficiary moved his/her residence and now seeks care from practitioners unaffiliated with the ACO.

- Beneficiary chose to enroll in MA or is otherwise no longer a FFS Medicare beneficiary in the subsequent

performance year (that is, the beneficiary is no longer eligible for assignment).

• A new ACO entered the market in the subsequent performance year and its ACO professionals furnish the plurality of primary care services to the beneficiary compared to the established ACO.

We estimate that on average, 76 percent of beneficiaries assigned to a Shared Savings Program ACO remain assigned from one year to the next. However, the retention rate varies from 58 percent to 88 percent across ACOs, and correspondingly, the turnover varies from 12 percent to 42 percent. On average, 7 percent of previously assigned beneficiaries are no longer eligible for assignment to an ACO and 17 percent of previously assigned beneficiaries remain eligible to be assigned, but do not receive the plurality of their primary care services from ACO professionals the ACO during the subsequent performance year. Of the 17 percent of previously assigned beneficiaries who remain eligible for assignment—

• Six percent had at least one primary care physician visit with a physician who is an ACO professional, but the plurality of their primary care services were rendered outside the ACO;

• Three percent had no physician or non-physician primary care visits during the subsequent year;

• Seven percent had at least one physician or non-physician primary care visit, but none with ACO professionals;

• One percent had at least one non-physician primary care visit with an ACO professional, but had no primary care visits with physicians who are ACO professionals in the ACO; and

• Seven percent had at least one primary care visit with a physician in the ACO, but did not receive the plurality of their primary care services from ACO professionals.

As suggested by these statistics, some percentage of beneficiaries may believe a certain primary care practitioner affiliated with an ACO has ultimate responsibility for coordinating their care, even when it is necessary for them to receive primary care services from other practitioners, including practitioners who are not participating in the same ACO with which the practitioner is affiliated. Such a beneficiary could become unassigned if his or her primary care service utilization shifted away from practitioners in the ACO in a year. For example, a beneficiary living in a small town may have had a primary care service visit during a performance year with a primary care provider who is an ACO professional with whom the beneficiary has a long-standing relationship and the beneficiary believes this ACO professional is responsible for coordinating his/her care. If this beneficiary chooses to go to a large health system in the next town for primary care services and receives primary care services from practitioners that are unaffiliated with the ACO during the performance year, at the end of the performance year it may be determined that ACO professionals did not render the plurality of the primary care services for that beneficiary and therefore the ACO would not be held accountable for the total quality and cost of the beneficiary's care for that performance year. However, commenters have suggested that beneficiaries should have the ability to designate which providers (and by extension, the ACOs with which they are affiliated) are responsible for overseeing their overall care, regardless of where the beneficiary received the plurality of his or her primary care services. These commenters argue that creating a methodology that takes into account what provider a beneficiary believes has ultimate responsibility for his or her care could reduce "churn" from year to year, and increase the chances that an ACO would see a return on the investments it makes in the care of specific beneficiaries. Commenters argue this is particularly important in two-sided models where ACOs face amplified levels of performance-based risk.

Patient advocacy groups and ACOs have expressed interest in and support for enhancing claims-based assignment of beneficiaries to ACOs by taking into account beneficiary attestation regarding the provider that they consider to be responsible for coordinating their overall care. Stakeholders believe that incorporating this information and giving beneficiaries the opportunity to voluntarily "align" with the ACO in which their primary healthcare provider participates will improve the patient-centeredness of the assignment methodology.

To begin to address these concerns, the Pioneer ACO Model is currently conducting a test of beneficiary attestation for the 2015 performance year. Specifically, the Innovation Center has designed a test in which participating ACOs mail cover letters to beneficiaries aligned to the Pioneer ACO in either the 2013 or 2014 performance years, explaining the process by which a beneficiary may indicate whom they consider to be their "main doctor", each with a form that asks the beneficiary to confirm their "main doctor". In the form the beneficiary is asked to confirm whether or not the listed provider or supplier is their "main doctor." Beneficiaries who confirm a care relationship with the provider/supplier listed on the form (who is an ACO participating provider/supplier identified by the Pioneer ACO) and meet all other eligibility criteria for alignment (or example, they did not drop either Part A or B coverage or join a MA plan), would be aligned to the Pioneer ACO for the following performance year, regardless of whether or not the practitioners participating in the Pioneer ACO rendered the plurality of the beneficiary's primary care services during the performance year. The Innovation Center will conduct claims-based attribution using the methodology established for the Pioneer ACO Model, but will include in the Pioneer's aligned beneficiary population not only those beneficiaries aligned through claims, but also those beneficiaries who returned the form confirming that a Pioneer ACO provider/supplier is their main doctor. Beneficiaries who do not return the form or who return the form, but indicate the provider listed is not their main doctor, will not be included in the ACO's assigned beneficiary population unless they are assigned through the existing claims-based attribution methodology. This means that if the beneficiary does not return the form and the beneficiary is not assigned to the Pioneer ACO through the claims-based attribution methodology, then the beneficiary would not be assigned to the Pioneer ACO.

Due to program integrity concerns and the additional administrative burden for ACOs participating in the Pioneer Model, discussions of beneficiary attestation or receipt of confirmation forms at the point of care were precluded under this first test of beneficiary attestation. Rather, in this initial test, the Innovation Center seeks only to evaluate the effectiveness of different types of mailed forms with respect to beneficiary willingness to attest that a particular practitioner has the primary responsibility for their care. Additional testing in the future is planned under the Pioneer ACO Model that will build upon lessons learned from this initial test and in which we would seek to enhance the meaningfulness of dialogue between beneficiaries and their providers regarding the nature of the care relationship.

Although we are not making any specific proposals related to beneficiary attestation, we welcome comments on

whether it would be appropriate to offer a beneficiary attestation process to ACOs that choose to participate in the Shared Savings Program under two-sided risk financial arrangements. We intend to carefully consider any comments on this issue during the development of the final rule, and will make an assessment at that time as to whether any change to our assignment methodology to include beneficiary attestation would be appropriate. We are interested in receiving comments and suggestions on a wide variety of policy and operational issues related to beneficiary attestation. For example, which beneficiaries should be eligible to attest into an ACO? Should this option be available to all beneficiaries or only to currently or previously aligned beneficiaries? What implications would attestation or voluntary alignment have for the assignment of beneficiaries to an ACO under a prospective versus a preliminary prospective method? Which types of care relationships should be considered—those with primary care physicians, specialists or other types of providers? How should beneficiaries receive communications about claims-based and voluntary alignment and who would provide the information? What method or process should be used to obtain beneficiary confirmation and when would this occur? Under what circumstances and how could beneficiaries reverse their decisions? Although we believe the option suggested would protect beneficiary freedom to choose, we seek comment on whether there are additional ways to protect beneficiaries from coercion and ensure proper monitoring and safeguards under the Shared Savings Program. What implications would there be for ACO information or other administrative systems? What provider education would be needed? Should there be additional application or eligibility requirements for ACOs in tracks under which beneficiary attestation is offered? We would note that if we were to offer a beneficiary attestation process for ACOs that choose to participate in the Shared Savings Program under two-sided risk financial arrangements, such beneficiaries would be eligible to be included in the sample for GPRO quality reporting by ACOs participating in the Shared Savings Program (76 FR 67900), even if the beneficiary did not chose to receive care from the ACO professionals during the performance year, as might be the case under Track 3 under the proposed prospective assignment methodology. Also, we are concerned about creating additional administrative burdens for ACOs that might discourage them from accepting two-sided risk arrangements. Are there ways that beneficiary attestation could be operationally implemented to reduce administrative burdens on ACOs and CMS and limit beneficiary confusion? We anticipate that if we were to offer a beneficiary attestation process for ACOs that choose to participate in the Shared Savings Program under two-sided risk financial arrangements, then at least initially we would anticipate implementing this beneficiary attestation in a manner consistent with the current beneficiary attestation under the Pioneer ACO Model. We believe this would be an appropriate starting point for beneficiary attestation under the Shared Savings Program because it allows us to take advantage of the policies and processes that have already been developed for the Pioneer ACO Model. Additionally, we believe it is unlikely that such a policy would impact "churn" for Track 3 ACOs during a performance year, given our proposals for prospectively assigning beneficiaries. However, beneficiary attestation may have a minor impact on "churn" during a performance year related to the preliminary prospective with retrospective reconciliation approach such as the methodology employed under Track 2. This process may also have a minor impact in stabilizing the beneficiary assignment list from one performance year to the next for all ACOs.

In addition, we seek comments on whether a beneficiary attestation process under the Shared Savings Program could bias performance year results compared to the ACO's benchmark. For example, we believe that such biases could occur because the beneficiaries used to establish performance benchmarks would not have had the same opportunity to designate their "main doctor." Rather, for purposes of the benchmark years, all beneficiaries would be assigned using the established claims-based assignment methodology. Would it be appropriate for us to use our authority to adjust an ACO's benchmark to account for "beneficiary characteristics" to address any such potential biases?

In connection with any implementation of beneficiary attestation, we would revise our regulations as necessary, to protect beneficiaries from undue coercion or influence in connection with whether they choose to attest or not. Beneficiary attestation is not intended to be used as a mechanism for ACOs (or ACO participants, ACO providers/suppliers, ACO professionals, or others) to target potentially lucrative beneficiaries or avoid those less likely to produce savings. To this end, we do not believe ACOs or others should be permitted to offer gifts or other inducements to beneficiaries, nor should they be allowed to withhold or threaten to withhold items or services, for the purpose of coercing or influencing their alignment decisions. The current regulations at § 425.304(a)(1) prohibit ACOs, ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities from providing gifts or other remuneration to beneficiaries as inducements for receiving items or services from, or remaining in, an ACO. The regulation at § 425.304(a)(2) permits certain in-kind items or services to be provided to beneficiaries if there is a reasonable connection between the items and services and the medical care of the beneficiary and certain other conditions are met. We would consider any inducement intended to coerce or influence a beneficiary attestation decision to be prohibited under § 425.304(a)(1) and not be considered reasonably connected to medical care under § 425.304(a)(2). We would not, however, prohibit an ACO or its ACO participants and ACO providers/suppliers from providing a beneficiary with accurate descriptive information about the potential patient care benefits of aligning with an ACO. We are also soliciting comments on this issue.

(2) Seeking Comment on a Step-Wise Progression for ACOs To Take on Performance-Based Risk

Under the current Shared Savings Program rules, an ACO may not include an entity on its list of ACO participants unless all ACO providers/suppliers billing through the entity's Medicare-enrolled TIN have agreed to participate in the program and comply with the program rules (see discussion in section II.B. of this proposed rule). Furthermore, it is not possible under our current regulations for some ACO providers/suppliers to participate in Track 1, while other ACO providers/suppliers that may be more ready to accept performance-based risk participate under Track 2. Some stakeholders have commented that requiring all ACO providers/suppliers billing through an ACO participant TIN to participate in the same risk track could deter some ACOs from entering higher risk arrangements (Tracks 2 or 3) if they do not believe that all of the ACO providers/suppliers billing through a given ACO participant TIN are prepared to operate under high levels of risk.

Conversely, we have heard from other stakeholders that requiring all ACO providers/suppliers billing though an ACO participant TIN to enter the same risk track can motivate an organization to work toward a common performance goal and implement uniform care processes that streamline patient care within and between various sites of care. We believe that the program works best when the incentives within an organization are aligned among all providers and suppliers in that organization. Given our policy objectives to encourage ACOs to redesign their care processes and move to increasing levels of financial risk, we are not proposing at this time to change our regulations in order to allow providers and suppliers billing through the same ACO participant TIN to participate in different tracks under the Shared Savings Program. However, we are interested in stakeholder opinion on this issue and seek comment on what options the program might consider in the future to encourage organizations to participate in the program while permitting the providers and suppliers within that organization to accept varying degrees of risk. In particular, we are interested in stakeholders' input on the advantages and disadvantages of allowing Shared Savings Program ACOs that wish to enter a track with increased risk to split their ACO participants into different tracks or split ACO provider/suppliers billing through a given Medicare-enrolled TIN so that a subset participate in a track that offers a higher sharing rate in exchange for taking on a greater degree of performance-based risk, while the remainder participate in a lower risk track. We intend to carefully review any comments that are received on these issues during the development of the final rule and will make an assessment at that time as to whether any change to our current policy is necessary and appropriate.

For reasons already stated in the November 2011 final rule (76 FR 67808 through 67811), we believe it is appropriate to use the Medicare-enrolled TINs that make up each ACO as the basis for a number of operational processes under the Shared Savings Program, including beneficiary assignment, and that, as a result, all providers and suppliers billing through the TIN of an ACO participant must agree to participate in the ACO and comply with program regulations in order for the ACO to include the entity on its ACO participant list. Therefore, we do not believe it would be necessary or ideal to adopt an approach under which ACOs would be permitted to pick and choose ACO provider/suppliers for participation. However, we are considering ways to encourage organizations to move in a step-wise progression to taking on performance-based risk when some entities on its ACO participant list are ready. Therefore, if we were to make modifications to our current policies to permit organizations to split their ACO participant TIN list into different risk tracks, we would anticipate the following:

- The ACO must have completed a full agreement period under Track 1 and meet requirements for renewing its agreement under Track 1 as proposed in this proposed rule.
- The ACO must submit an ACO participant list in the form and manner designated by CMS and by a deadline established by us.
- The ACO must indicate, in the form and manner specified by CMS, which ACO participants would continue under Track 1 and which would participate under a performance-based risk track. We would consider this list to be a "segmented list" of ACO participants.
- The ACO as a whole would be required to meet the eligibility requirements to participate in the program, including the requirement that the ACO have at least 5,000 assigned beneficiaries and the governance requirements.
- Regarding quality measures submission, we considered whether the ACO as a whole would be responsible for submitting quality data in accordance with subpart F of the Shared Savings Program regulations. On the one hand, the ability of the ACO to report quality measures once on behalf of both segmented lists would reduce quality reporting burden with the same aggregate quality score applying to each segment of the ACO participants. On the other hand, if each segmented list was required to report quality separately, we may be able to get a more accurate assessment of the quality of care by each segmented list leading to a more accurate determination of shared savings or losses.
- Regarding benchmarking and assignment of beneficiaries, we considered whether each half of the segmented list of ACO participants would have its own benchmark and list of assigned beneficiaries. Under this option, the two groups of ACO participants would each receive their own performance reports from CMS and be subject to the data sharing rules appropriate for their track, and the determination of shared savings would occur according to the rules of the chosen track. Another option would be to develop one benchmark and list of assigned beneficiaries for the ACO as a whole. This option would require a uniform assignment methodology to be applied, regardless in which track the segmented lists are participating. Alternatively, we could limit segmented lists to participation in only Tracks 1 and 2 because these tracks have an assignment methodology that does not conflict.
- Regarding changes in the ACO participant lists during the agreement period, we considered whether an ACO would be permitted to add or delete ACO participants from the segmented list of ACO participants. One option considered would be to permit an ACO to add or delete ACO participants from the segmented lists pursuant to the proposed regulation at § 425.118(b), but ACO participants would not be permitted to change risk tracks during the agreement period. Another option we considered and seek specific comments on is the option to require such organizations to articulate and carry out the transition of their Track 1 ACO participants to the list of ACO participants that are under a risk-based arrangement during the course of the agreement period. For example, in each year of the agreement period, the ACO would be required to remove ACO participants from the Track 1 list and add them to the list of ACO participants under the two-sided risk model. In this way, the ACO and its ACO participants would be better prepared to reapply to the Shared Savings Program under a two-sided risk model in its third agreement period.

Although we are not specifically proposing to allow for different risk tracks within the same ACO, we seek comments on these options and other considerations for permitting organizations to move forward to performance-based risk in a step-wise manner. We specifically seek comment on ways to mitigate selection bias when considering these options, in other words, we seek comment on whether additional considerations should be made with regards to organizations that may choose to create two different ACO participant lists in an effort to advantage the part of the organization that is participating in the two-sided model at the expense of the part of the organization participating in the one-sided model. We believe the concern is minimized by the option we considered that we would only make this option available under an ACO's second agreement period. Moreover, we note that our proposed criteria for renewal include a review of the ACO's history of program integrity. We intend to

carefully review any comments that are received on these issues during the development of the final rule and will make an assessment at that time as to whether any change to our current policy is necessary and appropriate.

5. Modifications to Repayment Mechanism Requirements

a. Overview

In the November 2011 final rule (76 FR 67937), we discussed the importance of a program requirement that ensures ACOs entering the two-sided model will be capable of repaying Medicare for shared losses. The final rule established a requirement that ACOs applying to participate in the two-sided model must establish a repayment mechanism to assure CMS that they can repay losses for which they may be liable (§ 425.204(f)). For an ACO's first performance year, the repayment mechanism must be equal to at least 1 percent of its total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries, as determined based on expenditures used to establish the ACO's benchmark (§ 425.204(f)).

Further, to continue participation in the program, each Track 2 ACO must annually demonstrate the adequacy of its repayment mechanism before the start of each performance year in which it takes risk (§ 425.204(f)(3)). The repayment mechanism for each performance year must be equal to at least 1 percent of the ACO's total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries, as determined based on expenditures for the ACO's most recent performance year.

An ACO may demonstrate its ability to repay losses, or other monies determined to be owed upon first year reconciliation, by obtaining reinsurance, placing funds in escrow, obtaining surety bonds, establishing a line of credit (as evidenced by a letter of credit that the Medicare program can draw upon), or establishing another appropriate repayment mechanism that will ensure its ability to repay the Medicare program (§ 425.204(f)(2)). Given our experience in implementing the program, we are proposing to revisit our requirements to simplify them and to address stakeholder concerns regarding the transition to risk, as discussed in the previous sections.

b. Proposals for Amount and Duration of the Repayment Mechanism

As noted previously, under the current regulations, ACOs entering a two-sided risk track must submit an adequate repayment mechanism at the time of application and again at the beginning of each performance year. The amount must be equal to at least 1 percent of the ACO's total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries, as determined based either on expenditures used to establish the ACO's benchmark or expenditures for the ACO's most recent performance year. This amount is estimated by CMS and reported to the ACO so that it can set up its required mechanism. We have heard from stakeholders that establishing multiple repayment mechanisms during the agreement period can be very burdensome and ties up capital that could otherwise be used to support ACO operations. Therefore, we have considered whether it would be possible to streamline the repayment mechanism requirements. Specifically, we considered whether it would be feasible for an organization to establish a single repayment mechanism to cover the entire 3-year agreement period. Initially we were concerned that requiring an organization to establish a single repayment mechanism to cover 3 performance years would involve repayment amounts that were excessive and overly burdensome for organizations. However, our actuaries have determined that this may not be the case. We believe that rather than requiring ACOs to create and maintain two separate repayment mechanisms for two consecutive performance years, which would effectively double the amount of the repayment mechanism during the overlapping time period between the start of a new performance year and settlement of the previous performance year, the repayment mechanism that is established for the first performance year of an agreement period under a two-sided risk model can be rolled over for subsequent performance years.

Thus, we propose to require an ACO to demonstrate at the time of its application to the Shared Savings Program or participation agreement renewal for a two-sided risk model and upon request thereafter that it would be able to repay shared losses incurred at any time within the agreement period, that is, upon each performance year reconciliation during the agreement period. Thus, an ACO would be required to establish a repayment mechanism for the required amount as discussed in this section to cover the entire agreement period under a two-sided risk model (that is, under Track 2 or under proposed Track 3) and a reasonable period of time after the end of the agreement period (the "tail period"). The tail period shall be sufficient to permit CMS to calculate the amount of any shared losses that may be owed by the ACO and to collect this amount from the ACO. The length of the tail period shall be established by CMS in guidance.

Under this approach, an ACO would be required to establish a repayment mechanism once at the beginning of a 3-year agreement period. We propose that an ACO must demonstrate the adequacy of its repayment mechanism and maintain the ability to repay 1 percent of the ACO's total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries based on the expenditures used to establish the benchmark for the applicable agreement period, as estimated by CMS at the time of application or participation agreement renewal. If the repayment mechanism is used to repay any portion of shared losses owed to CMS, the ACO must promptly replenish the amount of funds available through the repayment mechanism within 60 days. This would ensure continued availability of funds to cover any shared losses generated in subsequent performance years. Given that we propose in section II.B. of this proposed rule to adjust an ACO's benchmark annually to account for changes in the ACO participant list, it is possible that an ACO's benchmark could change such that the repayment mechanism amount established at the beginning of the 3-year agreement period no longer represents one percent of the ACO's benchmark expenditures. Therefore, we are considering whether we should require the ACO to adjust the repayment mechanism to account for this change, or whether a threshold should be established that triggers a requirement for the ACO to add to its repayment mechanism. We seek comment on this issue, including the appropriate threshold that should trigger a requirement that the ACO increase the amount guaranteed by the repayment mechanism.

These proposals are reflected in the proposed modifications to § 425.204(f). We note that the reference to "other monies determined to be owed" in the current provision directly relates to the interim payments that were available in the first performance year only for ACOs that started participating in the program in 2012. Because interim payments are no longer offered to ACOs, we also propose to remove the reference to "other monies determined to be owed" from § 425.204(f).

c. Proposals Regarding Permissible Repayment Mechanisms

Under our current rules, ACOs may demonstrate their ability to repay shared losses by obtaining reinsurance, placing funds in escrow, obtaining surety bonds, establishing a line of credit (as evidenced by a letter of credit that the Medicare program can draw upon), or establishing another appropriate repayment mechanism that will ensure their ability to repay the Medicare program. Based on our experience with the program, we are proposing to remove the option that permits ACOs to demonstrate their ability to pay using reinsurance or an alternative mechanism. First, no Shared Savings Program ACOs have obtained reinsurance for the purpose of establishing their repayment mechanism. ACOs that have explored this option have told us that it is difficult to obtain reinsurance, in part, because of insurers' lack of experience with the Shared Savings Program and the ACO model, and because Shared Savings Program ACOs take on performance-based risk not insurance risk. Additionally, the terms of reinsurance policies obtained by ACOs could vary greatly and prove difficult for CMS to effectively evaluate. Second, based on our experience to date, a request to use an alternative repayment mechanism increases administrative complexity for both ACOs and CMS during the application process and is more likely to be rejected by CMS than one of the specified repayment mechanisms.

Therefore, we propose to revise § 425.204(f)(2) to limit the types of repayment mechanisms ACOs may use to demonstrate their ability to repay shared losses to the following: Placing funds in escrow; establishing a line of credit; or obtaining a surety bond. Under this proposed revision, ACOs would retain the flexibility to choose a repayment mechanism that best suits their organization. We also believe that CMS would be more readily able to evaluate the adequacy of these three types of arrangements, as compared to reinsurance policies and other alternative repayment mechanisms. For instance, escrow account agreements, letters of credit, and surety bonds typically have standard terms, that CMS can more readily assess as compared to the documentation for alternative repayment mechanisms, which tends to be highly variable.

In addition, we propose to clarify that ACOs may use a combination of the designated repayment mechanisms, if needed, such as placing certain funds in escrow, obtaining a surety bond for a portion of remaining funds, and establishing a line of credit for the remainder. Thus, we are proposing to revise our rule at § 425.204(f)(2) to indicate that an ACO may demonstrate its ability to repay shared losses owed by placing funds in escrow, obtaining surety bonds, establishing a line of credit, or by using a combination of these mechanisms. We seek comment on our proposed modifications to the repayment mechanism requirements and also welcome comments on the availability and adequacy of reinsurance as a repayment mechanism.

6. Seeking Comment on Methodology for Establishing, Updating, and Resetting the Benchmark

a. Background on Establishing, Updating, and Resetting the Benchmark

Section 1899(d)(1)(B)(ii) of the Act addresses how ACO benchmarks are to be established and updated. This provision specifies that the Secretary shall estimate a benchmark for each agreement period for each ACO using the most recent available 3 years of per beneficiary expenditures for parts A and B services for Medicare FFS beneficiaries assigned to the ACO. Such benchmark shall be adjusted for beneficiary characteristics and such other factors as the Secretary determines appropriate and updated by the projected absolute amount of growth in national per capita expenditures for parts A and B services under the original Medicare fee-for-service program, as estimated by the Secretary. Such benchmark shall be reset at the start of each agreement period. Accordingly, through the initial rulemaking establishing the Shared Savings Program, we adopted policies for establishing, updating and resetting ACO benchmarks at § 425.602. As described later in this section, under this methodology, we establish ACO-specific benchmarks that account for national FFS trends.

As the statute requires the use of historical expenditures to establish an ACO's benchmark, the per capita costs for each benchmark year must be trended forward to current year dollars and then a weighted average is used to obtain the ACO's historical benchmark for the first agreement period. The statute further requires that we update the benchmark for each year of the agreement period based on the projected absolute amount of growth in national per capita expenditures for parts A and B services under the FFS program, as estimated by the Secretary. In the April 2011 proposed rule (76 FR 19609 through 19611), we considered a variety of options for establishing the trend factors used in establishing the historical benchmark and for accounting for FFS trends in updating the benchmark during the agreement period.

In addition to the statutory benchmarking methodology established in section 1899(d), section 1899(i)(3) of the Act grants the Secretary the authority to use other payment models, including payment models that would use alternative benchmarking methodologies, if the Secretary determines that doing so would improve the quality and efficiency of items and services furnished under this title and the alternative methodology would result in program expenditures equal to or lower than those that would result under the statutory payment model. As described later in this section, in the November 2011 final rule, we considered whether to invoke this authority to modify certain aspects of the statutory benchmarking methodology, but elected not to do so. We note that we did invoke this authority to help create two-sided risk under Track 2.

(1) Background on Use of National Growth Rate as a Benchmark Trending Factor

The statute does not specify the trending factor to be used in establishing the benchmark. In the April 2011 proposed rule (76 FR 19610), we considered use of either national, or state or local growth factors for trending the benchmark. We explained that using the national growth rate in Medicare A and B FFS expenditures appeared to be more consistent with the statutory methodology for updating an ACO's benchmark. Further, a national growth rate would allow a single growth factor to be applied to all ACOs regardless of their size or geographic area. However, a national rate could also disproportionately encourage the development of ACOs in areas with historical growth rates below the national average that would benefit from having a relatively higher base, which increases the chances for shared savings, while discouraging the development of ACOs in areas with historically higher growth rates above the national average that would have a relatively lower base.

In contrast, we explained in April 2011 proposed rule that trending expenditures based on State or local area growth rates in Medicare A and B expenditures may more accurately reflect the experience in an ACO's area and mitigate differential incentives for

participation based on location. Therefore, we considered an option to trend the benchmark by the lower of the national projected growth rate or the State or the local growth rate. This option balanced providing a more accurate reflection of local experience with not rewarding historical growth higher than the national average. We believed this method would instill strong saving incentives for ACOs in both high-cost growth and low-cost growth areas.

We proposed to employ the national growth rate in Medicare Parts A and B expenditures for FFS beneficiaries for trending forward the most recent 3 years of per beneficiary expenditures for Parts A and B services in order to establish the historical benchmark for each ACO. We believed this approach would help to ensure that ACOs in both high spending, high growth and low spending, low growth areas would have appropriate incentives to participate in the Shared Savings Program. We further indicated that this approach would allow us to move toward establishing a national standard to calculate and measure ACO financial performance. We sought comment on this proposal and on the alternatives to using a national growth rate to establish the benchmark.

Some commenters supported our proposal to employ a national growth rate for setting the benchmark and recognized the importance of using national growth rates for rationalizing overall spending across regions nationwide. Many more favored the use of either local, regional, or State growth rates, and some favored our proposal to use the lower of either the national or State or local growth rates. Commenters also offered a number of alternative approaches for trending benchmark expenditures, including the following:

- Use a blend of national average growth and absolute dollar growth.
- Use the ACO's own percentage growth rate to trend forward the historical benchmark data.
- Account for local variation after analyzing national and local growth rates. (76 FR 67925).

In the end, we finalized our policy under § 425.602 of using the national growth rate in Medicare Parts A and B expenditures for FFS beneficiaries for trending forward the most recent 3 years of per beneficiary expenditures for Parts A and B services in order to establish the benchmark for each ACO. In doing so, we make calculations for separate cost categories for each of the following populations of beneficiaries: ESRD, disabled, aged/dual eligible and aged/non-dual eligible. We stated our belief that implementing a historical benchmark trending factor using the national growth rate for Parts A and B FFS expenditures appropriately balanced commenters' concerns that benchmark trending should encourage participation among providers that are already efficient or operating in low cost regions without unduly rewarding ACOs in high-cost areas. We further stated that we anticipated the net effect of using the same trending factor for all ACOs would be to provide a relatively higher expenditure benchmark for low-growth/low spending ACOs and a relatively lower benchmark for high growth/high spending ACOs. ACOs in high cost, high growth areas would therefore have an incentive to reduce their rate of growth more to bring their costs more in line with the national average; while ACOs in low cost low, growth areas would have an incentive to continue to maintain or improve their overall lower spending levels.

Over 330 ACOs entered the Shared Savings Program between 2012 and 2014 and are located throughout the country—across diverse geographies—in a mix of high-cost/high-growth and low-cost/low-growth areas. Further, within local markets where multiple ACOs have formed, we have observed that ACOs can be a mix of both high- and low-cost and high- and low-growth organizations. We are encouraged by the continued interest in the program: Of the ACOs that entered the program, only two voluntarily terminated at the end of the performance year concluding December 31, 2013. (One was eligible for a performance payment of shared savings and the other merged with another participating ACO.) In addition, we continue to see strong interest in new entrants for the January 2015 start date.

Under the Pioneer ACO model, we adopted a different methodology for establishing an ACO's historical expenditure baseline for its first three performance years. See *http://innovation.cms.gov/Files/x/PioneerACOBmarkMethodology.pdf.* The Pioneer model benchmarking methodology trends forward baseline years 2009 and 2010 to 2011 by applying the growth in expenditures for the reference population. The reference population is defined as alignment-eligible beneficiaries with the same state of residence, eligibility status, age and sex as the ACO's aligned beneficiaries. The 3 historical baseline years under the Pioneer ACO Model also correspond to the 3 years prior to when ACOs entered the model, specifically 2009, 2010, and 2011. Further, baseline expenditures in 2011 dollars are updated to the appropriate performance year using a 50/50 blend of the national growth rate and the absolute dollar equivalent of that national growth rate. However, the benchmarking methodology used in the Pioneer ACO Model was revised for performance years four and five of the model to be more consistent with the benchmarking approach used in the Shared Savings Program, in part due to stakeholder feedback.

(2) Background on Use of National FFS Growth Factors in Updating the Benchmark During the Agreement Period

Section 1899(d)(1)(B)(ii) of the Act states that the benchmark shall be updated by the projected absolute amount of growth in national per capita expenditures for parts A and B services under the original Medicare fee-for-service program, as estimated by the Secretary.

In the April 2011 proposed rule (76 FR 19610 through 19611), we proposed to use a flat dollar amount equivalent of the absolute amount of growth in the national FFS expenditures to update the benchmark during an agreement period. We explained our view that in enacting section 1899(d)(1)(B)(ii) of the Act, Congress demonstrated interest in mitigating some of the regional differences in Medicare spending among ACOs and that this approach would help to ensure that ACOs in both high spending/high growth and low spending/low growth areas would have appropriate incentives to participate in the Shared Savings Program. We described the effect this update methodology might have in the 2nd and 3rd years of an agreement period: Using a flat dollar increase, which would be the same for all ACOs, provides a relatively higher expenditure benchmark for low growth, low spending ACOs and a relatively lower benchmark for high growth, high spending ACOs. All else being equal, an ACO can more likely share in savings when its actual expenditures are judged against a higher, rather than a lower benchmark. Thus, with a flat dollar increase to the benchmark, ACOs in high cost/high growth areas must reduce their rate of growth more to bring their costs more in line with the national average. We acknowledged that this approach to updating the benchmark could contribute to selective program participation by participants in low growth areas, as well as result in Medicare costs due to an increase in the amount of performance payments for unearned savings.

We also considered and sought comment on a second option, which

would be to use our authority under section 1899(i)(3) of the Act to update the benchmark by the lower of the national projected absolute amount of growth in national per capita expenditures or the local/State projected absolute amount of growth in per capita expenditures. We explained our belief that this option could instill strong saving incentives for ACOs in low-cost areas, as well as for those in high-cost areas. Incorporating more localized growth factors reflects the expenditure and growth patterns within the geographic area served by ACO participants, potentially providing a more accurate estimate of the updated benchmark based on the area from which the ACO derives its patient population. Capping the update at the projected absolute amount of growth in national per capita expenditures, however, can advantage ACOs in low cost/low growth areas that have already achieved greater efficiencies, while still offering a strong incentive for those in high cost/high growth areas to reduce their spending.

Commenters were mixed in their preference for either the proposed policy of updating the benchmark by absolute growth in national FFS expenditures, or use of the lower of the national projected absolute amount or the local/State projected absolute amount. For example, one commenter disagreed with the option to use the lower of the national projected absolute amount or the local/State projected absolute amount, suggesting it negatively prejudges all high growth sectors without regard to the underlying clinical or quality issues. However, another commenter favored this approach because this adjustment would afford ACOs the greatest potential for achieving shared savings and minimize the threat of an ACO being disadvantaged by virtue of pricing within its geographic location. Along these lines, one commenter stated the proposed approach offered insufficient incentives for efficient providers to form an ACO. More generally, many commenters urged CMS to adopt policies to encourage participation by organizations that are already efficient or in low cost areas. Several commenters urged use of regional or market-specific expense data for calculating the benchmark update.

In the November 2011 final rule (76 FR 67926 through 67927), we finalized a policy of using the flat dollar amount equivalent of the projected absolute amount of growth in national per capita FFS expenditures to update the benchmark. We stated our belief that this method for updating the benchmark could best address the program's goals and commenters' overall concerns about the participation of efficient/low cost ACOs. The net effect of using the same update for all ACOs is to provide a relatively higher expenditure benchmark for low growth/low spending ACOs and a relatively lower benchmark for high growth/high spending ACOs. Further, with a flat dollar increase to the benchmark equivalent to the absolute amount of growth in the national FFS expenditures, ACOs in high cost, high growth areas must reduce their rate of growth more (compared to ACOs in low cost, low growth areas) to bring their costs in line with the national average. We stated that in light of the alternatives we considered, we believed that the policy of updating benchmarks by the absolute amount of growth in national FFS expenditures offers sufficient incentives for efficient providers to form ACOs. Thus, under the final update methodology, ACOs in low cost areas would achieve a greater amount of savings, based on the same performance, than a comparable ACO in a higher cost area. Moreover, we stated we believed that a benchmark methodology that encourages providers in higher cost areas to bring their spending more in line with the national average is a desirable outcome in furtherance of the program's goal of lowering Medicare expenditures. Finally, we noted that updating the benchmark during the agreement period using a national growth factor aligns with our approach of using a national growth rate to trend forward base year expenditures when establishing the historical benchmark. We stated that we believed this alignment could facilitate analysis of trends in ACO financial performance relative to national trends in Medicare expenditures. For these reasons, we finalized a policy of using the flat dollar amount equivalent of the projected absolute amount of growth in national FFS expenditures to update the benchmark.

In applying these policies for ACOs that joined the program in 2012 and 2013, we observed that the national growth factors used to trend the historical benchmark were declining, highlighted by negative annual per capita expenditure growth in three of four Medicare eligibility categories in 2012. We also found during the first performance year reconciliation that the national update amounts applied to the historical benchmark continued to reflect historically low growth in cost even after an adjustment to restore the effect of sequestration on 2013 claim payments. These updates reflected the slow or negative FFS growth environment due to a number of factors, including demographic changes in program enrollment, low price updates for physician, skilled nursing, and other services, and a broad decrease in inpatient utilization. This resulted in ACOs having very low or even negative updates to their historical benchmarks. Recent projections estimate total Medicare per capita expenditure trends are likely to remain historically low through 2015 followed by a gradual return to historically-familiar positive trend rates starting in 2016.

(3) Background on Managing Changes to ACOs During the Agreement Period

Section 425.214 of the Shared Savings Program regulations addresses the circumstance under which an ACO adds or removes ACO participants or ACO providers/suppliers (identified by TINs and NPIs, respectively) during the term of the participation agreement. The regulation specifies that the ACO's benchmark, risk scores, and preliminary prospective assignment may be adjusted for this change at CMS' discretion (§ 425.214(a)(3)). Subregulatory guidance further describes our use of this discretion. See "Changes in ACO participants and ACO providers/suppliers during the Agreement Period" available online at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Updating-ACO-Participant-List.html*. This guidance explains:

After acceptance into the program and upon execution of the participation agreement with CMS, the ACO must certify the completeness and accuracy of its list of ACO participants. We set the ACO's historical benchmark at the start of the agreement period based on the assigned population in each of the three benchmark years by using the ACO Participant List certified by the ACO. The ACO must submit a new certified ACO Participant List at the start of each new performance year.

CMS will adjust the ACO's historical benchmark at the start of a performance year if the ACO Participant List that the ACO certified at the start of that performance year differs from the one it certified at the start of the prior performance year. CMS will use the updated certified ACO Participant List to assign beneficiaries to the ACO in the benchmark period (the 3 years prior to the start of the ACO's agreement period) in order to determine the ACO's adjusted historical benchmark. As a result of changes to the ACO's certified ACO Participant List, we may adjust the historical benchmark upward or downward. We'll use the new certified list of ACO participants and the adjusted benchmark for the new performance year's assignment, quality measurement and sampling, reports for the new performance

year, and financial reconciliation. We will provide ACOs with the adjusted Historical Benchmark Report.

During the program's first performance years, we experienced a high volume of change requests from ACOs, both adding and removing ACO participants. For example, cumulatively ACOs with 2012 and 2013 start dates requested the addition of over 2,800 ACO participants and removal of over 1,200 ACO participants. The ACO's composition of ACO participant TINs is used to determine the ACO's assigned beneficiary population. Changes to an ACO's participant list will result in changes to the ACO's assigned beneficiary population. As a result, it is necessary to make adjustments to the ACO's historical benchmark to account for these changes. In accordance with our guidance, we adjusted the historical benchmarks for 162 of 220 ACOs with 2012 and 2013 start dates for their second performance year to reflect changes in ACO participants. When an ACO adds new ACO participants or deletes existing ACO participants, the adjustments that are made to its historical benchmark will impact the ACO's performance in subsequent years, and can make forecasting performance more challenging.

As noted in the guidance, when we adjust historical benchmarks during the agreement period to account for changes in beneficiary assignment arising from ACO participant list changes, the benchmark period (the 3 years prior to the start of the ACO's agreement period) remains the same. For instance, if an ACO with an agreement start date of January 1, 2013, added ACO participants for its second performance year, then the adjustments made to the historical benchmark to reflect the ACO's certified ACO participant list for performance year 2 would have been based on the same three benchmark years (2010, 2011, and 2012) originally used to calculate the historical benchmark for the ACO based on its ACO participant list certified when it entered the program (for its first performance year).

Further, changes in the ACO participant TINs that compose ACOs are relevant to determining beneficiary assignment across the program. A beneficiary is assigned to an ACO if the beneficiary received the plurality of his or her primary care services (measured in allowed charges) from ACO professionals billing under the TINs of ACO participants in the ACO rather than outside the ACO (such as from ACO professionals billing under the TINs of ACO participants in other ACOs, individual providers, or provider organizations). We perform the assignment process for ACOs simultaneously, including all eligible organizations. To determine where a beneficiary got the plurality of his or her primary care services, we compare the total allowed charges for each beneficiary for primary care services provided by the ACO (in total for all ACO participants) to the allowed charges for primary care services provided by ACO participants in other ACOs and by non-ACO providers and suppliers. See "Medicare Shared Savings Program: Shared Savings and Losses and Assignment Methodology Specifications" available online at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Financial-and-Assignment-Specifications.html*. Therefore, in the case where a beneficiary is receiving primary care services from ACO participants in multiple ACOs or from both ACO participants and non-ACO providers and suppliers, an ACO's participant composition is important in determining whether the beneficiary is assigned to the ACO at all, and in determining to which (among several) ACO the beneficiary may be assigned.

In summary, in making adjustments to the historical benchmarks for ACOs within an agreement period to account for ACO participant list changes: The historical benchmark period remains constant, but beneficiary assignment reflects the influence of ACO participant list changes. Under this methodology, the historical benchmarks for ACOs with participant list changes from one performance year to the next continue to reflect the ACOs' historical costs in relation to their current composition.

(4) Background on Resetting the Benchmark

In the November 2011 final rule (see 76 FR 67915) establishing the Shared Savings Program, some commenters expressed concerns that rebasing the benchmark at the start of each agreement period would make savings more difficult to attain and eventually make savings unattainable by ACOs. Stakeholders have continued to express concerns about this methodology for rebasing the benchmark. They assert that the current methodology may also reduce the incentive for ACOs to achieve savings since any savings achieved during a given agreement period would result in lower future benchmarks, generating an offsetting reduction in the shared savings payments the ACO would receive in those future agreement periods.

During the initial rulemaking, commenters suggested a variety of alternatives to rebasing the benchmark for each agreement period, as well as technical suggestions on how to reset the benchmark (76 FR 67915 through 76 FR 67916). In the November 2011 final rule, we adopted a policy under which an ACO's benchmark would be reset at the start of each agreement period, as required under section 1899(d)(1)(B)(ii) of the Act. In finalizing this policy, we explained our belief that resetting the benchmark at the beginning of each agreement period would most accurately account for changes in an ACO's beneficiary population over time. We explained that because of turnover in an ACO's assigned beneficiary population, by the end of the agreement period, an ACO's assigned population may be significantly different from the historically assigned beneficiary population used to calculate the ACO's initial benchmark. Further, resetting the benchmark at the beginning of subsequent agreement periods would allow the benchmark to more accurately reflect the composition of an ACO's population, and therefore protect both the Trust Funds and ACOs. We acknowledged commenters' concerns that resetting the benchmark after 3 years could ultimately make it more challenging for ACOs to achieve savings, particularly for low-cost ACOs. However, we explained our belief that one of the fundamental purposes of the Shared Savings Program is to provide incentives for ACOs to strive continually to make further advances in the quality and efficiency of the care they provide (76 FR 67916).

Under § 425.602(c) of the rule, an ACO's benchmark would be reset at the start of its second or subsequent agreement period using the same methodology for establishing the historical benchmark under § 425.602(a). The existing regulations do not specify any alternative methodology for rebasing the benchmarks for ACOs that have completed one or more agreement periods in the Shared Savings Program. For example, for an ACO with a January 2013 agreement start date that continues in the program for a second agreement period beginning January 1, 2016, we would establish the ACO's historical benchmark for its second agreement period according to the methodology set forth in § 425.602(a). In particular, we would compute the ACO's benchmark for its second agreement period based on per capita Parts A and B fee-for-service expenditures for beneficiaries that would have been assigned to the ACO

in any of the 3 most recent years prior to the agreement period using the ACO participants' TINs identified at the start of the agreement period (§ 425.602(a)). In the example of an ACO with an initial agreement period beginning January 1, 2013 and a second agreement beginning January 1, 2016: The ACO's historical benchmark for its first agreement period would have been based on the historical years of 2010, 2011 and 2012 and the ACO's historical benchmark for its second agreement period would be based on the historical years of 2013, 2014 and 2015. In resetting the benchmark, the time period for the benchmark shifts forward to capture the ACOs participants' more recent historical spending. As noted previously, we adjust an ACO's benchmark based on the ACO participant list that it certifies at the start of each performance year, which may reflect changes during the course of the prior performance year. Similarly, in resetting the ACO's benchmark at the start of a second agreement period, we would effectively account for any ACO participant list changes between the ACO's third performance year under its first agreement period and its first performance year under its second agreement period.

Early experience for ACOs participating in the Shared Savings Program is limited to financial performance results for the first performance year of ACOs with 2012 and 2013 start dates. However, we anticipate that the trend for ACOs participating in the Shared Savings Program will be similar to the trend for sites in the Physician Group Practice (PGP) demonstration, with more organizations generating savings as they gain experience in a shared savings model. In the initial performance year of the PGP Demonstration, two sites were eligible for shared savings payments. As the demonstration progressed, more PGP sites demonstrated savings. Over the course of the 5-year demonstration, 7 of the 10 PGP sites were eligible for shared savings payments in one or more performance years.

The experience of PGP demonstration sites is also an indication that resetting ACO benchmarks at the start of the second and each subsequent agreement period would not deter ongoing participation in the program by ACOs. We note, however, that unlike the update methodology currently used in the Shared Savings Program, the benchmarks used in the PGP demonstration were updated using regional factors, as opposed to national factors. This approach is similar to some of the alternatives discussed later in this section, on which we are seeking comment. The benchmarks for the PGP sites were reset as they moved from the PGP demonstration to the PGP Transition Demonstration, and again when they transitioned into the Pioneer ACO Model or the Shared Savings Program. We note that most of the organizations participating in the PGP demonstration elected to continue their voluntary participation under these shared savings models, even though their benchmarks would be reset under the applicable benchmarking methodology. Based on this experience, we conclude that these organizations must have believed there was a sufficient opportunity to share in savings as well as other strategic and competitive advantages to warrant their continued participation in a shared savings initiative, even under a rebased benchmark that reflected the cost savings achieved by the site under the PGP demonstration.

However, while the PGP experience establishes that the current approach to rebasing is consistent with continued participation, at least in some cases, it is possible that additional organizations would have continued into the Pioneer ACO Model or the Shared Savings Program under an alternative rebasing methodology. The PGP experience cannot rule out the possibility that an alternative rebasing methodology could induce ACOs to achieve greater savings, particularly as providers gain more familiarity with the payment model, or could prove more sustainable over time.

(5) Background on Stakeholders' Concerns about Benchmarking Methodology

Since the initial rulemaking, stakeholders have continued to express their concern that resetting ACO benchmarks at the start of each agreement period, as required under the existing methodology, may disadvantage ACOs, particularly those that have generated shared savings. A closely related concern is that because savings achieved during one agreement period would lead to a lower benchmark in future agreement periods, achieving savings could hypothetically be financially unattractive for ACOs in some circumstances. Under the existing benchmarking methodology, an ACO that performs well in its first agreement period as a result of its effective strategies for lowering Medicare expenditures may have a significantly lower historical benchmark in its subsequent agreement period. Consequently, some stakeholders believe that achieving savings may sometimes be financially unattractive for ACOs because these savings would reduce their benchmarks for future periods. They are concerned that the value proposition of the program may diminish over time as ACOs become lower-cost entities, and, as a result, face increased difficulty in achieving additional efficiencies (hence savings) when judged against decreasing benchmarks.

Further, some stakeholders have expressed concern that the existing benchmarking methodology does not sufficiently account for the influence of cost trends in the surrounding region or local market on the ACO's financial performance. In particular, some stakeholders voiced concerns about the low or negative update amounts used during first performance year reconciliation under the existing benchmarking methodology, and favor alternative approaches, which they believe are more certain to yield positive updates to ACOs' historical benchmarks. Others have suggested that we move away from an approach for setting ACO-specific benchmarks and toward an approach for setting regionally-specific benchmarks for ACOs. These concerns, as with those raised regarding the methodology for resetting benchmarks in subsequent agreement periods, center on whether the benchmarks are set at a level ACOs perceive to be sufficient to make program participation financially viable.

We believe it is timely to consider these issues in the context of encouraging continued participation by ACOs in the program and continued improvement in ACO performance, particularly as ACOs with 2012 and 2013 start dates begin to contemplate whether to continue in the program for a second agreement period. Further, we believe there may be important interactions between the way in which the benchmarks for ACOs are set in their initial agreement period and reset in their subsequent agreement periods and encouraging participation by ACOs in the program's two-sided models (particularly ACOs that entered the program under Track 1 and are contemplating moving to a risk based track); namely in terms of the value proposition of moving to a performance-based risk track.

b. Factors To Use in Resetting ACO Benchmarks and Alternative Benchmarking Methodologies

We considered whether modifying the methodology used for establishing, updating, and resetting ACO benchmarks to account for factors relevant to ACOs that have participated in the program for 3 or more years

would help ensure that the Shared Savings Program remains attractive to ACOs and continues to encourage ACOs to improve their performance, particularly those that have achieved shared savings. As discussed later in this section, we considered a range of modifications to the benchmarking methodology in order to expand the methodology for resetting benchmarks to account for factors relevant to continued participation by ACOs in subsequent agreement periods and to increase incentives to achieve savings in a current agreement period, specifically: (1) Equally weighting the 3-benchmark years; (2) accounting for shared savings payments in benchmarks; (3) using regional FFS expenditures (as opposed to national FFS expenditures) to trend and update the benchmarks; (4) implementing an alternative methodology for resetting ACO benchmarks that would hold an ACO's historical costs, as determined for purposes of establishing the ACO's initial historical benchmark for its first agreement period, constant relative to costs in its region for all of the ACO's subsequent agreement periods; and (5) implementing an alternative methodology for resetting ACO benchmarks that would transition ACOs to benchmarks based only on regional FFS costs, as opposed to the ACO's own historical costs, over the course of multiple agreement periods. Further, we considered whether to apply these changes broadly to all ACOs or to apply these changes only when resetting benchmarks for ACOs entering their second or subsequent agreement periods. We also considered whether to apply these changes to a subset of ACOs, such as ACOs participating under a two-sided model (Tracks 2 and 3) or Track 3 ACOs only. In considering these potential options for modifying the benchmarking methodology, it is necessary to balance the desire to make the program more financially attractive to ACOs, against the need to protect the Medicare Trust Funds.

Although we are not proposing any changes to our benchmarking methodology at this time, we are seeking comment on these alternatives for how we approach establishing, updating and resetting benchmarks, as well as suggestions regarding alternative approaches not described here. We will carefully consider the comments that are received regarding these options during the development of the final rule, and may consider adopting one or more of these options in the final rule. We note, however, that any option that relies upon the use of the authority under section 1899(i)(3) of the Act to adopt alternate payment models must be determined to improve quality and efficiency and not to increase program spending.

(1) Equally Weighting the 3 Benchmark Years

Pursuant to section 1899(d)(1)(B)(ii) of the Act, in the November 2011 final rule, we adopted a methodology for establishing ACO benchmarks under which we weight benchmark expenditures at 60 percent for Benchmark Year (BY) 3, 30 percent for BY2, and 10 percent for BY1 (§ 425.602(a)(7)). As we explained in the November 2011 final rule (76 FR 67915), this weighting helps ensure that the benchmark reflects more accurately the latest expenditures and health status of the ACO's assigned beneficiary population. We indicated that giving BY3 the greatest weight would most accurately reflect recent cost trends for the Medicare beneficiaries who receive the plurality of their primary care from ACO providers/suppliers, and thus result in a more accurate benchmark.

To establish an ACO's benchmark for an agreement period, we determine the per capita Parts A and B fee-for-service expenditures for beneficiaries that would have been assigned to the ACO in any of the 3 most recent years prior to the agreement period using the ACO participants' TINs identified at the start of the agreement period (§ 425.602(a)). Therefore, an ACO's benchmark under a second or subsequent agreement period will reflect, to some degree, its previous performance under the program. For example, for ACOs with 2013 start dates that continue in the program for a second agreement period beginning January 1, 2016, BY1 will be based on expenditures for beneficiaries who were assigned to the ACO based on CY 2013 (the timeframe corresponding to performance year 1 under the first agreement period). Likewise, BY2 will be based on assignment for CY 2014 (performance year 2) and BY3 will be based on assignment for CY 2015 (performance year 3). We note, however, that a number of factors will affect beneficiary assignment for purposes of establishing ACO benchmarks in subsequent agreement periods, which may cause an ACO's benchmark year assigned population to deviate from its assigned population for the corresponding performance year. For example, an ACO may add or remove ACO participant TINs in its second or subsequent agreement period. Further, participation in the program by other organizations in an ACO's market may also change in the time between when we performed assignment for the performance year under the prior agreement and when we assign beneficiaries for the purpose of resetting the ACO's benchmark for the next agreement period, leading to changes in the ACO's assigned beneficiary population for purposes of establishing its benchmark for the new agreement period. The impact of these kinds of changes in the assigned beneficiary population between the performance year and the time the benchmark is established for a subsequent agreement is uncertain, and could result in either upward or downward adjustments to expenditures for purposes of establishing the benchmark.

Among ACOs whose assigned beneficiary populations for purposes of resetting the benchmark closely match their assigned beneficiary population for the corresponding performance years, those ACOs that generated savings during a prior agreement period will have comparatively lower benchmarks for their next agreement period. This is because the ACOs were effective in lowering expenditures for these assigned beneficiaries. We assume, for example, that if an ACO generates savings in its first agreement period it is likely that the impact on claims would be most significant in the second or third performance year as opposed to being uniformly distributed across all three performance years. This hypothesis is supported by following factors:

- There may be a lag between when an ACO starts care management activities and when these activities have a measurable impact upon expenditures for the ACO's assigned beneficiary population.
- ACOs may improve their effectiveness over time as they gain experience with population management and improve processes.
- There may be higher care costs during the early period of performance to treat or stabilize certain patients, as the ACO's care management activities involving these patients commence. Once stabilized, these patients may show relatively lower care costs over the course of time due to more effective, coordinated and quality care.

Under these circumstances, resetting the benchmark for ACOs starting a second or subsequent agreement period under the Shared Savings Program becomes a trade-off between the accuracy gained by weighting the benchmark years at 60 percent for BY3, 30 percent for BY2 and 10 percent for BY1 and the potential for further reducing the benchmarks for these ACOs by giving greater weight to the

later performance years of the preceding agreement period. Unchanged, the application of this methodology for weighting the benchmark years when resetting benchmarks could reduce the incentive for ACOs that generate savings or that are trending positive in their first agreement period to participate in the program over the longer run, or to reduce incentives for ACOs to achieve savings in their first agreement period. For instance, ACOs that have previously performed well under the program may be discouraged from continuing to participate in the program if their rebased benchmark is so low that they would have difficulty continuing to lower expenditures sufficiently to exceed their MSR in order to be eligible for shared savings during their next agreement period.

We considered an alternative methodology for resetting benchmarks where we would weigh the benchmark years equally (ascribing a weight of one-third to each benchmark year). We believe that equally weighting the benchmark years could more gradually lower the benchmarks of ACOs that perform well in their first agreement period, in contrast to giving the greatest weight to the most recent prior benchmark year, which, for the reasons discussed previously, is likely to be the year in which an ACO would have been most effective in lowering expenditures for its assigned population. This alternative approach would have the most significant impact upon ACOs whose assigned population during the three performance years of the preceding agreement period most closely approximates the assigned population used to determine their benchmark for the subsequent agreement period. This approach may be less accurate, and therefore less protective of the Trust Funds, since it may not sufficiently account for an ACO's most recent historical cost experience, particularly in the case of an ACO whose ACO participant composition (and therefore its assigned beneficiary population) changed over the course of the agreement period, such that its assigned beneficiary population in the subsequent agreement period is significantly different from the beneficiary population in the early years of its prior agreement period; this effect could be counteracted to the extent that this approach encourages greater participation in the Shared Savings Program or encourages ACOs to achieve greater shared savings.

(2) Accounting for Shared Savings Payments in Benchmarks

We also considered revising the methodology for resetting ACO benchmarks to account for shared savings earned by an ACO in its prior agreement period, as a way to encourage ongoing participation by successful ACOs and improve the incentive to achieve savings. Similar to the option of equally weighting the benchmark years discussed above, accounting for an ACO's shared savings during its prior agreement period would more gradually lower the benchmarks of ACOs that perform well in their prior agreement period.

The statute outlines the scope of Medicare expenditures to be used in calculating ACO benchmarks. Section 1899(d)(1)(B)(ii) of the Act specifies that the benchmark is established ". . . using the most recent available 3 years of per-beneficiary expenditures for parts A and B services for Medicare fee-for-service beneficiaries assigned to the ACO." This provision of the Act further specifies: "Such benchmark shall be adjusted for beneficiary characteristics and such other factors as the Secretary determines appropriate." In the November 2011 final rule establishing the Shared Savings Program, we explained that in implementing section 1899(d)(1)(B)(ii) of the Act, we would take into account payments made from the Medicare Trust Funds for Parts A and B services, for assigned Medicare fee-for-service beneficiaries, including payments made under a demonstration, pilot or time limited program when computing average per capita Medicare expenditures under the ACO. Our policies for determining per capita expenditures for purposes of establishing the benchmark are specified at § 425.602(a)(1). Shared savings payments are paid from the Medicare Trust Funds for the beneficiary population assigned to an ACO and are intended to recognize the costs incurred by the ACO and its ACO participants and ACO providers/suppliers in coordinating care and improving the quality of care for the assigned beneficiaries. Accordingly, we are considering whether it would be appropriate to revise our methodology under § 425.602(a)(1) for establishing an ACO's benchmark to incorporate the ACO's share of savings for those ACOs that receive shared savings payments under the prior agreement period. We considered how to account for these payments in ACOs' 3-year weighted average per capita benchmarks since ACO shared savings payments are determined at the population-level, reflecting aggregated per capita expenditures that have been truncated and annualized and weighted by the proportion of assigned beneficiaries in each of the four Medicare enrollment types: ESRD, disabled, aged/dual and aged/non-dual. For instance, we could develop a per-beneficiary average based on the shared savings payment for the particular performance year under the prior agreement period and apply this adjustment on a per beneficiary basis to the assigned population for the corresponding benchmark year. We also considered whether to make a symmetric adjustment in benchmarks for ACOs that owed losses in a previous agreement period.

We believe there are merits to upwardly adjusting benchmarks for ACOs in a second or subsequent agreement period to reflect any shared savings payments in the most recent prior agreement period. An adjustment that reflects the ACO's share of savings—based on its final sharing rate, which is a function of its quality performance—in the computation of the benchmark would increase the ACO's benchmark for the subsequent agreement period. This increase in the benchmark, relative to the ACO's prior success in the program, may address concerns expressed by some stakeholders (described previously) that under the existing benchmarking methodology achieving savings may sometimes be financially unattractive for ACOs because of the potential impact on their benchmarks in future agreement periods.

There are clear advantages of this adjustment for ACOs and the Medicare program. In particular, ACOs would have an increased incentive to continue to generate shared savings and improve quality because of the prospect of having a higher benchmark in future agreement periods. Consequently, ACOs may demonstrate improved performance over longer term participation in the program. Further, ACOs may be encouraged to enter the program's two-sided models (such as the proposed Track 3), which offer higher final sharing rates because making an adjustment to the benchmark for these ACOs to reflect successful participation during one agreement period may improve their potential to receive shared savings in the next agreement period. Other implications of this adjustment for consideration include the following:

- Not all ACOs would benefit. By making the adjustment only for ACOs that receive shared savings payments in their prior agreement period, some ACOs that reduce expenditures would

not receive the benefit of this adjustment. Specifically, ACOs whose performance year expenditures are lower than their benchmark expenditures by an amount that did not meet or exceed their MSR, and ACOs that generated savings outside their MSRs, but that failed to satisfy the quality reporting standard, would not receive the adjustment.

• Availability of performance data relative to timely creation of benchmarks. We anticipate completing financial reconciliation for an ACO's most recent prior performance year (for example, PY3 under the first agreement period which corresponds to BY3 for the second agreement period) mid-way through its current performance year (for example, PY1 under the second agreement period). As a result, one downside of relying on the availability of performance data from the most recent prior performance year is that it would delay the finalization of an ACO's historical benchmark for its first performance year during its subsequent agreement period.

(3) Use of Regional Factors (as Opposed to National Factors) in Establishing and Updating Benchmarks

Some stakeholders have expressed concern that the existing benchmarking methodology does not sufficiently account for the influence of cost trends in the surrounding region or local market on the ACO's financial performance. We considered addressing these concerns by using regional FFS expenditures, instead of national FFS expenditures, to trend forward the most recent 3 years of per beneficiary expenditures for Parts A and B services in order to establish the historical benchmark for each ACO under section 1899(d)(1)(B)(ii) of the Act. In addition, we considered making this modification in combination with an alternative payment model under section 1899(i)(3) of the Act under which we would use regional FFS expenditures, instead of national FFS expenditures, to update the benchmark for each performance year during an agreement period. We also considered other approaches to address this concern, as discussed later in this section describing alternative benchmarking methodologies.

In considering how to establish and update benchmarks based on regional factors, we favor use of an approach similar to the method for updating benchmarks used under the PGP demonstration, which has been tested and validated with physician groups across the country, including groups in rural, urban and suburban areas. Under this approach, much of the Shared Savings Program's existing benchmarking methodology would remain the same. Instead of using national Medicare FFS expenditure data to trend expenditures in establishing the historical benchmark (§ 425.602(a)(5)) and to update the benchmark for each performance year (§ 425.602(b)(1)), we would use regional FFS expenditure data to make these adjustments. We would calculate the ACO's regional expenditure trend and update factors according to the cost experience of a reference population. Specifically, in establishing benchmarks under the PGP demonstration, a comparison group was created using the PGP's service area. The growth rate of the comparison group expenditures was calculated and used as the growth rate for updating the PGP's benchmark. Specifically, we used each PGP's annual assigned beneficiary population to determine the PGP's service area. A PGP's service area was defined as all counties where one percent or more of assigned PGP beneficiaries reside. We identified which beneficiaries residing in each service area met the comparison group assignment criteria and assigned them to the PGP comparison group. The service area and comparison group for the PGP were re-determined each year to account for changes in the PGP's assigned beneficiaries. The expenditure growth rate for the PGP's comparison group was calculated and used to update the PGP's historical benchmark for purposes of determining each PGP's performance under the shared savings calculation methodology used in the demonstration. This benchmarking methodology was used over the course of the 5-year PGP demonstration. Given that we have already tested and refined this methodology, we believe that a similar approach could be implemented within the Shared Savings Program. As noted previously, over the course of the PGP demonstration, 7 of 10 sites were eligible for shared savings payments in one or more performance years. Taking these factors into consideration, we believe stakeholders may welcome this approach to revising the program's benchmarking methodology.

However, we have also identified a number of additional factors that must be considered in using this approach in the Shared Savings Program:

• Whether the comparison group counties should be weighted by the percent of assigned beneficiaries in the county out of all assigned beneficiaries in all comparison group counties. For example, for an ACO in a rural or suburban county near a large metropolitan area: On a weighted basis, the large metropolitan area would contribute less to the comparison group than on an unweighted basis. Alternatively, an ACO with high penetration in a specific county would have its regional factors significantly influenced by that county.

• Whether to establish a minimum sample size for the comparison group, such as equal to or greater than 25,000. Smaller comparison groups are more likely to demonstrate idiosyncratic expenditure trends, for instance, if an ACO has a high penetration in its service area, the remaining population may be non-representative compared to the ACO's patient population. These factors would seem to support the use of a minimum sample size threshold. Based on statistical modeling for an effective sample size, we anticipate that the minimum sample size threshold would be set not lower than 25,000 beneficiaries. In turn, a minimum sample size raises a question of what criteria should be used to ensure the ACO's comparison group is large enough. For instance, in markets where the ACO's assigned beneficiaries represent a substantial share (for example, more than 40 percent) of Medicare FFS beneficiaries, should the region be expanded—perhaps to include the entire corresponding metropolitan statistical area (MSA), hospital referral region (HRR), or another regional grouping approach? Similarly, in markets where multiple ACOs represent a substantial share (for example, more than 50 percent) of Medicare FFS beneficiaries, should the region be similarly expanded as described previously? We also considered whether to lock-in the counties composing the comparison group at the start of the agreement period, since over the course of the agreement the counties where one percent or more of assigned ACO beneficiaries reside may fluctuate (for example, just above or just below 1 percent).

(4) Alternative Benchmark Resetting Methodology: Holding the ACO's Historical Costs Constant Relative to its Region

Some stakeholders have also expressed a preference for further changes in the methodology used to reset ACO benchmarks to address the concerns described previously. For example, some stakeholders have suggested that ACOs would have stronger incentives to achieve shared savings during a given agreement period and to continue to participate in the program in subsequent agreement periods if we used a methodology for resetting benchmarks that held the ACO's historical per assigned

beneficiary spending constant relative to its local market so that improvements in efficiency that the ACO achieved during an agreement period would not lower its benchmark for a subsequent agreement period.

Accordingly, we considered using the authority under section 1899(i)(3) of the Act to establish an approach to resetting an ACO's benchmark at the start of a new agreement period under which the ACO's benchmark from the prior agreement period would be updated according to trends in FFS costs in the ACO's region, effectively holding a portion of the ACO's benchmark constant relative to its region. Under this approach, an ACO's benchmark for its initial agreement period would be set according to an approach similar to the existing methodology. For subsequent agreement periods, the trend in regional costs would be calculated using an approach based on the PGP demonstration, described previously, and the historical benchmark would be updated by increasing it by a percentage equal to the percentage increase in regional costs. This approach would prevent an ACO's improved efficiency during an agreement period from lowering its benchmark in a future agreement period.

We also considered a similar approach that would use information regarding the ACO's historical costs under its first agreement period to adjust regional FFS benchmarks developed for future agreement periods by developing a scaling factor. The scaling factor could be calculated as the ratio of—(1) an ACO's historical benchmark under its first agreement period (computed using an approach similar to the existing methodology) divided by; (2) the regional FFS benchmark that would have been calculated for the ACO for the third benchmark year of its first agreement period. We would compute an ACO's benchmark for each subsequent performance year by multiplying this scaling factor by the ACO's regional FFS benchmark for that performance year to account for the difference originally exhibited between the ACO expenditures and the regional FFS benchmark expenditures in the year prior to the beginning of the ACO's first agreement period. The regional FFS benchmark for an ACO in a given performance year would be computed using an approach based on the PGP demonstration described above. For example, if the ACO's assigned beneficiaries expenditures were 10 percent higher than what its regional FFS benchmark would have been in its most recent base year of its initial agreement period, the ACO's future benchmark based on regional FFS expenditures would be adjusted by 10 percent to account for this baseline difference. This approach would likely generate benchmarks very similar to those described in the previous paragraph and thus have a similar effect on an ACO's incentives to improve efficiency.

Under both of these approaches, we considered whether to adjust the benchmark or scaling factor to reflect changes in the list of ACO participant TINs over time, as we do now based on our authority under § 425.602((a)(8). We considered two approaches to making such adjustments, each of which could be used with either of the basic approaches to holding benchmarks constant relative to an ACO's region that were previously described. Under the first approach, we considered basing such adjustments off our current method of adjusting the benchmark on an annual basis to reflect ACO participant changes. Under the second approach, we considered an adjustment method to reflect the historical cost experience of any ACO participant TINs that are added to the ACO and to remove the influence of the cost experience of those ACO participant TINs that leave the ACO, but not incorporate updated cost information for ACO participants that have continued in the ACO.

First, we considered using an approach similar to our existing method for adjusting the ACO's benchmark during the course of its agreement period to account for changes in its ACO participant list as described previously.

Under this approach, each performance year that the ACO's participant list changed, we would recompute its initial historical benchmark or scaling factor using cost information from the benchmark period corresponding to the ACO's initial agreement period. This approach has the advantage that it is similar to the approach we have used successfully to adjust ACO benchmarks within an agreement period in response to changes in ACO participant lists. However, we recognize that not all ACO participants joining the ACO in subsequent agreement periods may have historical claims data during the 3 years prior to the start of the ACO's first agreement period. Therefore, we considered the need to expand this approach to include adjustments to the benchmark or scaling factor to account for ACO participant list changes.

Second, we considered an approach that would adjust an ACO's benchmark (or scaling factor) after each annual change in the ACO participant list based on the relative cost experience of patient populations associated with the new performance year's set of TINs relative to the prior performance year's set of TINs, as measured during a period immediately preceding the change in the ACO participant list. We note that under our current benchmarking methodology, assigned beneficiaries and benchmark expenditures are determined in aggregate at the ACO level rather than at the individual ACO participant TIN level. Therefore, under this alternative approach, we would develop a methodology for associating assigned beneficiary costs to individual ACO participant TINs that continue in the program so as not to incorporate updated cost information for the patient populations associated with the continuing ACO participants, as well as to incorporate updated cost information for the patient populations associated with new ACO participants or remove the influence of cost information for patient populations associated with departing ACO participants.

The advantage of this type of approach is that it could generate more accurate benchmarks in cases where an ACO adds many participant TINs that were not active during the ACO's initial agreement period. However, this approach could be more complicated to implement and could reintroduce a limited ability for ACOs to influence future benchmarks through current decisions.

A potential disadvantage of approaches that determine benchmarks by holding an ACO's costs constant relative to its region is that future benchmarks are influenced to a large degree by holding the cost experience for the ACO participants that continue in the ACO static. This static cost experience would become dated and would not necessarily reflect the evolving complex factors that influence the cost profile of the beneficiary populations assigned to the ACO in future agreement periods. By holding costs static for existing ACO participants, there would be incentives for successful ACOs to continue to participate in the program (with the same ACO participant composition) against more favorable benchmarks. Moreover, some ACOs may "shop" for a particularly advantageous benchmark, for instance by delaying program entry, and only improving their expenditure and utilization trends in later years. As a result, these approaches might continue to yield shared savings for some ACOs despite marginal effort to improve efficiency, and push out ACOs for whom cumulative variation creates a

predictable and unrealistically low expenditure target.

To the extent that this approach for resetting ACO benchmarks also incorporates elements of the other approaches described in this section, we would be faced with related concerns. For instance, when trending the benchmark according to regional FFS costs based on the PGP demonstration approach described above, we would need to determine what criteria to use in establishing the comparison group. Further, as discussed under the alternative benchmarking methodology later in this section, we may need to consider whether the risk adjustment methodology would need to be modified, in this case to account for changes in each ACO's risk profile relative to the risk profile of its regional comparison population. The types of approaches described in this section would require use of our authority under section 1899(i)(3) of the Act because we would be deviating from the requirement at section 1899(d)(1)(B)(ii) of the Act that the benchmark be reset at the start of each agreement period. Specifically, the benchmark would not be reset using the most recent available 3 years of per beneficiary expenditures for parts A and B services for those Medicare FFS beneficiaries that were assigned to the ACO during the preceding agreement period.

(5) Alternative Benchmark Methodology: Transitioning ACOs to Benchmarks Based Only on Regional FFS Costs Over the Course of Multiple Agreement Periods

We also considered using our authority under section 1899(i)(3) of the Act to transition ACOs from benchmarks based on their historical costs toward benchmarks based only on regional FFS costs, an approach suggested by stakeholders, including MedPAC. We recognize that under the existing benchmarking methodology, ACOs in the same market would have unique benchmarks, which may vary widely depending on the historical expenditures for the beneficiaries that receive care from the ACO participants in each ACO. As a result, ACOs within the same market may have substantially different benchmarks, such as the case of a historically low-cost ACO within a traditionally high cost market. Under the existing benchmarking methodology, the program may be more attractive (initially) to historically high-cost ACOs able to enter the program and achieve substantial shared savings by bringing costs down compared to their historical cost performance. ACOs with historically low costs may be less likely to enter and continue in the program because of their perceived difficulty in further reducing their assigned beneficiaries' costs relative to a benchmark based on their assigned beneficiaries populations' past experiences. However, as noted previously, the current benchmarking methodology may provide additional opportunity for increased shared savings for ACOs with low costs relative to the national average through the use of a flat dollar update for growth in national FFS expenditures, assuming program expenditure trends return to historically-familiar positive rates as compared to the unusually low growth experienced in the first several years of the program.

Under this alternative approach, over the course of several agreement periods, we would transition to using regional FFS cost data to make ACO benchmarks gradually more independent of the ACO's past performance and gradually more dependent on the ACO's success in being more cost efficient relative to its local market. For example, for the ACO's first agreement period, we may use the existing benchmarking methodology or one of the options described previously, which accounts for regional FFS expenditures. Starting in an ACO's second agreement period, we would calculate each ACO's benchmark as a weighted average of the ACO benchmark using the existing approach or one of the alternative approaches described above and risk adjusted regional FFS costs. The weight placed on risk adjusted regional FFS costs would increase over time. ACOs' assigned beneficiaries would be counted in the calculation of regional FFS costs and the definition of an ACO's region would require careful consideration so that the ACO's assigned beneficiary population would not be allowed to make up an unreasonable proportion of the region itself. This benchmarking methodology would help ensure the program remains attractive to ACOs, particularly those who have achieved shared savings in previous agreement periods, and strengthen the connection between the determination of the amount of shared savings earned by the ACO and an ACO's actual success in achieving savings relative to its region and local market.

An approach where we transition from ACO-specific benchmarks based on each ACO's historical costs to benchmarks based on regional FFS spending may be attractive to low-cost ACOs in high-cost regions because they would likely transition to a relatively higher (regional) benchmark over time against which they could likely show more savings because they have lower relative costs. However, high-cost ACOs in low-cost regions may find a regional benchmark unattractive because they would be required to create new efficiencies to fully offset their higher costs relative to their region in order to show savings under the benchmark. To mitigate the cost of any resulting selective participation by favored low-cost ACOs in high cost regions we considered whether a benchmark transition process could be employed over a number of agreement periods involving a gradual shift from the current methodology to one where benchmarks are set based on regional FFS spending (for example, using a weighted average of the two approaches whereby the weight for the regional FFS benchmark is gradually increased over several agreement periods). Using regional FFS spending to establish benchmarks could reward low-cost, high-quality ACOs, and further encourage them to attract more ACO participants and Medicare FFS beneficiaries over the course of time. We would also expect that a gradual transition may at least initially maintain an incentive for existing ACOs with high costs relative to their region to remain in the program because the initial ACO-specific benchmark would allow the ACOs to achieve shared savings for lowering their costs compared to their own historical performance. As they transition to a benchmark based on regional FFS spending, these ACOs' benchmarks would likely decline (given the overall experience of the market), encouraging these ACOs to continue to reduce their costs, while maintaining high quality care under the program. However, we also note that some ACOs may not perceive an ability to reduce their beneficiary expenditures below the regional average and therefore there remains a risk that the eventual transition to a regional benchmark would result in selective participation regardless of how the transition is performed. For instance, an ACO that perceives its patient population as having high relative costs may perceive itself as disadvantaged under this approach.

Therefore, to further mitigate selective participation and improve the accuracy of the benchmarks, we considered whether the regional FFS benchmark should be adjusted to reflect a regional or local reference population, similar to the method used in the PGP demonstration. However, as described previously, additional adjustment may be necessary to ensure the comparison

population is sufficiently large and representative of the ACO's assigned patient population, particularly in the cases where ACOs make up a significant portion of their regional market.

We also considered whether the risk adjustment methodology would need to be modified to account for changes in the risk profile of the regional population rather than the national population. For instance, it may be necessary to account for coding intensity differences relative to the ACO's region rather than just the change in coding intensity by the ACO. As we explained in the November 2011 final rule (see 76 FR 67916), it may be necessary to guard against changes that result from more specific or comprehensive coding as opposed to improvements in the coordination and quality of health care. Thus, we considered the need for normalization of risk scores for ACO assigned beneficiaries and the comparison group beneficiaries relative to the regionally based comparison group. For instance, the benchmark could be normalized to the mix of beneficiaries assigned across the four Medicare enrollment types (ESRD, disabled, aged/dual, aged/non-dual) to the same strata within the regional comparison population. We also considered risk adjusting the growth rates, for example based upon risk scores for the comparison group, in combination with using a regional coding intensity adjustment or independently.

We also considered how to account for ACO participant TIN changes, over time, under a methodology where we transition ACOs from ACO-specific to regionally based benchmarks. For instance, we considered whether to continue to adjust the benchmark at the start of each performance year to reflect changes in the set of ACO participant TINs that constitutes the ACO, perhaps similar to our current approach to managing changes to ACO participants during the agreement period.

We also considered the pace for transitioning ACOs from ACO-specific to regional benchmarks, including the following factors:

- The period of time for transitioning to regional FFS benchmarks: For instance, should the transition occur over two agreement periods, or five agreement periods, or longer.
- Whether to consider the ACO's performance during a prior agreement period in determining the pace of its transition to regional FFS benchmarks. For example, should we delay downward adjustments to an ACO's benchmark if the ACO fails to achieve shared savings.
- Whether to consider the ACO's historical costs, relative to regional Medicare FFS average per capita costs, in determining the pace of its transition to regional FFS benchmarks. For example, should low-cost ACOs (those below the risk adjusted regional Medicare FFS average per capita costs) transition more quickly to regional FFS benchmarks than high-cost ACOs.

Another consideration was whether this kind of benchmarking methodology would allow the Shared Savings Program to maintain a fiscal balance. For instance, would the shared savings paid to low-cost ACOs (treating beneficiaries at below average costs) be more than offset with savings from lower than expected spending in high-cost ACOs and further control of spending growth in low-cost ACOs. We also recognize that more customized benchmarking approaches make it more difficult to provide ACOs with information they can use to predict their performance.

(6) Seeking Comment on the Benchmarking Alternatives Considered and the Applicability of These Approaches

In general we seek comment on the approaches to adjusting the methodology for establishing, updating and resetting ACO benchmarks discussed in detail above. In particular, we seek comment on the following:

- Using combinations of these approaches, as opposed to any one approach. Specifically, we considered revising the methodology for resetting ACO benchmarks by equally weighting the three benchmark years, and/or accounting for shared savings payments received by an ACO in its prior agreement period, and/or using regional FFS expenditures instead of national FFS expenditures in establishing and updating the benchmark. We also considered and seek comment on revising the benchmarking methodology more broadly, shifting either to a methodology that resets ACOs' benchmarks between agreement periods by holding an ACO's historical costs constant relative to costs in its region or to a methodology that transitions ACOs from benchmarks based on their historical costs toward benchmarks based only on regional FFS costs, potentially in combination with some or all of the other revisions we are considering to the benchmarking methodology.
- How broadly or narrowly to apply these alternative benchmarking approaches to the program's Tracks. Specifically, we envisioned that the revisions in the benchmarking methodology under section 1899(d)(1)(B)(ii) of the Act. (for example, equally weighing the three benchmark years, and accounting for shared savings payments received by an ACO in its prior agreement period) would be applied when resetting the benchmarks for all ACOs, regardless of the model they participate under (Tracks 1, 2, and 3). We envisioned applying the approaches requiring use of our authority under section 1899(i)(3) of the Act to ACOs participating under performance-based risk models (Tracks 2 and Track 3) because stakeholders' concerns about resetting the benchmarks were closely related to ensuring the program remains sustainable over time, and we envision ACOs would be transitioning to the performance-based risk models over time, specifically given our proposal to limit the number of agreement periods an ACO can remain under Track 1. We also considered and seek comment on applying these alternative benchmarking methodologies more broadly, specifically to all ACOs participating in a risk-based model (Tracks 2 and 3), or to all ACO financial models (Tracks 1, 2, and 3).
- Whether to use regional FFS expenditures instead of national FFS expenditures in establishing and updating the benchmark and/or a methodology for transitioning ACOs from benchmarks based on their historical costs toward benchmarks based only on regional FFS costs only when resetting ACO benchmarks under their second or subsequent agreement period, or when establishing the benchmark for all participating ACOs (regardless of agreement start date) the next full performance year after the effective date of the final rule. In other words, if a final rule adopting a revised benchmarking methodology is issued in early 2015, should the revised methodology be used to determine the benchmark that will apply during the 2016 performance year for all ACOs.
- The criteria for defining the comparison group for using regional FFS expenditure data to establish, update or reset the historical benchmark. In particular we welcome comments on the criteria we described previously and welcome commenters' suggestions for different criteria.
- We believe the concerns about risk adjustment raised in this section in the context of the alternative benchmarking methodology for establishing, updating and/or transitioning from ACO-specific benchmarks to regionally based benchmarks are also relevant to the approach where we would use regional FFS expenditures (as opposed to

national FFS expenditures) in establishing or in updating the benchmark. We welcome comments on these concerns and commenters' suggestions about the use of regional normalization or coding intensity adjustments to guard against regional or other coding differences that may affect the characteristics of the ACOs' assigned beneficiary population in relation to the comparison group.

- We welcome commenters' detailed suggestions on our considerations of factors to use in resetting ACO benchmarks and for the alternative benchmark methodology; as well as considerations or concerns not described; and suggestions for alternative approaches for a benchmarking methodology that transition to use of regional benchmarks over the course of time. In particular, we seek commenters' input on whether an approach that transitions ACOs to regional benchmarks would encourage continued participation by existing low-cost and high-cost ACOs.

We also request commenters' input on alternatives not described here for resetting benchmarks to encourage ongoing participation by ACOs who perform well in the program and are successful in reducing expenditures for their assigned beneficiaries. We seek comment on whether these alterative benchmarking approaches would have unintended consequences for ACO participation in the program, for the Medicare Trust Funds, or for Medicare FFS beneficiaries. We intend to carefully review any comments that are received on these issues during the development of the final rule and will make an assessment at that time as to whether any change to our current methodology for establishing benchmarks is necessary and appropriate.

7. Seeking Comment on Technical Adjustments to the Benchmark and Performance Year Expenditures

When computing average per capita Medicare expenditures for an ACO during both the benchmark period and performance years under § 425.602, § 425.604, and § 425.606, we take into account all Parts A and B expenditures, including payments made under a demonstration, pilot or time limited program, with the exception of IME and DSH adjustments, which are excluded from these calculations. In the November 2011 final rule (76 FR 67919 through 67923), we considered whether to make adjustments to benchmark and performance year expenditures to exclude certain adjustments to Part A and B expenditures, including IME and DSH payments, geographic payment adjustments and some bonus payments and penalties. In the final rule, we acknowledged that taking into consideration payment changes could affect ACOs' financial performance and their ability to realize savings. However, with the exception of the adjustment to account for IME and DSH payments, we ultimately declined to make any adjustments to account for various differences in payment rates among providers and suppliers. We explained that while section 1899(d)(1)(B)(ii) of the Act provides a way of adjusting an ACO's benchmark for such payments, the statute does not include similar authority to adjust performance year expenditures. Therefore, we noted that while we could make adjustments to the ACO's benchmark to exclude certain payments under our authority in section 1899(d)(1)(B)(ii) of the Act, we did not have a similar authority to make adjustments in our calculation of an ACO's performance year expenditures, which would create a mismatch in expenditure calculations.

However, we were persuaded by commenters that not excluding IME and DSH payments in determining ACO financial performance could adversely affect the care of beneficiaries by creating an incentive for ACOs to avoid making appropriate referrals to teaching hospitals in an effort to demonstrate savings. Therefore, we considered using our authority under section 1899(i)(3) of the Act, which authorizes us to use other payment models for making payments under the Shared Savings Program that the agency "determines will improve the quality and efficiency of items and services" furnished under Medicare. Specifically we considered whether it would be appropriate to use this authority to include an adjustment to performance year expenditures to exclude IME and DSH payments. To exercise our authority under section 1899(i)(3) of the Act, we must also determine that the alternative payment model ". . . does not result in spending more for such ACO for such beneficiaries than would otherwise be expended . . . if the model were not implemented . . ."

In the November 2011 final rule (76 FR 67921 through 67922), we stated that we believed excluding IME and DSH payments would be consistent with the requirements under section 1899(i)(3) of the Act. That is, excluding these payments would both improve the care for beneficiaries while also not resulting in greater payments to ACOs than would otherwise have been made if these payments were included. Specifically, we stated that removing IME and DSH payments from benchmark and performance year expenditures would allow us to more accurately reward actual decreases in unnecessary utilization of healthcare services, rather than decreases arising from changes in referral patterns. In addition, we believed that excluding these payments from our financial calculations would help to ensure participation in ACOs by hospitals that receive these payments. Taken in combination, we believed these factors could result in Medicare beneficiaries receiving higher quality, better coordinated, and more cost-efficient care. As a result, we did not expect that excluding IME and DSH payments from the determination of ACOs' financial performance would result in greater payments to ACOs than would otherwise have been made. We also found that excluding these amounts was operationally feasible since they are included in separate fields on claims allowing them to be more easily excluded from financial calculations than certain other payments that are included on Part A and B claims. Therefore, we finalized a policy of excluding IME and DSH payments from both the benchmark and performance year expenditure calculations. We stated that we intended to monitor this issue and would revisit it if we determine that excluding these payments has resulted in additional program expenditures (76 FR 67922).

In addition to IME and DSH payments, we also considered whether standardizing payments to account for other types of payment adjustments would alleviate concerns resulting from changes in the Medicare payment systems. However, in light of the numerous payment adjustments included throughout the Medicare payment systems, we were concerned about the complexity resulting from standardizing payments and whether standardized payment information would provide meaningful and consistent feedback regarding ACO performance. We stated that we intended to evaluate this issue and would potentially address it in future rulemaking.

We also considered requests from commenters that we make adjustments to ACO benchmark and performance year expenditures to account for a number of other payments (76 FR 67922). We specifically considered how geographic payment adjustments, applied under Medicare payment systems (for example, the IPPS wage index adjustments and the physician fee schedule geographic practice cost index (GPCI) adjustments) could affect an

ACO's ability to realize savings. These adjustments increase and decrease payments under the applicable payment systems to account for the different costs of providing care in different areas of the country. We further noted that there have been a number of temporary legislative adjustments to the wage indexes for various parts of the country during recent years. In some cases these have been extended on virtually an annual basis while others have been updated more intermittently. We recognized that the timing of these adjustments could result in changes being made during an ACO's agreement period and between the benchmark and the performance years, thus influencing an ACO's ability to realize savings under the program. Additionally, there have been cases where hospitals have moved in and out of reclassification status which can either increase or decrease the wage index in the state.

Of the comments received, most favored excluding geographic payments from benchmark and performance year expenditures (76 FR 67923). Commenters suggested specific adjustments, such as exclusion of payments based on the area wage index, low cost county payment adjustments, GPCI, and the frontier States policy adjustment. Some commenters, however, expressed concerns that variations in cost growth across geographic areas as well as the current CMS methods for accounting for differences in local input and practice costs may create incentives that reward ACO formation in some markets but not in others. Others suggested that inclusion of these geographic payment adjustments could have unintended consequences for referral patterns by ACOs, such as driving referrals based on geographic wage adjustments rather than performance. Yet others were generally concerned that making geographic payment adjustments would disproportionately disadvantage some ACOs.

Ultimately, we disagreed with commenters' suggestions that we adjust expenditures to account for various differences in cost and payment. We stated that we believed that making such extensive adjustments, or allowing for benchmark adjustments on a case-by-case basis, would create an inaccurate and inconsistent picture of ACO spending and may limit innovations in ACOs' redesign of care processes or cost reduction strategies (76 FR 67920). Unlike the IME/DSH adjustments, we stated we did not believe these other payment adjustments that are made to Part A and B payments (such as geographic payment adjustments) would result in a significant incentive to steer patients away from particular hospitals or providers since an ACO's financial performance would be compared to its own historical expenditure benchmark, as updated.

Since the publication of the November 2011 final rule, some questions have persisted regarding the most appropriate way to handle payment differences and changes under Medicare FFS; including whether to take into consideration certain payment changes that could affect ACO financial performance. We are not proposing to make any further adjustments at this time. However, now that both CMS and external stakeholders have some experience with our policies, we are interested in seeking further comment from stakeholders on this issue that we could potentially consider in future rulemaking. We are particularly interested in comments regarding standardization of payments, including which elements to adjust for, the impact of value-based payment adjustments on payments to physicians and hospitals, and the value of providing feedback on nonstandardized results while using standardized results to perform financial reconciliation.

Table 7 summarizes certain provisions of the current regulations and our proposals to change them as discussed in this section.

TABLE 7—SHARED SAVINGS FINANCIAL MODEL OVERVIEW

	Track 1: One-sided risk model		Tracks 2 and 3: Two-sided risk models		
Issue	Current	Proposed	Current Track 2	Proposed Track 2	Proposed Track 3
Transition to Two-Sided Model.	First agreement period under one-sided model. Subsequent agreement periods under two-sided model.	Remove requirement to transition to two-sided model for a second agreement period.	ACOs may elect Track 2 without completing a prior agreement period under a one-sided model. Once elected, ACOs cannot go into Track 1 for subsequent agreement periods.	No change	Same as Track 2.
Assignment	Preliminary prospective assignment for reports; retrospective assignment for financial reconciliation.	No change	Preliminary prospective assignment for reports; retrospective assignment for financial reconciliation.	No change	Prospective assignment for reports and financial reconciliation.
Benchmark	Reset at the start of each agreement period.	Seeking comment on alternative methodology.	Same as Track 1	Seeking comment on alternative methodology.	Same as Tracks 1 and 2 and seeking comment on alternative methodology.

TABLE 7—SHARED SAVINGS FINANCIAL MODEL OVERVIEW—Continued

	Track 1: One-sided risk model		Tracks 2 and 3: Two-sided risk models		
Issue	Current	Proposed	Current Track 2	Proposed Track 2	Proposed Track 3
Adjustments for health status and demographic changes.	Historical benchmark expenditures adjusted based on CMS–HCC model. Updated historical benchmark adjusted relative to the risk profile of the performance year. Performance year: Newly assigned beneficiaries adjusted using CMS–HCC model; continuously assigned beneficiaries adjusted using demographic factors alone unless CMS–HCC risk scores result in a lower risk score.	No change	Same as Track 1	No change	Same as Tracks 1 and 2.
Adjustments for IME and DSH.	IME and DSH excluded from benchmark and performance year expenditures..	No change	Same as Track 1	No change	Same as Tracks 1 and 2.
Other payment adjustments.	Include other payment adjustments included in Part A and B claims such as, geographic payment adjustments and HVBP payments, in benchmark and performance year expenditures.	Seeking comment on other technical adjustments.	Same as Track 1	Seeking comment on other technical adjustments.	Same as Tracks 1 and 2.
Quality Sharing Rate.	Up to 50 percent based on quality performance.	Up to 50 percent based on quality performance for first agreement period, reduced by 10 percentage points for each subsequent agreement period under the one-sided model.	Up to 60 percent based on quality performance.	No change	Up to 75 percent based on quality performance.
Minimum Savings Rate.	2.0 percent to 3.9 percent depending on number of assigned beneficiaries.	No change	Fixed 2.0 percent	2.0 percent to 3.9 percent depending on number of assigned beneficiaries.	Fixed 2.0 percent.
Minimum Loss Rate.	Not applicable	No change	Fixed 2.0 percent	2.0 percent to 3.9 percent depending on number of assigned beneficiaries.	Fixed 2.0 percent.
Performance Payment Limit.	10 percent	No change	15 percent	No change	20 percent.
Shared Savings	First dollar sharing once MSR is met or exceeded.	No change	Same as Track 1	No change	Same as Tracks 1 and 2.
Shared Loss Rate.	Not applicable	No change	One minus final sharing rate applied to first dollar losses once minimum loss rate is met or exceeded; shared loss rate not to exceed 60 percent.	No change	One minus final sharing rate applied to first dollar losses once minimum loss rate is met or exceeded; shared loss rate may not be less than 40 percent or exceed 75 percent.
Loss Sharing Limit.	Not applicable	No change	Limit on the amount of losses to be shared in phases in over 3-years starting at 5 percent in year 1; 7.5 percent in year 2; and 10 percent in year 3 and any subsequent year. Losses in excess of the annual limit would not be shared.	No change	15 percent. Losses in excess of the annual limit would not be shared.

G. Additional Program Requirements and Beneficiary Protections

1. Background

Section 1899(a)(1)(A) of the Act authorizes the Secretary to specify criteria that ACOs must satisfy in order to be eligible to participate in the Shared Savings Program. In the November 2011 final rule, we finalized policies regarding how ACOs will be monitored with respect to program requirements and what actions will be taken against ACOs that are not in compliance with the requirements of the Shared Savings Program. Based on our initial experience with the Shared Savings Program, we propose several refinements and clarifications to our policies on—

- Public reporting (§ 425.308);
- Termination of the participation agreement (§§ 425.218 and 425.220);
- Enforcement of ACO compliance with quality performance standards (§ 425.316(c)); and

• Reconsideration review procedures (§§ 425.802 and 425.804)).

2. Public Reporting and Transparency

a. Overview

Section 1899 of the Act sets forth a number of requirements for ACOs. Section 1899(b)(2)(H) of the Act requires ACOs to demonstrate that they meet patient-centeredness criteria specified by the Secretary. We believe that one important aspect of patient-centeredness is patient engagement and transparency. Increasingly, transparency of information in the health care sector is seen as a means to help patients become more active in their health care choices and to generate feedback that may improve the quality of care and lower the cost of care. In addition, transparency may improve oversight and program integrity. Public reporting also supports the mandate for ACOs to be willing to "become accountable for the quality, cost, and overall care" of the Medicare beneficiaries assigned to them. Reports on ACO quality and cost-performance hold ACOs accountable and contribute to the dialogue on how to drive improvement and innovation in health care. Public reporting of ACO cost and quality data may improve a beneficiary's ability to make informed health care choices and facilitate an ACO's ability to improve the quality and efficiency of its care.

Therefore, for these reasons, which are described in more detail in the November 2011 final rule, we finalized requirements specified at § 425.308 that ACOs must make certain information publicly available. Since publication of the Shared Savings Program final rule, minor updates were made to § 425.308(e) in the 2013 PFS final rule with comment period (77 FR 69164 through 69170) and in the 2015 PFS final rule with comment period (79 FR 67769). For purposes of the Shared Savings Program, each ACO is currently required at § 425.308 to publicly report certain organizational information (such as the identification of ACO participants and governing body members), the amount of any shared savings or shared losses incurred, the proportion of shared savings invested in resources that support the three-part aim and certain quality performance information. (Specifically, ACOs are required to report the results of the claims-based quality measures while CMS will report the CAHPS and GPRO measure results on Physician Compare.) We recommend that ACOs publicly report the specified information in a standardized format that we have made available to ACOs through guidance at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Statutes_Regulations_Guidance.html*. Our guidance recommended that ACOs report the required information on a Web site that complies with the marketing requirements set forth at § 425.310. Because Web pages used to publicly report the information specified in § 425.308 constitute "marketing materials and activities," as defined at § 425.20, any changes to such Web pages must be submitted for CMS review in accordance with § 425.310. Thus, if an ACO changes any of the information on its public reporting Web page, such as adding an ACO participant or replacing a member of the governing body, the ACO must submit its Web page to us for marketing review. We believe this policy creates undue burden on the ACO as well as on CMS.

b. Proposed Revisions

We continue to believe that publicly reporting the information identified in § 425.308 supports our goals of program transparency and patient centeredness. We also continue to believe that it is important for the ACO to be responsible for making this information available to the public. We believe that the best way to do this is via an ACO-maintained Web site, the mechanism through which most ACOs have chosen to publicly report. However, based on our initial experience with the Shared Savings Program and requests from some ACOs, we propose some refinements to the requirements related to public reporting and transparency.

We propose to modify § 425.308 to reflect these new requirements. In § 425.308(a), we propose to require that each ACO maintain a dedicated Web page on which the ACO must publicly report the information listed in paragraph (b). In addition, we propose that an ACO must report to us the address of the Web page on which it discloses the information set forth in § 425.308 and apprise us of changes to that Web site address in the form and manner specified by CMS. We solicit comment on when an ACO should be required to inform us of such changes (for example, within 30 days after the change has occurred).

In § 425.308(b), we require ACOs to report certain information in a standardized format to be specified by CMS. Although we currently set forth a recommended standardized format in guidance, we intend to make a specific template available that ACOs must use so that ACOs report information uniformly. This would minimize the compliance burden on ACOs, enhance transparency for the public, and improve our oversight of ACO compliance with the public reporting requirement. We envision that the template would have fields in which the ACO must insert the applicable public reporting information. Additionally, because the ACOs would report information using a standard template, we do not believe the information would require marketing review each time the information is updated. Therefore, we propose in § 425.308(c) that information reported on an ACO's public reporting Web page which is in compliance with the requirements of the standardized format specified by CMS, (that is, through use of the template) is not subject to marketing review and approval under § 425.310. ACOs should keep in mind that although information reported using the template would not be subject to marketing review, we intend to monitor both the use of the template and the information inserted by ACOs into the template as part of our ongoing program monitoring and compliance oversight efforts.

Using a standardized format, such as a template, for this purpose has several advantages over the way ACOs currently make this information publicly available. First, using a template would improve the usefulness of this information for the public by standardizing the way the information is made available across ACOs. Second, using a template would minimize the compliance burden on ACOs by ensuring the information is reported in the way we intend. Finally, the use of a standardized format also affords CMS a more streamlined approach for our monitoring and compliance oversight activities. We seek comment on the proposal to use a standardized format for public reporting purposes.

We also propose to make a few changes to the information that must be publicly reported. In § 425.308(b), we propose to add two categories of organizational information that must be publicly reported. First, we propose to add a requirement at § 425.308(b)(3)(iv) that ACOs publicly identify key clinical and administrative leaders within their organization as part of the public reporting requirements. ACOs are already required to identify the members of their governing body, associated committees and committee leadership. However, key members of the ACO's clinical and administrative leadership might not be members of the governing body or committee leadership. For example, the ACO's medical director may be a stand-alone leadership position but not hold a committee leadership position or be a

member on the ACO's governing body. Because clinical and administrative leadership is an eligibility requirement for program participation, we believe that requiring the ACO to publicly report its clinical and administrative leadership would lend additional transparency and insight into the ACO's organization.

Second, we believe it would be helpful for the public to have a better understanding of the types of ACO participants or combinations of ACO participants that have joined to form the ACO. At § 425.102(a), we articulate the following types of ACO participants or combinations of ACO participants that are eligible to form an ACO:

- ACO professionals in group practice arrangement.
- Networks of individual practices of ACO professionals.
- Partnerships or joint venture arrangements between hospitals and ACO professionals.
- Hospitals employing ACO professionals.
- CAHs that bill under Method II.
- RHCs and FQHCs.

We note that if revised by our proposals in section II.E. of this proposed rule, this list would also include teaching hospitals. On the application to the Shared Savings Program, each ACO must indicate the types of entities that formed the ACO. We propose to add a provision at § 425.308(b)(3)(vi) requiring ACOs to publicly report the types of ACO participants or combinations of ACO participants, as listed in § 425.102(a), that form the ACO. Stakeholders have requested information about the composition of ACOs. Providing the types and combinations of ACO participants would assist stakeholders in understanding the composition of ACOs.

In addition, we propose at § 425.308(b)(5) to require each ACO to publicly report its performance on all quality measures used to assess the quality of care furnished by the ACO. We currently require ACOs to post only the results of their performance on claims-based measures. The results of quality measures are reported by CMS on Physician Compare. We agree with the comments made by stakeholders that requiring an ACO to publicly report its performance on all quality measures (as defined at § 425.20) would assist stakeholders in getting a more accurate picture of the ACO's performance. Therefore, we propose to broaden the public reporting requirement to require ACOs to publicly report performance on all quality measures.

We also note a technical modification to our rules. Currently, we require ACOs to report the amount of any "shared savings performance payment" (§ 425.308(d)(1)). However, to conform this provision to the definition of "shared savings" at § 425.20, we propose to remove the term "performance payment" from the phrase. The new language is found at revised § 425.308(b)(4)(i).

Finally, for purposes of program transparency, we find it useful to post on Physician Compare and our Web site (*www.cms.gov/sharedsavingsprogram/*) certain information about ACOs, such as ACO public contact information, ACO public reporting Web page addresses, the amount of any shared savings or losses incurred, and quality performance results. Therefore, in addition to information we already post on our Web site and Physician Compare, we propose at § 425.308(d) to post ACO-specific information, including information the ACO is required to publicly report under § 425.308, as is necessary to support program goals and transparency. We solicit comment on what other information should be published on our Web site. Because proposed § 425.308(d) encompasses our ability to publicly report ACO performance on all quality measures, we propose to remove § 425.308(e) or reserve it for future use. We intend to continue reporting ACO quality measure performance on Physician Compare in the same way as for group practices that report under PQRS.

3. Terminating Program Participation

a. Overview

Section 425.218 of our regulations sets forth the grounds for terminating an ACO for failure to comply with the requirements of the Shared Savings Program (§ 425.218(a)). For example, an ACO's or ACO participant's failure to notify beneficiaries of their provider's participation in the program as required under § 425.312 would constitute grounds for terminating the ACO. In addition, we may terminate an ACO for a number of other violations, such as those related to certain fraud and abuse laws, the antitrust laws, or other applicable Medicare laws and regulations relevant to ACO operations, or if certain sanctions have been imposed on the ACO by an accrediting organization or a federal, state or local government agency (§ 425.218(b)).

Prior to termination, we may take interim steps such as issuing the ACO a warning notice or placing the ACO on a corrective action plan (CAP) (§ 425.216). However, we reserve the right to immediately terminate a participation agreement if necessary (§ 425.218(c)). We notify the ACO in writing if the decision is made to terminate the participation agreement.

Under § 425.220, an ACO may voluntarily terminate its participation agreement. Such an ACO is required to provide CMS and all of its ACO participants with a 60-day advance written notice of its decision to terminate its participation in the Shared Savings Program. An ACO is not required to notify beneficiaries of the ACO's decision to terminate from the Shared Savings Program. Under current regulations, an ACO that terminates its participation agreement before completion of the participation agreement does not share in any savings for the performance year during which it notifies CMS of its decision to terminate the participation agreement (§ 425.220(b)). This is because an ACO that terminates its participation agreement during a performance year will have failed to complete the entire performance year and will therefore have failed to meet the requirements for shared savings.

b. Proposed Revisions

We propose several modifications to the regulations related to termination of a participation agreement. First, we propose to permit termination for failure to timely comply with requests for documents and other information and for submitting false or fraudulent data. In addition, we propose to add a new regulation at § 425.221 requiring ACOs to implement certain close-out procedures upon termination and nonrenewal. Finally, we propose to address in new § 425.221 the payment consequences upon termination of a participation agreement.

(1) Grounds for Termination

First, at § 425.218(b) we propose to modify the grounds for termination to specifically include the failure to comply with CMS requests for submission of documents and other information by the CMS specified deadline. At times, we may request certain information from the ACO in accordance with program rules. The submission of those documents by the specified due date is important for program operations. For example, we require each ACO to submit to us, on an annual basis, its list of ACO participants and their TINs (existing § 425.304 and proposed § 425.118). When ACOs do not submit these lists by the due date specified, it prevents us from applying the assignment methodology (which is dependent on having accurate lists of

ACO participants for all ACOs) and impacts the timelines for the program, such as the calculation of the benchmarks for all ACOs. Missing such deadlines is very disruptive to the program and other ACOs. Therefore, we propose to modify § 425.218(b) to permit termination of an ACO agreement for failure to comply with requests for information and documentation by the due date specified by CMS.

Additionally, under § 425.302, an individual with the authority to legally bind the individual or entity submitting data or information to CMS must certify the accuracy, completeness, and truthfulness of the data and information to the best of his or her knowledge and belief. However, circumstances could arise in which the data and information submitted was falsified or erroneous. Submission of false or fraudulent data, (for example, data submitted through the CMS web interface used to determine an ACO's quality performance) could impact the amount of shared savings calculated for the ACO and cause CMS to overpay the ACO. Because of the severity of the consequences of submitting false or fraudulent data, we propose to modify § 425.218(b) to permit termination of an ACO agreement for submission of false or fraudulent data. We note that ACOs are obligated to repay shared savings payments to which they are not entitled, including, by way of example only, any overpayment to the ACO based on the submission of false or fraudulent data.

(2) Close-Out Procedures and Payment Consequences of Early Termination

We propose to add new § 425.221 to address close-out procedures and payment consequences of early termination. First, we believe it is important to establish an orderly close-out process when an ACO's participation agreement is terminated. Therefore, we are proposing in § 425.221(a) that an ACO whose participation agreement is terminated prior to its expiration either voluntarily or by CMS must implement close-out procedures in a form, manner, and deadline specified by CMS. These close-out procedures shall address data sharing issues such as data destruction, beneficiary notification issues (for example removal of marketing materials and ensuring beneficiary care is not interrupted), compliance with quality reporting, record retention issues, and other issues established through guidance. We note that the close-out procedures would also apply to those ACOs that have elected not to renew their agreements upon expiration of the participation agreement. We further propose in § 425.221(a)(2) that any ACO that fails to complete the close-out procedures in the form and manner and by the deadline specified by CMS would not be eligible for shared savings. We solicit comments on other strategies that would ensure compliance with close-out procedures.

Second, we propose in § 425.221(b) to address certain payment consequences of early termination. Currently under § 425.220(b), an ACO that voluntarily terminates its agreement at any time during a performance year will not share in any savings for the performance year during which it notifies CMS of its decision to terminate the participation agreement. However, stakeholders have suggested that completion of the performance year, as part of an orderly close-out process, could be mutually beneficial to the ACO, its ACO participants and ACO providers/suppliers, and to CMS. Specifically, stakeholders have suggested that an ACO should be entitled to receive shared savings if the ACO completes a performance year through December 31 and satisfies all requirements for sharing in savings for that performance year (for example, the quality reporting for the performance year). Additionally, by completing quality reporting as part of the close-out process, the ACO participants would not be penalized by the ACO's decision to terminate its participation agreement. For example, eligible professionals that bill through the TIN of an ACO participant could satisfy the reporting requirement to avoid the downward payment adjustment under the PQRS in a subsequent year.

Therefore, we propose in § 425.221(b) to permit an ACO whose participation agreement is voluntarily terminated by the ACO under § 425.220 to qualify for shared savings, if—

- The effective date of termination is December 31; and
- By a date specified by CMS, it completes its close-out process for the performance year in which the termination becomes effective.

In order to effectively manage this option in the case of voluntary termination, the ACO must specify in its termination notice, and CMS must approve, a termination effective date of December 31 for the current performance year. Because the proposed new provision at § 425.221 will address the consequences of termination, including the payment consequences, we also propose to make a conforming change to § 425.220 to remove paragraph (b) addressing the payment consequences of early termination.

We note that the opportunity to share in savings for a performance year would not extend to ACOs that terminate their participation agreement with effective dates prior to December 31 or to ACOs that CMS terminates under § 425.218. Those ACOs that terminate prior to December 31 will not have completed the performance year and thus would not qualify for shared savings. ACOs terminated by CMS under § 425.218 would not qualify for shared savings irrespective of the termination date because maintaining eligibility to participate in the Shared Saving Program is a pre-requisite for sharing in savings (see §§ 425.604(c) and 425.606(c)). In such cases, we strongly encourage ACOs to fulfill their obligations to their ACO participants and ACO providers/suppliers by reporting quality for the performance year in which it terminates so that their ACO participants and ACO providers/suppliers are not unduly penalized by the ACO's decision. However, even if the ACO completes quality reporting on behalf of its ACO participants and ACO provider/suppliers, if the ACO terminates its participation midyear or is terminated by CMS under § 425.218 (prior to December 31), it would not be eligible to share in savings for the performance year. The ACO would not be eligible to share in savings because the ACO would not have satisfied all requirements for sharing in savings for that performance year.

(3) Reconsideration Review Process

(A) Overview

Under § 425.802(a), an ACO may appeal an initial determination that is not subject to the statutory preclusion on administrative or judicial review (see section 1899(g) of the Act). Specifically, the following determinations are not subject to administrative or judicial review:

- The specification of quality and performance standards under §§ 425.500 and 425.502.
- The assessment of the quality of care furnished by an ACO under the performance standards.
- The assignment of beneficiaries.
- The determination of whether the ACO is eligible for shared savings and the amount of such shared savings (including the determination of the estimated average per capita Medicare expenditures under the ACO for beneficiaries assigned to the ACO and the average benchmark for the ACO).
- The percent of shared savings specified by the Secretary and the limit on the total amount of shared savings established under §§ 425.604 and 425.606.

• The termination of an ACO for failure to meet the quality performance standards.

Initial determinations that are not precluded from administrative or judicial review would include the denial of an ACO application or the involuntary termination of an ACO's participation agreement by CMS.

Under § 425.802(a), an ACO may appeal an initial determination that is not prohibited from administrative or judicial review by requesting reconsideration review by a CMS official. The request for review must be submitted for receipt by CMS within 15 days of the notice of the initial determination. Section 425.802(a)(2) provides that reconsiderations may be heard orally (that is, in person, by telephone or other electronic means) or on the record (review of submitted documentation) at the discretion of the reconsideration official.

(B) Proposed Changes

To date, CMS reconsideration official(s) have reviewed all reconsideration requests received as on-the-record reviews. We believe that on-the-record reviews are fair to both parties. Experience to date has demonstrated that a robust oral review is not necessary in light of the narrow scope of review. The issues eligible for review can be easily communicated in a detailed writing by both parties and do not require in-person witness testimony. Finally, we believe that on-the-record reviews do not require as many agency resources and can therefore ensure that decisions are made in a timely manner.

Accordingly, we propose to modify § 425.802 to permit only on-the-record reviews of reconsideration requests. Additionally, we propose to similarly modify § 425.804 and also clarify that the reconsideration process allows both ACOs and CMS to submit one brief each in support of its position by the deadline established by the CMS reconsideration official.

4. Monitoring ACO Compliance With Quality Performance Standards

We propose a technical revision to § 425.316(c) to clarify our administrative enforcement authority when ACOs fail to meet the quality reporting requirements. Specifically, we propose to remove § 425.316(c)(3), which sets forth various required actions the ACO must perform if it fails to report one or more quality measures or fails to report completely and accurately on all measures in a domain. We also propose to remove § 425.316(c)(4), which sets forth the administrative action we may take against an ACO if it exhibits a pattern of inaccurate or incomplete reporting of quality measures or fails to make timely corrections following notice to resubmit. The actions identified in § 425.316(c)(3) and (4) include request for missing or corrected information, request for a written explanation for the noncompliance, and termination. All of these actions are already authorized under § 425.216 and § 425.218. Therefore, to reduce redundancy, prevent confusion, and to streamline our regulations, we propose to modify § 425.316(c) to remove § 425.316(c)(3) and (c)(4).

In addition, we propose a technical change to § 425.316(c)(5), which currently provides that an ACO "will not qualify to share in savings in any year it fails to report fully and completely on the quality performance measures." We propose to redesignate this paragraph as § 425.316(c)(3) and replace "fully and completely" with "accurately, completely, and timely" to align with § 425.500(f) and to emphasize the importance of timely submission of measures.

III. Collection of Information Requirements

As stated in section 3022 of the Affordable Care Act, Chapter 35 of title 44, United States Code, shall not apply to the Shared Savings Program. Consequently, the information collection requirements contained in this proposed rule need not be reviewed by the Office of Management and Budget.

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 proposed rule, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

A. Statement of Need

This proposed rule is necessary to propose payment and policy changes to the Medicare Shared Savings Program established under section 1899 of the Act. The Shared Savings Program promotes accountability for a patient population, coordinates items and services under parts A and B, and encourages investment in infrastructure and redesigned care processes for high quality and efficient service delivery.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as "economically significant"); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this rulemaking is "economically significant" as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis, which to the best of our ability presents the costs and benefits of the rulemaking.

C. Anticipated Effects

1. Effects on the Medicare Program

The Shared Savings Program is a voluntary program involving an innovative mix of financial incentives

for quality of care and efficiency gains within FFS Medicare. As a result, the changes being proposed to the Shared Savings Program could result in a range of possible outcomes. In previous rulemaking (76 FR 67904), we indicated that participation in Track 1 might enable ACOs to gain the experience necessary to take on risk in a subsequent agreement period under a two-sided arrangement, possibly enhancing the opportunity for greater program savings in years beyond the first agreement period. Conversely, if in that first agreement period, ACOs come to reliably predict a bias that ensures an outcome—whether favorable or unfavorable—the program would be at risk for increasingly selective participation from favored ACOs and any real program savings could be overwhelmed by outsized shared-savings payments (76 FR 67964). Further, even ACOs that opt for a two-sided arrangement could eventually terminate their agreements if they anticipate that efforts to improve efficiency are overshadowed by their particular market circumstances. This scenario could also contribute to selective program participation by ACOs favored by the national flat-dollar growth target, or favored by other unforeseen biases affecting performance.

However, as we indicated in the previous rulemaking, even with the optional liability for a portion of excess expenditures, which offers less incentive to reduce costs than a model involving full capitation, the opportunity to share in FFS Medicare savings still represents an incentive for efficiency. The actual effects of shared savings (and potential liabilities in the form of shared losses) will have varying degrees of influence on hospitals, primary care physicians, specialty physicians, and other providers and suppliers. Moreover, while certain care improvements might be achieved relatively quickly (for example, prevention of hospital readmissions and emergency-room visits for certain populations with chronic conditions), some ACOs might need more than 3 years to achieve comprehensive efficiency gains.

As of the spring of 2014, over 330 organizations have chosen to participate in the Shared Savings Program. These organizations care for nearly 5 million assigned FFS beneficiaries living in 47 states, plus Puerto Rico and the District of Columbia. Half of all ACOs characterize themselves as networks of individual practices and the other half include hospitals. In the fall of 2014, CMS announced the final financial reconciliation and quality performance results for performance year 1 for ACOs with 2012 and 2013 agreement start dates. Of the 220 ACOs with 2012 and 2013 start dates, 58 ACOs generated shared savings during their first performance year. They held spending $705 million below their targets and earned shared savings payments of more than $315 million as their share of program savings. One ACO in Track 2 overspent its target by $10 million and owed shared losses of $4 million. Total net savings to Medicare is close to $383 million, including repayment of shared losses by one Track 2 ACO. An additional 60 ACOs reduced health costs compared to their benchmark, but did not qualify for shared savings, as they did not meet the minimum savings threshold. While evaluation of the program's overall impact is ongoing, the performance year 1 final financial reconciliation and quality results are within the range originally projected for the program's first year. Also, at this point, we have seen no evidence of systematic bias in ACO participation or performance that would raise questions about the savings that have been achieved.

Earlier in this proposed rule, we proposed additions to or changes in policy that are intended to better encourage ACO participation in risk-based models by—

- Easing the transition from Track 1 to Track 2;
- Reducing risk under Track 2; and
- Adopting an alternative risk-based model—Track 3.

First, as is currently the case, an ACO would be able to apply to participate in Track 1 for its initial agreement period during which the ACO could be eligible for shared savings payments in all 3 performance years of the agreement period without the risk of being responsible for repayment of any losses if actual expenditures exceed the benchmark. However, rather than requiring all Track 1 ACOs to transition to a risk-based model in their second agreement period, as is currently required, we are proposing to improve the transition from the shared-savings only model to a risk-based model for Track 1 ACOs that might require additional experience with the program before taking on performance-based risk. Specifically, in this proposed rule, we are proposing that Track 1 ACOs may elect to continue participation under Track 1 for a subsequent agreement period, albeit with a lower sharing rate, provided that they meet the eligibility requirements to continue in the program under Track 1.

Second, we are proposing to reduce the current level of risk for ACOs that participate in Track 2, which provides an opportunity for an ACO to receive a higher percentage of shared savings for all years of the agreement period, but with potential liability for shared losses in each of the agreement years if annual expenditures exceed the benchmark. Specifically, in this proposed rule, we are proposing to replace the current flat 2 percent MSR and MLR under Track 2 with a variable MSR and MLR using the same methodology as is currently used to establish the MSRs for ACOs under Track 1. Under this methodology an ACO's MSR varies based on the number of assigned beneficiaries using a sliding scale. Similarly, we are proposing to vary a Track 2 ACO's MSR and MLR based on the number of assigned beneficiaries. This proposal would reduce risk for many Track 2 ACOs by increasing the threshold before they would have to share in additional costs that they had incurred for the program.

Third, in this proposed rule, we are proposing to establish an additional risk-based option (Track 3) that offers a higher maximum shared savings percentage (75 percent) and performance payment limit (20 percent) than is available under Track 2 (60 percent and 15 percent respectively), a fixed MSR and MLR of 2 percent, and a cap on the amount of losses for which an ACO is liable that is fixed at 15 percent of its updated benchmark in each year. Also, under this model, beneficiaries would be assigned prospectively so an ACO would know in advance those beneficiaries for which it would be responsible.

As detailed in Table 8, we estimate at baseline (that is, without the proposed changes detailed in this proposed rule) a total aggregate median impact of $730 million in net federal savings for calendar years (CY) 2016 through 2018 from the continued operation of the Shared Savings Program for ACOs electing a second agreement period starting in January 2016. The 10th and 90th percentiles of the estimate distribution, for this same time period, yield a net savings of $380 million and $1,160 million, respectively. These estimated impacts represent the effect on federal transfers of payments to Medicare providers and suppliers. The median estimated federal savings are higher than the estimate for the program effects over the preceding calendar years (CY) 2012 through 2015 published in the previous final rule (estimated median net savings of $470 million for such 4 year period). This increase in savings is due to multiple factors related to maturation of the program, including continued phase-in of assumed savings potentials, lowered effective sharing

rates due in part to rebased benchmarks, and increased collection of shared losses due to mandatory enrollment in Track 2 in a second agreement period. However, absent changes to improve the viability of participation for ACOs considering a second agreement period, we estimate fewer than one in four ACOs will opt for continued participation under downside risk in Track 2 as required under the current regulations. Further, we estimate approximately one in three of such re-enrolling ACOs would ultimately drop out of the program by 2018 to avoid future shared loss liability.

Alternatively, as detailed in Table 9, by including the proposed changes detailed in this rule, the total aggregate median impact would increase to $1,010 million in net federal savings for calendar years (CY) 2016 through 2018. The 10th and 90th percentiles of the estimate distribution, for the same time period, would also be higher, yielding net savings of $430 million and $1,650 million, respectively. Such median estimated federal savings are $280 million greater than the $730 million median net savings estimated at baseline absent proposed changes. A key driver of an anticipated increase in net savings is through improved ACO participation levels in a second agreement period. We estimate that at least 90 percent of eligible ACOs will renew their participation in the Shared Savings Program if presented with the new options, primarily under Track 1 and, to a lesser extent, under Track 3. This expansion in the number of ACOs willing to continue their participation in the program is estimated to result in additional improvements in care efficiency of a magnitude significantly greater than the reduced shared loss receipts estimated from baseline (median shared loss dollars reduced by $140 million relative to baseline) and the added shared savings payments flowing from a higher sharing rate in Track 3 and continued one-sided sharing available in Track 1 (median shared savings payments increased by $320 million relative to baseline).

With respect to costs incurred by ACOs, as discussed later in this section, for purposes of this analysis, we are retaining our assumption included in our November 2011 final rule (76 FR 67969) of an average of $0.58 million for start-up investment costs but are revising our assumption for average ongoing annual operating costs for an ACO participating in the Shared Savings Program to $0.86 million, down from the $1.27 million assumed in our November 2011 final rule (76 FR 67969). This revision is related to the lower average number of beneficiaries currently observed to be assigned to existing Shared Savings Program ACOs compared to the larger organizations participating in the Physician Group Practice Demonstration upon which the original assumption was based. We also believe that our proposals to streamline the administrative requirements for the program could further assist in lowering administrative costs.

For our analysis, we are comparing the effects of the proposed changes in this proposed rule for a cohort of ACOs that either continued their participation, beginning in 2016 or newly began participation in that same year. For purposes of our analysis, we assume that roughly one quarter of ACOs will incur aggregate start-up investment costs in 2016, ranging from $7 million under the baseline scenario to $30 million under the alternative (all proposed changes) scenario in aggregate. Aggregate-ongoing operating costs are estimated to range from $43 million under the baseline scenario to $181 million under the alternative scenario. Both start-up investment and ongoing operating cost ranges assume an anticipated average participation level of 50 (baseline scenario) to 210 (alternative scenario) new or currently participating ACOs that establish or renew participation agreements in 2016. For purposes of this analysis, we assume that some portion of ACOs currently participating in the program will not renew their participation agreement for a subsequent agreement period. As a result, under our baseline scenario, we assume 50 ACOs will either renew or begin an agreement period in 2016—far fewer than the 100 new ACOs that have entered the program in each of the last 2 years. The 3-year aggregate ongoing operating cost estimate also reflects our assumption that, under the baseline scenario, there would be a greater propensity for ACOs that have completed the full term of their initial agreement period, and that would be required to participate under Track 2 in their second agreement period, to drop out of the program after receiving poor results from their final settlement for the first performance year under Track 2 in the new agreement period. Therefore, as illustrated in Table 8 for the baseline scenario, for CYs 2016 through 2018, total median ACO shared savings payments of $310 million offset by $170 million in shared losses coupled with the aggregate average start-up investment and ongoing operating cost of $121 million result in an estimated net private benefit of $19 million. Alternatively, as illustrated in Table 9 for the all changes scenario, for CYs 2016 through 2018 the total median ACO shared savings payments of $630 million, offset by $30 million in shared losses, coupled with the aggregate average start-up investment and ongoing operating costs of $562 million, result in an estimated net private benefit of $38 million. By proposing to no longer require ACOs to accept risk in their second agreement period, our proposed changes also provide the benefit of reducing the per-ACO average shared loss liability by over 95 percent compared to the baseline. Therefore, the proposed changes would likely prevent a significant number of ACOs that would renew their participation agreements in 2016 from leaving the program prior to 2018.

By encouraging greater Shared Savings Program participation, the changes proposed in this rule will also benefit beneficiaries through broader improvements in accountability and care coordination than would occur under current regulations. Accordingly, we have prepared a regulatory impact analysis (RIA) that to the best of our ability presents the costs and benefits of this proposed rule.

TABLE 8—BASELINE (ABSENT ALL PROPOSED CHANGES) ESTIMATED NET FEDERAL SAVINGS, COSTS AND BENEFITS, CYS 2016 THROUGH 2018

	CY 2016	CY 2017	CY 2018	CYs (2016–2018)
Net Federal Savings:				
10th Percentile	$200 million	$150 million	$20 million	$380 million.
Median	$340 million	$270 million	$110 million	$730 million.
90th Percentile	$510 million	$430 million	$240 million	$1160 million.
ACO Shared Savings:				
10th Percentile	$40 million	$60 million	$70 million	$180 million.
Median	$80 million	$110 million	$120 million	$310 million.

TABLE 8—BASELINE (ABSENT ALL PROPOSED CHANGES) ESTIMATED NET FEDERAL SAVINGS, COSTS AND BENEFITS, CYs 2016 THROUGH 2018—Continued

	CY 2016	CY 2017	CY 2018	CYs (2016–2018)
90th Percentile	$130 million	$170 million	$190 million	$480 million.
ACO Shared Losses:				
10th Percentile	$20 million	$40 million	$10 million	$80 million.
Median	$60 million	$80 million	$30 million	$170 million.
90th Percentile	$100 million	$150 million	$60 million	$290 million.
Costs	The estimated aggregate average start-up investment and 3-year operating costs is $121 million. The total estimated start-up investment costs average $7 million, with ongoing costs averaging $43 million, for the anticipated mean baseline participation of 50 ACOs.			
Benefits	Improved healthcare delivery and quality of care and better communication to beneficiaries through patient-centered care.			

* Note that the percentiles for each individual year do not necessarily sum to equal the corresponding percentiles estimated for the total 3-year impact, in the column labeled CYs 2016 through 2018, due to the annual and overall distributions being constructed independently.

TABLE 9—ALTERNATIVE SCENARIO ASSUMING ALL PROPOSED CHANGES ESTIMATED NET FEDERAL SAVINGS, COSTS AND BENEFITS, CYs 2016 THROUGH 2018

	CY 2016	CY 2017	CY 2018	CYs (2016–2018)
Net Federal Savings:				
10th Percentile	$190 million	$150 million	$80 million	$430 million.
Median	$380 million	$350 million	$280 million	$1,010 million.
90th Percentile	$590 million	$570 million	$510 million	$1650 million.
ACO Shared Savings:				
10th Percentile	$90 million	$150 million	$220 million	$470 million.
Median	$140 million	$210 million	$280 million	$630 million.
90th Percentile	$200 million	$280 million	$350 million	$820 million.
ACO Shared Losses:				
10th Percentile	$0 million	$0 million	$0 million	$10 million.
Median	$10 million	$20 million	$0 million	$30 million.
90th Percentile	$30 million	$40 million	$20 million	$70 million.
Costs	The estimated aggregate average start-up investment and 3-year operating costs is $562 million. The total estimated start-up investment costs average $30 million, with ongoing costs averaging $181 million, for the anticipated mean baseline participation of 210 ACOs.			
Benefits	Improved healthcare delivery and quality of care and better communication to beneficiaries through patient-centered care.			

Note that the percentiles for each individual year do not necessarily sum to equal the corresponding percentiles estimated for the total 3-year impact in the column labeled CYs 2016 through 2018, due to the annual and overall distributions being constructed independently. Also, the cost estimates for this table reflect our assumptions for increased ACO participation as well as changes in the mix of new and continuing ACOs.

There remains uncertainty as to the number of ACOs that will continue to participate in the program, provider and supplier response to the financial incentives offered by the program in the medium and long run, and the ultimate effectiveness of the changes in care delivery that may result as ACOs work to improve the quality and efficiency of patient care. These uncertainties continue to complicate efforts to assess the financial impacts of the Shared Savings Program and result in a wide range of potential outcomes regarding the net impact of the proposed changes in this proposed rule on Medicare expenditures.

To best reflect these uncertainties, we continue to utilize a stochastic model that incorporates assumed probability distributions for each of the key variables that will affect the overall financial impact of the Shared Savings Program. Using a Monte Carlo simulation approach, the model randomly draws a set of specific values for each variable, reflecting the expected covariance among variables, and calculates the program's financial impact based on the specific set of assumptions. We repeated the process for a total of 2,500 random trials, tabulating the resulting individual cost or savings estimates to produce a distribution of potential outcomes that reflects the assumed probability distributions of the incorporated variables, as shown in Table 9. In this way, we cen evaluate the full range of potential outcomes based on all combinations of the many factors that will affect the financial impact, and with an indication of the likelihood of these outcomes. It is important to note that these indications do not represent formal statistical probabilities in the usual sense, since the underlying assumptions for each of the factors in the model are based on reasonable judgments, using independent expert opinion when available.

The median result from the distribution of simulated outcomes represents the "best estimate" of the financial effect of the proposed changes to the Shared Savings Program. The full distribution illustrates the uncertainty surrounding the mean or median financial impact from the simulation.

The median estimate involves a combination of—

- Reduced actual Medicare expenditures due to more efficient care;
- Shared savings payments to ACOs; and
- Payments to CMS for shared losses when actual expenditures exceed the

benchmark, resulting in a projected total of $1,010 million in net savings over CYs 2016 through 2018, or $280 million greater than the median projected total at baseline without the changes proposed in this rule.

This net Federal savings estimate, detailed at the top of Table 9, can be summed with the projected ACO shared savings less projected ACO shared losses—both also detailed in Table 9—to show the median expected effect on Medicare claim expenditures before accounting for shared savings payments (that is, the reduction in actual Medicare expenditures due to more efficient care).

A net savings (cost) occurs when payments of earned and unearned shared savings (less shared losses collected) resulting from: (1) Reductions in spending; (2) care redesign; and (3) random group claim fluctuation, in total are less than (greater than) assumed savings from reductions in expenditures.

As continued emerging data become available on the differences between actual expenditures and the target expenditures reflected in ACO benchmarks, it may be possible to evaluate the financial effects with greater certainty. The estimate distribution shown in Table 10 provides an objective and reasonable indication of the likely range of financial outcomes, given the chosen variables and their assumed distributions at this time in the program's operation.

a. Assumptions and Uncertainties

We continue to rely on input gathered as part of the analysis for the existing regulation from a wide range of external experts, including credentialed actuaries, consultants, and academic researchers, to identify the pertinent variables that could determine the efficacy of the program, and to identify the reasonable ranges for each variable. We also continue to monitor emerging evidence from current participation in this program, the Pioneer ACO Model, and related published evidence where available. The factors that we are continuing to consider for modeling include all of the following:

- Number of participating ACOs, including the sensitivity to burdens of participation and the generosity of the sharing arrangement.
- Size mix of participating ACOs.
- Type of ACO that would consider accepting risk.
- Participating ACOs' current level of integration and preparedness for improving the quality and efficiency of care delivery.
- Baseline per-capita costs for ACOs, relative to the national average.
- Number and profile of providers and suppliers available to participate in the Shared Savings Program as a result of Innovation Center model initiatives.
- Range of gross savings achieved by ACOs, and the time required for full phase-in.
- Local variation in expected claims cost growth relative to the national average.
- Quality reporting scores and resulting attained sharing (or loss) percentages.
- Potential 'spillover' effects between the Shared Savings Program and other value-based incentive programs implemented by CMS and/or other payers.

We assumed that overall between 0.8 million Medicare beneficiaries (under baseline) and 3.3 million Medicare beneficiaries (with all proposed changes) would annually be assigned to between 50 and 210 ACOs beginning a new agreement period in 2016. Given data on current participation, we anticipate the program will continue to garner comparable levels of participation from markets exhibiting baseline per-capita FFS expenditures above, at, or below the national average. In addition, we assumed the level of savings generated by an ACO to positively correlate to the achieved quality performance score and resulting sharing percentage.

For estimating the impact of the proposed changes, we assume that most ACOs (approximately 9 out of 10, on average) will choose Track 1 despite a proposed decrease in the savings sharing percentage. This is because the ACOs will seek to simultaneously: (1) Avoid the potential for financial loss if expenditures experience a significant upward fluctuation or efficiency improvements are less effective than planned; and (2) continue to build organizational experience to achieve a per-capita cost target as determined under the program's benchmark methodology.

In contrast, we assume that a minority of ACOs—disproportionately represented from a more capable subset of the total program participation—will opt for Track 3 in the second agreement period. These ACOs will be enabled by experience accepting risk and/or achieving success in their first agreement period in this program, and motivated by the provision for prospective assignment of beneficiaries and the greater sharing percentage as proposed for this new option. A particularly important cause for uncertainty in our estimate is the high degree of variability observed for local per-capita cost growth rates relative to the national average "flat dollar" growth (used to update ACO benchmarks). The benchmark or expenditure target effectively serves as the chief measure of efficiency for participating ACOs. Factors such as lower-than-average baseline per-capita expenditure and variation in local growth rates relative to the national average can trigger shared savings payments even in the absence of any efficiency gains. Similarly, some ACOs could find that factors, such as prevailing per-capita expenditure growth in their service area that is higher than the national average, limit efficiency gains and reduce or prevent shared savings.

b. Detailed Stochastic Modeling Results

Table 10 shows the distribution of the estimated net financial impact for the 2,500 stochastically generated trials under the scenario where all proposed changes are implemented. (The amounts shown are in millions, with negative net impacts representing Medicare savings). The net impact is defined as the total cost of shared savings less—(1) any amount of savings generated by reductions in actual expenditures; and (2) any shared losses collected from ACOs that accepted risk and have actual expenditures exceeding their benchmark.

The median estimate of the Shared Savings Program financial impact for ACOs potentially entering a second agreement period as proposed in this rule and covering calendar years 2016 through 2018 is a net federal savings of $1,010 million, which is $280 million higher than our estimate for the same period assuming a baseline scenario, which excludes the changes proposed in this rule. This amount represents the "best estimate" of the financial impact of the Shared Savings Program during the applicable period. However, it is important to note the relatively wide range of possible outcomes. While over 99 percent of the stochastic trials resulted in net program savings, the 10th and 90th percentiles of the estimated distribution show net savings of $430 million to net savings of $1,650 million, respectively. In the extreme scenarios, the results were as large as $2.9 billion in savings or $200 million in costs.

The stochastic model and resulting financial estimates were prepared by the CMS Office of the Actuary (OACT). The median result of $1,010 million in savings is a reasonable "point estimate" of the impact of the Shared Savings Program during the period between 2016 and 2018 if the changes proposed

in this proposed rule are finalized and implemented. However, we emphasize the possibility of outcomes differing substantially from the median estimate, as illustrated by the estimate distribution. As we analyze additional data on ACO performance in the first agreement period, we may likely improve the precision of future financial impact estimates.

To the extent that the Shared Savings Program will result in net savings or costs to Part B of Medicare, revenues from Part B beneficiary premiums would also be correspondingly lower or higher. In addition, because MA payment rates depend on the level of spending within traditional FFS Medicare, savings or costs arising from the Shared Savings Program would result in corresponding adjustments to MA payment rates. Neither of these secondary impacts has been included in the analysis shown.

TABLE 10—SCENARIO ASSUMING ALL PROPOSED CHANGES STOCHASTIC DISTRIBUTION FOR THE ESTIMATED NET SAVINGS (–) OR COSTS (+), CYs 2016 THROUGH 2018
($ millions)

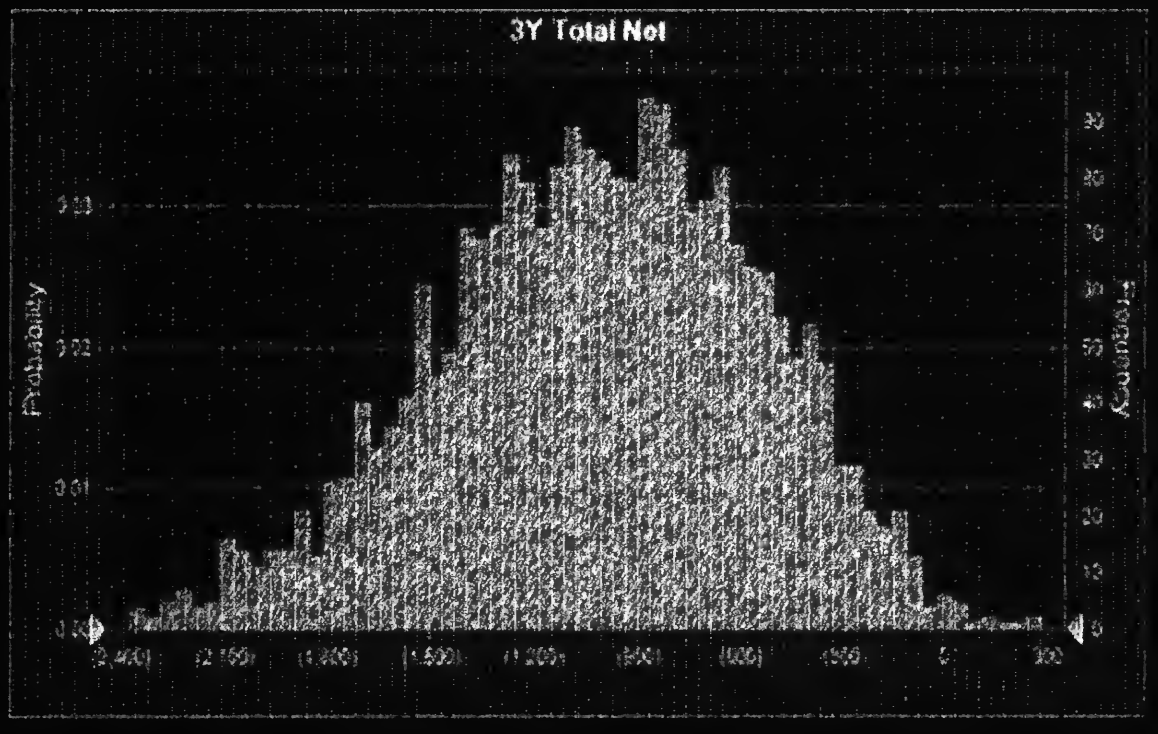
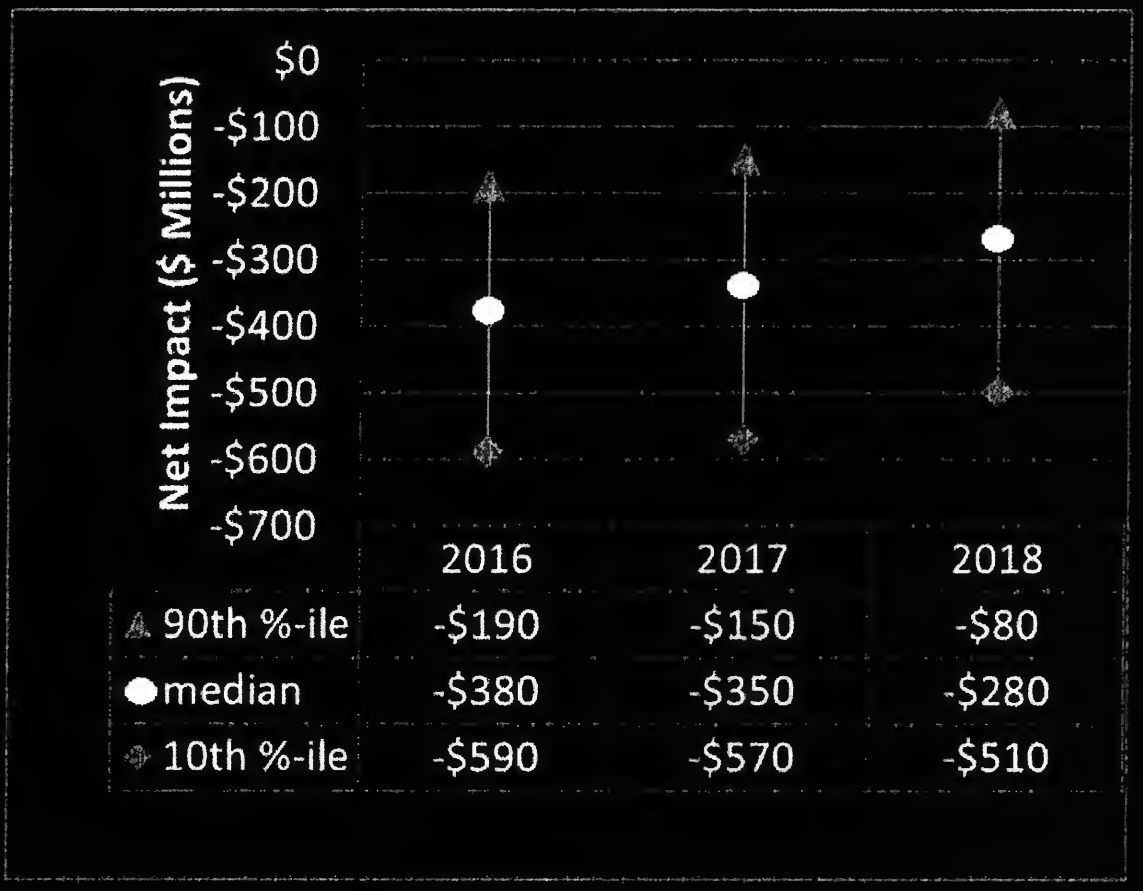


Table 11 shows the median estimated financial effects for the Shared Savings Program of ACOs entering in a new agreement period starting in 2016 and the associated 10th and 90th percentile ranges, assuming all changes in this proposed rule are implemented. Net savings (characterized by a negative net impact on federal outlays) are expected to moderately contract over the 3-year period, from a median of $380 million in 2016 to $270 million in 2018. This progression is related to the maturation of efficiencies achieved by renewing ACOs contrasted by progressive increases in shared savings payments due to increasing variability in expenditures in later performance years relative to a static benchmark expenditure baseline. To similar effect, the potential that Track 3 ACOs experiencing losses may elect to voluntarily terminate their participation in the program could work to decrease net savings in the last year of the period relative to prior years. We note that the percentiles are tabulated for each year separately. Therefore, the overall net impact distribution (Table 9) will not necessarily exactly match the sum of distributions for each distinct year.

TABLE 11—STOCHASTIC DISTRIBUTION FOR ESTIMATED FEDERAL NET SAVINGS (–) OR COSTS (+), CYs 2016 THROUGH 2018
($ millions)



	2016	2017	2018
90th %-ile	-$190	-$150	-$80
median	-$380	-$350	-$280
10th %-ile	-$590	-$570	-$510

c. Further Consideration

The impact analysis shown is only for the 3 years 2016 through 2018 corresponding to the second agreement period potentially available for the up to nearly 220 ACOs that will complete their first agreement period in 2015. As of January 1, 2014, 123 additional ACOs have joined the program and would potentially be eligible for a second agreement period beginning in 2017. For both groups of ACOs, uncertainties exist regarding providers' continued engagement with program goals and incentives, especially for providers who fail to generate shared savings revenue comparable to the cost of effective participation in the program. It is possible that, notwithstanding the enhancements proposed in this rule, a significant drop-off in participation could materialize from ACOs failing to achieve significant revenue from shared savings in the short run. On the other hand, value-based payment models are showing significant growth in arrangements from state Medicaid programs, private insurers, and employer-sponsored plans. Moreover, we would also note that the number of providers and suppliers participating in these models and in the existing ACOs continues to grow. Therefore, providers may view continued participation in this program as part of a wider strategy for care redesign rather than be driven only by the potential for receiving incentives in the form of shared savings payments from the Medicare Shared Savings Program. Therefore, there remains a potential for broad gains in efficiency and quality of care delivery across all populations served by ACOs participating in the Shared Savings Program with possible additional "spillover" effects on federal savings potentially traceable to momentum originally created by this program. The stochastic model for estimating future program impacts starting in 2016 does not incorporate either of these divergent longer-run scenarios, but both remain possibilities. An impact estimate expanded to include performance beyond the 2016 through 2018 agreement period would likely entail a significantly wider range of possible outcomes. However, emerging results of the first performance cycle will help inform estimates of the ongoing financial effects of the Shared Savings Program.

2. Effects on Beneficiaries

This program is still in the early stages of implementation. However, we continue to believe that the Shared Savings Program will benefit beneficiaries because the intent of the program is to—

- Encourage providers and suppliers to join together to form ACOs that will be accountable for the care provided to an assigned population of Medicare beneficiaries;
- Improve the coordination of FFS items and services; and

• Encourage investment in infrastructure and redesigned care processes for high quality and efficient service delivery that demonstrates a dedication to, and focus on, patient-centered care that results in higher quality care.

The benefits of a payment model that encourages providers and suppliers to become accountable for the overall care furnished to Medicare beneficiaries were evidenced by the PGP demonstration, upon which many features of the Shared Savings Program are based. Under the PGP demonstration, all of the PGP participants achieved improvements in their scores for most of the quality measures over time. While only 2 PGP participants met all 10 quality measure targets active in their first performance year, by the fifth performance year, seven sites met all 32, or 100 percent of their targets, and the remaining 3 PGP participants met over 90 percent of the targets. More specifically, as we previously discussed in our November 2011 final rule (76 FR 67968), over the first 4 years of the PGP Demonstration, physician groups increased their quality scores an average of 10 percentage points on the ten diabetes measures, 13 percentage points on the ten congestive heart failure measures, 6 percentage points on the seven coronary artery disease measures, 9 percentage points on the 2 cancer screening measures, and 3 percentage points on the 3 hypertension measures. Further analysis is provided in the Physician Group Practice Demonstration Evaluation Report (Report to Congress, 2009; *http://www.cms.gov/DemoProjectsEvalRpts/downloads/PGP_RTC_Sept.pdf*).

As we have also previously discussed (76 FR 67968), in addition to the overall increases in quality scores, we can examine the impact of the PGP Demonstration on quality by comparing the values of the seven claims-based quality measures for each PGP site and its comparison group. Our analysis found that, on the claims-based measures, PGP performance exceeded that of the comparison groups (CGs) on all measures between the base year (BY) and performance year 2 (PY2). It also found that the PGP sites exhibited more improvement than their CGs on all but one measure between the BY and PY2. Even after adjusting for pre-demonstration trends in the claims-based quality indicators, the PGP sites improved their claims-based quality process indicators more than their comparison groups.

Further, for the first year of the Pioneer ACO Model, all 32 Pioneer ACOs successfully reported quality measures and achieved the maximum quality score for complete and accurate reporting, earning incentive payments for their reporting accomplishments. Overall, Pioneer ACOs performed better than published rates in FFS Medicare for all 15 clinical quality measures for which comparable data are available. For example,

• Twenty-five of 32 Pioneer ACOs generated lower risk-adjusted readmission rates for their aligned beneficiaries than the benchmark rate for all Medicare FFS beneficiaries.

• Pioneer ACOs performed better on clinical quality measures that assess hypertension control for patients. The median rate among Pioneer ACOs on blood pressure control among beneficiaries with diabetes was 68 percent compared to 55 percent as measured in adult diabetic population in 10 managed care plans across 7 states from 2000 to 2001.

• Pioneer ACOs performed better on clinical quality measures that assess low density lipoprotein (LDL) control for patients with diabetes. The median rate among Pioneer ACOs for LDL control among beneficiaries with diabetes was 57 percent compared to 48 percent in an adult diabetic population in 10 managed care plans across 7 states from 2000 to 2001.

Additionally, under the Shared Savings Program, all but 6 organizations fully and completely reported quality measures for the 2013 reporting period, providing important information on current performance that can be used to improve patient engagement and make meaningful positive impacts on patient care.

Above and beyond the early quality data generated by participating organizations, we have anecdotal evidence that illustrates the importance of encouraging participation in the Shared Savings Program. For example, ACO providers/suppliers report very meaningful changes in patient engagement through beneficiary participation on the governing body of the ACO and on patient advisory committees. In response to beneficiary input, clinical practices are offering extended office hours, including weekend hours, and ensuring timely appointments and access to clinical staff. Using the data shared by CMS, ACOs are able to identify high risk beneficiaries that require additional clinical attention, assign case managers, and actively work to improve care for these beneficiaries. One ACO reported that it has implemented a process for performing in-home medication reconciliation and review of care plans as a follow up to hospital discharge and for one third of those patients, discovered an intervention that avoided an unnecessary hospital readmission. Active identification and management of these patients has uncovered previously unaddressed issues that factored into patient inability to adhere to treatment plans. For example, one ACO reported that it has uncovered several psycho-social issues that were resulting in avoidable readmissions such as—

• The inability to self-medicate (the ACO arranged for home health services);

• Lack of transportation to clinical practices (the ACO's affiliated hospitals had a taxi service voucher program that the ACO was able to expand to the beneficiary population assigned to the ACO);

• Inadequate access to healthy food resources (the ACO worked with community stakeholders to have meals delivered to the patient's home).

Additionally, ACOs are using claims data to identify diagnoses prevalent in the assigned population and develop best practice guidelines for those conditions, and educating and alerting ACO participants and ACO providers/suppliers to standardize care.

We expect that the changes proposed in this proposed rule, specifically those easing administrative requirements, smoothing the transition to a risk-based model, and expanding opportunities to share in a higher level of savings will encourage greater program participation by ACOs, which will in turn increase the number of beneficiaries that can potentially benefit from high quality and more coordinated care. Nonetheless, this program does not affect beneficiaries' freedom of choice regarding which providers and suppliers they see for care since beneficiaries assigned to an ACO continue to be in the traditional Medicare program. Thus, beneficiaries may continue to choose providers and suppliers that do not participate in ACOs under the Shared Savings Program.

3. Effect on Providers and Suppliers

Based on discussions with ACOs that generated interim shared savings and demonstrated high quality care during their first performance year in the Shared Savings Program, we know that ACOs are busy implementing a variety of strategies designed to improve care coordination for beneficiaries and lower the rate of growth in expenditures. Most of these ACOs consider themselves to be "physician-based" organizations, rather than "hospital-based", although many state that a strong collaboration between

inpatient and outpatient facilities is critical to better care coordination across sites of care. ACOs mentioned several strategies they believed were important such as careful pre-participation planning, transparency between the ACO leadership and its ACO participants and ACO providers/suppliers, education of ACO providers/suppliers regarding the ACO's care processes, strong physician leadership, and working to streamline and transform practices for highly efficient coordinated care across sites of care. Several clinicians in ACOs have reported to us that the ACO is providing them with the support and structure needed to practice "how [they] always hoped [they] could". All of the ACOs recognize that they are early in the process of implementing their strategies to improve care coordination and reduce the rate of growth in expenditures and have plans to refine and improve based upon their early lessons learned.

We realize that ACOs bear costs in building the organizational, financial and legal infrastructure that is necessary to participate in the Shared Savings Program and implementing the strategies previously articulated, as well as performing the tasks required of an ACO, such as: Quality reporting, conducting patient surveys, and investing in infrastructure for effective care coordination. While provider and supplier participation in the Shared Savings Program is voluntary, we have examined the potential costs of continued program participation.

In this proposed rule, we are proposing to revise several program policies in order to reduce the burden associated with the infrastructure, start-up and ongoing annual operating costs for participating ACOs in the Shared Savings Program. These proposals include simplifying the application process for certain ACOs with experience under either Pioneer ACO Model or the Shared Savings Program streamlining sharing of beneficiary data. These significant proposed policy modifications are discussed in detail in sections II.B., C., and D. of this proposed rule.

The Shared Savings Program is still relatively new, and the initial group of organizations that applied to participate has only recently completed the first performance year. Because of this limited experience with the program and flexibility regarding the composition of providers and suppliers within an ACO and the strategies that the provider community will pursue in order to improve quality and reduce cost of care, precise estimates of expected provider costs or changes to their costs due to this proposed rule are difficult to create.

In our November 2011 final rule (76 FR 67968), we discussed a Government Accountability Office analysis of the PGP demonstration. The GAO study showed that both start-up and annual operating costs varied greatly across the participating practices. Thus, as we indicated in the November 2011 final rule (76 FR 67968), we use GAO's analysis not to predict cost investment and operating expenditures, but to demonstrate that we expect the range of investment to vary greatly across ACOs and to provide the potential scope for aspiring participants.

For purposes of our current impact analysis, we are retaining the assumption included in our November 2011 final rule (76 FR 67969) of $0.58 million in average start-up investment cost but are revising our assumption for average ongoing annual operating costs for an ACO from $1.27 million to $0.86 million to reflect the lower average number of beneficiaries assigned to existing Shared Savings Program ACOs (approximately 14,700 beneficiaries) compared to the ten PGP sites examined by GAO (average size approximately 22,400 beneficiaries). Therefore, our cost estimates for purposes of this proposed rule reflect an average estimate of $0.58 million for the start-up investment costs and $0.86 million in ongoing annual operating costs for an ACO participating in the Shared Savings Program. Assuming an expected range of ACOs participating in the Shared Savings Program of 50 to 210 ACOs (baseline scenario and all changes scenario, respectively) yields an estimated aggregate start-up investment cost ranging from $7 million to $30 million (assuming 1 in 4 ACOs will incur start-up costs), with aggregate ongoing operating costs ranging from $43 million to $181 million for the agreement period coinciding with CYs 2016 through 2018. We are also assuming that ACOs participating in a track that includes two-sided performance-based risk will in certain cases drop out of the program after receiving poor results for the first performance period beginning in 2016. Such drop out activity is assumed to affect a greater proportion of ACOs at baseline than under the all changes scenario because of the requirement that all renewing ACOs participate in Track 2 under the baseline scenario. When utilizing the anticipated mean participation rate of ACOs in the Shared Savings Program for such agreement period coupled with the average start-up investment and ongoing annual operating costs for the up to 3 years that ACOs may participate for such agreement period, this yields estimated aggregate average start-up investment and ongoing operating costs of $121 million for 50 ACOs (assuming no regulatory changes) to $562 million for 210 ACOs (assuming the proposed regulatory changes) for the agreement period covering CYs 2016 through 2018.

While there will be a financial cost placed on ACOs that participate, there will be benefits to the respective organizations in the form of increased operational and healthcare delivery efficiency. Furthermore, as discussed previously, and explained in more detail in the preamble of this proposed rule, there will be an opportunity for financial reward for success in the program in the form of shared savings. As shown in Table 12, the estimate of the shared savings that will be paid to participating ACOs is a median of $630 million during CYs 2016 through 2018, with $470 million and $820 million reflecting the 10th and 90th percentiles, respectively. (Similar to the previously presented stochastic distributions, the distribution represents uncertainty given the range of expert opinion, rather than a true statistical probability distribution.)

Compared to shared savings payments, under our proposed changes to the program, we anticipate collection from participating ACOs of a relatively moderate $30 million in shared losses during the same period, with our 10th and 90th percentiles projecting $10 million and $70 million in shared losses collected, respectively. Shared losses decrease relative to the baseline (median of $170 million over the same 3 years) because, in contrast to the baseline requirement, not all renewing ACOs would be required to enter Track 2 and take on downside risk. Modeling indicates that not all ACOs choosing downside risk in a second agreement period, whether required, as under the current regulation or as an alternative option under the proposed changes, will achieve shared savings and some may incur a financial loss, due to the requirement to repay a share of actual expenditures in excess of their benchmark as shared losses. The significantly reduced level of shared losses anticipated under the all proposed changes scenario is largely attributable to the proposed option for eligible ACOs to be able to renew under a modified Track 1, and illustrates a key reason why the program would be anticipated to see significantly stronger continued participation under the proposed changes than at baseline.

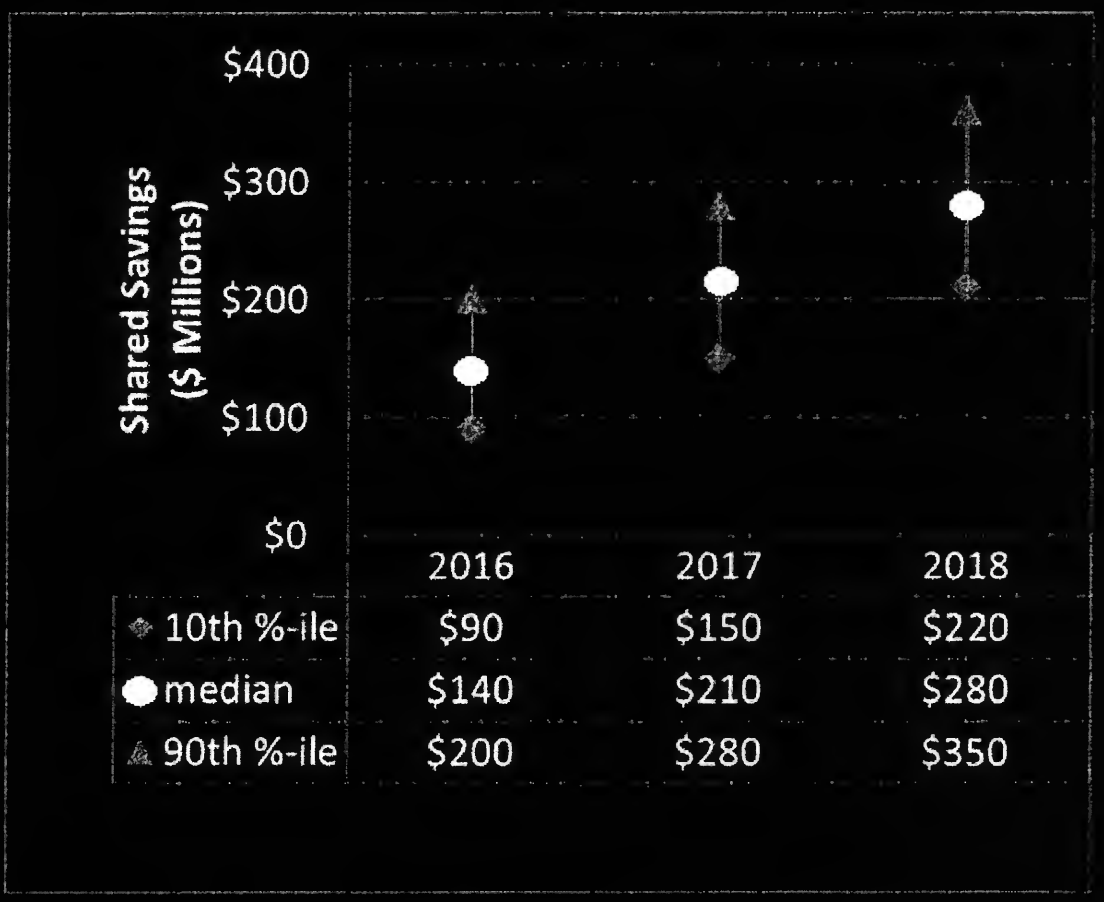
Assuming the proposed changes in this proposed rule, total median ACO shared savings payments ($630 million) net of median shared losses ($30 million) to ACOs with agreement periods covering CYs 2016 through 2018 are $600 million in net payments. Such median total net payment amount, coupled with the aggregate average start-up investment and ongoing operating cost of $562 million, incurred by the mean participation rate of ACOs in the Shared Savings Program during the same time period, yields a net private benefit of $38 million. At baseline, absent the proposed changes, the median net payments to ACOs over the same time period would be only $140 million ($310 million in shared savings payments less $170 million in shared losses). Such lower net sharing at baseline, combined with baseline average start-up investment and ongoing operating costs of $121 million, yields a net private benefit of $19 million. We expect that a significant portion of Track 1 ACOs that are assumed to be unwilling to renew under the program without the protection from downside risk will welcome the opportunity to continue under Track 1 for a second agreement period, albeit with a lower maximum sharing rate of 40 percent. Moreover, the proposed changes reduce the estimated per-ACO average shared loss liability by over 95 percent compared to the baseline, and increase the chance an ACO renewing in 2016 will continue to participate for all 3 years of the new agreement period.

We would note that our estimates of net private benefits under the baseline and all proposed changes scenarios are influenced by assumptions that could vary in practice and thus result in a very different actual result than what was estimated. First, we assume that savings realized by existing ACOs during their first agreement period are built into their benchmarks and our baseline for their successive agreement period. This means that these ACOs may have to achieve greater efficiencies and quality improvements during their successive agreement period compared to their prior one in order to share in savings. Moreover, the extent to which these ACOs actually exceed or fall short of our assumed baseline savings will result in higher or lower actual net private benefits relative to our estimate. Second, our estimates assume a large proportion of existing Track 1 ACOs will continue participating under Track 1 for 2016 to 2018, albeit at the lower 40 percent sharing rate. This assumption has the effect of diminishing estimated benefits under our model. Thus, all else being equal, the extent to which a smaller or larger percentage of these ACOs remain under Track 1 for their second agreement period will also respectively increase or decrease the actual net private benefits relative to what we estimated. Finally, to the extent that actual ACO quality performance exceeds or falls short of our estimates, the net private benefits could be respectively higher or lower than what we estimated.

We also note that the net private benefits actually experienced by a given ACO may increase as a result of other benefits associated with participation in the Shared Savings Program. For example, an ACO that is participating in the Shared Savings Program and simultaneously receives value-based contracts from other payers may receive additional benefits. Such potential benefits are not considered in our analysis because they are not readily quantifiable. Therefore, we limit our benefit-cost estimate to shared savings and shared loss dollars received under the Shared Savings Program relative to estimated operational costs associated with participating in the program as previously described.

TABLE 12—STOCHASTIC DISTRIBUTION FOR ESTIMATED ACO SHARED SAVINGS PAYMENTS, CYs 2016 THROUGH 2018

($ millions)



4. Effect on Small Entities

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most physician practices, hospitals and other providers are small entities, either by virtue of their nonprofit status or by qualifying as small businesses under the Small Business Administration's size standards (revenues of less than $7.5 to $38.5 million in any 1 year; NAIC Sector-62 series). States and individuals are not included in the definition of a small entity. For details, see the Small Business Administration's Web site at *http://www.sba.gov/content/small-business-size-standards*. For purposes of the RFA, approximately 95 percent of physicians are considered to be small entities. There are over 1 million physicians, other practitioners, and medical suppliers that receive Medicare payment under the Physician Fee Schedule (PFS).

Although the Shared Savings Program is a voluntary program and payments for individual items and services will continue to be made on a FFS basis, we acknowledge that the program can affect many small entities and have drafted the proposed changes to our rules and regulations accordingly in order to minimize costs and administrative burden on such entities as well as to maximize their opportunity to participate. Small entities are both allowed and encouraged to participate in the Shared Savings Program, provided they have a minimum of 5,000 assigned beneficiaries, thereby potentially realizing the economic benefits of receiving shared savings resulting from the utilization of enhanced and efficient systems of care and care coordination. Therefore, a solo, small physician practice or other small entity may realize economic benefits as a function of participating in this program and the utilization of enhanced clinical systems integration, which otherwise may not have been possible.

We have determined that this proposed rule will have a significant impact on a substantial number of small entities and we present more detailed analysis of these impacts, including costs and benefits to small entities and alternative policy considerations throughout this RIA. However, as detailed in this RIA, total median shared

savings payments net of shared losses will offset about 107 percent of the average costs borne by entities participating in the Shared Savings Program, with an offset significantly greater than the cost of participation for the subset of ACOs that achieve shared savings in a given year, and no downside risk of significant shared losses for ACOs choosing to remain under Track 1 for a second agreement period. As a result, this regulatory impact section, together with the remainder of the preamble, constitutes our preliminary Regulatory Flexibility Analysis.

5. Effect on Small Rural Hospitals

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 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 and has fewer than 100 beds. Although the Shared Savings Program is a voluntary program, this proposed rule will have a significant impact on the operations of a substantial number of small rural hospitals. We have proposed changes to our regulations such that rural hospitals will have stronger incentives to participate in the program through offering a smoother transition to risk-based models, additional opportunities to potentially share in savings under proposed new Track 3, and streamlined administrative requirements. As detailed in this RIA, the estimated aggregate median impact of shared savings payments to participating ACOs is approximately 107 percent of the average costs borne by entities that voluntarily participate in the Shared Savings Program, with an offset significantly greater than the cost of participation for the subset of ACOs that achieve shared savings in a given year, and no downside risk of significant shared loss penalties for ACOs choosing to remain under Track 1 for a second agreement period.

6. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2014, that is approximately $141 million. This proposed rule does not include any mandate that would result in spending by state, local or tribal governments, in the aggregate, or by the private sector in the amount of $141 million in any 1 year. Further, participation in this program is voluntary and is not mandated.

D. Alternatives Considered

In the November 2011 final rule (76 FR 67971), we noted in the regulatory impact analysis that many tenets of the program are statutorily mandated and thus allow for little, if any, flexibility in the rulemaking process. Where there was flexibility, we made our policy decisions regarding alternatives based on a balance between creating the least possible negative impact on the stakeholders affected by the program and satisfactorily fitting the vision of the program within given operational constraints. This proposed rule contains a range of modifications to program policies that take this balance into consideration. The preceding preamble provides descriptions of the various statutory provisions that are addressed in this proposed rule, identifies those policies where discretion has been allowed and exercised, presents the rationales for our proposals and, where relevant, alternatives that were considered.

In addition to estimating the difference between impacts at baseline and assuming all proposed changes are adopted, the stochastic model was also adapted to isolate marginal impacts for several alternative scenarios related to individual proposals within the overall set of proposed changes to the program. In one scenario, all proposed changes were assumed except the addition of Track 3. Relative to the all-changes scenario, this modification was not anticipated to materially reduce overall participation. However, we estimated that excluding Track 3 as a proposal would reduce median gross savings by $70 million over 3 years as fewer ACOs would be willing to accept the stronger incentive of downside risk without the opportunity to earn enhanced shared savings up to the 75 percent maximum sharing percentage under Track 3. Lastly, median shared losses under this scenario would decline by $10 million. Thus, the overall impact on net federal savings of offering Track 3 in the context of all other proposed changes to the program is minimal. However for individual ACOs, the higher sharing rate available under Track 3 may boost efforts to build capacity for accepting downside risk while potentially accelerating activities related to improving the efficiency of care. Also, the opportunity under Track 3 to share in a greater percentage of the savings that are achieved could assist in addressing the concerns of ACOs that were successful in achieving savings in their first agreement period but are concerned that their new expenditure baseline for the agreement period starting in 2016 will be lower as a result of their prior success in reducing the cost of care for their assigned beneficiaries, thus making it more difficult to achieve savings.

Another alternative scenario we considered included all proposed changes except for lowering the Track 1 sharing rate from 50 percent to 40 percent for Track 1 ACOs that elect to renew for a second agreement period under this model starting in 2016. Similar to the previous scenario, this change would not be expected to materially change overall assumed participation. However, relative to the all changes model, the net effect of this alternative would be to increase median shared savings payments by $110 million over 3 years. Furthermore, because a portion of ACOs that would have otherwise chosen Track 3 under the all changes scenario would now be expected to choose Track 1 given the higher sharing rate, overall median gross savings would decline by $30 million under this alternative, resulting in an overall reduction of $140 million in median net federal savings compared to the all changes scenario.

Lastly, an alternative scenario was considered where no changes were proposed other than to allow current Track 1 ACOs a 2-year extension to their current agreement period, after which they would then be limited to participating under Track 2 as required under the current regulations. This alternative was assumed to boost ACO participation in 2016 and 2017 comparable to the participation level expected for such years in the all-changes scenario. However, we would anticipate a significant contraction in participation in 2018 similar to the rate of participation assumed at baseline for that year. The net impact of this alternative would be $220 million in reduced net federal savings compared to all changes as proposed in this rule, driven mainly by reduced program participation in the third year and by increased shared savings payments in 2016 and 2017 because ACO benchmarks would not be rebased until 2018.

E. Accounting Statement and Table

As required by OMB Circular A–4 under Executive Order 12866, in Table 13, we have prepared an accounting statement showing the change in (A) net

federal monetary transfers, (B) shared savings payments to ACOs net of shared loss payments from ACOs and (C) the aggregate cost of ACO operations for ACO participants and ACO providers/suppliers from 2016 to 2018 that are associated with the provisions of this proposed rule as compared to baseline.

TABLE 13—ACCOUNTING STATEMENT ESTIMATED IMPACTS

[CYs 2016–2018]

Category	Primary estimate (in millions)	Minimum estimate (in millions)	Maximum estimate (in millions)	Source citation (RIA, preamble, etc.)
BENEFITS: Annualized monetized transfers Discount rate: 7%	−$76.3	−$12.0	−$129.7	Change from baseline (Table 8) to proposed changes (Table 9)
Annualized monetized transfers Discount rate: 3%	−$83.8	−$13.7	−$142.0	
From whom to whom?	Negative values reflect reduction in federal net cost resulting from care management by ACOs			
BENEFITS: Annualized monetized transfers Discount rate: 7%	$124.1	$96.5	$152.0	Change from baseline (Table 8) to proposed changes (Table 9)
Annualized monetized transfers Discount rate: 3%	$134.8	$105.1	$164.7	
From whom to whom?	Positive values reflect increase in aggregate shared savings net of shared losses			
OPERATIONAL COST: Annualized monetized transfers Discount rate: 7%	$121.3			Change from baseline (Table 8) to proposed changes (Table 9)
Annualized monetized transfers Discount rate: 3%	$130.7			
From whom to whom?	Positive values reflect increase in aggregate ACO operating costs largely attributable to assumed increased participation as a result of the proposals included in this proposed rule compared to baseline			

F. Conclusion

The analysis in this section, together with the remainder of this preamble, provides a Regulatory Impact Analysis. As a result of this proposed rule, the median estimate of the financial impact of the Shared Savings Program for CYs 2016 through 2018 would be net federal savings (after shared savings payments) of $1,010 million. Under this proposed rule, median savings would be about $280 million higher than we estimate assuming none of the proposed changes for this period. Although this is the "best estimate" of the financial impact of the Shared Savings Program during CYs 2016 through 2018, a relatively wide range of possible outcomes exists. While over 99 percent of the stochastic trials resulted in net program savings, the 10th and 90th percentiles of the estimated distribution show net savings of $430 million to net savings of $1,650 million, respectively. In the extreme scenarios, the results were as large as $2.9 billion in savings or $200 million in costs.

In addition, at the anticipated mean participation rate of ACOs in the Shared Savings Program, participating ACOs may experience an estimated aggregate average start-up investment and ongoing operating cost of $815 million for CYs 2016 through 2018. Lastly, we estimate an aggregate median impact of $630 million in shared savings payments to participating ACOs in the Shared Savings Program for CYs 2016 through 2018. The 10th and 90th percentiles of the estimate distribution, for the same time period, yield shared savings payments to ACOs of $470 million and $820 million, respectively. Therefore, the total median ACO shared savings payments of $630 million during CYs 2016 through 2018, net of a median $30 million shared losses, coupled with the aggregate average start-up investment and ongoing operating cost of $562 million yields a net private benefit of $38 million.

Overall, we assumed greater participation by ACOs under the policies contained in this proposed rule due to our proposals to ease the transition from Track 1 to Track 2, reduce risk under Track 2, and adopt an alternative risk-based model—Track 3. This resulted in total shared savings increasing significantly, while shared losses decreased due to these changes. Moreover, as participation in the Shared Savings Program continues to expand, we anticipate there will be a broader focus on care coordination and quality improvement among providers and suppliers within the Medicare program that will lead to both increased efficiency in the provision of care and improved quality of the care that is provided to beneficiaries.

In accordance with the provisions of Executive Order 12866, this rule was

reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 425

Administrative practice and procedure, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR part 425 as follows:

PART 425—MEDICARE SHARED SAVINGS PROGRAM

■ 1. The authority citation for part 425 continues to read as follows:

Authority: Secs. 1102, 1106, 1871, and 1899 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

§ 425.10 [Amended]

■ 2. Amend § 425.10 (b)(6) by removing the phrase "two-sided model" and adding in its place the phrase "two-sided models".

■ 3. Amend § 425.20 as follows:

■ A. By revising the definition of "ACO participant".

■ B. By adding the definition of "ACO participant agreement" in alphabetical order.

■ C. By revising the definitions of "ACO professional", "ACO provider/supplier", "Agreement period", and "Assignment".

■ D. By adding the definition of "Assignment window" in alphabetical order.

■ E. By revising the definitions of "Continuously assigned beneficiary", "Hospital", and "Newly assigned beneficiary".

■ F. By adding the definition of "Participation agreement" in alphabetical order.

■ G. In the definition of "Performance year" by removing the phrase "in the ACO's agreement" and adding in its place the phrase "in the participation agreement".

■ H. In paragraph (2) of the definition of "Primary care services", by removing the ";" and adding in its place ".".

■ I. By adding paragraphs (4) and (5) to the definition of "Primary care services".

The revisions and additions read as follows:

§ 425.20 Definitions.

* * * * *

ACO participant means an entity identified by a Medicare-enrolled billing TIN through which one or more ACO providers/suppliers bill Medicare, that alone or together with one or more other ACO participants compose an ACO, and that is included on the list of ACO participants that is required under § 425.118.

ACO participant agreement means the written agreement (as required at § 425.116) between the ACO and ACO participant in which the ACO participant agrees to participate in, and comply with, the requirements of the Shared Savings Program.

ACO professional means an individual who is Medicare-enrolled and bills for items and services furnished to Medicare fee-for-service beneficiaries under a Medicare billing number assigned to the TIN of an ACO participant in accordance with applicable Medicare regulations and who is either of the following:

(1) A physician legally authorized to practice medicine and surgery by the State in which he or she performs such function or action.

(2) A practitioner who is one of the following:

(i) A physician assistant (as defined at § 410.74(a)(2) of this chapter).

(ii) A nurse practitioner (as defined at § 410.75(b) of this chapter).

(iii) A clinical nurse specialist (as defined at § 410.76(b) of this chapter)

ACO provider/supplier means an individual or entity that meets all of the following:

(1) Is a—

(i) Provider (as defined at § 400.202 of this chapter); or

(ii) Supplier (as defined at § 400.202 of this chapter).

(2) Is enrolled in Medicare.

(3) Bills for items and services furnished to Medicare fee-for-service beneficiaries during the agreement period under a Medicare billing number assigned to the TIN of an ACO participant in accordance with applicable Medicare regulations.

(4) Is included on the list of ACO providers/suppliers that is required under § 425.118.

Agreement period means the term of the participation agreement, which is 3 performance years unless otherwise specified in the participation agreement.

* * * * *

Assignment means the operational process by which CMS determines whether a beneficiary has chosen to receive a sufficient level of the requisite primary care services from ACO professionals so that the ACO may be appropriately designated as exercising basic responsibility for that beneficiary's care during a given benchmark or performance year.

Assignment window means the 12-month period used to assign beneficiaries to an ACO.

* * * * *

Continuously assigned beneficiary means a beneficiary assigned to the ACO in the current performance year who was either assigned to or received a primary care service from any of the ACO participants during the assignment window for the most recent prior benchmark or performance year.

* * * * *

Hospital means a hospital as defined in section 1886(d)(1)(B) of the Act.

* * * * *

Newly assigned beneficiary means a beneficiary that is assigned to the ACO in the current performance year who was neither assigned to nor received a primary care service from any of the ACO participants during the assignment window for the most recent prior benchmark or performance year.

* * * * *

Participation agreement means the written agreement required under § 425.208(a) between the ACO and CMS that, along with the regulations in this part, govern the ACO's participation in the Shared Savings Program.

* * * * *

Primary care services * * *

(4) CPT codes 99495 and 99496 and HCPCS code GXXX1.

(5) Additional codes designated by CMS as primary care services for purposes of the Shared Savings Program, including new HCPCS/CPT and revenue center codes and any subsequently modified or replacement codes for the HCPCS/CPT and revenue center codes identified in paragraphs (1) through (4) of this definition.

* * * * *

§ 425.100 [Amended]

■ 4. Amend § 425.100 as follows:

■ A. In paragraph (b) by removing the reference "under § 425.604 or § 425.606" and adding in its place the reference "under § 425.604, § 425.606 or § 425.610".

■ B. In paragraph (c) by removing the phrase "under the two-sided model" and adding in its place the phrase "under a two-sided model".

■ C. In paragraph (c) by removing the reference "under § 425.606" and adding in its place the reference "under § 425.604, § 425.606 or § 425.610".

■ 5. Amend § 425.102 as follows:

■ A. By adding paragraph (a)(8).

■ B. In paragraph (b) by removing the phrase "eligible participate" and adding in its place the phrase "eligible to participate".

The addition reads as follows:

§ 425.102 Eligible providers and suppliers.

(a) * * *

(8) Teaching hospitals that have elected under § 415.160 of this chapter

to receive payment on a reasonable cost basis for the direct medical and surgical services of their physicians.

* * * * *

§ 425.104 [Amended]

■ 6. Amend § 425.104(b), by removing the phrase "otherwise independent ACO participants must" and adding in its place the phrase "ACO participants, each of which is identified by a unique TIN, must".

■ 7. Amend § 425.106 by revising paragraphs (a), (b)(3), (c)(1), (c)(2), and (c)(5) to read as follows:

§ 425.106 Shared governance.

(a) *General rule.* (1) An ACO must maintain of an identifiable governing body with ultimate authority to execute the functions of an ACO as defined under this part, including but not limited to the processes defined under § 425.112 to promote evidence-based medicine and patient engagement, to report on quality and cost measures, and to coordinate care.

(2) The governing body of the ACO must satisfy all of the following criteria:

(i) Be the same as the governing body of the legal entity that is the ACO.

(ii) Be separate and unique to the ACO and must not be the same as the governing body of any ACO participant, in the case of an ACO that comprises two or more ACO participants.

(iii) Satisfy all other requirements of this section.

(b) * * *

(3) The governing body members must have a fiduciary duty to the ACO, including the duty of loyalty, and must act consistent with that fiduciary duty.

* * * * *

(c) * * *

(1) The ACO must—(i) Establish a mechanism for shared governance among the ACO participants or combinations of ACO participants (as identified in § 425.102(a)) that formed the ACO; and

(ii) Provide for meaningful participation in the composition and control of the ACO's governing body for ACO participants or their designated representatives.

(2) The ACO governing body must include a Medicare beneficiary who—

(i) Is served by the ACO;

(ii) Is not an ACO provider/supplier;

(iii) Does not have a conflict of interest with the ACO; and

(iv) Does not have an immediate family member who has a conflict of interest with the ACO.

* * * * *

(5) In cases in which the composition of the ACO's governing body does not meet the requirements of paragraphs (c)(2) of this section, the ACO must describe—

(i) Why it seeks to differ from this requirement; and

(ii) How it will provide meaningful representation of Medicare beneficiaries in ACO governance.

* * * * *

■ 8. Amend § 425.108 by removing paragraph (e) and revising paragraph (c) to read as follows:

§ 425.108 Leadership and management.

* * * * *

(c) Clinical management and oversight must be managed by a senior-level medical director. The medical director must be—

(1) A board-certified physician;

(2) Licensed in a State in which the ACO operates; and

(3) Physically present on a regular basis at any clinic, office or other location of the ACO, ACO participant or ACO provider/supplier.

* * * * *

■ 9. Amend § 425.110 by revising paragraphs (a)(2) and (b) to read as follows:

§ 425.110 Number of ACO professionals and beneficiaries.

(a) * * *

(2) CMS deems an ACO to have initially satisfied the requirement to have at least 5,000 assigned beneficiaries as specified in paragraph (a)(1) of this section if 5,000 or more beneficiaries are historically assigned to the ACO participants in each of the 3 benchmark years, as calculated using the assignment methodology set forth in subpart E of this part. In the case of the third benchmark year, CMS uses the most recent data available to estimate the number of assigned beneficiaries.

(b) If at any time during the performance year, an ACO's assigned population falls below 5,000, the ACO may be subject to the actions described in §§ 425.216 and 425.218.

(1) While under a CAP, the ACO remains eligible for shared savings and losses and the MSR is set at a level consistent with the number of assigned beneficiaries.

(2) If the ACO's assigned population is not at least 5,000 by the end of the performance year specified by CMS in its request for a CAP, CMS terminates the participation agreement and the ACO is not eligible to share in savings for that performance year.

■ 10. Amend § 425.112 by adding paragraphs (b)(4)(ii)(C), (D), and (E) to read as follows:

§ 425.112 Required processes and patient-centeredness criteria.

* * * * *

(b) * * *

(4) * * *

(ii) * * *

(C) Describe how the ACO will encourage and promote use of enabling technologies for improving care coordination for beneficiaries. Enabling technologies may include one or more of the following:

(*1*) Electronic health records and other health IT tools.

(*2*) Telehealth services, including remote patient monitoring.

(*3*) Electronic exchange of health information.

(*4*) Other electronic tools to engage beneficiaries in their care.

(D) Describe how the ACO intends to partner with long-term and post-acute care providers, both inside and outside the ACO, to improve care coordination for their assigned beneficiaries.

(E) Define and submit a set of major milestones or performance metrics the ACO will use in each performance year to assess the progress of its ACO participants in implementing the processes described in paragraph (b)(4) of this section.

■ 11. Add § 425.116 to subpart B to read as follows:

§ 425.116 Agreements with ACO participants and ACO providers/suppliers.

(a) *ACO participant agreements.* The ACO must have an ACO participant agreement with each ACO participant that complies with the following criteria:

(1) The only parties to the agreement are the ACO and the ACO participant.

(2) The agreement must be signed on behalf of the ACO and the ACO participant by individuals who are authorized to bind the ACO and the ACO participant, respectively.

(3) The agreement must expressly require the ACO participant to agree, and to ensure that each ACO provider/supplier billing through the TIN of the ACO participant agrees, to participate in the Shared Savings Program and to comply with the requirements of the Shared Savings Program and all other applicable laws and regulations (including, but not limited to, those specified at § 425.208(b)).

(4) The agreement must set forth the ACO participant's rights and obligations in, and representation by, the ACO, including without limitation, the quality reporting requirements set forth in subpart F of this part, the beneficiary notification requirements set forth at § 425.312, and how participation in the Shared Savings Program affects the

ability of the ACO participant and its ACO providers/suppliers to participate in other Medicare demonstration projects or programs that involve shared savings.

(5) The agreement must describe how the opportunity to receive shared savings or other financial arrangements will encourage the ACO participant to adhere to the quality assurance and improvement program and evidence-based medicine guidelines established by the ACO.

(6) The agreement must require the ACO participant to update its enrollment information, including the addition and deletion of ACO professionals and ACO providers/suppliers billing through the TIN of the ACO participant, on a timely basis in accordance with Medicare program requirements and to notify the ACO of any such changes within 30 days after the change.

(7) The agreement must permit the ACO to take remedial action against the ACO participant, and must require the ACO participant to take remedial action against its ACO providers/suppliers, including imposition of a corrective action plan, denial of incentive payments, and termination of the ACO participant agreement, to address noncompliance with the requirements of the Shared Savings Program and other program integrity issues, including those identified by CMS.

(8) The agreement must be for a term of at least one performance year and must articulate potential consequences for early termination from the ACO.

(9) The agreement must require completion of a close-out process upon termination or expiration of the agreement that requires the ACO participant to furnish all data necessary to complete the annual assessment of the ACO's quality of care and addresses other relevant matters.

(b) *Agreements with ACO providers/suppliers.* ACOs have the option of contracting directly with its ACO providers/suppliers regarding items and services furnished to beneficiaries aligned to the ACO. An ACO's agreement with an ACO provider/supplier regarding such items and services must satisfy the following criteria:

(1) The only parties to the agreement are the ACO and the ACO provider/supplier.

(2) The agreement must be signed by the ACO provider/supplier and by an individual who is authorized to bind the ACO.

(3) The agreement must expressly require the ACO provider/supplier to agree to participate in the Shared Savings Program and to comply with the requirements of the Shared Savings Program and all other applicable laws and regulations (including, but not limited to, those specified at § 425.208(b)).

(4) The agreement must set forth the ACO provider's/supplier's rights and obligations in, and representation by, the ACO, including without limitation, the quality reporting requirements set forth in subpart F of this part, the beneficiary notification requirements set forth at § 425.312, and how participation in the Shared Savings Program affects the ability of the ACO provider/supplier to participate in other Medicare demonstration projects or programs that involve shared savings.

(5) The agreement must describe how the opportunity to receive shared savings or other financial arrangements will encourage the ACO provider/supplier to adhere to the quality assurance and improvement program and evidence-based medicine guidelines established by the ACO.

(6) The agreement must require the ACO provider/supplier to—

(i) Update its enrollment information on a timely basis in accordance with Medicare program requirements; and

(ii) Notify the ACO of any such changes within 30 days after the change.

(7) The agreement must permit the ACO to take remedial action including the following against the ACO provider/supplier to address noncompliance with the requirements of the Shared Savings Program and other program integrity issues, including those identified by CMS:

(i) Imposition of a corrective action plan.

(ii) Denial of incentive payments.

(iii) Termination of the ACO participant agreement.

(c) *Submission of agreements.* The ACO must submit an executed ACO participant agreement in accordance with CMS guidance for each ACO participant at the time of its initial application, participation agreement renewal process, and when adding to its list of ACO participants in accordance with § 425.118. The agreements may be submitted in the form and manner set forth in § 425.204(c)(6).

■ 12. Add new § 425.118 to subpart B to read as follows:

§ 425.118 Required reporting of ACO participants and ACO providers/suppliers.

(a) *List requirements.* (1) The ACO must maintain, update, and submit to CMS an accurate and complete list identifying each ACO participant (including its Medicare-enrolled TIN) and each ACO provider/supplier (including its NPI or other identifier) in accordance with this section.

(2) Before the start of an agreement period, before each performance year thereafter, and at such other times as specified by CMS, the ACO must submit to CMS an ACO participant list and an ACO provider/supplier list.

(3) The ACO must certify the submitted lists in accordance with § 425.302(a)(2).

(4) All Medicare enrolled individuals and entities that have reassigned their right to receive Medicare payment to the TIN of the ACO participant must be included on the ACO provider/supplier list and must agree to participate in the ACO and comply with the requirements of the Shared Savings Program before the ACO submits the ACO participant list and the ACO provider/supplier list.

(b) *Changes to the ACO participant list.* (1) *Additions.* (i) An ACO must submit to CMS a request to add an entity and its Medicare enrolled TIN to its ACO participant list. This request must be submitted at such time and in the form and manner specified by CMS.

(ii) If CMS approves the request, the entity and its Medicare enrolled TIN is added to the ACO participant list effective January 1 of the following performance year.

(iii) CMS may deny the request on the basis that the entity is not eligible to be an ACO participant or on the basis of the results of the screening performed under § 425.304(b).

(2) *Deletions.* (i) An ACO must notify CMS no later than 30 days after the termination of an ACO participant agreement. Such notice must be submitted in the form and manner specified by CMS and must include the termination date of the ACO participant agreement.

(ii) The entity is deleted from the ACO participant list as of the termination date of the ACO participant agreement.

(3) *Adjustments.* (i) CMS annually adjusts an ACO's assignment, historical benchmark, the quality reporting sample, and the obligation of the ACO to report on behalf of ACO providers/suppliers for certain CMS quality initiatives to reflect the addition or deletion of entities from the list of ACO participants that is submitted to CMS before the start of a performance year in accordance with paragraph (a) of this section.

(ii) Absent unusual circumstances, CMS does not make adjustments during the performance year to the ACO's assignment, historical benchmark, performance year financial calculations, the quality reporting sample, or the obligation of the ACO to report on

behalf of ACO providers/suppliers for certain CMS quality initiatives to reflect the addition or deletion of entities from the ACO participant list that become effective during the performance year. CMS has sole discretion to determine whether unusual circumstances exist that would warrant such adjustments.

(c) *Changes to the ACO provider/supplier list.* (1) *Additions.* (i) An ACO must notify CMS within 30 days after an individual or entity becomes a Medicare-enrolled provider or supplier that bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant. The notice must be submitted in the form and manner specified by CMS.

(ii) If the ACO timely submits notice to CMS, the addition of an individual or entity to the ACO provider/supplier list is effective on the date specified in the notice furnished to CMS, but no earlier than 30 days before the date of the notice. If the ACO fails to submit timely notice to CMS, the addition of an individual or entity to the ACO provider/supplier list is effective on the date of the notice.

(2) *Deletions.* (i) An ACO must notify CMS no later than 30 days after an individual or entity ceases to be a Medicare-enrolled provider or supplier that bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant. The notice must be submitted in the form and manner specified by CMS.

(ii) The deletion of an ACO provider/supplier from the ACO provider/supplier list is effective on the date the individual or entity ceased to be a Medicare-enrolled provider or supplier that bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant.

(d) *Update of Medicare enrollment information.* The ACO must ensure that all changes to enrollment information for ACO participants and ACO providers/suppliers, including changes to reassignment of the right to receive Medicare payment, are reported to CMS consistent with § 424.516.

■ 13. Amend § 425.200 as follows:

■ A. By revising the section heading.

■ B. In paragraph (a), by removing the term "three" and adding in its place the figure "3".

■ C. In the heading of paragraph (b), and paragraphs (b)(1) introductory text, (b)(1)(i), (b)(1)(ii), (b)(2)(ii), and (c)(1) by removing the term "agreement" each time it appears and adding in its place the terms "participation agreement".

The revision reads as follows:

§ 425.200 Participation agreement with CMS.

* * * * *

■ 14. Amend § 425.202 by revising paragraphs (b) and (c) to read as follows:

§ 425.202 Application procedures.

* * * * *

(b) *Condensed application form.* (1) PGP demonstration sites applying to participate in the Shared Savings Program will have an opportunity to complete a condensed application form.

(2) A Pioneer ACO may use a condensed application form to apply for participation in the Shared Savings Program if it satisfies all of the following criteria:

(i) The applicant is the same legal entity as the Pioneer ACO.

(ii) ACO participant list does not contain any ACO participant TINs that did not appear on the "Confirmed Annual TIN/NPI List" (as defined in the Pioneer ACO Model Innovation Agreement with CMS) for the applicant ACO's last full performance year in the Pioneer ACO Model.

(iii) The applicant is not applying to participate in the one-sided model.

(c) *Application review.* CMS reviews applications in accordance with § 425.206.

■ 15. Amend § 425.204 as follows:

■ A. In paragraph (b)(2) by removing the terms "ACO agreement" and adding in its place the terms "participation agreement".

■ B. In paragraph (b)(3) by removing the term "agreement" and adding in its place the terms "participation agreement".

■ C. By revising paragraphs (c)(1) introductory text and (c)(1)(i), (iii), and (iv).

■ D. In paragraph (c)(1)(vi) by removing the terms "ACO's agreement" and adding in its place the terms "participation agreement".

■ E. By revising paragraph (c)(3).

■ F. In paragraph (c)(4)(ii), by removing the phrase " among multiple, independent ACO participants" and adding in its place the phrase "among two or more ACO participants".

■ G. By revising paragraph (c)(5)(i).

■ H. By adding paragraph (c)(6).

■ I. In paragraph (e)(1), removing the phrase "an ACO must specify whether it is applying to participate in Track 1 or Track 2" and adding in its place the phrase "an ACO must specify the Track for which it is applying"

■ J. By revising paragraph (f).

■ K. By adding paragraph (g).

The revisions and additions read as follows:

§ 425.204 Content of the application.

* * * * *

(c) * * *

(1) As part of its application, and upon request thereafter, an ACO must submit to CMS the following supporting materials to demonstrate that the ACO satisfies the requirements set forth in this part:

(i) Documents (for example, ACO participant agreements, agreements with ACO providers/suppliers, employment contracts, and operating policies) sufficient to describe the ACO participants' and ACO providers'/suppliers' rights and obligations in and representation by the ACO, and how the opportunity to receive shared savings or other financial arrangements will encourage ACO participants and ACO providers/suppliers to adhere to the quality assurance and improvement program and evidence-based clinical guidelines.

* * * * *

(iii) Materials documenting the ACO's organization and management structure, including an organizational chart, a list of committees (including names of committee members) and their structures, and job descriptions for senior administrative and clinical leaders specifically noted in § 425.108 and § 425.112(a)(2).

(iv) Evidence that the governing body—

(A) Is an identifiable body;

(B) Represents a mechanism for shared governance for ACO participants;

(C) Is composed of representatives of its ACO participants; and

(D) Is at least 75 percent controlled by its ACO participants.

* * * * *

(3) If an ACO requests an exception to the governing body requirement in § 425.106(c)(2), the ACO must describe—

(i) Why it seeks to differ from this requirement; and

(ii) How the ACO will provide meaningful representation in ACO governance by Medicare beneficiaries.

* * * * *

(5) * * *

(i) The ACO must submit a list of all ACO participants and ACO providers/suppliers in accordance with § 425.118.

* * * * *

(6) As part of the application process and upon request by CMS, the ACO must submit documents demonstrating that its ACO participants, ACO providers/suppliers, and other individuals or entities performing

functions or services related to ACO activities are required to comply with the requirements of the Shared Savings Program. The evidence to be submitted must include, without limitation, sample or form agreements and, in the case of ACO participant agreements, the first and signature page(s) of each executed ACO participant agreement. CMS may request all pages of an executed ACO participant agreement to confirm that it conforms to the sample form agreement submitted by the ACO. The ACO must certify that all of its ACO participant agreements comply with the requirements of this part.

* * * * *

(f) *Assurance of ability to repay.* (1) An ACO must have the ability to repay all shared losses for which it may be liable under a two-sided model.

(i) As part of the application or participation agreement renewal process, an ACO that is seeking to participate under a two-sided model of the Shared Savings Program must submit for CMS approval documentation that it is capable of repaying shared losses that it may incur during the agreement period.

(ii) The documentation specified in paragraph (f)(1)(i) of this section must include details supporting the adequacy of the mechanism for repaying shared losses equal to at least 1 percent of the ACO's total per capita Medicare parts A and B fee-for-service expenditures for its assigned beneficiaries based on expenditures used to calculate the benchmark for the applicable agreement period, as estimated by CMS at the time of application or participation agreement renewal.

(2) An ACO may demonstrate its ability to repay shared losses by placing funds in escrow, obtaining a surety bond, establishing a line of credit (as evidenced by a letter of credit that the Medicare program can draw upon), or establishing a combination of such repayment mechanisms, that will ensure its ability to repay the Medicare program.

(3) An ACO participating under a two-sided model must demonstrate the adequacy of this repayment mechanism prior to the start of each agreement period in which it takes risk, and upon request thereafter. After the repayment mechanism has been used to repay any portion of shared losses owed to CMS, the ACO must replenish the amount of funds available through the repayment mechanism within 60 days.

(4) The repayment mechanism must be in effect for a sufficient period of time after the conclusion of the agreement period to permit CMS to calculate the amount of shared losses owed and to collect this amount from the ACO.

(g) *Consideration of claims billed under merged and acquired Medicare-enrolled TINs.* An ACO may request that CMS consider, for purposes of beneficiary assignment and establishing the ACO's benchmark under § 425.602, claims billed by Medicare-enrolled entities' TINs that have been acquired through sale or merger by an ACO participant.

(1) The ACO may include an acquired Medicare-enrolled entity's TIN on its ACO participant list under the following circumstances:

(i) The ACO participant has subsumed the acquired entity's TIN in its entirety, including all of the providers and suppliers that reassigned their right to receive Medicare payment to the acquired entity's Medicare-enrolled TIN.

(ii) Each provider or supplier that previously reassigned his or her right to receive Medicare payment to the acquired entity's TIN has reassigned his or her right to receive Medicare payment to the TIN of the acquiring ACO participant and has been added to the ACO provider/supplier list under paragraph (c)(5) of the section.

(iii) The acquired entity's TIN is no longer used to bill Medicare.

(2) The ACO must submit the following supporting documentation in the form and manner specified by CMS.

(i) An attestation that—

(A) Identifies by Medicare-enrolled TIN both the acquired entity and the ACO participant that acquired it;

(B) Specifies that all the providers and suppliers that previously reassigned their right to receive Medicare payment to the acquired entity's TIN have reassigned such right to the TIN of the identified ACO participant and have been added to the ACO provider/supplier list under paragraph (c)(5) of this section; and

(C) Specifies that the acquired entity's TIN is no longer used to bill Medicare.

(ii) Documentation sufficient to demonstrate that the acquired entity's TIN was merged with or purchased by the ACO participant.

■ 16. Amend § 425.206 by revising paragraph (a) to read as follows:

§ 425.206 Evaluation procedures for applications.

(a) *Basis for evaluation and determination.* (1) CMS evaluates an ACO's application to determine whether an applicant satisfies the requirements of this part and is qualified to participate in the Shared Savings Program. Applications are approved or denied on the basis of the following:

(i) Information contained in and submitted with the application by a deadline specified by CMS.

(ii) Supplemental information that was submitted by a deadline specified by CMS in response to CMS' request for information.

(iii) Other information available to CMS.

(2) CMS notifies an ACO applicant when supplemental information is required for CMS to make such determination and provides an opportunity for the ACO to submit the information.

(3) CMS may deny an application if an ACO applicant fails to submit information by the deadlines established by CMS.

* * * * *

■ 17. Amend § 425.212 by revising the section heading and paragraph (a) to read as follows:

§ 425.212 Changes to program requirements during the agreement period.

(a) An ACO is subject to all regulatory changes that become effective during the agreement period, with the exception of the following program areas, unless otherwise required by statute:

(1) Eligibility requirements concerning the structure and governance of ACOs.

(2) Calculation of sharing rate.

* * * * *

■ 18. Amend § 425.214 as follows:

■ A. By revising the section heading.

■ B. By removing paragraph (a).

■ C. By redesignating paragraphs (b) and (c) as paragraphs (a) and (b), respectively.

■ D. By revising newly redesignated paragraph (a).

■ E. In newly redesignated paragraph (b) introductory text, removing the phrase "Upon receiving" and adding in its place the phrase "Upon becoming aware of a significant change or receiving".

■ F. In newly redesignated paragraphs (b)(2) and (4) by removing the term "agreement" and adding in its place the terms "participation agreement".

The revisions read as follows:

§ 425.214 Managing changes to the ACO during the agreement period.

(a)(1) An ACO must notify CMS within 30 days of any significant change.

(2) An ACO's failure to notify CMS of a significant change shall not preclude CMS from determining that the ACO has experienced a significant change.

(3) A "significant change" occurs when —

(i) An ACO is no longer able to meet the eligibility or program requirements of this part; or

(ii) The number or identity of the ACO participants on the ACO's list of ACO participants has changed by 50 percent or more.

* * * * *

§ 425.216 [Amended]

■ 19. Amend § 425.216 in paragraph (b) by removing the term "ACO's agreement" and adding in its place the terms "participation agreement".

■ 20. Amend § 425.218 by revising the section heading and adding paragraphs (b)(4) and (5) to read as follows:

§ 425.218 Termination of the participation agreement by CMS.

* * * * *

(b) * * *

(4) Failure to comply with CMS requests for documentation or other information by the deadline specified by CMS.

(5) Submitting false or fraudulent data or information.

* * * * *

§ 425.220 [Amended]

■ 21. Amend § 425.220 by removing and reserving paragraph (b).

■ 22. Add § 425.221 to read as follows:

§ 425.221 Close-out procedures and payment consequences of early termination.

(a) *Close-out procedures.* (1) An ACO whose participation agreement has expired or is terminated by CMS under § 425.218 or by the ACO under § 425.220 must implement close-out procedures regarding the following in a form and manner and by a deadline specified by CMS:

(i) Notice to ACO participants of termination.

(ii) Record retention.

(iii) Data sharing.

(iv) Quality reporting.

(v) Beneficiary continuity of care

(vi) Other relevant operational matters established through guidance.

(2) ACOs that fail to complete close-out procedures in the form and manner and by the deadline specified by CMS will not be eligible to share in savings.

(b) *Payment consequences of early termination.* (1) An ACO whose participation agreement is terminated by the ACO under § 425.220 is eligible to receive shared savings for the performance year during which the termination becomes effective only if—

(i) CMS designates or approves an effective date of termination of December 31st of such performance year;

(ii) The ACO has completed all close-out procedures by the deadline specified by CMS; and

(iii) The ACO has satisfied the criteria for sharing in savings for the performance year.

(2) An ACO that terminates its participation agreement under § 425.220 before December 31 of a performance year or whose participation agreement is terminated by CMS under § 425.218 at any time is not eligible to receive shared savings for the performance year during which the termination becomes effective.

■ 23. Amend § 425.222 by revising paragraph (c) to read as follows:

§ 425.222 Reapplication after termination.

* * * * *

(c) An ACO whose participation agreement was previously terminated may reenter the program under a subsequent agreement period.

(1) If the termination occurred less than half way through the agreement period, an ACO that was previously under a one-sided model may reenter the program under the one-sided model or a two-sided model. If the ACO reenters the program under the one-sided model, the ACO will be considered to be in its first agreement period under the one-sided model.

(2) If the termination occurred more than half way through the agreement period, an ACO that was previously under a one-sided model may reenter the program under the one-sided model or a two-sided model. If the ACO reenters the program under the one-sided model, the ACO will be considered to be in its second agreement period under the one-sided model.

(3) Regardless of the date of termination, an ACO that was previously under a two-sided model may only reapply for participation in a two-sided model.

■ 24. Add § 425.224 to subpart C to read as follows:

§ 425.224 Renewal of participation agreements.

(a) *General rules.* An ACO may request renewal of its participation agreement for a second or subsequent agreement period.

(1) In order to obtain a determination regarding whether it meets the requirements for renewal of its participation agreement, the ACO must submit a complete renewal request in the form and manner and by the deadline specified by CMS.

(2) An ACO executive who has the authority to legally bind the ACO must certify to the best of his or her knowledge, information, and belief that the information contained in the renewal request is accurate, complete, and truthful.

(3) An ACO that seeks renewal of its participation agreement and was newly formed after March 23, 2010, as defined in the Antitrust Policy Statement, must agree that CMS can share a copy of its renewal request with the Antitrust Agencies.

(b) *Review of renewal request.* (1) CMS determines whether to renew a participation agreement based on an evaluation of all of the following factors:

(i) Whether the ACO satisfies the criteria for operating under the selected risk track.

(ii) The ACO's history of compliance with the requirements of the Shared Savings Program.

(iii) Whether the ACO has established that it is in compliance with the eligibility and other requirements of the Shared Savings Program, including the ability to repay losses, if applicable.

(iv) Whether the ACO met the quality performance standard during at least one of the first 2 years of the previous agreement period.

(v) For ACOs under a two-sided model, whether the ACO has repaid losses owed to the program that it generated during the first 2 years of the previous agreement period.

(vi) The results of a program integrity screening of the ACO, its ACO participants, and its ACO providers/suppliers (conducted in accordance with § 425.304(b)).

(2) Renewal requests are approved or denied on the basis of the following information:

(i) Information contained in and submitted with the renewal request by a deadline specified by CMS.

(ii) Supplemental information that was submitted by a deadline specified by CMS in response to CMS' request for information.

(iii) Other information available to CMS.

(3) CMS notifies the ACO when supplemental information is required for CMS to make such a determination and provides an opportunity for the ACO to submit the information.

(c) *Notice of determination.* (1) CMS notifies in writing each ACO of its determination to approve or deny the ACO's renewal request.

(2) If CMS denies the renewal request, the notice of determination—

(i) Specifies the reasons for the denial; and

(ii) Informs the ACO of its right to request reconsideration review in accordance with the procedures specified in subpart I of this part.

§ 425.304 [Amended]

■ 25. Amend § 425.304 by removing paragraph (d).

■ 26. Revise § 425.306 to read as follows:

§ 425.306 Participant agreement and exclusivity of ACO participants.

(a) Each ACO participant must commit to the term of the participation agreement and sign an ACO participant agreement that complies with the requirements of this part.

(b)(1) Except as specified in paragraph (b)(2) of this section, ACO participants are not required to be exclusive to one Shared Savings Program ACO.

(2) Each ACO participant that submits claims for primary care services used to determine the ACO's assigned population under subpart E of this part must be exclusive to one Shared Savings Program ACO.

■ 27. Revise § 425.308 to read as follows:

§ 425.308 Public reporting and transparency.

(a) *ACO public reporting Web page.* Each ACO must create and maintain a dedicated Web page on which it publicly reports the information set forth in paragraph (b) of this section. The ACO must report the address of such Web page to CMS in a form and manner specified by CMS and must notify CMS of changes to the Web address in the form and manner specified by CMS.

(b) *Information to be reported.* The ACO must report the following information in a standardized format specified by CMS:

(1) Name and location.

(2) Primary contact.

(3) Organizational information, including all of the following:

(i) Identification of ACO participants.

(ii) Identification of participants in joint ventures between ACO professionals and hospitals.

(iii) Identification of the members of its governing body.

(iv) Identification of key clinical and administrative leadership.

(v) Identification of associated committees and committee leadership.

(vi) Identification of the types of ACO participants or combinations of ACO participants (as listed in § 425.102(a)) that formed the ACO.

(4) Shared savings and losses information, including the following:

(i) Amount of any payment of shared savings received by the ACO or shared losses owed to CMS.

(ii) Total proportion of shared savings invested in infrastructure, redesigned care processes and other resources required to support the three-part aim goals of better health for populations, better care for individuals and lower growth in expenditures, including the proportion distributed among ACO participants.

(5) The ACO's performance on all quality measures.

(c) *Approval of public reporting information.* Information reported on an ACO's public reporting Web page in compliance with the requirements of the standardized format specified by CMS is not subject to marketing review and approval under § 425.310.

(d) *Public reporting by CMS.* CMS may publicly report ACO-specific information, including but not limited to the ACO public reporting Web page address and the information required to be publicly reported under paragraph (b) of this section.

■ 28. Amend § 425.312 by removing and reserving paragraph (b) and revising paragraph (a) to read as follows:

§ 425.312 Notification to beneficiaries of participation in the shared savings program.

(a) ACO participants must notify beneficiaries at the point of care that their ACO providers/suppliers are participating in the Shared Savings Program and of the opportunity to decline claims data sharing under § 425.708.

(1) Notification is carried out when an ACO participant posts signs in its facilities and, in settings in which beneficiaries receive primary care services, by making standardized written notices available upon request.

(2) The ACO must use template language developed by CMS for notifications described in paragraph (a)(1) of this section.

* * * * *

§ 425.314 [Amended]

■ 29. Amend § 425.314 in paragraph (c) by removing the word "agreement" and adding in its place the words "participation agreement".

§ 425.316 [Amended]

■ 30. Amend § 425.316 as follows:

■ A. By removing paragraphs (c)(3) and (4).

■ B. By redesignating paragraph (c)(5) as (c)(3).

■ C. In newly redesignated paragraph (c)(3) by removing the phrase "fully and completely" and adding in its place the phrase "accurately, completely, and timely".

■ 31. Amend § 425.400 as follows:

■ A. By adding paragraph (a)(1) introductory text.

■ B. By revising paragraph (a)(1)(i).

■ C. In paragraph (a)(1)(ii), by removing the phrase "by a physician who is an ACO provider/supplier during the performance year" and adding in its place the phrase "by a physician who is an ACO professional during each benchmarking year and during each performance year".

■ D. By adding a subject heading to paragraph (a)(2).

■ E. By adding paragraph (a)(3).

The additions read as follows:

§ 425.400 General.

(a)(1) *General.* (i) A Medicare fee-for-service beneficiary is assigned to an ACO for a performance year if the—

(A) Beneficiary meets the eligibility criteria under § 425.401(a); and

(B) Beneficiary's utilization of primary care services meets the criteria established under the assignment methodology described in § 425.402 and § 425.404.

* * * * *

(2) *Assignment under Tracks 1 and 2.*

* * * * *

(3) *Prospective assignment under Track 3.* (i) Medicare fee-for-service beneficiaries are prospectively assigned to an ACO under Track 3 at the beginning of each performance year based on the beneficiary's use of primary care services in the most recent 12 months for which data are available, using the assignment methodology described in § 425.402 and § 425.404.

(ii) Beneficiaries that are prospectively assigned to an ACO under paragraph (a)(3)(i) of this section will remain assigned to the ACO at the end of the performance year unless they meet any of the exclusion criteria under § 425.401(b).

* * * * *

■ 32. Add § 425.401 to read as follows:

§ 425.401 Criteria for a beneficiary to be assigned to an ACO.

(a) A beneficiary may be assigned to an ACO under the assignment methodology in §§ 425.402 and 425.404, for a performance or benchmark year, if the beneficiary meets all of the following criteria during the assignment window:

(1)(i) Has at least 1 month of Part A and Part B enrollment; and

(ii) Does not have any months of Part A only or Part B only enrollment.

(2) Does not have any months of Medicare group (private) health plan enrollment.

(3) Is not assigned to any other Medicare shared savings initiative.

(4) Lives in the United States or U.S. territories and possessions, based on the most recent available data in our beneficiary records regarding the beneficiary's residence at the end of the assignment window.

(b) A beneficiary will be excluded from the prospective assignment list of

an ACO participating under Track 3 at the end of a performance or benchmark year, if the beneficiary meets any of the following criteria during the performance or benchmark year:

(1)(i) Does not have at least 1 month of Part A and Part B enrollment; and

(ii) Has any months of Part A only or Part B only enrollment.

(2) Has any months of Medicare group (private) health plan enrollment.

(3) Did not live in the United States or U.S. territories and possessions, based on the most recent available data in our beneficiary records regarding the beneficiary's residency at the end of the year.

■ 33. Revise § 425.402 to read as follows:

§ 425.402 Basic assignment methodology.

(a) For purposes of benchmarking, preliminary prospective assignment (including quarterly updates) and retrospective reconciliation, and prospective assignment, CMS employs the following step-wise methodology to assign Medicare fee-for-service beneficiaries to an ACO:

(1) Identify all beneficiaries that had at least one primary care service with a physician who is an ACO professional in the ACO and who is a primary care physician as defined under § 425.20 or who has one of the primary specialty designations included in paragraph (b) of this section.

(2) Identify all primary care services furnished to beneficiaries identified in paragraph (a)(1) by ACO professionals of that ACO who are primary care physicians as defined under § 425.20, non-physician ACO professionals, and physicians with specialty designations included in paragraph (b) of this section during the applicable assignment window.

(3) Under the first step, a beneficiary identified in paragraph (a)(1) of this section is assigned to an ACO if the allowed charges for primary care services furnished to the beneficiary by primary care physicians who are ACO professionals and non-physician ACO professionals in the ACO are greater than the allowed charges for primary care services furnished by primary care physicians, nurse practitioners, physician assistants, and clinical nurse specialists who are—

(i) ACO professionals in any other ACO; or

(ii) Not affiliated with any ACO and identified by a Medicare-enrolled billing TIN.

(4) The second step considers the remainder of the beneficiaries identified in paragraph (a)(1) of this section who have not had a primary care service rendered by any primary care physician, nurse practitioner, physician assistant, or clinical nurse specialist, either inside the ACO or outside the ACO. The beneficiary will be assigned to an ACO if the allowed charges for primary care services furnished to the beneficiary by physicians who are ACO professionals with specialty designations as specified in paragraph (b) of this section are greater than the allowed charges for primary care services furnished by physicians with specialty designations as specified in paragraph (b) of this section—

(i) Who are ACO professionals in any other ACO; or

(ii) Who are unaffiliated with an ACO and are identified by a Medicare-enrolled billing TIN.

(b) ACO professionals considered in the second step of the assignment methodology in paragraph (a)(4) of this section include physicians who have one of the following primary specialty designations:

(1) Allergy/immunology.
(2) Cardiology.
(3) Gastroenterology.
(4) Neurology.
(5) Obstetrics/gynecology.
(6) Hospice and palliative care.
(7) Sports medicine.
(8) Physical medicine and rehabilitation.
(9) Pulmonary disease.
(10) Pediatric medicine.
(11) Nephrology.
(12) Infectious disease.
(13) Endocrinology.
(14) Rheumatology.
(15) Multispecialty clinic or group practice.
(16) Hematology.
(17) Hematology/oncology.
(18) Preventive medicine.
(19) Medical oncology.
(20) Gynecology/oncology.

(c) When considering services furnished by ACO professionals in teaching hospitals that have elected under § 415.160 to receive payment on a reasonable cost basis for the direct medical and surgical services of their physicians in the assignment methodology under paragraph (a) of this section, CMS uses the amount payable under the physician fee schedule for the specified HCPCS code as a proxy for the amount of the allowed charges for the service.

■ 34. Amend § 425.404 by revising paragraph (b) to read as follows:

§ 425.404 Special assignment conditions for ACOs including FQHCs and RHCs.

* * * * *

(b) Under the assignment methodology in § 425.402, CMS treats a service reported on an FQHC/RHC claim as—

(1) A primary care service if the claim includes a HCPCS or revenue center code that meets the definition of primary care services under § 425.20;

(2) A primary care service performed by a primary care physician if the NPI of a physician identified in the attestation provided under paragraph (a) of this section is reported on the claim for a primary care service (as described in paragraph (b)(1) of this section) as the attending provider; and

(3) A primary care service performed by a non-physician ACO professional if the NPI reported on the claim for a primary care service (as described in paragraph (b)(1) of this section) as the attending provider is an ACO professional but is not identified in the attestation provided under paragraph (a) of this section.

■ 36. Amend § 425.600 as follows:

■ A. In paragraph (a)(2), by removing the phrase "under the two-sided model" and adding in its place the phrase "under a two-sided model".

■ B. By adding paragraph (a)(3).

■ C. By revising paragraph (b).

The addition and revision read as follows:

§ 425.600 Selection of risk model.

(a) * * *

(3) *Track 3.* Under Track 3, the ACO operates under a two-sided model (as described under § 425.610), sharing both savings and losses with the Medicare program for the agreement period.

(b) An ACO may not operate under the one-sided model for a second agreement period unless the—

(1) Immediately preceding agreement period was under the one-sided model;

(2) The ACO did not generate losses in excess of its negative MSR in both of the first 2 performance years of the previous agreement period; and

(3) The ACO meets the criteria established for ACOs seeking to renew their agreements under § 425.224(b).

* * * * *

§ 425.602 [Amended]

■ 37. Amend § 425.602 (a)(8), by removing the phrase "The ACO's benchmark may be adjusted" and adding in its place the phrase "The ACO's benchmark will be adjusted in accordance with § 425.118(b)".

■ 38. Amend § 425.604 as follows:

■ A. By redesignating the text of paragraph (d) as paragraph (d)(1).

■ B. In newly redesignated paragraph (d)(1), removing the phrase "under the one-sided model" and adding in its place the phrase "during a performance year in its first agreement period under the one-sided model".

■ D. By adding a paragraph (d)(2).

The addition reads as follows:

§ 425.604 Calculation of savings under the one-sided model.

* * * * *

(d) * * *

(2) An ACO that meets all the requirements for receiving shared savings payments during a performance year in its second agreement period under the one-sided model will receive a shared savings payment of up to 40 percent of all savings under the updated benchmark, as determined on the basis of its quality performance under § 425.502 (up to the performance payment limit described in paragraph (e)(2) of this section).

* * * * *

■ 39. Amend § 425.606 as follows:

■ A. By revising the section heading.

■ B. In paragraph (a) introductory text, by removing the phrase "under the two-sided model," and adding in its place the phrase "under Track 2,".

■ C. By revising paragraph (b).

■ D. In paragraph (d), by removing the phrase "under the two-sided model" and adding in its place the phrase "under Track 2".

■ E. In paragraph (e)(2), by removing the phrase "under the two-sided model" and adding in its place the phrase "under Track 2".

■ F. In paragraph (g)(1), by removing the phrase "in a two-sided model" and adding in its place the phrase "in Track 2".

The revisions read as follows:

§ 425.606 Calculation of shared savings and losses under Track 2.

* * * * *

(b) *Minimum savings or loss rate.* CMS uses a sliding scale, based on the number of beneficiaries assigned to the ACO under subpart E of this part, to establish the MSR and MLR for an ACO participating under Track 2. The MSR under Track 2 is the same as the MSR that would apply in the one-sided model under § 425.604(b) and is based on the number of assigned beneficiaries. The MLR under Track 2 is equal to the negative MSR.

(1) To qualify for shared savings under Track 2, an ACO's average per capita Medicare expenditures for the performance year must be below its updated benchmark costs for the year by at least the MSR established for the ACO.

(2) To be responsible for sharing losses with the Medicare program, an ACO's average per capita Medicare expenditures for the performance year must be above its updated benchmark costs for the year by at least the MLR established for the ACO.

* * * * *

■ 40. Add § 425.610 to subpart G to read as follows:

§ 425.610 Calculation of shared savings and losses under Track 3.

(a) *General rule.* For each performance year, CMS determines whether the estimated average per capita Medicare expenditures under the ACO for Medicare fee-for-service beneficiaries for Parts A and B services are above or below the updated benchmark determined under § 425.602. In order to qualify for a shared savings payment under Track 3, or to be responsible for sharing losses with CMS, an ACO's average per capita Medicare expenditures under the ACO for Medicare fee-for-service beneficiaries for Parts A and B services for the performance year must be below or above the updated benchmark, respectively, by at least the minimum savings or loss rate under paragraph (b) of this section.

(1) *Newly assigned beneficiaries.* CMS uses an ACO's HCC prospective risk score to adjust for changes in severity and case mix in this population.

(2) *Continuously assigned beneficiaries.* (i) CMS uses demographic factors to adjust for changes in the continuously assigned beneficiary population.

(ii) If the prospective HCC risk score is lower in the performance year for this population, CMS adjusts for changes in severity and case mix for this population using this lower prospective HCC risk score.

(3) Assigned beneficiary changes in demographics and health status are used to adjust benchmark expenditures as described in § 425.602(a). In adjusting for health status and demographic changes CMS makes separate adjustments for each of the following populations of beneficiaries:

(i) ESRD.

(ii) Disabled.

(iii) Aged/dual eligible Medicare and Medicaid beneficiaries.

(iv) Aged/non-dual eligible Medicare and Medicaid beneficiaries.

(4) To minimize variation from catastrophically large claims, CMS truncates an assigned beneficiary's total annual Parts A and B fee-for-service per capita expenditures at the 99th percentile of national Medicare fee-for-service expenditures as determined for each performance year.

(5) CMS uses a 3-month claims run out with a completion factor to calculate an ACO's per capita expenditures for each performance year.

(6) Calculations of the ACO's expenditures will include the payment amounts included in Part A and B fee-for-service claims.

(i) These calculations will exclude indirect medical education (IME) and disproportionate share hospital (DSH) payments.

(ii) These calculations will take into consideration individually beneficiary identifiable payments made under a demonstration, pilot or time limited program.

(7) In order to qualify for a shared savings payment, the ACO's average per capita Medicare expenditures for the performance year must be below the applicable updated benchmark by at least the minimum savings rate established for the ACO under paragraph (b) of this section.

(b) *Minimum savings or loss rate.* (1) To qualify for shared savings under Track 3 an ACO's average per capita Medicare expenditures for the performance year must be below its updated benchmark costs for the year by at least 2 percent.

(2) To be responsible for sharing losses with the Medicare program under Track 3, an ACO's average per capita Medicare expenditures for the performance year must be at least 2 percent above its updated benchmark costs for the year.

(c) *Qualification for shared savings payment.* To qualify for shared savings, an ACO must meet the minimum savings rate requirement established under paragraph (b) of this section, meet the minimum quality performance standards established under § 425.502, and otherwise maintain its eligibility to participate in the Shared Savings Program under this part.

(d) *Final sharing rate.* An ACO that meets all the requirements for receiving shared savings payments under Track 3 will receive a shared savings payment of up to 75 percent of all the savings under the updated benchmark, as determined on the basis of its quality performance under § 425.502 (up to the performance payment limit described in paragraph (e)(2) of this section).

(e) *Performance payment.* (1) If an ACO qualifies for savings by meeting or exceeding the MSR, the final sharing rate will apply to an ACO's savings on a first dollar basis.

(2) The amount of shared savings an eligible ACO receives under Track 3 may not exceed 20 percent of its updated benchmark.

(f) *Shared loss rate.* The shared loss rate—

(1) For an ACO that is required to share losses with the Medicare program for expenditures over the updated

benchmark, the amount of shared losses is determined based on the inverse of its final sharing rate described in § 425.610(d) (that is, 1 minus the final shared savings rate determined under § 425.610(d));

(2) May not exceed 75 percent; and

(3) May not be less than 40 percent.

(g) *Loss recoupment limit.* The amount of shared losses for which an eligible ACO is liable may not exceed 15 percent of its updated benchmark as determined under § 425.602.

(h) *Notification of savings and losses.* (1) CMS notifies an ACO in writing regarding whether the ACO qualifies for a shared savings payment, and if so, the amount of the payment due.

(2) CMS provides written notification to an ACO of the amount of shared losses, if any, that it must repay to the program.

(3) If an ACO has shared losses, the ACO must make payment in full to CMS within 90 days of receipt of notification.

■ 41. Amend § 425.702 by revising paragraph (c)(1) to read as follows:

§ 425.702 Aggregate reports.

* * * * *

(c) * * *

(1) At the beginning of the agreement period, during each quarter (and in conjunction with the annual reconciliation), and at the beginning of each performance year, CMS, upon the ACO's request for the data for purposes of population-based activities relating to improving health or reducing growth in health care costs, process development, care management, and care coordination, will provide the ACO with information about its fee-for-service population.

(i) Under Tracks 1 and 2, the following information is made available regarding preliminarily prospectively assigned beneficiaries and beneficiaries that received a primary care service during the previous 12 months from one of the ACO participants that submits claims for primary care services used to determine the ACO's assigned population under subpart E of this part:

(A) Beneficiary name.

(B) Date of birth.

(C) Health Insurance Claim Number (HICN).

(D) Sex.

(ii) Under Tracks 1 and 2, information in the following categories, which represents the minimum data necessary for ACOs to conduct health care operations work is made available regarding preliminarily prospectively assigned beneficiaries:

(A) Demographic data such as enrollment status.

(B) Health status information such as risk profile and chronic condition subgroup.

(C) Utilization rates of Medicare services such as the use of evaluation and management, hospital, emergency, and post-acute services, including the dates and place of service.

(D) Expenditure information related to utilization of services.

(iii) The information under paragraphs (c)(1)(i) and (c)(1)(ii) of this section will be made available to ACOs in Track 3, but will be limited to the ACO's prospectively assigned beneficiaries.

* * * * *

■ 42. Amend § 425.704 as follows:

■ A. By revising the section heading.

■ B. In the introductory text, by removing the phrase "claims data for preliminary prospectively assigned beneficiaries" and adding in its place the phrase "claims data for preliminarily prospectively and prospectively assigned beneficiaries".

■ C. In the introductory text, by removing the phrase "upon whom assignment is based during the agreement period" and adding in its place the phrase "that submits claims for primary care services used to determine the ACO's assigned population under subpart E of this part during the performance year".

■ D. In paragraph (a) by removing the phrase "ACOs may request data as often" and adding in its place "ACOs may access requested data as often".

■ E. By revising paragraph (d)(1).

■ F. In paragraph (d)(2) by removing the phrase "has been notified in writing how the ACO intends to use" and adding in its place the phrase "has been notified in compliance with § 425.708 that the ACO has requested access to".

The revisions read as follows:

§ 425.704 Beneficiary-identifiable claims data.

* * * * *

(d) * * *

(1) For an ACO participating—

(i) In Track 1 or 2, the beneficiary's name appears on the preliminary prospective assignment list provided to the ACO at the beginning of the performance year, during each quarter (and in conjunction with the annual reconciliation) or the beneficiary has received a primary care service from an ACO participant upon whom assignment is based (under subpart E of this part) during the most recent 12-month period.

(ii) In Track 3, the beneficiary's name appears on the prospective assignment list provided to the ACO at the beginning of the performance year.

* * * * *

■ 43. Amend § 425.708 as follows:

■ A. Revising the section heading and paragraph (a).

■ B. Removing paragraphs (b) and (c).

■ C. Redesignating paragraphs (d) through (f) as paragraphs (b) through (d), respectively.

■ D. Revising newly redesignated paragraphs (b) and (c).

The revisions read as follows:

§ 425.708 Beneficiaries may decline claims data sharing.

(a) Beneficiaries must receive notification about the Shared Savings Program and the opportunity to decline claims data sharing and instructions on how to inform CMS directly of their preference.

(1) FFS beneficiaries are notified about the opportunity to decline claims data sharing through CMS materials such as the Medicare & You Handbook and through the notifications required under § 425.312.

(2) The notifications provided under § 425.312 must state that the ACO may have requested beneficiary identifiable claims data about the beneficiary for purposes of its care coordination and quality improvement work, and inform the beneficiary how to decline having his or her claims information shared with the ACO in the form and manner specified by CMS.

(3) Beneficiary requests to decline claims data sharing will remain in effect unless and until a beneficiary subsequently contacts CMS to amend that request to permit claims data sharing with ACOs.

(b) The opportunity to decline having claims data shared with an ACO under paragraph (a) of this section does not apply to the information that CMS provides to ACOs under § 425.702(c).

(c) In accordance with 42 U.S.C. 290dd–2 and the implementing regulations at 42 CFR part 2, CMS does not share beneficiary identifiable claims data relating to the diagnosis and treatment of alcohol and substance abuse without the explicit written consent of the beneficiary.

* * * * *

■ 44. Amend § 425.802 by revising paragraph (a)(2) to read as follows:

§ 425.802 Request for review.

(a) * * *

(2) The reconsideration review must be held on the record (review of submitted documentation).

* * * * *

■ 45. Amend § 425.804 as follows:

■ A. By revising paragraph (a)(3).

■ B. By removing paragraph (d).

■ C. Redesignating paragraphs (e) and (f) as paragraphs (d) and (e), respectively.

The revision reads as follows:

§ 425.804 Reconsideration review process.

(a) * * *

(3) A briefing schedule that permits each party to submit only one written brief, including any evidence, for consideration by the reconsideration official in support of the party's position.

* * * * *

Dated: November 20, 2014.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Dated: November 21, 2014.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2014–28388 Filed 12–1–14; 4:15 pm]

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Part III

Environmental Protection Agency

40 CFR Part 63
National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2010–0544; FRL–9919–33–OAR]

RIN 2060–AQ40

National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production

AGENCY: Environmental Protection Agency.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This action supplements our notice of proposed rulemaking for the national emissions standards for hazardous air pollutants (NESHAP) for secondary aluminum production, which was published in the **Federal Register** on February 14, 2012. In that action, the Environmental Protection Agency (EPA) proposed decisions concerning the residual risk and technology review for the Secondary Aluminum Production source category and proposed amendments to correct and clarify rule requirements. This supplemental proposal presents a revised risk review (including a revised inhalation risk assessment, a refined multipathway risk assessment, and an updated ample margin of safety analysis) and a revised technology review for the Secondary Aluminum Production source category. Similar to the 2012 proposal, we found risks due to emissions of air toxics to be acceptable from this source category and we identified no cost effective controls under the updated ample margin of safety analysis or the technology review to achieve further emissions reductions. Therefore, we are proposing no revisions to the numeric emission standards based on these revised analyses. However, this supplemental proposal supplements and modifies several of the proposed technical corrections and rule clarifications that were originally presented in the February 14, 2012 proposal; withdraws our previous proposal to include affirmative defense provisions in the regulation; proposes alternative compliance options for the operating and monitoring requirements for sweat furnaces; and provides a revised cost analysis for compliance testing. This action, if finalized, would result in improved monitoring, compliance and implementation of the rule.

DATES: *Comments.* Comments must be received on or before January 22, 2015. A copy of comments on the information collection provisions should be submitted to the Office of Management and Budget (OMB) on or before January 7, 2015.

Public Hearing. If anyone contacts the EPA requesting a public hearing by December 15, 2014, the EPA will hold a public hearing on December 23, 2014 at the U.S. EPA building at 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. If you are interested in requesting a public hearing or attending the public hearing, contact Ms. Virginia Hunt at (919) 541–0832 or at *hunt.virginia@epa.gov.* If the EPA holds a public hearing, the EPA will keep the record of the hearing open for 30 days after completion of the hearing to provide an opportunity for submission of rebuttal and supplementary information.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0544, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: A-and-R-docket@epa.gov.* Include Attention Docket ID No. EPA–HQ–OAR–2010–0544 in the subject line of the message.
- *Fax:* (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2010–0544.
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Mail Code 28221T, Attention Docket ID No. EPA–HQ–OAR–2010–0544, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.
- *Hand/Courier Delivery:* EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2010–0544. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0544. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

Docket: The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2010–0544. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* 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. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Public Hearing: If anyone contacts the EPA requesting a public hearing by December 15, 2014, the public hearing will be held on December 23, 2014 at the EPA's campus at 109 T.W. Alexander Drive, Research Triangle Park, North Carolina. The hearing will begin at 1:00 p.m. (Eastern Standard Time) and conclude at 5:00 p.m. (Eastern Standard Time). Please contact

Ms. Virginia Hunt at 919–541–0832 or at *hunt.virginia@epa.gov* to register to speak at the hearing or to inquire as to whether or not a hearing will be held. The last day to pre-register in advance to speak at the hearing will be December 22, 2014. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk, although preferences on speaking times may not be able to be accommodated. If you require the service of a translator or special accommodations such as audio description, please let us know at the time of registration. If you require an accommodation, we ask that you pre-register for the hearing, as we may not be able to arrange such accommodations without advance notice.

If no one contacts the EPA requesting a public hearing to be held concerning this proposed rule by December 15, 2014, a public hearing will not take place. If a hearing is held, it will provide interested parties the opportunity to present data, views or arguments concerning the supplemental notice of proposed rulemaking. The EPA will make every effort to accommodate all speakers who arrive and register. Because the hearing will be held at a U.S. government facility, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma or the state of Washington, you must present an additional form of identification to enter the federal building. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses and military identification cards. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building and demonstrations will not be allowed on federal property for security reasons.

The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Commenters should notify Ms. Hunt if they will need specific equipment, or if there are other special needs related to providing comments at the hearings. Verbatim transcripts of the hearing and written statements will be included in the docket for the rulemaking. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule. Again, a hearing will not be held unless requested. Please contact Ms. Virginia Hunt at (919) 541–0832 or at *hunt.virginia@epa.gov* to request or register to speak at the hearing or to inquire as to whether or not a hearing will be held.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Rochelle Boyd, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–1390; fax number: (919) 541–3207; and email address: *boyd.rochelle@epa.gov*. For specific information regarding the risk modeling methodology, contact James Hirtz, Health and Environmental Impacts Division, (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov*. For information about the applicability of the NESHAP to a particular entity, contact Scott Throwe, Office of Enforcement and Compliance Assurance (OECA), telephone number (202) 564–7013; and email address: *throwe.scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

Preamble Acronyms and Abbreviations: We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

ACGIH American Conference of Government Industrial Hygienists
AEGL acute exposure guideline levels
AERMOD air dispersion model used by the HEM–3 model
AMOS ample margin of safety
ATSDR Agency for Toxic Substances and Disease Registry
BACT best available control technology
CAA Clean Air Act
CalEPA California Environmental Protection Agency
CBI confidential business information
CFR Code of Federal Regulations
D/F dioxins and furans
EJ environmental justice
EPA United States Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
ERT Electronic Reporting Tool
HAP hazardous air pollutants
HCl hydrogen chloride
HEM–3 Human Exposure Model, Version 3
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
ICR information collection request
IRIS Integrated Risk Information System
km kilometer
lb/yr pounds per year
LOAEL lowest-observed-adverse-effect level
MACT maximum achievable control technology
mg/m^3 milligrams per cubic meter
MIR maximum individual risk
NAAQS National Ambient Air Quality Standard
NAICS North American Industry Classification System
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NEI National Emissions Inventory
NESHAP National Emissions Standards for Hazardous Air Pollutants
NOAEL no observed adverse effects level
NRC National Research Council
NTTAA National Technology Transfer and Advancement Act
O&M operation and maintenance
OAQPS Office of Air Quality Planning and Standards
OECA Office of Enforcement and Compliance Assurance
OMB Office of Management and Budget
OM&M operation, maintenance and monitoring
PAH polycyclic aromatic hydrocarbons
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PEL probable effect levels
PM particulate matter
POM polycyclic organic matter
REL reference exposure level
RFA Regulatory Flexibility Act
RfC reference concentration
RfD reference dose
RTR residual risk and technology review
SAB Science Advisory Board
SAPU secondary aluminum processing unit
SBA Small Business Administration
SOP standard operating procedures
SSM startup, shutdown, and malfunction
TEQ toxic equivalents
THC total hydrocarbons
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology Fate, Transport and Ecological Exposure model
TTN Technology Transfer Network
UBC used beverage containers
UF uncertainty factor
$\mu g/m^3$ microgram per cubic meter
UMRA Unfunded Mandates Reform Act
URE unit risk estimate
WHO World Health Organization

Organization of this Document. The information in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

The regulated industrial source category that is the subject of this supplemental proposal is listed in Table 1 of this preamble. Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding the entities likely to be affected by this proposed action. These standards, once finalized, will be directly applicable to affected sources. Federal, state, local and tribal government entities are not affected by this proposed action. To determine whether your facility would be affected, you should examine the applicability criteria in the NESHAP. The Secondary Aluminum Production source category includes any facility using clean charge, aluminum scrap or dross from aluminum production, as the raw material and performing one or more of the following processes: scrap shredding, scrap drying/delacquering/decoating, thermal chip drying, furnace operations (*i.e.*, melting, holding, sweating, refining, fluxing or alloying), recovery of aluminum from dross, in-line fluxing or dross cooling.

TABLE 1—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Industrial source category	NESHAP	NAICS Code[a]
Secondary Aluminum Production	Secondary Aluminum Production	331314
Primary Aluminum Production Facilities		331312
Aluminum Sheet, Plate, and Foil Manufacturing Facilities		331315
Aluminum Extruded Product Manufacturing Facilities		331316
Other Aluminum Rolling and Drawing Facilities		331319
Aluminum Die Casting Facilities		331521
Aluminum Foundry Facilities		331524

[a] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the Internet through EPA's Technology Transfer Network (TTN) Web site, a forum for information and technology exchange in various areas of air pollution control. Following signature by the EPA Administrator, the EPA will post a copy of this supplemental proposal at: *http://www.epa.gov/ttn/atw/alum2nd/alum2pg.html.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same Web site. Information on the overall residual risk and technology review program is available at the following Web site: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.*

C. What should I consider as I prepare my comments for the EPA?

Submitting CBI. Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to the 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 comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI for inclusion in the public docket. If you submit a CD–ROM or disk that does not contain CBI, mark the outside of the disk or CD–ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control

Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2010–0544.

II. Background Information

A. What is the statutory authority for this action?

Section 112 of the Clean Air Act (CAA) establishes a two-stage regulatory process to address emissions of hazardous air pollutants (HAP) from stationary sources. In the first stage, after the EPA has identified categories of sources emitting one or more of the HAP listed in CAA section 112(b), CAA section 112(d) requires us to promulgate technology-based NESHAP for those sources. "Major sources" are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. For major sources, the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements and non-air quality health and environmental impacts) and are commonly referred to as maximum achievable control technology (MACT) standards.

MACT standards must reflect the maximum degree of emission reduction achievable through the application of measures, processes, methods, systems or techniques, including, but not limited to, measures that (1) reduce the volume of or eliminate pollutants through process changes, substitution of materials or other modifications; (2) enclose systems or processes to eliminate emissions; (3) capture or treat pollutants when released from a process, stack, storage or fugitive emissions point; (4) are design, equipment, work practice or operational standards (including requirements for operator training or certification); or (5) are a combination of the above. CAA section 112(d)(2)(A) through (E). The MACT standards may take the form of design, equipment, work practice or operational standards where the EPA first determines either that (1) a pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (2) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. CAA section 112(h)(1) and (2).

The MACT "floor" is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emissions control that is achieved in practice by the best-controlled similar source. The MACT floor for existing sources can be less stringent than floors for new sources but not less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, the EPA must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on considerations of the cost of achieving the emission reductions, any non-air quality health and environmental impacts and energy requirements.

The EPA is then required to review these technology-based standards and revise them "as necessary (taking into account developments in practices, processes, and control technologies)" no less frequently than every eight years. CAA section 112(d)(6). In conducting this review, the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA*, 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA*, 716 F.3d 667 (D.C. Cir. 2013).

The second stage in standard-setting focuses on reducing any remaining (*i.e.*, "residual") risk according to CAA section 112(f). Section 112(f)(1) required that the EPA prepare a report to Congress discussing (among other things) methods of calculating the risks posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks and the EPA's recommendations as to legislation regarding such remaining risk. The EPA prepared and submitted the *Residual Risk Report to Congress*, EPA–453/R–99–001 (*Risk Report*) in March 1999. CAA section 112(f)(2) then provides that if Congress does not act on any recommendation in the *Risk Report*, the EPA must analyze and address residual risk for each category or subcategory of sources 8 years after promulgation of such standards pursuant to CAA section 112(d).

Section 112(f)(2) of the CAA requires the EPA to determine for source categories subject to MACT standards whether the emission standards provide an ample margin of safety to protect public health. Section 112(f)(2)(B) of the CAA expressly preserves the EPA's use of the two-step process for developing standards to address any residual risk and the agency's interpretation of "ample margin of safety" developed in the *National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the *Risk Report* that the agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and in a challenge to the risk review for the Synthetic Organic Chemical Manufacturing source category, the United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the EPA's interpretation that subsection 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008)("[S]ubsection 112(f)(2)(B) expressly incorporates the EPA's interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the **Federal Register**."); see also *A Legislative History of the Clean Air Act Amendments of 1990*, vol. 1, p. 877 (Senate debate on Conference Report).

The first step in the process of evaluating residual risk is the determination of acceptable risk. If risks are unacceptable, the EPA cannot consider cost in identifying the emissions standards necessary to bring risks to an acceptable level. The second step is the determination of whether standards must be further revised in order to provide an ample margin of safety to protect public health. The ample margin of safety is the level at which the standards must be set, unless an even more stringent standard is necessary to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect.

1. Step 1—Determination of Acceptability

The agency in the Benzene NESHAP concluded that "the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information" and that the "judgment on acceptability cannot be reduced to any single factor." *Benzene*

NESHAP at 38046. The determination of what represents an "acceptable" risk is based on a judgment of "what risks are acceptable in the world in which we live" (*Risk Report* at 178, quoting *NRDC* v. *EPA*, 824 F. 2d 1146, 1165 (D.C. Cir. 1987) (en banc) ("Vinyl Chloride"), recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that "EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately one in 10 thousand, that risk level is considered acceptable." 54 FR at 38045. We discussed the maximum individual lifetime cancer risk (or maximum individual risk (MIR)) as being "the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years." *Id.* We explained that this measure of risk "is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years." *Id.* We explained that this measure of risk "is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years." *Id.* We acknowledged that maximum individual lifetime cancer risk "does not necessarily reflect the true risk, but displays a conservative risk level which is an upper-bound that is unlikely to be exceeded." *Id.*

Understanding that there are both benefits and limitations to using the MIR as a metric for determining acceptability, we acknowledged in the Benzene NESHAP that "consideration of maximum individual risk . . . must take into account the strengths and weaknesses of this measure of risk." *Id.* Consequently, the presumptive risk level of 100-in-1 million (1-in-10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination. Further, in the Benzene NESHAP, we noted that:

> "[p]articular attention will also be accorded to the weight of evidence presented in the risk assessment of potential carcinogenicity or other health effects of a pollutant. While the same numerical risk may be estimated for an exposure to a pollutant judged to be a known human carcinogen, and to a pollutant considered a possible human carcinogen based on limited animal test data, the same weight cannot be accorded to both estimates. In considering the potential public health effects of the two pollutants, the Agency's judgment on acceptability, including the MIR, will be influenced by the greater weight of evidence for the known human carcinogen."

Id. at 38046. The agency also explained in the Benzene NESHAP that:

> "[i]n establishing a presumption for MIR, rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50 km exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants."

Id. at 38045. In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone.

As noted earlier, in *NRDC* v. *EPA*, the court held that section 112(f)(2) "incorporates the EPA's interpretation of the Clean Air Act from the Benzene Standard." The court further held that Congress' incorporation of the Benzene standard applies equally to carcinogens and non-carcinogens. 529 F.3d at 1081–82. Accordingly, we also consider non-cancer risk metrics in our determination of risk acceptability and ample margin of safety.

2. Step 2—Determination of Ample Margin of Safety

CAA section 112(f)(2) requires the EPA to determine, for source categories subject to MACT standards, whether those standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, "the second step of the inquiry, determining an 'ample margin of safety,' again includes consideration of all of the health factors, and whether to reduce the risks even further. . . . Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties and any other relevant factors. Considering all of these factors, the agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by section 112." 54 FR at 38046, September 14, 1989.

According to CAA section 112(f)(2)(A), if the MACT standards for HAP "classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million," the EPA must promulgate residual risk standards for the source category (or subcategory), as necessary to provide an ample margin of safety to protect public health. In doing so, the EPA may adopt standards equal to existing MACT standards if the EPA determines that the existing standards (*i.e.*, the MACT standards) are sufficiently protective. *NRDC* v. *EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008) ("If EPA determines that the existing technology-based standards provide an 'ample margin of safety,' then the Agency is free to readopt those standards during the residual risk rulemaking.") The EPA must also adopt more stringent standards, if necessary, to prevent an adverse environmental effect,[1] but must consider cost, energy, safety and other relevant factors in doing so.

The CAA does not specifically define the terms "individual most exposed," "acceptable level" and "ample margin of safety." In the Benzene NESHAP, 54 FR at 38044–38045, September 14, 1989, we stated as an overall objective:

> In protecting public health with an ample margin of safety under section 112, EPA strives to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million and (2) limiting to no higher than approximately 1-in-10 thousand [*i.e.*, 100-in-1 million] the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The agency further stated that "[t]he EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risks to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population." *Id.* at 38045.

In the ample margin of safety decision process, the agency again considers all of the health risks and other health information considered in the first step, including the incremental risk reduction

[1] "Adverse environmental effect" is defined as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas. CAA section 112(a)(7).

associated with standards more stringent than the MACT standard or a more stringent standard that the EPA has determined is necessary to ensure risk is acceptable. In the ample margin of safety analysis, the agency considers additional factors, including costs and economic impacts of controls, technological feasibility, uncertainties and any other relevant factors. Considering all of these factors, the agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112(f). 54 FR 38046, September 14, 1989.

B. What is this source category and how does the current NESHAP regulate its HAP emissions?

The Secondary Aluminum Production source category includes facilities that produce aluminum from scrap aluminum material and consists of the following operations: (1) Preprocessing of scrap aluminum, including size reduction and removal of oils, coatings and other contaminants; (2) furnace operations, including melting, in-furnace refining, fluxing and tapping; (3) additional refining, by means of in-line fluxing; and (4) cooling of dross. The following sections include descriptions of the affected sources in the Secondary Aluminum Production source category, the origin of HAP emissions from these affected sources and factors affecting the emissions.

Scrap aluminum is often preprocessed prior to melting. Preprocessing steps may include shredding to reduce the size of aluminum scrap; drying of oily scrap such as machine turnings and borings; and/or heating in a scrap dryer, delacquering kiln or decoating kiln to remove coatings or other contaminants that may be present on the scrap. Heating of high iron content scrap in a sweat furnace to reclaim the aluminum content is also a preprocessing operation.

Crushing, shredding and grinding operations are used to reduce the size of scrap aluminum. Particulate matter (PM) and HAP metals emissions are generated as dust from coatings and other contaminants contained in the scrap aluminum.

A chip dryer is used to evaporate oil and/or moisture from uncoated aluminum chips and borings. Chip dryers typically operate at temperatures ranging between 150 °C to 400 °C (300 °F to 750 °F). An uncontrolled chip dryer may emit dioxins and furans (D/F) and total hydrocarbons (THC), of which some fraction is organic HAP.

Painted and/or coated materials are processed in a scrap dryer/delacquering kiln/decoating kiln to remove coatings and other contaminants that may be present in the scrap prior to melting. Coatings, oils, grease and lubricants represent up to 20 percent of the total weight of these materials. Organic HAP, D/F and inorganic HAP including particulate metal HAP are emitted during the drying/delacquering/decoating process.

Used beverage containers (UBC) comprise a major portion of the recycled aluminum scrap used as feedstock by the industry. In scrap drying/delacquering/decoating operations, UBC and other post-consumer coated products (*e.g.*, aluminum siding) are heated to an exit temperature of up to 540 °C (1,000 °F) to volatilize and remove various organic contaminants such as paints, oils, lacquers, rubber and plastic laminates prior to melting. An uncontrolled scrap dryer/delacquering kiln/decoating kiln emits PM (of which some fraction is particulate metal HAP), hydrogen chloride (HCl), THC (of which some fraction is organic HAP) and D/F.

A sweat furnace is typically used to reclaim (or "sweat") the aluminum from scrap with high levels of iron. These furnaces operate in batch mode at a temperature that is high enough to melt the aluminum, but not high enough to melt the iron. The aluminum melts and flows out of the furnace while the iron remains in the furnace in solid form. The molten aluminum can be cast into sows, ingots or T-bars that are used as feedstock for aluminum melting and refining furnaces. Alternately, molten aluminum can be fed directly to a melting or refining furnace. An uncontrolled sweat furnace may emit D/F.

Process (*i.e.*, melting, holding or refining) furnaces are refractory-lined metal vessels heated by an oil or gas burner to achieve a metal temperature of about 760 °C (1,400 °F). The melting process begins with the charging of scrap into the furnace. A gaseous (typically, chlorine) or salt flux may be added to remove impurities and reduce aluminum oxidation. Once molten, the chemistry of the bath is adjusted by adding selected scrap or alloying agents, such as silicon. Salt and other fluxes contain chloride and fluoride compounds that may be released when introduced to the bath. HCl may also be released when chlorine-containing contaminants (such as polyvinyl chloride coatings) present in some types of scrap are introduced to the bath. Argon and nitrogen fluxes are not reactive and do not produce HAP. In a sidewell melting furnace, fluxing is performed in the sidewell, and fluxing emissions from the sidewell are controlled. In this type of furnace, fluxing is not typically done in the hearth, and hearth emissions (which include products of combustion from the oil and gas-fired furnaces) are typically uncontrolled.

Process furnaces may process contaminated scrap which can result in HAP emissions. In addition, fluxing agents may contain compounds capable of producing HAP, some fraction of which is emitted from the furnace. Process furnaces are significant sources of HAP emissions in the secondary aluminum industry. An uncontrolled melting furnace which processes contaminated scrap and uses reactive fluxes emits PM (of which some fraction is particulate metal HAP), HCl and D/F.

Process furnaces are divided into group 1 and group 2 furnaces. Group 1 furnaces are unrestricted in the type of scrap they process and the type of fluxes they can use. Group 2 furnaces process only clean charge and conduct no reactive fluxing.

Dross-only furnaces are furnaces dedicated to reclamation of aluminum from drosses formed during the melting/holding/alloying operations carried out in other furnaces. Exposure to the atmosphere causes the molten aluminum to oxidize, and the flotation of the impurities to the surface along with any salt flux creates "dross." Prior to tapping, the dross is periodically skimmed from the surface of the aluminum bath and cooled. Dross-only furnaces are typically rotary barrel furnaces (also known as salt furnaces). A dross-only furnace emits PM (of which some fraction is particulate metal HAP).

Rotary dross coolers are devices used to cool dross in a rotating, water-cooled drum. A rotary dross cooler emits PM (of which some fraction is particulate metal HAP).

In-line fluxers are devices used for aluminum refining, including degassing, outside the furnace. The process involves the injection of chlorine, argon, nitrogen or other gases to achieve the desired metal purity. In-line fluxers are found primarily at facilities that manufacture very high quality aluminum or in facilities with no other means of degassing. An in-line fluxer operating without emission controls emits HCl and PM.

A summary description of requirements in the existing subpart RRR NESHAP is provided below for the convenience of the reader. The inclusion of this description, however, does not reopen the existing rule requirements and we are neither reconsidering nor soliciting public comment on the requirements

described. In addition, this summary description should not be relied on to determine applicability of the regulatory provisions or compliance obligations. The proposed decisions and rule amendments addressed in section IV below are the only provisions on which we are taking comment.

The NESHAP for the Secondary Aluminum Production source category were promulgated on March 23, 2000 (65 FR 15690) and codified at 40 CFR part 63, subpart RRR (referred to from here on as subpart RRR in the remainder of this document). The rule was amended at 67 FR 79808, December 30, 2002; 69 FR 53980, September 3, 2004; 70 FR 57513, October 3, 2005 and 70 FR 75320, December 19, 2005. The existing subpart RRR NESHAP regulates HAP emissions from secondary aluminum production facilities that are major sources of HAP that operate aluminum scrap shredders, thermal chip dryers, scrap dryers/delacquering kilns/decoating kilns, group 1 furnaces, group 2 furnaces, sweat furnaces, dross-only furnaces, rotary dross coolers and secondary aluminum processing units (SAPUs). The SAPUs include group 1 furnaces and in-line fluxers. The subpart RRR NESHAP regulates HAP emissions from secondary aluminum production facilities that are area sources of HAP only with respect to emissions of D/F from thermal chip dryers, scrap dryers/delacquering kilns/decoating kilns, group 1 furnaces, sweat furnaces and SAPUs.

The secondary aluminum industry consists of approximately 161 secondary aluminum production facilities, of which the EPA estimates 53 to be major sources of HAP. The HAP emitted by these facilities are metals, organic HAP, D/F, HCl and hydrogen fluoride (HF).

Several of the secondary aluminum facilities are co-located with primary aluminum, coil coating and possibly other source category facilities. Natural gas boilers or process heaters may also be co-located at a few secondary aluminum facilities.

The standards promulgated in 2000 established emission limits for PM as a surrogate for metal HAP, THC as a surrogate for organic HAP other than D/F, D/F expressed as toxic equivalents and HCl as a surrogate for acid gases including HF, chlorine and fluorine. HAP are emitted from the following affected sources: Aluminum scrap shredders (subject to PM standards), thermal chip dryers (subject to standards for THC and D/F), scrap dryers/delacquering kilns/decoating kilns (subject to standards for PM, D/F, HCl and THC), sweat furnaces (subject to D/F standards), dross-only furnaces (subject to PM standards), rotary dross coolers (subject to PM standards), group 1 furnaces (subject to standards for PM, HCl and D/F) and in-line fluxers (subject to standards for PM and HCl). Group 2 furnaces and certain in-line fluxers are subject to work practice standards. Table 2 provides a summary of the current MACT emissions limits for existing and new sources under the subpart RRR NESHAP.

Table 2. Emission Standards for New and Existing Affected Sources for the Secondary Aluminum Source Category[2]

Affected source/ Emission unit	Pollutant	Limit	Units
All new and existing affected sources and emission units that are controlled with a PM add-on control device and that choose to monitor with a Continuous Opacity Monitor (COM) and all new and existing aluminum scrap shredders that choose to monitor with a COM or to monitor visible emissions	Opacity	10	percent
New and existing aluminum scrap shredder	PM	0.01	gr/dscf
New and existing thermal chip dryer	THC	0.80	lb/ton of feed
	D/F[a]	2.50	µg TEQ/Mg of feed
New and existing scrap dryer/delacquering kiln/decoating kiln	PM	0.08	lb/ton of feed
	HCl	0.80	lb/ton of feed
	THC	0.06	lb/ton of feed
	D/F[a]	0.25	µg TEQ/Mg of feed
Or			
Alternative limits if afterburner has a design residence time of at least 1 second and operates at a temperature of at least 1,400°F	PM	0.30	lb/ton of feed
	HCl	1.50	lb/ton of feed
	THC	0.20	lb/ton of feed
	D/F[a]	5.0	µg TEQ/Mg of feed
New and existing sweat furnace	D/F[a]	0.80	ng TEQ/dscm @ 11% O_2[b]
New and existing dross-only furnace	PM	0.30	lb/ton of feed
New and existing in-line fluxer[c]	HCl	0.04	lb/ton of feed
	PM	0.01	lb/ton of feed
New and existing in-line fluxer with no reactive fluxing		No limit	Work practice: no reactive fluxing
New and existing rotary dross cooler	PM	0.04	gr/dscf

[2] 40 CFR Part 63, Subpart RRR, Table 1.

New and existing clean furnace (Group 2)		No limit	Work practices: clean charge only and no reactive fluxing
New and existing group 1 melting/holding furnace (processing only clean charge)[c]	PM	0.80	lb/ton of feed
	HCl	0.40	lb/ton of feed
		or	
		10	percent of the HCl upstream of an add-on control device
New and existing group 1 furnace[c]	PM	0.40	lb/ton of feed
	HCl	0.40	lb/ton of feed
		or	
		10	Percent of the HCl upstream of an add-on control device
	D/F[a]	15.0	µg TEQ/Mg of feed
New and existing group 1 furnace[c] with clean charge only	PM	0.40	lb/ton of feed
	HCl	0.40	lb/ton of feed
		or	
		10	percent of the HCl upstream of an add-on control device
	D/F[a]	No Limit	Clean charge only
New and existing secondary aluminum processing unit[a,d] (consists of all existing group 1 furnaces and existing in-line flux boxes at the facility, or all simultaneously constructed new group 1 furnaces and new in-line fluxers)	PM[e]	$L_{t_{PM}} = \frac{\sum_{i=1}^{n}\left(L_{i_{PM}} \times T_i\right)}{\sum_{i=1}^{n}\left(T_i\right)}$	
	HCl[f]	$L_{t_{HCl}} = \frac{\sum_{i=1}^{n}\left(L_{i_{HCl}} \times T_i\right)}{\sum_{i=1}^{n}\left(T_i\right)}$	

D/F[g]

$$L_{t_{D/F}} = \frac{\sum_{i=1}^{n}\left(L_{i\ D/F} \times T_i\right)}{\sum_{i=1}^{n}\left(T_i\right)}$$

[a] D/F limit applies to a unit at a major or area source.
[b] Sweat furnaces equipped with afterburners meeting the specifications of §63.1505(f)(1) are not required to conduct a performance test.
[c] These limits are also used to calculate the limits applicable to secondary aluminum processing units.
[d] Equation definitions: L_{iPM} = the PM emission limit for individual emission unit i in the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; T_i = the feed rate for individual emission unit i in the secondary aluminum processing unit; L_{tPM} = the overall PM emission limit for the secondary aluminum processing unit [kg/Mg (lb-ton) of feed]; L_{iHCl} = the HCl emission limit for individual emission unit i in the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; L_{tHCl} = the overall HCl emission limit for the secondary aluminum processing unit [kg/Mg (lb/ton) of feed]; $L_{iD/F}$ = the D/F emission limit for individual emission unit i [µg toxic equivalents (TEQ)/Mg (gr TEQ/ton) of feed]; $L_{tD/F}$ = the overall D/F emission limit for the secondary aluminum processing unit [µg TEQ/Mg (gr TEQ/ton) of feed]; n = the number of units in the secondary aluminum processing unit.
[e] In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the PM limit.
[f] In-line fluxers using no reactive flux materials cannot be included in this calculation since they are not subject to the HCl limit.
[g] Clean charge furnaces cannot be included in this calculation since they are not subject to the D/F limit.

Control devices currently in use to reduce emissions from affected sources subject to the subpart RRR NESHAP include fabric filters for control of PM from aluminum scrap shredders; afterburners for control of THC and D/F from thermal chip dryers; afterburners plus lime-injected fabric filters for control of PM, HCl, THC and D/F from scrap dryers/delacquering kilns/decoating kilns; afterburners for control of D/F from sweat furnaces; fabric filters for control of PM from dross-only furnaces and rotary dross coolers; lime-injected fabric filters for control of PM and HCl from in-line fluxers; and lime-injected fabric filters for control of PM, HCl and D/F from group 1 furnaces. All affected sources with add-on controls are also subject to design requirements and operating limits to limit fugitive emissions.

Compliance with the emission limits in the current rule is demonstrated by an initial performance test for each affected source. Repeat performance tests are required every 5 years. Area sources are only subject to one-time performance tests for D/F. After the compliance tests, facilities are required to monitor various control parameters or conduct other types of monitoring to ensure continuous compliance with the MACT standards. Owners or operators of sweat furnaces that operate an afterburner that meets temperature and residence time requirements are not required to conduct performance tests.

C. What is the history of the Secondary Aluminum Risk and Technology Review?

On February 14, 2012 (77 FR 8576), we proposed that no amendments to subpart RRR were necessary as a result of the residual risk and technology review (RTR) conducted for the Secondary Aluminum Production source category. In the same notice (77 FR 8576, which is referred to as the 2012 proposal in the remainder of this **Federal Register** document), we proposed amendments to correct and clarify existing requirements in subpart RRR. In this supplemental proposal, we are soliciting comment on modified proposed amendments to the subpart RRR rule requirements and on alternative compliance options related to sweat furnaces. The proposed revisions and alternative compliance options, described in more detail later in this document, on which we are soliciting comment are:

- Revised proposed limit on number of allowed furnace operating mode changes per year (*i.e.*, frequency) in proposed section 63.1514(e) of four times in any 6-month period, with the ability of sources to apply to the appropriate authority for additional furnace operating mode changes;
- Revised wording in proposed section 63.1511(b)(1) related to testing under worst-case scenario clarifying under what conditions the performance tests are to be conducted;
- Revised proposed requirements to account for fugitive emissions during performance testing of uncontrolled furnaces, including: (1) Installation of hooding according to American Conference of Government Industrial Hygienists (ACGIH) guidelines; (2) application of an assumption of 67 percent capture/control efficiency when calculating emissions; or (3) in certain cases where installing ACGIH hooding is impractical, allowing the facility to petition the permitting authority for major sources or the Administrator for area sources, for approval to use alternative testing procedures that will minimize fugitive emissions;
- Revised proposed requirement that emission sources comply with the emissions limits at all times including periods of startup and shutdown. Definitions of startup and shutdown are

being proposed as well as an alternative method for demonstrating compliance with emission limits;

- Revised proposed monitoring requirements in section 63.1510(d)(2) that require annual inspection of capture/collection systems;
- Revised proposed compliance dates of 180 days for certain requirements and 2 years for other requirements; and
- Revised operating and monitoring requirements for demonstrating compliance for sweat furnaces.

In addition, we are withdrawing our 2012 proposal to include provisions establishing an affirmative defense in light of a recent court decision vacating an affirmative defense in one of the EPA's section 112(d) regulations. *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (vacating affirmative defense provisions in Section 112(d) rule establishing emission standards for Portland cement kilns).

After reviewing the comments, data and other information received after the 2012 proposal, we determined it is appropriate to present certain revised analyses and revised proposed amendments in this supplemental proposal to allow the public an opportunity to review and comment on these revised analyses and revised proposed amendments.

The 2012 proposal also contained other proposed requirements (topics listed below) for which we have not made any changes to the analyses, and, therefore, on which we are not seeking public comment in this document. Other amendments or requirements that we proposed in 2012, which we are not re-opening for comment, are the following:

- Electronic reporting.
- ACGIH Guidelines.
- Lime injection rate.
- Flux monitoring.
- Cover flux.
- Bale breakers.
- Bag Leak Detection Systems (BLDS).
- Sidewell furnaces.
- Testing representative units.
- Initial performance tests.
- Scrap dryer/delacquering/decoating kiln definition.
- Group 2 furnace definition.
- HF emissions compliance.
- SAPU definition.
- Clean charge definition.
- Residence time definition.
- SAPU feed/charge rate.
- Dross-only versus dross/scrap furnaces.
- Applicability of rule to area sources.
- Altering parameters during testing with new scrap streams.
- Controlled furnaces that are temporarily idled for 24 hours or longer.
- Annual compliance certification for area sources.

The comment period for the February 2012 proposal ended on April 13, 2012. We will address the comments we received during the public comment period for the 2012 proposal, as well as comments received during the comment period for this supplemental proposal, at the time we take final action.

Subpart RRR inadvertently uses several different terms for the agency that has primary responsibility for implementation of certain subpart RRR provisions. The terms used include "responsible permitting authority," "permitting authority," "applicable permitting authority" and "delegated authority." Depending on the particular state and whether the facility is a major or area source, the permitting authority and the delegated authority for purposes of subpart RRR may be the same or may differ. Therefore, the EPA deems it appropriate to clarify for purposes of these specific subpart RRR provisions that the "permitting authority" (defined in the General Provisions as the Title V permitting authority) is the primary implementing authority for major sources, and the Administrator is the primary implementing authority for area sources. The General Provisions define "Administrator" to mean the EPA Administrator or his or her authorized representative (*e.g.*, a state that has been delegated authority to implement Subpart RRR).

Where these terms for the implementing authority appear in this supplemental proposal, we have made the necessary corrections. We plan to correct the remainder of these references when we issue the final rule.

D. What data collection activities were conducted to support this action?

For the risk analysis performed for the 2012 proposal, we compiled a dataset from two primary sources: (1) A nine-company testing information collection request (ICR) sent in May 2010, and (2) an all-company ICR sent to companies in February 2011. These data collection efforts are described in the 2012 proposal, and a comprehensive description of the emissions data, calculations and risk assessment inputs are in the memorandum, *Development of the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category* (Docket item EPA–HQ–OAR–2010–0544–0149).

For the revised risk analysis conducted for this supplemental proposal, changes were made in the methodology used to calculate allowable emissions. Generally, allowable emissions were calculated for the 2012 proposal as the product of the emissions limit for the secondary aluminum emissions unit and the maximum production capacity of the unit. For the revised emissions modeling for this supplemental proposal, the amount of charge to the unit from the all-company ICR was used in the allowable emissions calculation, rather than the maximum production capacity of the unit. Uniformly assuming that every piece of equipment is being used at maximum capacity results in an overestimate of total aluminum throughput that is much larger than the actual throughput for the facility as a whole. Moreover, if we assume maximum production capacity coupled with the assumption that all HAP are being emitted at the highest level allowed by the MACT rule (*i.e.*, at the level of the emissions limit), this results in an overly conservative estimate of emissions. This overestimation is magnified for large facilities, with multiple pieces of equipment. Therefore, for this supplemental proposal, the amount of charge to the unit from the all-company ICR was used in the allowable emissions calculation, rather than the maximum production capacity of the unit. Furthermore, this revised methodology is consistent with EPA's risk assessment methodology performed in other RTR modeling projects. See National Emission Standards for Hazardous Air Pollutants: Primary Lead Smelting; proposed rule (76 FR 9410, February 17, 2011), National Emissions Standards for Hazardous Air Pollutants: Secondary Lead Smelting; proposed rule (76 FR 29032, May 19, 2011) and National Emissions Standards for Hazardous Air Pollutants: Ferroalloys Production (76 FR 72508, November 23, 2011). For an in-depth description of the revised risk modeling dataset, including changes in methodologies between the emissions modeling for the 2012 proposal and the emissions modeling for this supplemental proposal, see the memorandum, *Development of the RTR Supplemental Proposal Risk Modeling Dataset for the Secondary Aluminum Production Source Category*, available in this rulemaking docket.

As part of the revised risk analysis, process equipment and unit emissions data used in the emissions modeling for the 2012 proposal were also reviewed. Since cancer risks were driven by D/F emissions in the modeling done for the 2012 proposal, we focused our refined assessment on the D/F emissions data. The other modeled pollutants had considerably lower estimated risks (compared to D/F) and the estimated

risks for all these HAP were well below the presumptive acceptable risk levels.

For almost all facilities, the D/F emissions reported in the 2011 ICR responses were used for the revised modeling. However, for the companies operating the 10 facilities that had the highest modeled risk from actual emissions in the modeling for the 2012 proposal, we requested and received results from additional compliance D/F testing that was conducted since the 2011 ICR. The results for all test runs associated with 2011 ICR responses and all test runs received as part of the request for additional test data were averaged together for each facility to provide more accurate estimates of the D/F emissions and resulting risks for these facilities. A memorandum comparing the 2011 emissions data with the revised emissions data used for this supplemental proposal and the reasons for differences is available in the docket for this rulemaking. See *Modeling Input Revisions for the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category.*

We also revised emissions data for primary aluminum operations at primary aluminum facilities that were co-located at secondary aluminum facilities. The revised primary aluminum emissions data were based on recent test data used in the supplemental proposed rulemaking for the Primary Aluminum Production source category. These data included the following:

- Additional emission test data for polycyclic organic matter (POM) emissions from prebake potlines;
- Additional emission test data for PM emissions from prebake and Soderberg potlines, anode bake furnaces and paste plants;
- Additional emission test data for speciated polycyclic aromatic hydrocarbons (PAHs), speciated HAP metals, speciated polychlorinated biphenyls (PCBs) and speciated D/Fs from potlines, anode bake furnaces and paste plants.

III. Analytical Procedures

A. How did we evaluate the post-MACT risks posed by the Secondary Aluminum Production source category in the risk assessment developed for this supplemental proposal?

The EPA conducted a risk assessment that provides estimates of the MIR posed by the HAP emissions from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risks within the exposed populations, cancer incidence and an evaluation of the potential for adverse environmental effects. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models used for this revised assessment: *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal.* The methods used to assess risks (as described in the seven primary steps below) are consistent with those peer-reviewed by a panel of the EPA's Science Advisory Board (SAB) in 2009 and described in their peer review report issued in 2010; [3] they are also consistent with the key recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

As explained in section II.D above, the revised RTR emissions dataset for the Secondary Aluminum Production source category constitutes the basis for the revised risk assessment. This includes recent test data received from the primary aluminum facilities that were co-located at secondary aluminum production facilities. We estimated the magnitude of emissions using emissions test data collected through ICRs along with more recent data submitted by companies with facilities identified as the highest risk facilities for D/F emissions in the 2012 risk analysis. We also reviewed the information regarding emissions release characteristics such as stack heights, stack gas exit velocities, stack temperatures and source locations. In addition to the data quality checks performed on the source data for the facilities contained in the dataset, we also verified the coordinates of every emission source in the dataset through visual observations using Google Earth. We also performed data quality checks on the emissions data and release characteristics. The revised emissions data, the data quality checks and the methods used to estimate emissions from all the various emissions sources, are described in more detail in the technical documents: *Development of the RTR Supplemental Proposal Risk Modeling Dataset for the Secondary Aluminum Production Source Category* and *Modeling Input Revisions for the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category,* which are available in the docket for this action.

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during the specified annual time period. In some cases, these "actual" emission levels are lower than the emission levels required to comply with the MACT standards. The emissions level allowed to be emitted by the MACT standards is referred to as the "MACT-allowable" emissions level. We discussed the use of both MACT-allowable and actual emissions in the final Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP residual risk rules (71 FR 34428, June 14, 2006 and 71 FR 76609, December 21, 2006, respectively). In those previous actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable since these risks reflect the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach (54 FR 38044, September 14, 1989).

For this supplemental proposal, we evaluated allowable stack emissions based on the level of control required by the subpart RRR MACT standards. As described in section II.D above, changes were made in the methodology used to calculate the allowable emissions for the revised risk analysis conducted for this supplemental proposal. In the 2012 proposal, allowable emissions were calculated using the emissions limits for the 67 secondary aluminum emissions units and the maximum production capacity of each unit. For the revised emissions modeling, the actual amount of charge to the unit from the all-company ICR was used in the allowable emissions calculation, rather than the maximum production capacity of the unit. The methodology used to calculate allowable emissions is explained in more detail in the technical documents: *Development of the RTR Supplemental Proposal Risk Modeling Dataset for the Secondary Aluminum Production*

[3] U.S. EPA SAB. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* May 2010.

Source Category and *Modeling Input Revisions for the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category*, which are available in the docket for this action.

3. How did we conduct dispersion modeling, determine inhalation exposures and estimate individual and population inhalation risks?

Both long-term and short-term inhalation exposure concentrations and health risks from the source category addressed in this proposal were estimated using the Human Exposure Model (Community and Sector HEM–3 version 1.1.0). The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources[4], and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The air dispersion model used by the HEM–3 model (AERMOD) is one of the EPA's preferred models for assessing pollutant concentrations from industrial facilities.[5] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2011) of hourly surface and upper air observations for more than 800 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[6] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by the EPA for HAP and other toxic air pollutants. These values are available at *http://www.epa.gov/ttn/atw/toxsource/summary.html* and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentrations of each HAP emitted by each major source and D/F emissions from each area source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. We calculated the MIR for each facility as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week and 52 weeks per year for a 70-year period) exposure to the maximum concentration at the centroid of inhabited census blocks. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use URE values from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without EPA IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) URE values, where available. In cases where new, scientifically credible dose response values have been developed in a manner consistent with the EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate.

The EPA estimated incremental individual lifetime cancer risks associated with emissions from the facilities in the source category as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans and suggestive evidence of carcinogenic potential[7]) emitted by the modeled sources. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of the sources were also estimated for the source category as part of this assessment by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044, September 14, 1989) and the limitations of Gaussian dispersion models, including AERMOD.

To assess the risk of non-cancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or target organ-specific HI, TOSHI). The HQ is the estimated exposure divided by the chronic reference value, which is a value selected from one of several sources. First, the chronic reference level can be the EPA reference concentration (RfC) (*http://www.epa.gov/riskassessment/glossary.htm*), defined as "an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime." Alternatively, in cases where an RfC from the EPA's IRIS database is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic reference level can be a value from the following prioritized sources: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*http://www.atsdr.cdc.gov/mrls/index.asp*), which is defined as "an estimate of daily human exposure to a hazardous substance that is likely to be without an appreciable risk of adverse non-cancer health effects (other than cancer) over a specified duration of exposure"; (2) the CalEPA Chronic Reference Exposure Level (REL) (*http://www.oehha.ca.gov/air/hot_spots/pdf/HRAguidefinal.pdf*), which is defined as "the concentration level (that is expressed in units of micrograms per cubic meter ($\mu g/m^3$) for inhalation exposure and in a dose expressed in units of milligram per kilogram-day (mg/kg-day) for oral exposures), at or below which no adverse health effects are anticipated for a specified exposure duration"; or (3), as noted above, a scientifically credible dose-response value that has been developed in a

[4] This metric comes from the Benzene NESHAP. See 54 FR 38046.

[5] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[6] A census block is the smallest geographic area for which census statistics are tabulated.

[7] These classifications also coincide with the terms "known carcinogen, probable carcinogen, and possible carcinogen," respectively, which are the terms advocated in the EPA's previous *Guidelines for Carcinogen Risk Assessment*, published in 1986 (51 FR 33992, September 24, 1986). Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled, *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory*, available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf*.

manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA, in place of or in concert with other values.

The EPA also evaluated screening estimates of acute exposures and risks for each of the HAP at the point of highest potential off-site exposure for each facility. To do this, the EPA estimated the risks when both the peak hourly emissions rate and worst-case dispersion conditions occur. We also assume that a person is located at the point of highest impact during that same time. In accordance with our mandate in section 112 of the CAA, we use the point of highest off-site exposure to assess the potential risk to the maximally exposed individual. In some cases, the agency may choose to refine the acute screen by also assessing the exposure that may occur at a centroid of a census block. The acute HQ is the estimated acute exposure divided by the acute dose-response value. In each case, the EPA calculated acute HQ values using best available, short-term dose-response values. These acute dose-response values, which are described below, include the acute REL, acute exposure guideline levels (AEGL) and emergency response planning guidelines (ERPG) for 1-hour exposure durations. As discussed below, we used conservative assumptions for emissions rates, meteorology and exposure location for our acute analysis.

As described in the *CalEPA's Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* an acute REL value (*http://www.oehha.ca.gov/air/pdf/acuterel.pdf*) is defined as "the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration." *Id.* at page 2. Acute REL values are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. Acute REL values are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact.

As we state above, in assessing the potential risks associated with acute exposures to HAP, we do not follow a prioritization scheme and, therefore, we consider available dose-response values from multiple authoritative sources. In the RTR program, the EPA assesses acute risk using toxicity values derived from one hour exposures.

AEGL values were derived in response to recommendations from the National Research Council (NRC). As described in *Standing Operating Procedures (SOP) of the National Advisory Committee on Acute Exposure Guideline Levels for Hazardous Substances* (*http://www.epa.gov/oppt/aegl/pubs/sop.pdf*),[8] "the NRC's previous name for acute exposure levels—community emergency exposure levels—was replaced by the term AEGL to reflect the broad application of these values to planning, response, and prevention in the community, the workplace, transportation, the military, and the remediation of Superfund sites." *Id.* at 2. This document also states that AEGL values "represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to eight hours." *Id.* at 2.

The document lays out the purpose and objectives of AEGL by stating that "the primary purpose of the AEGL program and the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances is to develop guideline levels for once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals." *Id.* at 21. In detailing the intended application of AEGL values, the document states that "[i]t is anticipated that the AEGL values will be used for regulatory and nonregulatory purposes by U.S. Federal and state agencies and possibly the international community in conjunction with chemical emergency response, planning, and prevention programs. More specifically, the AEGL values will be used for conducting various risk assessments to aid in the development of emergency preparedness and prevention plans, as well as real-time emergency response actions, for accidental chemical releases at fixed facilities and from transport carriers." *Id.* at 31.

The AEGL–1 value is then specifically defined as "the airborne concentration (expressed as ppm (parts per million) or mg/m^3 (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure." *Id.* at 3. The document also notes that, "Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects." *Id.* Similarly, the document defines AEGL–2 values as "the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape." *Id.*

ERPG values are derived for use in emergency response, as described in the American Industrial Hygiene Association's Emergency Response Planning (ERP) Committee document titled, *ERPGS Procedures and Responsibilities* (*https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERP-SOPs2006.pdf*), which states that, "Emergency Response Planning Guidelines were developed for emergency planning and are intended as health based guideline concentrations for single exposures to chemicals."[9] *Id.* at 1. The ERPG–1 value is defined as "the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor." *Id.* at 2. Similarly, the ERPG–2 value is defined as "the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action." *Id.* at 1.

As can be seen from the definitions above, the AEGL and ERPG values include the similarly-defined severity levels 1 and 2. For many chemicals, a severity level 1 value AEGL or ERPG has not been developed because the types of effects for these chemicals are not consistent with the AEGL–1/ERPG–1 definitions; in these instances, we compare higher severity level AEGL–2 or ERPG–2 values to our modeled exposure levels to screen for potential

[8] National Academy of Sciences (NAS), 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2.

[9] *ERP Committee Procedures and Responsibilities.* November 1, 2006. American Industrial Hygiene Association.

acute concerns. When AEGL–1/ERPG–1 values are available, they are used in our acute risk assessments.

Acute REL values for 1-hour exposure durations are typically lower than their corresponding AEGL–1 and ERPG–1 values. Even though their definitions are slightly different, AEGL–1 values are often the same as the corresponding ERPG–1 values and AEGL–2 values are often equal to ERPG–2 values. Maximum HQ values from our acute screening risk assessments typically result when basing them on the acute REL value for a particular pollutant. In cases where our maximum acute HQ value exceeds 1, we also report the HQ value based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1 value).

To develop screening estimates of acute exposures in the absence of hourly emissions data, generally we first develop estimates of maximum hourly emissions rates by multiplying the average actual annual hourly emissions rates by a default factor to cover routinely variable emissions. We choose the factor to use partially based on process knowledge and engineering judgment. The factor chosen also reflects a Texas study of short-term emissions variability, which showed that most peak emission events in a heavily-industrialized four-county area (Harris, Galveston, Chambers and Brazoria Counties, Texas) were less than twice the annual average hourly emissions rate. The highest peak emissions event was 74 times the annual average hourly emissions rate and the 99th percentile ratio of peak hourly emissions rate to the annual average hourly emissions rate was 9.[10] Considering this analysis, to account for more than 99 percent of the peak hourly emissions, we apply a conservative screening multiplication factor of 10 to the average annual hourly emissions rate in our acute exposure screening assessments as our default approach. However, we use a factor other than 10 if we have information that indicates that a different factor is appropriate for a particular source category. For this source category, there was no such information available and the default factor of 10 was used in the acute screening process.

Ideally, we would prefer to have continuous measurements over time to see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emissions rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this screening analysis. Recognizing that this level of data is rarely available, we instead rely on the multiplier approach.

As part of our acute risk assessment process, for cases where acute HQ values from the screening step are less than or equal to 1 (even under the conservative assumptions of the screening analysis), acute impacts are deemed negligible and no further analysis is performed. In cases where an acute HQ from the screening step are greater than 1, additional site-specific data would be considered to develop a more refined estimate of the potential for acute impacts of concern. However, for this source category, no acute values were greater than 1. Therefore, further refinement was not performed.

To better characterize the potential health risks associated with estimated acute exposures to HAP, and in response to a key recommendation from the SAB's peer review of the EPA's RTR risk assessment methodologies,[11] we generally examine a wider range of available acute health metrics (*e.g.*, RELs, AEGLs) than we do for our chronic risk assessments. This is in response to the SAB's acknowledgement that there are generally more data gaps and inconsistencies in acute reference values than there are in chronic reference values. In some cases, when Reference Value Arrays[12] for HAP have been developed, we consider additional acute values (*i.e.*, occupational and international values) to provide a more complete risk characterization.

4. How did we conduct the multipathway exposure and risk screening?

The EPA conducted a screening analysis examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.*, ingestion). We first determined whether any major sources in the source category emitted any HAP known to be persistent and bioaccumulative in the environment (PB–HAP). The PB–HAP compounds or compound classes are identified for the screening from the EPA's Air Toxics Risk Assessment Library (available at: *http://www2.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*). Since D/F is the only pollutant for which subpart RRR area sources are regulated under CAA section 112(d), this was the only PB–HAP evaluated in this screening analysis for area sources.

For major sources in the Secondary Aluminum Production source category, we identified emissions of cadmium compounds, D/F, lead compounds, mercury compounds and POM. Because one or more of these PB–HAP are emitted by at least one facility in the Secondary Aluminum Production source category, we proceeded to the next step of the evaluation. In this step, we determined whether the facility-specific emissions rates of the emitted PB–HAP were large enough to create the potential for significant non-inhalation human health risks under reasonable worst-case conditions. To facilitate this step, we developed emissions rate screening levels for several PB–HAP using a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology.Fate, Transport and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with emissions rate screening levels are: lead, cadmium, D/F, mercury compounds and POM. We conducted a sensitivity analysis on the screening scenario to ensure that its key design parameters would represent the upper end of the range of possible values, such that it would represent a conservative but not impossible scenario. The facility-specific emissions rates of these PB–HAP were compared to the emission rate screening levels for these PB–HAP to assess the potential for significant human health risks via non-inhalation pathways. We call this application of the TRIM.FaTE model the Tier 1 TRIM-screen or Tier 1 screen.

For the purpose of developing emissions rates for our Tier 1 TRIM-screen, we derived emission levels for these PB–HAP (other than lead compounds) at which the maximum excess lifetime cancer risk would be 1-in-1 million (*i.e.*, for D/F and POM) or, for HAP that cause non-cancer health effects (*i.e.*, cadmium compounds and mercury compounds), the maximum HQ would be 1. If the emissions rate of any PB–HAP included in the Tier 1 screen exceeds the Tier 1 screening emissions rate for any facility, we conduct a

[10] See *http://www.tceq.state.tx.us/compliance/field_ops/eer/index.html* or docket to access the source of these data.

[11] The SAB peer review of *RTR Risk Assessment Methodologies* is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

[12] U.S. EPA. (2009) Chapter 2.9 Chemical Specific Reference Values for Formaldehyde in Graphical Arrays of Chemical-Specific Health Effect Reference Values for Inhalation Exposures (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/061 and available online at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=211003.*

second screen, which we call the Tier 2 TRIM-screen or Tier 2 screen.

In the Tier 2 screen, the location of each facility that exceeded the Tier 1 emission rate is used to refine the assumptions associated with the environmental scenario while maintaining the exposure scenario assumptions. A key assumption that is part of the Tier 1 screen is that a lake is located near the facility; we confirm the existence of lakes near the facility as part of the Tier 2 screen. We then adjust the risk-based Tier 1 screening level for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenarios for the subsistence fisher and the subsistence farmer change with meteorology and environmental assumptions. PB–HAP emissions that do not exceed these new Tier 2 screening levels are considered to pose no unacceptable risks. If the PB–HAP emissions for a facility exceed the Tier 2 screening emissions rate and data are available, we may decide to conduct a more refined Tier 3 multipathway screening analysis. There are several analyses that can be included in a Tier 3 screen depending upon the extent of refinement warranted, including validating that the lake is fishable and considering plume-rise to estimate emissions lost above the mixing layer. If the Tier 3 screen is exceeded, the EPA may further refine the assessment.

For this source category, we conducted a Tier 3 screening analysis for six major sources with Tier 2 cancer screen values greater than or equal to 50 times the Tier 2 threshold for the subsistence fisher scenario. The major sources represented the highest screened cancer risk for multipathway impacts. Therefore, further screening analyses were not performed on the area sources. A detailed discussion of the approach for this risk assessment can be found in Appendix 8 of the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal.*

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening emissions rate for them, we compared maximum estimated chronic inhalation exposures with the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[13] Values below the level of the primary (health-based) lead NAAQS were considered to have a low potential for multipathway risk.

For further information on the multipathway analysis approach, see the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket for this action.

5. How did we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect

The EPA conducts a screening assessment to examine the potential for adverse environmental effects as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines "adverse environmental effect" as "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas."

b. Environmental HAP

The EPA focuses on seven HAP, which we refer to as "environmental HAP," in its screening analysis: Five PB–HAP and two acid gases. The five PB–HAP are cadmium, D/F, POM, mercury (both inorganic mercury and methyl mercury) and lead compounds. The two acid gases are HCl and HF. The rationale for including these seven HAP in the environmental risk screening analysis is presented below.

The HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment and water. The PB–HAP are taken up, through sediment, soil, water and/or ingestion of other organisms, by plants or animals (*e.g.,* small fish) at the bottom of the food chain. As larger and larger predators consume these organisms, concentrations of the PB–HAP in the animal tissues increase as does the potential for adverse effects. The five PB–HAP we evaluate as part of our screening analysis account for 99.8 percent of all PB–HAP emissions nationally from stationary sources (on a mass basis from the 2005 National Emissions Inventory (NEI)).

In addition to accounting for almost all of the mass of PB–HAP emitted, we note that the TRIM.FaTE model that we use to evaluate multipathway risk allows us to estimate concentrations of cadmium compounds, D/F, POM and mercury in soil, sediment and water. For lead compounds, we currently do not have the ability to calculate these concentrations using the TRIM.FaTE model. Therefore, to evaluate the potential for adverse environmental effects from lead compounds, we compare the estimated HEM-modeled exposures from the source category emissions of lead with the level of the secondary NAAQS for lead.[14] We consider values below the level of the secondary lead NAAQS as unlikely to cause adverse environmental effects.

Due to their well-documented potential to cause direct damage to terrestrial plants, we include two acid gases, HCl and HF, in the environmental screening analysis. According to the 2005 NEI, HCl and HF account for about 99 percent (on a mass basis) of the total acid gas HAP emitted by stationary sources in the U.S. In addition to the potential to cause direct damage to plants, high concentrations of HF in the air have been linked to fluorosis in livestock. Air concentrations of these HAP are already calculated as part of the human multipathway exposure and risk screening analysis using the HEM3–AERMOD air dispersion model, and we are able to use the air dispersion modeling results to estimate the potential for an adverse environmental effect.

The EPA acknowledges that other HAP beyond the seven HAP discussed above may have the potential to cause adverse environmental effects. Therefore, the EPA may include other relevant HAP in its environmental risk screening in the future, as modeling science and resources allow. The EPA invites comment on the extent to which other HAP emitted by the source category may cause adverse environmental effects. Such information should include references to peer-reviewed ecological effects benchmarks that are of sufficient quality for making

[13] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring among other things that the standard provide an "ample margin of safety"). However, the lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

[14] The secondary lead NAAQS is a reasonable measure of determining whether there is an adverse environmental effect since it was established considering "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being."

regulatory decisions, as well as information on the presence of organisms located near facilities within the source category that such benchmarks indicate could be adversely affected.

c. Ecological Assessment Endpoints and Benchmarks for PB–HAP

An important consideration in the development of the EPA's screening methodology is the selection of ecological assessment endpoints and benchmarks. Ecological assessment endpoints are defined by the ecological entity (*e.g.*, aquatic communities including fish and plankton) and its attributes (*e.g.*, frequency of mortality). Ecological assessment endpoints can be established for organisms, populations, communities or assemblages and ecosystems.

For PB–HAP (other than lead compounds), we evaluated the following community-level ecological assessment endpoints to screen for organisms directly exposed to HAP in soils, sediment and water:

- Local terrestrial communities (*i.e.*, soil invertebrates, plants) and populations of small birds and mammals that consume soil invertebrates exposed to PB–HAP in the surface soil;
- Local benthic (*i.e.*, bottom sediment dwelling insects, amphipods, isopods and crayfish) communities exposed to PB–HAP in sediment in nearby water bodies; and
- Local aquatic (water-column) communities (including fish and plankton) exposed to PB–HAP in nearby surface waters.

For PB–HAP (other than lead compounds), we also evaluated the following population-level ecological assessment endpoint to screen for indirect HAP exposures of top consumers via the bioaccumulation of HAP in food chains;

- Piscivorous (*i.e.*, fish-eating) wildlife consuming PB–HAP-contaminated fish from nearby water bodies.

For cadmium compounds, D/F, POM and mercury, we identified the available ecological benchmarks for each assessment endpoint. An ecological benchmark represents a concentration of HAP (*e.g.*, 0.77 µg of HAP per liter of water) that has been linked to a particular environmental effect level through scientific study. For PB–HAP we identified, where possible, ecological benchmarks at the following effect levels:

- Probable effect levels (PEL): Level above which adverse effects are expected to occur frequently;
- Lowest-observed-adverse-effect level (LOAEL): The lowest exposure level tested at which there are biologically significant increases in frequency or severity of adverse effects; and
- No-observed-adverse-effect levels (NOAEL): The highest exposure level tested at which there are no biologically significant increases in the frequency or severity of adverse effect.

We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. In general, the EPA sources that are used at a programmatic level (*e.g.*, Office of Water, Superfund Program) were used in the analysis, if available. If not, the EPA benchmarks used in regional programs (*e.g.*, Superfund) were used. If benchmarks were not available at a programmatic or regional level, we used benchmarks developed by other federal agencies (*e.g.*, National Oceanic and Atmospheric Administration (NOAA)) or state agencies.

Benchmarks for all effect levels are not available for all PB–HAP and assessment endpoints. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

d. Ecological Assessment Endpoints and Benchmarks for Acid Gases

The environmental screening analysis also evaluated potential damage and reduced productivity of plants due to direct exposure to acid gases in the air. For acid gases, we evaluated the following ecological assessment endpoint:

- Local terrestrial plant communities with foliage exposed to acidic gaseous HAP in the air.

The selection of ecological benchmarks for the effects of acid gases on plants followed the same approach as for PB–HAP (*i.e.*, we examine all of the available benchmarks). For HCl, the EPA identified chronic benchmark concentrations. We note that the benchmark for chronic HCl exposure to plants is greater than the reference concentration for chronic inhalation exposure for human health. This means that where the EPA includes regulatory requirements to prevent an exceedance of the reference concentration for human health, additional analyses for adverse environmental effects of HCl would not be necessary.

For HF, the EPA identified chronic benchmark concentrations for plants and evaluated chronic exposures to plants in the screening analysis. High concentrations of HF in the air have also been linked to fluorosis in livestock. However, the HF concentrations at which fluorosis in livestock occur are higher than those at which plant damage begins. Therefore, the benchmarks for plants are protective of both plants and livestock.

e. Screening Methodology

For the environmental risk screening analysis, the EPA first determined whether any of the major source facilities in the Secondary Aluminum Production source category emitted any of the seven environmental HAP. We identified emissions of five of the PB–HAP (cadmium, mercury, lead, D/F, PAHs) and two acid gases (HCl and HF). Because one or more of the seven environmental HAP evaluated were emitted by facilities in the source category, we proceeded to the second step of the evaluation. Since D/F is the only pollutant for which subpart RRR area sources are regulated under CAA section 112(d), this was the only PB–HAP evaluated in this screening analysis.

f. PB–HAP Methodology

For cadmium, mercury, POM and D/F, the environmental screening analysis consists of two tiers, while lead compounds are analyzed differently as discussed earlier. In the first tier, we determined whether the maximum facility-specific emission rates of each of the emitted environmental HAP for the major sources were large enough to create the potential for adverse environmental effects under reasonable worst-case environmental conditions. This same assessment was done for area sources for D/F because this is the only pollutant for which subpart RRR area sources are regulated under CAA section 112(d). These are the same environmental conditions used in the human multipathway exposure and risk screening analysis.

To facilitate this step, TRIM.FaTE was run for each PB–HAP under hypothetical environmental conditions designed to provide conservatively high HAP concentrations. The model was set to maximize runoff from terrestrial parcels into the modeled lake, which in turn, maximized the chemical concentrations in the water, the sediments and the fish. The resulting media concentrations were then used to back-calculate a screening level emission rate that corresponded to the relevant exposure benchmark

concentration value for each assessment endpoint. To assess emissions from a facility, the reported emission rate for each PB–HAP was compared to the screening level emission rate for that PB–HAP for each assessment endpoint. If emissions from a facility do not exceed the Tier 1 screening level, the facility "passes" the screen, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening level, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening analysis, the emission rate screening levels are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screen. The modeling domain for each facility in the Tier 2 analysis consists of eight octants. Each octant contains 5 modeled soil concentrations at various distances from the facility (5 soil concentrations × 8 octants = total of 40 soil concentrations per facility) and one lake with modeled concentrations for water, sediment and fish tissue. In the Tier 2 environmental risk screening analysis, the 40 soil concentration points are averaged to obtain an average soil concentration for each facility for each PB–HAP. For the water, sediment and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening level, the facility passes the screen, and is typically not evaluated further. If emissions from a facility exceed the Tier 2 screening level, the facility does not pass the screen and, therefore, may have the potential to cause adverse environmental effects. Such facilities are evaluated further to investigate factors such as the magnitude and characteristics of the area of exceedance.

g. Acid Gas Methodology

The environmental screening analysis evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to acid gases. The environmental risk screening methodology for acid gases is a single-tier screen that compares the average off-site ambient air concentration over the modeling domain to ecological benchmarks for each of the acid gases. Because air concentrations are compared directly to the ecological benchmarks, emission-based screening levels are not calculated for acid gases as they are in the ecological risk screening methodology for PB–HAP.

For purposes of ecological risk screening, the EPA identifies a potential for adverse environmental effects to plant communities from exposure to acid gases when the average concentration of the HAP around a facility exceeds the LOAEL ecological benchmark. In such cases, we further investigate factors such as the magnitude and characteristics of the area of exceedance (*e.g.*, land use of exceedance area, size of exceedance area) to determine if there is an adverse environmental effect. For further information on the environmental screening analysis approach, see the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, which is available in the docket for this action.

6. How did we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire "facility," where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category of interest, but also emissions of HAP from all other emissions sources at the facility for which we have data. For the Secondary Aluminum Production source category, we had nine facilities that were co-located with primary aluminum reduction plants.

7. How did we consider uncertainties in risk assessment?

In the Benzene NESHAP, we concluded that risk estimation uncertainty should be considered in our decision-making under the ample margin of safety framework. Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health protective and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates and dose-response relationships follows below. A more thorough discussion of these uncertainties is included in the *Development of the RTR Supplemental Proposal Risk Modeling Dataset for the Secondary Aluminum Production Source Category* and *Modeling Input Revisions for the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category*, which are available in the docket for this action. The other uncertainties are described in more detail in the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, which is available in the docket for this action.

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor of 10 applied to the average annual hourly emission rates for all emission process groups, which are intended to account for emission fluctuations due to normal facility operations. A description of the development of the emissions dataset is in section II.D of this preamble and in the documents, *Development of the RTR Supplemental Proposal Risk Modeling Dataset for the Secondary Aluminum Production Source Category* and *Modeling Input Revisions for the RTR Risk Modeling Dataset for the Secondary Aluminum Production Source Category*, which are in the docket for this rulemaking.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.*, not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.*, not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.*, meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the

RTR assessments should yield unbiased estimates of ambient HAP concentrations.

c. Uncertainties in Inhalation Exposure

The EPA did not include the effects of human mobility on exposures in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling domain were not considered.[15] The approach of not considering short or long-term population mobility does not bias the estimate of the theoretical MIR (by definition), nor does it affect the estimate of cancer incidence because the total population number remains the same. It does, however, affect the shape of the distribution of individual risks across the affected population, shifting it toward higher estimated individual risks at the upper end and reducing the number of people estimated to be at lower risks, thereby increasing the estimated number of people at specific high risk levels (*e.g.,* 1-in-10 thousand or 1-in-1 million).

In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live farther from the facility and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact, but is an unbiased estimate of average risk and incidence. We reduce this uncertainty by analyzing large census blocks near facilities using aerial imagery and adjusting the location of the block centroid to better represent the population in the block, as well as adding additional receptor locations where the block population is not well represented by a single location.

The assessment evaluates the cancer inhalation risks associated with pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emission sources at facilities actually operate (*i.e.,* more or less than 70 years) and the domestic growth or decline of the modeled industry (*i.e.,* the increase or decrease in the number or size of domestic facilities) will influence the future risks posed by a given source or source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in the unlikely scenario where a facility maintains, or even increases, its emissions levels over a period of more than 70 years, residents live beyond 70 years at the same location, and the residents spend most of their days at that location, then the cancer inhalation risks could potentially be underestimated. However, annual cancer incidence estimates from exposures to emissions from these sources would not be affected by the length of time an emissions source operates.

The exposure estimates used in these analyses assume chronic exposures to ambient (outdoor) levels of pollutants. Because most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAP, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, indoor levels are typically lower. This factor has the potential to result in an overestimate of 25 to 30 percent of exposures.[16]

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA that should be highlighted. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology and the presence of humans at the location of the maximum concentration. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and worst-case meteorological conditions co-occur, thus, resulting in maximum ambient concentrations. These two events are unlikely to occur at the same time, making these assumptions conservative. We then include the additional assumption that a person is located at this point during this same time period. For this source category, these assumptions would tend to be worst-case actual exposures as it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and worst-case meteorological conditions occur simultaneously.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and non-cancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in the EPA's *2005 Cancer Guidelines*; namely, that "the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective" (*EPA 2005 Cancer Guidelines,* pages 1–7). This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variability in dose-response relationships is given in the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket for this action.

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a "plausible upper limit to the true value of a quantity" (although this is usually not a true statistical confidence limit).[17] In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[18] When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health protection, the EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have limitations for

[15] Short-term mobility is movement from one micro-environment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

[16] U.S. EPA. *National-Scale Air Toxics Assessment for 1996.* (EPA 453/R–01–003; January 2001; page 85.)

[17] IRIS glossary (*http://www.epa.gov/NCEA/iris/help_gloss.htm*).

[18] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

other uses (*e.g.*, priority-setting or expected benefits analysis).

Chronic non-cancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure (RfC) or a daily oral exposure (RfD) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be "without appreciable risk," the methodology relies upon an uncertainty factor (UF) approach (U.S. EPA, 1993, 1994) which considers uncertainty, variability and gaps in the available data. The UF are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UF are commonly default values,[19] *e.g.*, factors of 10 or 3, used in the absence of compound-specific data; where data are available, UF may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UF are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (*i.e.*, less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated.

While collectively termed "UF," these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UF are intended to account for: (1) Variation in susceptibility among the members of the human population (*i.e.*, inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (*i.e.*, interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (*i.e.*, extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies.

Many of the UF used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but they more often use individual UF values that may be less than 10. The UF are applied based on chemical-specific or health effect-specific information (*e.g.*, simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (see the following paragraph). The UF applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.*, 4 hours) to derive an acute reference value at another exposure duration (*e.g.*, 1 hour).

Not all acute reference values are developed for the same purpose and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Although every effort is made to identify appropriate human health effect dose-response assessment values for all pollutants emitted by the sources in this risk assessment, some HAP emitted by this source category are lacking dose-response assessments. Accordingly, these pollutants cannot be included in the quantitative risk assessment, which could result in quantitative estimates understating HAP risk. To help to alleviate this potential underestimate, where we conclude similarity with a HAP for which a dose-response assessment value is available, we use that value as a surrogate for the assessment of the HAP for which no value is available. To the extent use of surrogates indicates appreciable risk, we may identify a need to increase priority for new IRIS assessment of that substance. We additionally note that, generally speaking, HAP of greatest concern due to environmental exposures and hazard are those for which dose-response assessments have been performed, reducing the likelihood of understating risk.

For a group of compounds that are unspeciated (*e.g.*, glycol ethers), we conservatively use the most protective reference value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.*, ethylene glycol diethyl ether) that does not have a specified reference value, we also apply the most protective reference value from the other compounds in the group to estimate risk.

e. Uncertainties in the Multipathway Assessment

For each source category, we generally rely on site-specific levels of PB-HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary. This determination is based on the results of a tiered screening analysis that relies on the outputs from models that estimate environmental pollutant concentrations and human exposures for four PB-HAP. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[20]

Model uncertainty concerns whether the selected models are appropriate for the assessment being conducted and whether they adequately represent the actual processes that might occur for that situation. An example of model uncertainty is the question of whether the model adequately describes the movement of a pollutant through the soil. This type of uncertainty is difficult to quantify. However, based on feedback received from previous SAB reviews and other reviews, we are confident that the models used in the screen are

[19] According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) "[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain." The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process*, defined default option as "the option chosen on the basis of risk assessment policy that appears to be the best choice in the absence of data to the contrary" (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the agency; rather, the agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with the EPA's goal of protecting public health and the environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See EPA, 2004, *An Examination of EPA Risk Assessment Principles and Practices*, EPA/100/B–04/001 available at: *http://www.epa.gov/osa/pdfs/ratf-final.pdf.*

[20] In the context of this discussion, the term "uncertainty" as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

appropriate and state-of-the-art for the multipathway risk assessments conducted in support of RTR.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway screen, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally-representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water and soil characteristics and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures. The multipathway screens include some hypothetical elements, namely the hypothetical farmer and fisher scenarios. It is important to note that even though the multipathway assessment has been conducted, no data exist to verify the existence of either the farmer or fisher scenario outlined above.

In Tier 2 of the multipathway assessment, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screen. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all the Tiers.

For both Tiers 1 and 2 of the multipathway assessment, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do screen out, we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do not screen out, it does not mean that multipathway impacts are significant, only that we cannot rule out that possibility and that a refined multipathway screening analysis for the site might be necessary to obtain a more accurate risk characterization for the source category.

For further information on uncertainties and the multipathway screening methods, refer to the Appendix 5 of the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal.*

We completed a Tier 3 refined multipathway screening analysis for this supplemental proposal for assessing multipathway risks. This assessment contains less uncertainty compared to the Tier 1 and Tier 2 screens. The Tier 3 screen reduces uncertainty through improved lake evaluations used in the Tier 2 screen and by calculating the amount of mass lost to the upper air sink through plume rise. Nevertheless, some uncertainties also exist with these refined assessments. The Tier 3 multipathway screen and related uncertainties are described in detail in the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket for this action.

f. Uncertainties in the Environmental Risk Screening Assessment

For each source category, we generally rely on site-specific levels of environmental HAP emissions to perform an environmental screening assessment. The environmental screening assessment is based on the outputs from models that estimate environmental HAP concentrations. The same models, specifically the TRIM.FaTE multipathway model and the AERMOD air dispersion model, are used to estimate environmental HAP concentrations for both the human multipathway screening analysis and for the environmental screening analysis. Therefore, both screening assessments have similar modeling uncertainties.

Two important types of uncertainty associated with the use of these models in RTR environmental screening assessments—and inherent to any assessment that relies on environmental modeling—are model uncertainty and input uncertainty.[21]

Model uncertainty concerns whether the selected models are appropriate for the assessment being conducted and whether they adequately represent the movement and accumulation of environmental HAP emissions in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous SAB reviews and other reviews, we are confident that the models used in the screen are appropriate and state-of-the-art for the environmental risk assessments conducted in support of our RTR analyses.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the environmental screen for PB–HAP, we configured the models to avoid underestimating exposure and risk to reduce the likelihood that the results indicate the risks are lower than they actually are. This was accomplished by selecting upper-end values from nationally-representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, the location and size of any bodies of water, meteorology, surface water and soil characteristics and structure of the aquatic food web. In Tier 1, we used the maximum facility-specific emissions for the PB–HAP (other than lead compounds, which were evaluated by comparison to the secondary lead NAAQS) that were included in the environmental screening assessment and each of the media when comparing to ecological benchmarks. This is consistent with the conservative design of Tier 1 of the screen. In Tier 2 of the environmental screening analysis for PB–HAP, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the locations of water bodies near the facility location. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screen. To better represent widespread impacts, the modeled soil concentrations are averaged in Tier 2 to obtain one average soil concentration value for each facility and for each PB–HAP. For PB–HAP concentrations in water, sediment and fish tissue, the

[21] In the context of this discussion, the term "uncertainty," as it pertains to exposure and risk assessment, encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

highest value for each facility for each pollutant is used.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For both Tiers 1 and 2 of the environmental screening assessment, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying potential risks for adverse environmental impacts.

Uncertainty also exists in the ecological benchmarks for the environmental risk screening analysis. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. In general, EPA benchmarks used at a programmatic level (*e.g.*, Office of Water, Superfund Program) were used, if available. If not, we used EPA benchmarks used in regional programs (*e.g.*, Superfund Program). If benchmarks were not available at a programmatic or regional level, we used benchmarks developed by other agencies (*e.g.*, NOAA) or by state agencies.

In all cases (except for lead compounds, which were evaluated through a comparison to the NAAQS), we searched for benchmarks at the following three effect levels, as described in section III.A.6 of this preamble:

1. A no-effect level (*i.e.*, NOAEL).
2. Threshold-effect level (*i.e.*, LOAEL).
3. Probable effect level (*i.e.*, PEL).

For some ecological assessment endpoint/environmental HAP combinations, we could identify benchmarks for all three effect levels, but for most, we could not. In one case, where different agencies derived significantly different numbers to represent a threshold for effect, we included both. In several cases, only a single benchmark was available. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we used all of the available effect levels to help us to determine whether risk exists and if the risks could be considered significant and widespread.

The EPA evaluates the following seven HAP in the environmental risk screening assessment: cadmium, D/F, POM, mercury (both inorganic mercury and methyl mercury), lead compounds, HCl and HF, where applicable. These seven HAP represent pollutants that can cause adverse impacts for plants and animals either through direct exposure to HAP in the air or through exposure to HAP that is deposited from the air onto soils and surface waters. These seven HAP also represent those HAP for which we can conduct a meaningful environmental risk screening assessment. For other HAP not included in our screening assessment, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond the seven HAP that we are evaluating may have the potential to cause adverse environmental effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

Further information on uncertainties and the Tier 1 and 2 screening methods is provided in Appendix 5 of the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, available in the docket for this action.

B. How did we consider the risk results in making decisions for this supplemental proposal?

As discussed in section II.A of this preamble, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step process to address residual risk. In the first step, the EPA determines whether risks are acceptable. This determination "considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) of approximately [1-in-10 thousand] [*i.e.*, 100-in-1 million]." 54 FR 38045, September 14, 1989. If risks are unacceptable, the EPA must determine the emissions standards necessary to bring risks to an acceptable level without considering costs. In the second step of the process, the EPA considers whether the emissions standards provide an ample margin of safety "in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision." *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety.

In past residual risk actions, the EPA considered a number of human health risk metrics associated with emissions from the categories under review, including the MIR, the number of persons in various risk ranges, cancer incidence, the maximum non-cancer HI and the maximum acute non-cancer hazard. See, *e.g.*, 72 FR 25138, May 3, 2007; 71 FR 42724, July 27, 2006. The EPA considered this health information for both actual and allowable emissions. See, *e.g.*, 75 FR 65068, October 21, 2010; 75 FR 80220, December 21, 2010; 76 FR 29032, May 19, 2011. The EPA also discussed risk estimation uncertainties and considered the uncertainties in the determination of acceptable risk and ample margin of safety in these past actions. The EPA considered this same type of information in support of this action.

The agency is considering these various measures of health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). As explained in the Benzene NESHAP, "the first step judgment on acceptability cannot be reduced to any single factor" and, thus, "[t]he Administrator believes that the acceptability of risk under [previous] section 112 is best judged on the basis of a broad set of health risk measures and information." 54 FR 38046, September 14, 1989. Similarly, with regard to the ample margin of safety determination, "the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors." *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. In responding to comment on our policy under the Benzene NESHAP, the EPA explained that:

> "[t]he policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the Vinyl Chloride mandate that the Administrator

ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health'."

See 54 FR at 38057, September 14, 1989. Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risks. The Benzene NESHAP explained that "an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors." *Id.* at 38045. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: "EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category." *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify those HAP risks that may be associated with emissions from other facilities that do not include the source categories in question, mobile source emissions, natural source emissions, persistent environmental pollution or atmospheric transformation in the vicinity of the sources in these categories.

The agency understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing non-cancer risks, where pollutant-specific exposure health reference levels (*e.g.*, RfCs) are based on the assumption that thresholds exist for adverse health effects. For example, the agency recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse non-cancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.*, other facilities) to which an individual is exposed may be sufficient to result in increased risk of adverse non-cancer health effects. In May 2010, the SAB advised the EPA "that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area." [22]

In response to the SAB recommendations, the EPA is incorporating cumulative risk analyses into its RTR risk assessments, including those reflected in this proposal. The agency is: (1) Conducting facility-wide assessments, which include source category emission points as well as other emission points within the facilities; (2) considering sources in the same category whose emissions result in exposures to the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzing the ingestion route of exposure. In addition, the RTR risk assessments have always considered aggregate cancer risk from all carcinogens and aggregate non-cancer hazard indices from all non-carcinogens affecting the same target organ system.

Although we are interested in placing source category and facility-wide HAP risks in the context of total HAP risks from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Because of the contribution to total HAP risk from emission sources other than those that we have studied in depth during this RTR review, such estimates of total HAP risks would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

[22] The EPA's responses to this and all other key recommendations of the SAB's advisory on RTR risk assessment methodologies (which is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf*) are outlined in a memo to this rulemaking docket from David Guinnup titled, *EPA's Actions in Response to the Key Recommendations of the SAB Review of RTR Risk Assessment Methodologies.*

C. How did we perform the technology review?

Our technology review focused on the identification and evaluation of developments in practices, processes and control technologies that have occurred since the MACT standards were promulgated. Where we identified such developments, in order to inform our decision of whether it is "necessary" to revise the emissions standards, we analyzed the technical feasibility of applying these developments and the estimated costs, energy implications, non-air environmental impacts, as well as considering the emission reductions. We also considered the appropriateness of applying controls to new sources versus retrofitting existing sources.

Based on our analyses of the available data and information, we identified potential developments in practices, processes and control technologies. For this exercise, we considered any of the following to be a "development":

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards.
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emission reduction.
- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards.
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards.
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

We reviewed a variety of data sources in our investigation of potential practices, processes or controls to consider. Among the sources we reviewed were the NESHAP for various industries that were promulgated since the MACT standards being reviewed in this action. We reviewed the regulatory requirements and/or technical analyses associated with these regulatory actions to identify any practices, processes and control technologies considered in these efforts that could be applied to emission

sources in the Secondary Aluminum Production source category, as well as the costs, non-air impacts and energy implications associated with the use of these technologies. Additionally, we requested information from facilities regarding developments in practices, processes or control technology. Finally, we reviewed information from other sources, such as state and/or local permitting agency databases and industry-supported databases.

IV. Revised Analytical Results and Proposed Decisions for the Secondary Aluminum Production Source Category

A. What are the results of the risk assessment and analysis?

1. *Inhalation Risk Assessment Results*

Table 3 provides an overall summary of the results of the inhalation risk assessment.

TABLE 3—SECONDARY ALUMINUM PRODUCTION SOURCE CATEGORY INHALATION RISK ASSESSMENT RESULTS

Number of facilities modeled	Maximum individual cancer risk (in 1-million) [a]		Estimated annual cancer incidence (cases/yr) [d]	Estimated population at increased risk of cancer ≥1-in-1 million [d]	Maximum chronic non-cancer TOSHI [b]		Worst-case maximum screening acute non-cancer HQ [c]
	Based on actual emissions	Based on allowable emissions			Based on actual emissions level	Based on allowable emissions level	
Major Sources (52)	0.6	4	0.0007	0	0.04	0.1	$HQ_{(REL)}$ = 0.7 (HF). $HQ_{(AEGL1)}$ = 0.4 (HCl).
Area Sources (103)	0.3	1	0.001	0	0.0003	0.001	NA.
Facility-wide (52 Major Sources)	70	NA	0.05	760,000	1	NA	NA.

[a] Estimated maximum individual excess lifetime cancer risk due to HAP emissions from the source category for major sources and for D/F emissions from the area sources.
[b] Maximum TOSHI. The target organ with the highest TOSHI for the Secondary Aluminum Production source category for both actual and allowable emissions is the respiratory system.
[c] There is no acute dose-response value for D/F. Thus an acute HQ value for area sources was not calculated. The maximum off-site HQ acute value of 0.7 for actuals is driven by emissions of hydrofluoric acid. See section III.A.3 of this document for explanation of acute dose-response values. Acute assessments are not performed on allowable emissions.
[d] These estimates are based upon actual emissions.

The inhalation risk modeling performed to estimate risks based on actual and allowable emissions relied primarily on emissions data from the ICRs. The results of the chronic baseline inhalation cancer risk assessment indicate that, based on estimates of current actual emissions, the MIR posed by the Secondary Aluminum Production source category from major sources and from area sources was less than 1-in-1 million. The estimated cancer incidence is slightly higher for area sources compared to the major sources due to the larger number of area sources nationwide. The total estimated cancer incidence from secondary aluminum production sources from both major and area sources based on actual emission levels is 0.002 excess cancer cases per year, with emissions of D/F, naphthalene and PAH contributing 48 percent, 31 percent and 11 percent, respectively, to this cancer incidence. In addition, we note that there are no excess cancer risks greater than or equal to 1-in-1 million as a result of actual emissions from this source category over a lifetime. The maximum modeled chronic non-cancer HI (TOSHI) value for the source category for both major and area sources based on actual emissions was estimated to be 0.04, with HCl emissions from group 1 furnaces accounting for 99 percent of the HI.

When considering MACT-allowable emissions, the MIR is estimated to be up to 4-in-1 million, driven by emissions of D/F compounds, naphthalene and PAHs from the scrap dryer/delacquering/decoating kiln. The estimated potential cancer incidence considering allowable emissions for both major and area sources is estimated to be 0.014 excess cancer cases per year, or 1 case every 70 years. Approximately 3,400 people were estimated to have cancer risks greater than or equal to 1-in-1 million considering allowable emissions from secondary aluminum plants. When considering MACT-allowable emissions, the maximum chronic non-cancer TOSHI value was estimated to be 0.1, driven by allowable emissions of HCl from the group 1 furnaces.

2. Acute Risk Results

Our screening analysis for worst-case acute impacts based on actual emissions indicates no pollutants exceeding an HQ value of 1 based upon the REL.

3. Multipathway Risk Screening Results

Results of the worst-case Tier 1 screening analysis indicate that 36 of the 52 major sources exceeded the PB–HAP emission cancer screening rates (based on estimates of actual emissions) for D/F, and 3 of the 52 major sources exceeded the Tier 1 screen value for PAHs. Regarding area sources, 60 of the 103 area sources exceeded the PB–HAP emission cancer screening rates (based on estimates of actual emissions) for D/F. For the compounds and facilities that did not screen out at Tier 1, we conducted a Tier 2 screen. The Tier 2 screen replaces some of the assumptions used in Tier 1 with site-specific data, including the location of fishable lakes and local precipitation, wind direction and speed. The Tier 2 screen continues to rely on high-end assumptions about consumption of local fish and locally grown or raised foods (adult female angler at 99th percentile consumption for fish [23] for the subsistence fisherman scenario and 90th percentile consumption for locally grown or raised foods [24] for the farmer scenario). It is important to note that, even with the inclusion of some site-specific information in the Tier 2 analysis, the multipathway screening analysis is still a very conservative, health-protective assessment (*e.g.*, upper-bound consumption of local fish and locally grown and/or raised foods) and in all likelihood will yield results that serve as an upper-bound multipathway risk associated with a facility.

While the screening analysis is not designed to produce a quantitative risk result, the factor by which the emissions exceed the threshold serves as a rough gauge of the "upper-limit" risks we would expect from a facility. Thus, for

[23] Burger, J. 2002. *Daily Consumption of Wild Fish and Game: Exposures of High End Recreationists.* International Journal of Environmental Health Research 12:343–354.

[24] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

example, if a facility emitted a PB–HAP carcinogen at a level 2 times the screening threshold, we can say with a high degree of confidence that the actual maximum cancer risks will be less than 2-in-1 million. Likewise, if a facility emitted a noncancer PB–HAP at a level 2 times the screening threshold, the maximum noncancer hazard would represent an HQ less than 2. The high degree of confidence comes from the fact that the screens are developed using the very conservative (health-protective) assumptions that we describe above.

Based on the Tier 2 cancer screening analysis, 25 of the 52 major sources and 34 of the 103 area sources emit D/F above the Tier 2 cancer screening thresholds for the subsistence fisher and farmer scenarios. The individual D/F emissions are all scaled based on their toxicity to 2,3,7,8-tetrachlorodibenzo-p-dioxin and reported as toxic equivalents (TEQs). The subsistence fisher scenario for the highest risk facilities exceeds the D/F cancer threshold by a factor of 80 for the major sources and by a factor of 70 for the area sources. The Tier 2 analysis also identifies 23 of the 52 major sources and 26 of the 103 area sources emitting D/F above the Tier 2 cancer screening thresholds for the subsistence farmer scenario. The highest exceedance of the Tier 2 screen value is 40 for the major sources and 20 for the area sources for the farmer scenario.

We have only one major source emitting PAHs above the Tier 2 cancer screen value with an exceedance of 2 for the farmer scenario. All PAH emissions are scaled based on their toxicity to benzo(a)pyrene and reported as TEQs.

A more refined Tier 3 multipathway screening analysis was conducted for six Tier 2 major source facilities. The six facilities were selected because the Tier 2 cancer screening assessments for these facilities had exceedances greater than or equal to 50 times the screen value for the subsistence fisher scenario. The major sources represented the highest screened cancer risk for multipathway impacts. Therefore, further screening analyses were not performed on the area sources. The Tier 3 screen examined the set of lakes from which the fisher might ingest fish. Any lakes that appeared to not be fishable or not publicly accessible were removed from the assessment, and the screening assessment was repeated. After we made the determination the critical lakes were fishable, we analyzed plume rise data for each of the sites. The Tier 3 screen was conducted only on those HAP that exceeded the Tier 2 screening threshold, which for this assessment were D/F and PAHs. Both of these PB–HAP are carcinogenic. The Tier 3 screen resulted in lowering the maximum exceedance of the screen value for the highest site from 80 to 70. Results for the other sites were all less than 70. The highest exceedance of the Tier 2 cancer screen value of 40 for the farmer scenario was also reduced in the Tier 3 screening assessment to a value of 30 for the major sources within this source category.

Overall, the refined multipathway screening analysis for D/F and PAHs utilizing the Tier 3 screen predicts a potential lifetime cancer risk of 70-in-1 million or lower to the most exposed individual, with D/F emissions from group 1 furnaces handling other than clean charge driving the risk. Cancer risks due to PAH emissions for the maximum exposed individual were less than 1-in-1 million.

The chronic non-cancer HQ is predicted to be below 1 for cadmium compounds and 1 for mercury compounds. For lead, we did not estimate any exceedances of the primary lead NAAQS.

Further details on the refined multipathway screening analysis can be found in Appendix 8 of the *Residual Risk Assessment for the Secondary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket.

4. Environmental Risk Screening Results

As described in section III.A of this document, we conducted an environmental risk screening assessment for the Secondary Aluminum Production source category for the following seven pollutants: PAHs, mercury (methyl mercury and mercuric chloride), cadmium, lead, D/F, HCl and HF.

Of the seven pollutants included in the environmental risk screen, major sources in this source category emit PAHs, mercuric chloride, cadmium, lead, D/F, HCl and HF. In the Tier 1 screening analysis for PB–HAP, none of the individual modeled concentrations for any facility in the source category exceeded any of the ecological benchmarks (either the LOAEL or NOAEL) for PAHs, mercuric chloride, cadmium and D/F. For lead, we did not estimate any exceedances of the secondary lead NAAQS. For HCl and HF, the average modeled concentration around each facility (*i.e.*, the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl and HF (*i.e.*, each off-site data point in the modeling domain) was below the ecological benchmarks for all facilities.

Of the seven pollutants included in the environmental risk screen, area sources in this source category are regulated only for D/F. In the Tier 1 screening analysis for D/F, none of the individual modeled concentrations for any facility in the source category exceeded any of the ecological benchmarks (either the LOAEL or NOAEL) for D/F.

5. Facility-Wide Risk Assessment Results

Considering facility-wide emissions at the 52 major sources, the MIR is estimated to be 70-in-1 million driven by arsenic and Ni emissions, and the chronic non-cancer TOSHI value is calculated to be 1 driven by emissions of cadmium compounds. The above risks are driven by emissions from the potline roof vents at the co-located primary aluminum production operations. The Secondary Aluminum Production source category represents less than 1 percent of the inhalation risks from the facility-wide assessment based upon actual emissions. Emissions from primary aluminum sources are being addressed in a separate action. Details regarding primary aluminum sources are available at *http://www.epa.gov/ttn/atw/alum/alumpg.html.*

6. What demographic groups might benefit from this regulation?

To determine whether or not to conduct a demographics analysis, which is an assessment of risks to individual demographic groups, we look at a combination of factors including the MIR, non-cancer TOSHI, population around the facilities in the source category and other relevant factors. For the Secondary Aluminum Production source category, inhalation risks were low with excess cancer risks being less than 1-in-1 million and non-cancer hazards being less than 1. Therefore, we did not conduct an assessment of risks to individual demographic groups for this rulemaking. However, we did conduct a proximity analysis for both area and major sources, which identifies any overrepresentation of minority, low income or indigenous populations near facilities in the source category. The results of the proximity analyses suggest there are a higher percent of minorities, people with low income, and people without a high school diploma living near these facilities (*i.e.*, within 3 miles) compared to the national averages for these subpopulations. However, as explained above, the risks due to HAP emissions from this source category are low for all populations (*e.g.*, inhalation cancer risks are less than 1-in-1 million

for all populations and non-cancer hazard indices are less than 1). Furthermore, we do not expect this supplemental proposal to achieve reductions in HAP emissions. Therefore, we conclude that this supplemental proposal will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. However, this supplemental proposal, if finalized, will provide additional benefits to these demographic groups by improving the compliance, monitoring and implementation of the NESHAP.

The detailed results of the proximity analyses can be found in the *EJ Screening Report for Secondary Aluminum Area Sources* and the *EJ Screening Report for Secondary Aluminum Major Sources,* which are available in the docket for this rulemaking.

B. What are our proposed decisions regarding risk acceptability, ample margin of safety and adverse environmental effects based on our revised analyses?

1. Risk Acceptability

As noted in section II.A.1 of this preamble, the EPA sets standards under CAA section 112(f)(2) using "a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on MIR of approximately 1 in 10 thousand [25]." (54 FR 38045, September 14, 1989).

In this proposal, the EPA estimated risks based on both actual and allowable emissions from secondary aluminum facilities. As discussed above, in determining acceptability, we considered risks based on both actual and allowable emissions.

a. Estimated Risks From Actual Emissions

The baseline inhalation cancer risk to the individual most exposed to emissions from the Secondary Aluminum Production source category is from major sources with cancer risks less than 1-in-1 million based on actual emissions. The total estimated incidence of cancer for this source category from both major and area sources due to inhalation exposures is 0.002 excess cancer cases per year, or 1 case in 500 years. The agency estimates that the maximum chronic non-cancer TOSHI from inhalation exposure for this source category is from major sources with an HI of 0.04 based on actual emissions, with HCl emissions from group 1 furnaces accounting for a large portion (99 percent) of the HI.

The multipathway screening analysis, based upon actual emissions, indicates the excess cancer risk from this source category is lower than 70-in-1 million with D/F emissions representing 99 percent of these potential risks based on the fisher scenario. The multipathway MIR cancer risks are the same for both the major and area sources within this source category for the fisher scenario. For the farmer scenario, the excess cancer risk is lower than 30-in-1 million for the major sources and 20-in-1 million for the area sources. There were no facilities within this source category having a multipathway non-cancer screen value greater than 1 for cadmium or mercury. In evaluating the potential for multipathway effects from emissions of lead, modeled maximum annual lead concentrations were compared to the secondary NAAQS for lead (0.15 $\mu g/m^3$). Results of this analysis estimate that the NAAQS for lead would not be exceeded at any off-site locations.

As noted above, the multipathway screens are conservative and incorporate many health-protective assumptions. For example, the EPA chooses inputs from the upper end of the range of possible values for the influential parameters used in the Tier 2 screen and assumes that the exposed individual for each scenario exhibits ingestion behavior that would lead to a high total exposure. A Tier 2 or 3 exceedance of a cancer or non-cancer screen value cannot be equated with an actual risk value or a HQ or HI. Rather, it represents a high-end estimate of what the risk or hazard may be. For example, a non-cancer screen value of 2 can be interpreted to mean that we have high confidence that the HI is lower than 2. Similarly, a cancer screen value of 30 for a carcinogen means that we have high confidence that the risk is lower than 30-in-1-million. Confidence comes from the conservative, or health-protective, assumptions that are used in the Tier 2 and Tier 3 screens. The Tier 3 screen improves the accuracy of the Tier 2 screen through validation of impacted lakes assessed and accounting for mass lost to the upper air sink, which reduces the uncertainty in the screen. The maximum Tier 3 exceedance of the cancer screen values for the secondary aluminum source category are 70 for the sustainable fisher scenario and 30 for the farmer scenario, both driven by D/F emissions from major sources.

The screening assessment of worst-case acute inhalation impacts from baseline actual emissions indicates no pollutants exceeding an HQ value of 1 based on the REL, with an estimated worst-case maximum acute HQ of 0.7 for HF based on the 1-hour REL.

b. Estimated Risks From Allowable Emissions

The EPA estimates that the inhalation cancer risk to the individual most exposed to emissions from the Secondary Aluminum Production source category is up to 4-in-1 million based on allowable emissions from major sources, with D/F, naphthalene and PAH emissions driving the risks. The EPA estimates that the incidence of cancer due to inhalation for the entire source category based on allowable emissions could be up to 0.014 excess cancer cases per year, or 1 case approximately every 70 years. About 3,400 people face an estimated increased cancer risk greater than or equal to 1-in-1 million due to inhalation exposure to allowable HAP emissions from this source category.

The risk assessment estimates that the maximum chronic non-cancer TOSHI from inhalation exposure values for the source category is up to 0.1 based on allowable emissions, driven by HCl emissions from major sources.

c. Acceptability Determination

In determining whether risks are acceptable for this source category, the EPA considered all available health information and risk estimation uncertainty as described above. As noted above, the agency estimated risk from actual and allowable emissions. While there are uncertainties associated with both the actual and allowable emissions, we consider the allowable emissions to be an upper bound, based on the conservative methods we used to calculate allowable emissions.

The risk results indicate that both the actual and allowable inhalation cancer risks to the individual most exposed are up to but no greater than approximately 4-in-1 million, based on allowable emissions which is considerably less than 100-in-1 million, the presumptive limit of acceptability. The MIR based on actual emissions is 0.6-in-1 million, well below the presumptive limit as well. The maximum chronic non-cancer hazard indices for both the actual and allowable inhalation non-cancer risks to the individual most exposed are less than 1. The maximum individual non-cancer HI is 0.04 based on actual

[25] 1-in-10 thousand is equivalent to 100-in-1 million. The EPA currently describes cancer risks as "n-in-1 million."

emissions and 0.1 based on allowable emissions.

The maximum acute non-cancer HQ for all pollutants was below 1, with a maximum value of 0.7 based on the REL for hydrofluoric acid. The excess cancer risks from the multipathway screen from actual D/F and PAH emissions from major and area sources indicate that the risk to the individual most exposed could be up to, but no greater than, 70-in-1 million for the fisher scenario and 30-in-1 million for the farmer scenario. These results are less than 100-in-1 million, which is the presumptive limit of acceptability. The multipathway Tier 2 screen for non-cancer is at 1 for mercury and cadmium.

The multipathway screens are based on model runs that use upper end values for influential parameters and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. The multipathway screens also include some hypothetical elements, namely the existence and location of the hypothetical farmer and fisher.

Considering all of the health risk information and factors discussed above, including the uncertainties discussed in section III.A.8 of this preamble, the EPA proposes that the risks at baseline are acceptable since the cancer risks are below the presumptive limit of acceptability and the non-cancer results indicate there is minimal likelihood of adverse non-cancer health effects due to HAP emissions from this source category.

2. Ample Margin of Safety Analysis

Under the ample margin of safety analysis, we evaluated the cost and feasibility of available control technologies and other measures (including the controls, measures and costs reviewed under the technology review) that could be applied in this source category to further reduce the risks (or potential risks) due to emissions of HAP identified in our risk assessment, along with all of the health risks and other health information considered in the risk acceptability determination described above. In this analysis, we considered the results of the technology review, risk assessment and other aspects of our MACT rule review to determine whether there are any cost-effective controls or other measures that would reduce emissions further to provide an ample margin of safety with respect to the risks associated with these emissions.

Our inhalation risk analysis indicated very low potential for risk from the facilities in the source category, and, therefore, very little inhalation risk reductions could be realized regardless of the availability of control options. Our technology review, which was conducted for the 2012 proposal and is in large part applicable to this supplemental proposal (see section IV.C below for more discussion of the technology review), did not identify any new practices, controls or process options that are being used in this industry or in other industries that would be cost effective for further reduction of these emissions and risks.

Our multipathway screening analysis results for the 2012 proposal indicated exceedances of the worst-case screening levels which did not necessarily indicate any risks. However, they did suggest a potential for risks. For this supplemental proposal, a more refined multipathway screening analysis was conducted, including a Tier 3 screen for the top six major source facilities for cancer. The more refined screening analysis was conducted only on those PB–HAP that exceeded the screening threshold, which for this assessment were PAHs and D/F. The refined multipathway screening analysis showed that the earlier screening analysis for the 2012 proposal over-predicted the potential cancer risk when compared to the refined analysis for three of the six facilities assessed, with emissions of D/F driving these cancer risks. The remaining facilities had the same cancer screen value in the refined analysis as in the earlier screening results when rounded to 1 significant figure. The cancer risks due to PAH emissions were less than 1-in-1 million based on the refined analysis.

To evaluate the potential to reduce D/F emissions and risks, as part of our revised ample margin of safety analysis, we used the same analysis that we conducted for the 2012 proposal except that we incorporated more recent D/F emissions data and control cost information. As in the analysis conducted for the 2012 proposal, we evaluated two control options. Option 1 considered lowering the existing D/F emissions limit from 15 to 10 μg TEQ/Mg feed for all group 1 furnaces processing other than clean charge. Option 2 considered lowering the existing D/F limit for group 1 furnaces processing other than clean charge after applying a subcategorization based on facility production capacity. An emission reduction to 10 μg TEQ/Mg represents a level that could potentially be met with an activated carbon injection system. With regard to the option of lowering the D/F emission limit to 10 μg TEQ/Mg feed for group 1 furnaces handling other than clean charge, we estimate that about 12 furnaces at eight facilities would need to reduce their D/F emissions and that the total capital costs would be $390,000 with total annualized costs of $1.4 million. This option would achieve an estimated 0.49 grams TEQ reduction of D/F emissions with an overall cost effectiveness of about $2.9 million per gram D/F TEQ. For the second option, facilities with group 1 furnace production capacity greater than 200,000 tpy (melting other than clean charge) would be required to meet a limit of 10 μg TEQ/Mg limit. For this option, we estimate that 4 furnaces at two facilities would be required to reduce their D/F emissions. We estimate that the total capital costs would be $130,000 with total annualized costs of $460,000. This option would achieve an estimated 0.12 grams TEQ reduction of D/F emissions with an overall cost-effectiveness of about $3.8 million per gram D/F TEQ. As we concluded in the ample margin of safety analysis for the 2012 proposal, our analysis indicates that these options would result in very little emission reductions (0.49 grams TEQ of D/F for Option 1 and 0.12 grams TEQ of D/F reductions for Option 2) and, therefore, would result in little or no changes to the potential risk levels. After considering the costs and the level of reductions that would be achieved, we have decided, as we did in the 2012 proposal, not to propose any of these options. For more information on this analysis, see the *Supplemental Proposal Technical Support Document for the Secondary Aluminum Production Source Category*, which is available in the public docket for this proposed rulemaking.

In the 2012 proposal, we also evaluated possible options based on work practices to achieve further emission reductions. The current subpart RRR NESHAP includes work practices to minimize D/F emissions which include scrap inspection, limitations on materials processed by group 2 furnaces, temperature and residence time requirements for afterburners controlling sweat furnaces, labeling requirements, capture/collection requirements and requirements for an operations, maintenance and monitoring plan that contains details on the proper operation and maintenance of processes and control equipment. For the 2012 proposal, we searched for and evaluated other possible work practices such as good combustion practices, better scrap inspection and cleaning, and process monitoring. However, none of these potential work practices were determined to be feasible and effective

in further reducing D/F emissions for this source category. Thus, we did not identify any feasible or applicable work practices for this industry beyond those that are currently in the MACT rule. Therefore, in the 2012 proposal we did not propose any additional work practices. Since the 2012 proposal, we have not identified any changes in the sources of emissions, the types of pollutants emitted or the work practices available to be used in the secondary aluminum production industry. Therefore, as in the 2012 proposal, we are not proposing any revisions to subpart RRR based on work practices. Further details on work practices and control options are provided in the *Supplemental Proposal Technology Review for the Secondary Aluminum Production Source Category,* which is available in the public docket for this rulemaking.

In accordance with the approach established in the Benzene NESHAP, we weighed all health risk information and factors considered in the risk acceptability determination, including uncertainties, along with the cost and feasibility of control technologies and other measures that could be applied in this source category, in making our ample margin of safety determination. In summary, our risk analysis indicated very low potential for risk, and we identified no developments in technology that would be cost effective in reducing HAP emissions relative to reductions already being achieved. We also did not identify any cost effective approaches to further reduce D/F emissions and multipathway risk beyond what is already being achieved by the current NESHAP.

Because of the high cost associated with the use of activated carbon injection systems and because work practices are already required to help ensure low emissions, and in light of the considerations discussed above, we propose that the existing MACT standards provide an ample margin of safety to protect public health.

3. Adverse Environmental Effects

Based on the results of our environmental risk screening assessment, we conclude that there is not an adverse environmental effect as a result of HAP emissions from the Secondary Aluminum Production source category. We are proposing that it is not necessary to set a more stringent standard to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect.

C. What are the results and proposed decisions based on our technology review?

A technology review was conducted for the Secondary Aluminum Production source category and is described in the 2012 proposal at 77 FR 8596, February 14, 2012. Details of the technology review and its findings are available in the memorandum, *Draft Technology Review for the Secondary Aluminum Production Source Category* (Docket item EPA–HQ–OAR–2010–0544–0144). The typical controls used to minimize emissions at secondary aluminum facilities include fabric filters for control of PM from aluminum scrap shredders; afterburners for control of THC and D/F from thermal chip dryers; afterburners plus lime-injected fabric filters for control of PM, HCl, THC and D/F from scrap dryers/delacquering kilns/decoating kilns; afterburners for control of D/F from sweat furnaces; fabric filters for control of PM from dross-only furnaces and rotary dross coolers; lime-injected fabric filters for control of PM and HCl from in-line fluxers; and lime-injected fabric filters for control of PM, HCl and D/F from group 1 furnaces. In our review of technology, we determined that there have been some developments in practices, processes or control technologies that have been implemented in this source category since promulgation of the current NESHAP. We stated in the 2012 proposal that these findings did not warrant any changes to subpart RRR. Following the 2012 proposal, no public comments were received that would alter the conclusions of our technology review for the Secondary Aluminum Production source category. Therefore, for this supplemental proposal, we are proposing that the technology review findings are still valid. The EPA is not aware of any changes in technology development since the 2012 proposal.

As part of the technology review for the 2012 proposal, we also evaluated other technologies that have the potential to reduce HAP emissions, in particular emissions of D/F. See *Draft Technical Support Document for the Secondary Aluminum Production Source Category,* Docket item EPA–HQ–OAR–2010–0544–0152. We have updated that analysis for this supplemental proposal. See *Supplemental Proposal Technical Support Document for the Secondary Aluminum Production Source Category* and the *Supplemental Proposal Technology Review for the Secondary Aluminum Production Source Category,* which are available in the public docket for this rulemaking. Under this analysis, we evaluated the same approaches that were evaluated under the ample margin of safety analysis described in section IV.B of this document. We evaluated the option of lowering the existing D/F limit from 15 to 10 μg TEQ/Mg feed for group 1 furnaces processing other than clean charge either at all secondary aluminum facilities or only at larger secondary aluminum facilities based on facility production capacity. The lower D/F emissions limits potentially could be met by using an activated carbon injection system. Using updated information on emissions and control costs, we estimate that about 12 furnaces at eight facilities would need to reduce their D/F emissions to meet the 10 μg TEQ/Mg feed for group 1 furnaces and that the total capital costs would be $390,000 with total annualized costs of $1.4 million. This option would achieve an estimated 0.49 grams TEQ reduction of D/F emissions with an overall cost effectiveness of about $2.9 million per gram D/F TEQ. For the second option, only facilities with group 1 furnace production capacity greater than 200,000 tpy (melting other than clean charge) would be required to meet the lower 10 μg TEQ/Mg limit. For this option, we estimate that four furnaces at two facilities would be required to reduce their D/F emissions. We estimate that the total capital cost would be $130,000 with total annualized costs of $460,000. This option would achieve an estimated 0.12 grams TEQ reduction of D/F emissions with an estimated overall cost effectiveness of $3.8 million per gram D/F TEQ. (The details of this analysis are in the *Supplemental Proposal Technical Support Document for the Secondary Aluminum Production Source Category,* which is available in the public docket for this rulemaking. After considering the costs and the small emission reductions that would be achieved, we have decided not to propose any of these options.

D. What other actions are we proposing?

In the 2012 proposal, we proposed amendments to correct and clarify existing requirements in subpart RRR. In this supplemental proposal, we are proposing revisions to certain rule corrections and clarifications that were in the 2012 proposal as well as proposing alternative compliance options to the operating and monitoring requirements for sweat furnaces. On these limited revisions, we are soliciting comment. As discussed above, the 2012 proposal also contained other proposed rule corrections and clarifications for which we are not proposing any changes in this document, and,

therefore, for which we are not seeking public comment (if EPA nonetheless were to receive any such comments, the comments would be outside the scope of this supplemental proposal and would not be considered).

1. Changing Furnace Classification

In the 2012 proposal, we proposed to address an area of uncertainty under subpart RRR by specifying in 40 CFR 63.1514 rule provisions expressly allowing changes in furnace classification, subject to procedural and testing requirements, operating requirements and recordkeeping requirements. We proposed a frequency limit of no more than one change in classification (and associated reversion) every six months, with an exception for planned control device maintenance activities requiring shutdown. We received comments on the 2012 proposal requesting additional or unlimited changes in furnace classification. Based on the information received, we reevaluated the appropriate limit on frequency of furnace classification changes. The EPA received from one commenter an inventory of the number of classification changes that occurred each year at a specific subpart RRR furnace over a nearly 10-year period (available in the docket for this rulemaking). The highest number of furnace classification changes in one year, including both planned and unplanned changes, was nine.

Based on the comments and information received and because of the potential difficulty in distinguishing between a planned and unplanned change in classification, we are proposing and requesting comments on a revised limit on the frequency of changes in furnace classification of four (including the four associated reversions) in any 6-month period, including both planned and unplanned changes in classification, with a provision allowing additional changes by petitioning the permitting authority for major sources, or the Administrator for area sources. These revisions in proposed 40 CFR 63.1514(e) would balance the interest in allowing industry to make furnace classification changes while preserving the EPA's and delegated authorities' practical and effective enforcement of the emission limitations, work practice standards and other requirements of subpart RRR. We request that any commenter who would like the EPA to consider a different limit on frequency to include a specific rationale and factual basis for why a different frequency would be appropriate as well as any data on historical frequencies of furnace classification changes under subpart RRR.

We are specifically requesting comments on the revised proposed provisions in 40 CFR 63.1514(e), which addresses the frequency of changing furnace classification. No substantive changes have been made to the other proposed provisions in 40 CFR 63.1514, and we are not requesting comments on any other aspect of the proposed provisions for furnace classification changes. We will address the comments previously received on the 2012 proposal, as well as comments that are received in response to the revised proposed frequency limit in this document, when we take final rulemaking action.

2. Worst Case Scenario Testing

In the 2012 proposal, we proposed amendments to clarify that performance tests under multiple scenarios may be required in order to reflect the emissions ranges for each regulated pollutant. We received comments on the 2012 proposal that the worst case charge materials, and blends of these, have differing process rates and, therefore, the charge rate from the stack tests is not representative of the charge rate that will be achieved during normal operations. Based on the comments received and recognizing that it may be necessary to conduct performance tests under one or multiple scenarios to be representative of the range of normal operating conditions, we are proposing revised language in 40 CFR 63.1511(b)(1) to clarify the conditions under which subpart RRR performance tests must be conducted. The intention in the subpart RRR rule is to require testing under "worst case" conditions from the standpoint of emissions and to establish parameters based on such testing that ensure compliance under all operating conditions. For example, in a response to comments on the original proposed subpart RRR rule regarding the inlet temperature requirement for fabric filters, the EPA stated that testing under worst case conditions, such as higher than normal fabric filter inlet temperatures, could provide a larger temperature operating range, which would be used to monitor and ensure continuous compliance between periodic performance tests (65 FR 15699, March 23, 2000). In the EPA response-to-comments document (*Summary of Public Comments and Responses on Secondary Aluminum NESHAP,* December 14, 1999, Docket No. A–92–61, item V–C–1, comment 4.1.47), the EPA explained that requiring multiple tests over a range of different furnace operating conditions will show that the selected monitoring parameters are valid indicators of emissions and that it may not be possible for a single test to be representative of worst case conditions and that more than a single test may be required. It is not permissible, for example, to demonstrate compliance while processing relatively uncontaminated scrap, and then at a later time, when the supply of this scrap is constrained, process more heavily contaminated scrap, without demonstrating compliance under these conditions based on previous emissions testing or on new emissions testing if previous tests would not be representative of the emissions from the processing of the more heavily contaminated scrap.

To clarify the requirements for testing, we are proposing that performance tests be conducted under representative (normal) conditions expected to produce the highest level of HAP emissions expressed in the units of the emission standards for the HAP (considering the extent of scrap contamination, reactive flux addition rate and feed/charge rate). If a single test condition is not expected to produce the highest level of emissions for all HAP, testing under two or more sets of conditions (for example high contamination at low feed/charge rate and low contamination at high feed/charge rate) may be required. Any subsequent performance tests for the purposes of establishing new or revised parametric limits shall be allowed upon pre-approval from the permitting authority for major sources or the Administrator for area sources. These new parametric settings shall be used to demonstrate compliance for the period being tested. We solicit comment on whether the proposed amendment adequately addresses and clarifies the requirement that multiple tests may be necessary to represent different operational conditions.

3. Testing of Uncontrolled Furnaces

As explained in the 2012 proposal, while subpart RRR specifies capture and collection requirements for emission units that are equipped with add-on air pollution control devices, there are no such requirements for furnaces that are not equipped with an add-on air pollution control device. To clarify how uncontrolled sources are to be tested for compliance, in 2012 we proposed compliance alternatives for uncontrolled affected sources. Specifically, in 2012 we proposed either the installation of ACGIH hooding or an assumption of 67-percent capture

efficiency for furnace exhaust (*i.e.*, multiply emissions measured at the furnace exhaust outlet by 1.5 to calculate the total estimated emissions from the furnace). Under the 2012 proposed provisions, if the source fails to demonstrate compliance using the 67-percent capture efficiency assumption, the source would have to retest using hooding that meets ACGIH guidelines or petition the permitting authority for major sources, or the Administrator for area sources, that such hoods are impractical and propose alternative testing procedures that will minimize unmeasured fugitive emissions. In the 2012 proposal, we proposed that the retesting would need to occur within 90 days.

We received comments that the EPA was proposing to mandate ACGIH hooding during performance testing for uncontrolled furnaces. Commenters also provided information that ACGIH-compliant hoods are not possible to install on round top furnaces.

Based on the comments received and our consideration of specific testing scenarios and types of uncontrolled furnaces, we are proposing revised requirements for the testing of uncontrolled furnaces. In this supplemental proposal, we are proposing that if the source fails to demonstrate compliance by the uncontrolled furnace using the 67-percent capture efficiency assumption proposed in the 2012 proposal, then they must retest using ACGIH hooding within 180 days (rather than the 90 days specified in the 2012 proposal), or the source can petition the appropriate authority within 180 days that such hoods are impracticable and propose alternative testing procedures to minimize emissions. No time constraints on petitioning the appropriate authority were specified in the 2012 proposal. In this supplemental proposal, we are also proposing to clarify situations and circumstances whereby installation of hooding according to ACGIH guidelines would be considered impractical and are adding examples of procedures for minimizing fugitive emissions during testing for such situations and circumstances. The EPA is proposing conditions that would be considered impractical to install hooding according to ACGIH guidelines. The EPA is also proposing alternative procedures to minimize fugitive emissions in the event that ACGIH-compliant hooding cannot be installed. These alternative procedures are described in more detail below.

Comments on the 2012 proposal also contained information regarding the feasibility of installing ACGIH-compliant hooding on certain furnace types in preparation for testing. Based on our review of the information submitted by the commenters, we agree that it is not possible to install ACGIH-compliant hoods on round top furnaces for testing because the top of the furnace would have to be removed by a crane operating above the furnace. We also agree that case-by-case impracticability determinations are not necessary for round top furnaces. Consequently, we are proposing that existing round top furnaces be excluded from the proposed requirement either to install ACGIH-compliant hooding or to use a 67-percent capture efficiency, as well as from the proposed requirement that a petition of impracticality be submitted to the appropriate authority. Instead, we propose that round top furnaces must be operated to minimize fugitive emissions during testing. We have not received any documentation to support requests by commenters to exclude other types of furnaces such as box reverberatory furnaces and box reverberatory furnaces with a side door. Therefore, we have not proposed to exclude them, but we are prepared to evaluate any comments submitted regarding impracticality and other types of furnaces and, most importantly, supporting documentation that we may receive from commenters.

Under this supplemental proposal, owners or operators of uncontrolled furnaces, including round top furnaces, who petition the appropriate authority that it is impractical to install ACGIH-compliant hooding would be required to minimize fugitive emissions from such furnaces during testing. In response to commenters' requests, we are proposing example procedures that can be used to minimize unmeasured fugitive emissions during testing. These procedures may include, if practical, one or more of the following, but are not limited to:

- Installing a hood that does not entirely meet ACGIH guidelines;
- Using the building as an enclosure and measuring emissions exhausted from the building if there are no other furnaces or other significant sources in the building of the pollutants to be measured;
- Installing temporary baffles on the sides or top of the furnace opening, if it is practical to do so where they will not interfere with material handling or with the furnace door opening and closing;
- Increasing the exhaust rate from the furnace from furnaces with draft fans, so as to capture emissions that might otherwise escape into the building;
- Minimizing the time the furnace doors are open or the top is off;
- Delaying gaseous reactive fluxing until charging doors are closed or the top is on;
- Agitating or stirring molten metal as soon as practicable after salt flux addition and closing doors as soon as possible after solid fluxing operations, including mixing and dross removal;
- Keeping building doors and other openings closed to the greatest extent possible to minimize drafts that would divert emissions from being drawn into the furnace; and
- Maintaining burners on low-fire or pilot operation while the doors are open or the top is off.

We are also proposing revised amendments to clarify in what circumstances installation of temporary capture hoods for testing would be considered impractical. We are proposing that temporary capture hooding installation would be considered impractical if:

- Building or equipment obstructions (for example, wall, ceiling, roof, structural beams, utilities, overhead crane or other) are present such that the temporary hood cannot be located consistent with acceptable hood design and installation practices;
- Space limitations or work area constraints exist such that the temporary hood cannot be supported or located to prevent interference with normal furnace operations or avoid unsafe working conditions for the furnace operator; or
- Other obstructions and limitations subject to agreement by the permitting authority for major sources, or the Administrator for area sources.

We invite comments and solicit information on certain aspects of the proposed compliance provisions for testing of uncontrolled furnaces. Specifically, we are soliciting comments and information on the requirements in this supplemental proposal that specify the types of obstacles and limitations that can be used to show that testing using ACGIH-compliant hooding is impractical, the procedures that can be implemented to minimize unmeasured fugitive emissions during testing, and the exemption of existing round top furnaces from the requirements to test using ACGIH-compliant hooding or apply the 67-percent capture efficiency assumption. We are not soliciting comment on any other element of the provisions proposed in the 2012 proposal regarding testing of uncontrolled furnaces.

4. Annual Inspections of Capture/Collection Systems

In the 2012 proposal, we proposed codifying in subpart RRR our existing interpretation that annual hood inspections include flow rate measurements using EPA Reference Methods 1 and 2 in Appendix A to 40 CFR part 60. These flow rate measurements supplement the effectiveness of the required visual inspection for leaks, to reveal the presence of obstructions in the ductwork, confirm that fan efficiency has not declined and provide a measured value for air flow. Commenters requested that the EPA allow flexibility in the methods used to complete the annual inspections of capture/collection systems stating that the use of volumetric flow measurement was often not necessary and Method 1 and 2 tests could be a cost burden for some facilities. Comments also indicated that routine, but less frequent, flow rate measurements could ensure that capture/collection systems are operated properly and suggested alternative methods of ensuring the efficiency of capture/collection systems.

Based on the comments received and our consideration of inspection needs, the EPA is proposing additional options that provide more flexibility in how affected sources can verify the efficiency of their capture/collection system. Instead of annual Methods 1 and 2 testing, we propose that sources may choose to perform flow rate measurements using EPA Methods 1 and 2 once every 5 years provided that a flow rate indicator consisting of a pitot tube and differential pressure gauge is installed and used to record daily the differential pressure and to ensure that the differential pressure is maintained at or above 90 percent of the pressure differential measured during the most recent Method 2 performance test series, and that the flow rate indicator is inspected annually. As another option to annual flow rate measurements using Methods 1 and 2, the EPA is proposing to allow Methods 1 and 2 testing to be performed every 5 years provided that daily measurements of the revolutions per minute (RPM) of the capture and collection system's fan are taken, the readings are recorded daily and the fan RPM is maintained at or above 90 percent of the RPM measured during the most recent Method 2 performance test. Further, we are proposing that as an alternative to the flow rate measurements using Methods 1 and 2, the annual hood inspection requirements can be satisfied by conducting annual verification of a permanent total enclosure using EPA Method 204. We are further proposing that as an alternative to the annual verification of a permanent total enclosure using EPA Method 204, verification can be performed once every 5 years if negative pressure in the enclosure is directly monitored by a pressure indicator and readings are recorded daily or the system is interlocked to halt material feed should the system not operate under negative pressure. In this supplemental proposal, we are also proposing that readings outside a specified range would need to be investigated and steps taken to restore normal operation, and that pressure indicators would need to be inspected annually for damage and operability.

5. Sweat Furnace Operating and Monitoring Requirements

We are also proposing to amend 40 CFR 63.1506(c) and 63.1510(d) to provide sweat furnaces with alternative compliance options to the ACGIH Guidelines and the required annual flow rate measurements using EPA Methods 1 and 2. We are proposing that in lieu of meeting the ACGIH guidelines for capture and collection and the annual flow rate measurements using Methods 1 and 2, sweat furnaces may comply by demonstrating negative air flow into or towards the sweat furnace opening as well as operating and maintaining the sweat furnace in such a way that minimizes fugitive emissions.

6. Startup, Shutdown, Malfunction and the Malfunction Affirmative Defense

In the 2012 proposal, we proposed to eliminate provisions that exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standards during periods of Startup, Shutdown and Malfunction (SSM). We explained in the 2012 proposal that because the scrap processed at secondary aluminum production facilities is the source of emissions, we expect emissions during startup and shutdown would be no higher, and most likely would be significantly lower, than emissions during normal operations since no scrap is processed during those periods. We stated that we knew of no reason why the existing standards should not apply at all times. For production processes in the Secondary Aluminum Production source category where the standards are expressed in units of pounds per ton of feed or similar units (*i.e.*, thermal chip dyers, scrap dryer/delacquering kiln/decoating kilns, dross-only furnaces, in-line fluxers using reactive flux and group 1 furnaces), the 2012 proposal included a method for demonstrating compliance with those limits based on emissions measured during startup and shutdown.

Because conducting meaningful testing during periods of startup and shutdown can be problematic, in this supplemental proposal we are proposing an additional method that can be used to demonstrate compliance with production based emission limits during periods of startup and shutdown. Together, these proposed compliance provisions for periods of startup and shutdown better reflect the MACT requirement for those periods. Recognizing that the source of HAP emissions is the processing of scrap and the use of fluxes during processing and that the heat for processing in the Secondary Aluminum Production source category is generated exclusively by use of clean fuels—natural gas, propane or electricity—we are proposing that compliance with emission standards during startup and shutdown can be demonstrated by keeping records that show that the feed/charge rate was zero, the flux rate was zero and the affected source or emission unit either was heated with electricity, propane or natural gas as the sole sources of heat or was not heated (see proposed section 63.1513(f)). We are also proposing that the following records be kept: The date and time of each startup and shutdown, the quantity of feed/charge and flux introduced during each startup and shutdown and the types of fuel used to heat the unit during startup and shutdown.

We are also proposing to define periods of startup and shutdown. For the purposes of subpart RRR, startup means "the period of operation for thermal chip dryers, scrap dryers/delacquering kilns, decoating kilns, dross-only furnaces, group 1 furnaces, in-line fluxers, sweat furnaces and group 2 furnaces that begins with equipment warming from a cold start or a complete shutdown. Startup ends at the point that feed/charge is introduced." Shutdown means the period of operation for thermal chip dryers, scrap dryers/delacquering kilns, decoating kilns, dross-only furnaces, group 1 furnaces, in-line fluxers, sweat furnaces and group 2 furnaces that begins when the introduction of feed/charge is halted and all product has been removed from the emission unit (*e.g.*, by tapping a furnace)."

We solicit comments and additional information related to the proposed definitions of startup and shutdown, as well as the additional option proposed in this supplemental proposal for demonstrating compliance during

periods of startup and shutdown based on the presence (or absence) in the furnace of feed/charge or fluxing, and the type of combustion fuels or the absence of combustion fuels. We are also proposing to move the requirements for compliance demonstration during startup and shutdown from the emission standards section (section 63.1505), where they were in the 2012 proposal, to the more appropriate compliance demonstration section (section 63.1513). However, we are not soliciting comments on the compliance demonstration method for periods of startup and shutdown that was presented in the 2012 proposal.

In the 2012 proposal, we proposed to eliminate provisions that exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standards during periods of SSM. We also included provisions for affirmative defense to civil penalties for violations of emission standards caused by malfunctions. Periods of startup, normal operations and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition sudden, infrequent and not reasonably preventable failures of emissions control, process or monitoring equipment. As explained in the 2012 proposal (77 FR 8598), the EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards. Under section 112, emissions standards for new sources must be no less stringent than the level "achieved" by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation "achieved" by the best performing 12 percent of sources in the category. There is nothing in section 112 that directs the agency to consider malfunctions in determining the level "achieved" by the best performing sources when setting emission standards. As the United States Court of Appeals for the District of Columbia Circuit has recognized, the phrase "average emissions limitation achieved by the best performing 12 percent of" sources "says nothing about how the performance of the best units is to be calculated." *Nat'l Ass'n of Clean Water Agencies* v. *EPA*, 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in section 112 requires the agency to consider malfunctions as part of that analysis. A malfunction should not be treated in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a "normal or usual manner" and no statutory language compels the EPA to consider such events in setting section 112 standards.

Further, accounting for malfunctions in setting emission standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. As a result, the performance of units that are malfunctioning is not "reasonably" foreseeable. See, *e.g.*, *Sierra Club* v. *EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) ("The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' ") See also, *Weyerhaeuser* v. *Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation."). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99 percent removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99 percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with section 112 and is a reasonable interpretation of the statute.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable and was not instead caused in part by poor maintenance or careless operation.

If the EPA determines in a particular case that enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA interpretation of the CAA and, in particular, section 112 is reasonable and encourages practices that will avoid malfunctions. Administrative and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations.

As noted above, the 2012 proposal included an affirmative defense to civil penalties for violations caused by malfunctions. The EPA included the affirmative defense in the 2012 proposal as it had in several prior rules in an effort to create a system that incorporates some flexibility, recognizing that there is a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission standards may be violated under circumstances entirely beyond the control of the source. Although the EPA recognized that its case-by-case enforcement discretion provides sufficient flexibility in these circumstances, it included the

affirmative defense in the 2012 proposal and in several prior rules to provide a more formalized approach and more regulatory clarity. See *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1057–58 (D.C. Cir. 1978) (holding that an informal case-by-case enforcement discretion approach is adequate); but see *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977) (requiring a more formalized approach to consideration of "upsets beyond the control of the permit holder."). Under the EPA's regulatory affirmative defense provisions, if a source could demonstrate in a judicial or administrative proceeding that it had met the requirements of the affirmative defense in the regulation, civil penalties would not be assessed. The United States Court of Appeals for the District of Columbia Circuit vacated an affirmative defense in one of the EPA's section 112(d) regulations. *NRDC* v. *EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (vacating affirmative defense provisions in section 112 rule establishing emission standards for Portland cement kilns). The court found that the EPA lacked authority to establish an affirmative defense for private civil suits and held that under the CAA, the authority to determine civil penalty amounts in such cases lies exclusively with the courts, not the EPA. Specifically, the court found: "As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are 'appropriate.'" See *NRDC* v. *EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) ("[U]nder this statute, deciding whether penalties are 'appropriate' in a given private civil suit is a job for the courts, not for EPA."). In light of NRDC, the EPA is withdrawing its proposal to include a regulatory affirmative defense provision in this rulemaking and in this supplementary proposal has eliminated section 63.1520 (the provision that established the affirmative defense in the proposed rule published in the **Federal Register** on February 14, 2012 (77 FR 8576)). As explained above, if a source is unable to comply with emissions standards as a result of a malfunction, the EPA may use its case-by-case enforcement discretion to provide flexibility, as appropriate. Further, as the D.C. Circuit recognized, in an EPA or citizen enforcement action, the court has the discretion to consider any defense raised and determine whether penalties are appropriate. Cf. *NRDC* v. *EPA*, 749 F.3d 1055, 1064 (D.C. Cir. 2014) (arguments that violation were caused by unavoidable technology failure can be made to the courts in future civil cases when the issue arises). The same logic applies to EPA administrative enforcement actions.

E. What compliance dates are we proposing?

In the 2012 proposal, the EPA proposed that owners or operators of existing affected sources comply with the proposed amendments within 90 days of the publication of the final rule in the **Federal Register**. Commenters stated that the proposed 90 day compliance deadline was insufficient for sources to comply with certain provisions of the final rule. They maintained that the rule changes would require operational planning, maintenance planning, reprogramming of data acquisition systems, design and installation of hooding equipment and/or negotiations with permitting authorities to gain performance test plan approvals (with provisions to minimize fugitive emissions during testing in place of capture hoods). They pointed out that facilities that choose to design and install capture hoods for performance testing will need time to design and complete these installations, conduct initial performance testing and modify their operations, charge materials and/or products to ensure compliance. Some rule changes, furnace switching, HF testing and testing uncontrolled furnaces for example, would require revisions to operation, maintenance and monitoring (OM&M) plans as well as to permits to include newly established operating parameters in cases where changes to furnace classifications are made. Commenters stated that compliance with HF emission standards that may affect choice of flux materials, daily calculation of HF emissions and compliance with SAPU limit that will require reprogramming of data systems to include HF and/or fluoride containing flux composition data would also require time to be researched, selected, purchased, financed and installed. Commenters suggested compliance deadlines ranging from 2 to 3 years.

The EPA agrees with commenters that the proposed 90-day compliance deadline is insufficient for sources to comply with certain provisions of the final rule and is proposing extended compliance periods. The EPA is proposing a 180-day compliance period for the revisions listed in section 63.1501(d). For the amendments to include HF emissions (in section 63.1505(i)(4) and (k)(2)), the testing of existing uncontrolled furnaces (sections 63.1512(e)(4), (e)(5), (e)(6) and (e)(7)), and changing furnace classification (section 63.1514), the EPA agrees that a longer compliance period is required and is proposing a compliance date of 2 years after promulgation.

V. Summary of the Revised Cost, Environmental and Economic Impacts

A. What are the affected sources?

We estimate that there are 161 secondary aluminum production facilities that will be affected by this proposed rule. We performed risk modeling for 155 of these sources (52 of the 53 major sources and 103 of the 108 area sources). There were six facilities that are subject to the Secondary Aluminum NESHAP that were not included in the risk assessment input modeling files. The facilities that were not included in the risk assessment input files included one major HAP source and five area HAP sources. The major HAP source was not included because the secondary aluminum equipment at the source consists of group 2 furnaces, for which the EPA did not have HAP emissions estimates. The five area sources were not included because they had no equipment subject to D/F emission standards, which are the only standards in the NESHAP applicable to area sources. We estimate that nine secondary aluminum facilities have co-located primary aluminum operations. The affected sources at secondary aluminum production facilities include new and existing scrap shredders, thermal chip dryers, scrap dryer/delacquering kiln/decoating kilns, group 2 furnaces, sweat furnaces, dross-only furnaces, rotary dross cooler and secondary aluminum processing units containing group 1 furnaces and in-line fluxers.

B. What are the air quality impacts?

No changes are being proposed to numerical emissions limits. This supplemental proposal affects the number of times that a furnace can switch operating modes, clarifies how uncontrolled furnaces are to conduct emissions testing, extends the compliance deadline, revises the monitoring requirements for annual inspection of capture/collection systems, clarifies the requirements for conducting performance testing under worst case conditions and provides monitoring alternatives for sweat furnaces. These proposed amendments would not have any appreciable effect on emissions or result in emission reductions, although the proposed requirements for testing uncontrolled furnaces could result in some unquantifiable emission reduction. Therefore, no quantifiable air quality impacts are expected. However, these

proposed amendments will help to improve compliance, monitoring and implementation of the rule.

C. What are the cost impacts?

We conservatively estimate the total cost of the proposed amendments to be $1,711,000 per year (in 2011 dollars). However, depending on assumptions used for the costs for installing temporary hooding for uncontrolled furnaces, the estimate of total annualized costs could range from $611,000 to $2,871,000 per year.

Our estimate for the source category includes an annualized cost of $1,200,000 to $3,460,000 for installing hooding that meets ACGIH guidelines for testing uncontrolled furnaces, assuming that 107 furnaces choose that option (rather than assuming a 67-percent capture efficiency for their existing furnace exhaust system). We believe that a number of these 107 furnaces will choose to apply the 67-percent assumption rather than install hooding. Therefore, these total cost estimates are considered conservative (more likely to be overestimates rather than underestimates) of the total costs to the industry. Our estimates of total costs also include an annualized cost of $11,000 for testing for HF on uncontrolled furnaces that are already testing for HCl. Finally, we estimate cost savings of $600,000 per year for furnaces that change furnace operating modes and turn off their control devices. Our estimate of savings is based on 50 furnaces turning off their controls for approximately 6 months every year. This savings reflects the cost of testing (to demonstrate these furnaces remain in compliance with emission limits) minus the savings realized from operating with the control devices turned off.

We estimate that 57 facilities will be affected and that the cost per facility ranges from negative $36,000 (a cost savings) per year for a facility changing furnace operating modes to $216,500 per year for a facility installing hooding for testing.

The estimated costs are explained further in the document titled *Updated Cost Estimates for the Proposed Rule Changes to Secondary Aluminum NESHAP*, which is available in the docket for this action.

D. What are the economic impacts?

We performed an economic impact analysis for the proposed revisions and amendments in this supplemental proposed rulemaking. This analysis estimates impacts based on using annualized cost-to-sales ratios for affected firms. For the 28 parent firms affected by this proposed rule, the cost-to-sales estimate for each parent firm is less than 0.1 percent. For more information, please refer to the document titled *Economic Impact Analysis for the Secondary Aluminum Supplemental Proposal*, which is available in the docket.

E. What are the benefits?

We do not anticipate any significant reductions in HAP emissions as a result of these proposed amendments. However, we think that the proposed amendments will help to improve the clarity of the rule, which can improve compliance and minimize emissions. Certain provisions also provide operational flexibility with no increase in HAP emissions.

VI. Request for Comments

As discussed in detail above, we solicit comments on the revised risk assessment and proposed changes presented in this supplemental proposal. We are not re-opening comment on any other elements of the 2012 proposal (77 FR 8576, February 14, 2012). Comments previously received on the 2012 proposal, along with comments received on and within the scope of this supplemental proposal, will be addressed in the final rulemaking action.

We are also interested in any additional data that may help to reduce the uncertainties inherent in the risk assessments and other analyses. We are specifically interested in receiving corrections to the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available on the RTR Web page at *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html*. The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern and provide any "improved" data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR page, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.
2. Fill in the commenter information fields for each suggested revision (*i.e.*, commenter name, commenter organization, commenter email address, commenter phone number and revision comments).
3. Gather documentation for any suggested emissions revisions (*e.g.*, performance test reports, material balance calculations, etc.).
4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2010–0544 (through one of the methods described in the **ADDRESSES** section of this preamble).
5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the RTR Web page at *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html*.

VIII. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

The information collection requirements in this proposed action have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The ICR document prepared by the EPA has been assigned the EPA ICR number 2453.01.

We are proposing changes to the paperwork requirements to the Secondary Aluminum Production source category that were proposed in 2012.

In addition, in the 2012 proposal, we included an estimate of the burden associated with the affirmative defense in the ICR. However, as explained above, we are withdrawing our proposal

to include affirmative defense provisions, and the burden estimate has been revised accordingly.

We estimate 161 regulated entities are currently subject to subpart RRR. The annual monitoring, reporting and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the standards) for these amendments to subpart RRR is estimated to be $2,990,000 per year. This includes 1,694 labor hours per year at a total labor cost of $162,000 per year, and total non-labor capital and operation and maintenance (O&M) costs of $2,828,000 per year. The total burden for the federal government (averaged over the first 3 years after the effective date of the standard) is estimated to be 271 labor hours per year at an annual cost of $12,231. Burden is defined at 5 CFR 1320.3(b).

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.

To comment on the agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this ICR, under Docket ID No. EPA–HQ–OAR–2010–0544. Submit any comments related to the ICR to the EPA and OMB. See the **ADDRESSES** section at the beginning of this document for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 8, 2014, a comment to OMB is best assured of having its full effect if OMB receives it by January 7, 2015. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. For this source category, which has the NAICS code 331314 (*i.e.*, Secondary Smelting and Alloying of Aluminum), the SBA small business size standard is 750 employees according to the SBA small business standards definitions.

After considering the economic impacts of these proposed changes on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We determined in the economic and small business analysis that, using the results from the cost memorandum, 28 entities will incur costs associated with the proposed rule. Of these 28 entities, nine of them are small. Of these nine, all of them are estimated to experience a negative cost (*i.e.*, a cost savings) as a result of the proposed action according to our analysis. For more information, please refer to the *Economic Impact Analysis for the Secondary Aluminum Supplemental Proposal*, which is available in the docket.

D. Unfunded Mandates Reform Act

This action does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. Thus, this action is not subject to the requirements of section 202 or 205 of the Unfunded Mandates Reform Act (UMRA).

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments as it contains no requirements that apply to such governments nor does it impose obligations upon them.

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, as specified in Executive Order 13132. None of the facilities subject to this proposed action are owned or operated by state governments. Thus, Executive Order 13132 does not apply to this proposed action.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). There are no secondary aluminum production facilities that are owned or operated by tribal governments. Thus, Executive Order 13175 does not apply to this action. The EPA specifically solicits additional comments on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866 and because the agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in sections III and IV of this document. The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposures to the pollutants emitted by this source category.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113 (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards (VCS) in its regulatory

activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This proposed action involves technical standards. Therefore, the agency conducted a search to identify potentially applicable VCS. The VCS ASTM D7520–09, "Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere" was identified as an acceptable alternative to EPA Method 9. The standard was developed and is published by the American Society for Testing and Materials (ASTM). The standard can be obtained by contacting ASTM at 100 Barr Harbor Drive, Post Office Box C700, West Conshohocken, PA 19428–2959 or at their Web site, *http://www.astm.org*.

In addition, as a result of comments received on the 2012 proposal, EPA Method 26 was identified as a reasonable alternative to EPA Method 26A and EPA Method 204 was identified as a reasonable alternative method for EPA Methods 1 and 2. The EPA agrees that EPA Methods 26 and 204 are acceptable alternatives for use in this rule. Therefore, the EPA has proposed adding ASTM D7520–09, "Standard Test Method for Determining the Opacity of a Plume in the Outdoor Ambient Atmosphere," as an alternative method for the currently required EPA Method 9; EPA Method 26 as an alternative for the currently required EPA Method 26A; and EPA Method 204 as an alternative to the currently required EPA Methods 1 and 2.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable VCS and to explain why such standards should be used in this regulation.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This proposed rule will not relax the emission limits on regulated sources and will not result in emissions increases.

Because our residual risk assessment determined that there was minimal residual risk associated with the emissions from facilities in this source category, a demographic risk analysis was not necessary for this category. However, the EPA did conduct a proximity analysis for both area and major sources. The results of these analyses are summarized in section IV.A.6 of this notice and in more detail in the *EJ Screening Report for Area Sources* and the *EJ Screening Report for Major Sources*, which are available in the docket for this rulemaking.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Reporting and recordkeeping requirements.

Dated: November 13, 2014.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, part 63 of title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCES CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart RRR—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SECONDARY ALUMINUM PRODUCTION

■ 2. Section 63.1501 is amended by adding paragraphs (d), (e), and (f) to read as follows:

§ 63.1501 Dates.

* * * * *

(d) The owner or operator of an existing affected source must comply with the following requirements of this subpart by [DATE 180 DAYS FROM PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]: § 63.1505 (k) introductory text, (k)(1) through (k)(5), other than the emission standards for HF in (k)(2); § 63.1506 (a)(1), (c)(1), (g)(5), (k)(3), (m)(4), (n)(1); § 63.1510, (b)(5), (b)(9), (d)(2), (d)(3), (f)(1)(ii), (i)(4), (j)(4), (n)(1), (o)(1), (o)(1)(ii), (s)(2)(iv), (t) introductory text, (t)(2)(i), (t)(2)(ii), (t)(4), (t)(5); § 63.1511(a) introductory text, (b) introductory text, (b)(1), (b)(6), (c)(9), (f)(6), (g)(5); § 63.1512(e)(1), (e)(2), (e)(3), (h)(2), (j), (j)(1)(i), (j)(2)(i), (o)(1), (p)(2); § 63.1513(b) introductory text, (b)(1), (e)(1), (e)(2), (e)(3), (f); § 63.1516 (b) introductory text, (b)(2)(iii), (b)(3), (d); § 63.1517(b)(16)(i), (b)(18), (b)(19), (c).

(e) The owner or operator of an existing affected source must comply with the following requirements of this subpart by [DATE 2 YEARS FROM PUBLICATION OF THE FINAL RULE IN THE **Federal Register**]: § 63.1505(i)(4) and (k)(2) emission standards for HF; § 63.1512(e)(4) through (7) requirements for testing existing uncontrolled group 1 furnaces; and § 63.1514 requirements for change of furnace classification.

(f) The owner or operator of a new affected source that commences construction or reconstruction after February 14, 2012 must comply with all of the requirements listed in paragraphs (d) and (e) of this section by [DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] or upon startup, whichever is later.

■ 3. Section 63.1503 is amended by adding in alphabetical order definitions for "round top furnace," "shutdown," and "startup" to read as follows:

§ 63.1503 Definitions.

* * * * *

Round top furnace means a cylindrically-shaped reverberatory furnace that has a top that is removed for charging and other furnace operations.

* * * * *

Shutdown means the period of operation for thermal chip dryers, scrap dryers/delacquering kilns, decoating kilns, dross-only furnaces, group 1 furnaces, in-line fluxers, sweat furnaces and group 2 furnaces that begins when the introduction of feed/charge is halted and all product has been removed from the emission unit (*e.g.*, by tapping a furnace).

* * * * *

Startup means the period of operation for thermal chip dryers, scrap dryers/delacquering kilns, decoating kilns, dross-only furnaces, group 1 furnaces, in-line fluxers, sweat furnaces and group 2 furnaces that begins with equipment warming from a cold start or

a complete shutdown. Startup ends at the point that feed/charge is introduced.

* * * * *

■ 4. Section 63.1506 is amended by adding paragraph (c)(4) to read as follows:

§ 63.1506 Operating requirements.

* * * * *

(c) * * *

(4) In lieu of paragraph (c)(1) of this section, the owner or operator of a sweat furnace may design, install and operate each sweat furnace in accordance with paragraphs (c)(4)(i) through (iii) of this section.

(i) As demonstrated by an annual negative air flow test conducted in accordance with § 63.1510(d)(3), air flow must be into the sweat furnace or towards the plane of the sweat furnace opening.

(ii) The owner or operator must maintain and operate the sweat furnace in a manner consistent with the good practices requirements for minimizing emissions, including fugitive emissions, in paragraph (a)(5) of this section. Procedures that will minimize fugitive emissions may include, but are not limited to the following:

(A) Increasing the exhaust rate from the furnace with draft fans, so as to capture emissions that might otherwise escape from the sweat furnace opening;

(B) Minimizing the time the sweat furnace doors are open;

(C) Keeping building doors and other openings closed to the greatest extent possible to minimize drafts that would divert emissions from being drawn into the sweat furnace;

(D) Maintaining burners on low-fire or pilot operation while the doors are open;

(E) Conducting periodic inspections and maintenance of sweat furnace components to ensure their proper operation and performance including but not limited to, door assemblies, seals, combustion chamber refractory material, afterburner and stack refractory, blowers, fans, dampers, burner tubes, door raise cables, pilot light assemblies, baffles, sweat furnace and afterburner shells and other internal structures.

(iii) The owner or operator must document in their OM&M plan the procedures to be used to minimize emissions, including fugitive emissions, in addition to the procedures to ensure the proper operation and maintenance of the sweat furnace.

* * * * *

■ 5. Section 63.1510 is amended by revising paragraph (d)(2) and adding paragraph (d)(3) to read as follows:

§ 63.1510 Monitoring requirements.

* * * * *

(d) * * *

(2) Inspect each capture/collection and closed vent system at least once each calendar year to ensure that each system is operating in accordance with the operating requirements in § 63.1506(c) and record the results of each inspection. This inspection shall include a volumetric flow rate measurement taken at a location in the ductwork downstream of the hoods that is representative of the actual volumetric flow rate without interference due to leaks, ambient air added for cooling or ducts from other hoods. The flow rate measurement must be performed in accordance with paragraphs (d)(2)(i), (ii), or (iii) of this section. As an alternative to the flow rate measurement specified in this paragraph, the inspection may satisfy the requirements of this paragraph, including the operating requirements in § 63.1506(c), by including permanent total enclosure verification in accordance with (d)(2)(i) or (iv) of this section.

(i) Conduct annual flow rate measurements using EPA Methods 1 and 2 in Appendix A to 40 CFR part 60, or conduct annual verification of a permanent total enclosure using EPA Method 204; or

(ii) As an alternative to annual flow rate measurements using EPA Methods 1 and 2, measurement with EPA Methods 1 and 2 can be performed once every 5 years, provided that:

(A) A flow rate indicator consisting of a pitot tube and differential pressure gauge (Magnehelic®, manometer or other differential pressure gauge) is installed with the pitot tube tip located at a representative point of the duct proximate to the location of the Methods 1 and 2 measurement site; and

(B) The flow rate indicator is installed and operated in accordance with the manufacturer's specifications; and

(C) The differential pressure is recorded during the Method 2 performance test series; and

(D) Differential pressure readings are recorded daily, and maintained at or above 90 percent of the pressure differential indicated by the flow rate indicator during the most recent Method 2 performance test series; and

(E) An inspection of the pitot tube and associated lines for damage, plugging, leakage and operational integrity is conducted at least once per year; or

(iii) As an alternative to annual flow rate measurements using EPA Methods 1 and 2, measurement with EPA Methods 1 and 2 can be performed once every 5 years, provided that:

(A) Daily measurements of the capture and collection system's fan revolutions per minute (RPM) are made by taking three measurements with at least 5 minutes between each measurement, and averaging the three measurements; and

(B) Readings are recorded daily and maintained at or above 90 percent of the RPM measured during the most recent Method 2 performance test series.

(iv) As an alternative to the annual verification of a permanent total enclosure using EPA Method 204, verification can be performed once every 5 years, provided that:

(A) Negative pressure in the enclosure is directly monitored by a pressure indicator installed at a representative location;

(B) Pressure readings are recorded daily or the system is interlocked to halt material feed should the system not operate under negative pressure;

(C) When there are readings outside the range specified in the OM&M plan, the facility investigates and takes steps to restore normal operation, which may include initial inspection and evaluation, recording that operations returned to normal without operator action or other applicable actions; and

(D) An inspection of the pressure indicator for damage and operational integrity is conducted at least once per calendar year.

(3) In lieu of paragraph (d)(2) of this section, the owner or operator of a sweat furnace may inspect each sweat furnace at least once each calendar year to ensure that they are being operated in accordance with the negative air flow requirements in § 63.1506(c)(4). The owner or operator of a sweat furnace must demonstrate negative air flow into the sweat furnace in accordance with paragraphs (d)(3)(i) through (iii) of this section.

(i) Perform an annual visual smoke test to demonstrate airflow into the sweat furnace or towards the plane of the sweat furnace opening;

(ii) Perform the smoke test using a smoke source, such as a smoke tube, smoke stick, smoke cartridge, smoke candle or other smoke source that produces a persistent and neutral buoyancy aerosol; and

(iii) Perform the visual smoke test at a safe distance from and near the center of the sweat furnace opening.

* * * * *

■ 6. Section 63.1511 is amended by revising paragraph (b)(1) to read as follows:

§ 63.1511 Performance test/compliance demonstration general requirements.

* * * * *

(b) * * *

(1) The performance tests must be conducted under representative (normal) conditions expected to produce the highest level of HAP emissions expressed in the units of the emission standards for the HAP (considering the extent of scrap contamination, reactive flux addition rate and feed/charge rate). If a single test condition is not expected to produce the highest level of emissions for all HAP, testing under two or more sets of conditions (for example high contamination at low feed/charge rate, and low contamination at high feed/charge rate) may be required. Any subsequent performance tests for the purposes of establishing new or revised parametric limits shall be allowed upon pre-approval from the permitting authority for major sources, or the Administrator for area sources. These new parametric settings shall be used to demonstrate compliance for the period being tested.

* * * * *

■ 7. Section 63.1512 is amended by adding paragraphs (e)(4) through (7) to read as follows:

§ 63.1512 Performance test/compliance demonstration requirements and procedures.

* * * * *

(e) * * *

(4) When testing an existing uncontrolled furnace, the owner or operator must comply with the requirements of either paragraphs (e)(4)(i) or (ii) of this section at the next required performance test.

(i) Install hooding that meets ACGIH Guidelines, or

(ii) Assume a 67-percent capture efficiency for the furnace exhaust (*i.e.*, multiply emissions measured at the furnace exhaust outlet by 1.5). If the source fails to demonstrate compliance using the 67-percent capture efficiency assumption, the owner or operator must re-test with a hood that meets the ACGIH Guidelines within 180 days, or petition the permitting authority for major sources, or the Administrator for area sources, within 180 days that such hoods are impractical under the provisions of paragraph (e)(6) of this section and propose testing procedures that will minimize fugitive emissions during the performance test according to paragraph (e)(7) of this section.

(iii) Existing round top furnaces are exempt from the requirements of paragraphs (e)(4)(i) and (ii) of this section. Round top furnaces must be operated to minimize fugitive emissions according to paragraph (e)(7) of this section.

(5) When testing a new uncontrolled furnace the owner or operator must:

(i) Install hooding that meets ACGIH Guidelines or petition the permitting authority for major sources, or the Administrator for area sources, that such hoods are impracticable under the provisions of paragraph (e)(6) of this section and propose testing procedures that will minimize fugitive emissions during the performance test according to the provisions of paragraph (e)(7); and

(ii) Subsequent testing must be conducted in accordance with paragraphs (e)(4)(i) and (ii) of this section.

(6) The installation of hooding that meets ACGIH Guidelines is considered impractical if any of the following conditions exist:

(i) Building or equipment obstructions (for example, wall, ceiling, roof, structural beams, utilities, overhead crane or other obstructions) are present such that the temporary hood cannot be located consistent with acceptable hood design and installation practices;

(ii) Space limitations or work area constraints exist such that the temporary hood cannot be supported or located to prevent interference with normal furnace operations or avoid unsafe working conditions for the furnace operator; or

(iii) Other obstructions and limitations subject to agreement of the permitting authority for major sources, or the Administrator for area sources.

(7) Testing procedures that will minimize fugitive emissions may include, but are not limited to the following:

(i) Installing a hood that does not entirely meet ACGIH guidelines;

(ii) Using the building as an enclosure, and measuring emissions exhausted from the building if there are no other furnaces or other significant sources in the building of the pollutants to be measured;

(iii) Installing temporary baffles on those sides or top of furnace opening if it is practical to do so where they will not interfere with material handling or with the furnace door opening and closing;

(iv) Increasing the exhaust rate from the furnace with draft fans, so as to capture emissions that might otherwise escape into the building if it can be done without increasing furnace emissions in a way that make the test non-representative;

(v) Minimizing the time the furnace doors are open or the top is off;

(vi) Delaying gaseous reactive fluxing until charging doors are closed and, for round top furnaces, until the top is on;

(vii) Agitating or stirring molten metal as soon as practicable after salt flux addition and closing doors as soon as possible after solid fluxing operations, including mixing and dross removal;

(viii) Keeping building doors and other openings closed to the greatest extent possible to minimize drafts that would divert emissions from being drawn into the furnace; or

(ix) Maintaining burners on low-fire or pilot operation while the doors are open or the top is off.

* * * * *

■ 8. Section 63.1513 is amended by adding paragraph (f) to read as follows:

§ 63.1513 Equations for determining compliance.

* * * * *

(f) *Periods of startup and shutdown.* For a new or existing affected source, or a new or existing emission unit subject to an emissions limit in paragraphs § 63.1505(b) through (j) expressed in units of pounds per ton of feed/charge, or µg TEQ or ng TEQ per Mg of feed/charge, demonstrate compliance during periods of startup and shutdown in accordance with paragraph (f)(1) of this section or determine your emissions per unit of feed/charge during periods of startup and shutdown in accordance with paragraph (f)(2) of this section. Startup and shutdown emissions for group 1 furnaces and in-line fluxers must be calculated individually, and not on the basis of a SAPU. Periods of startup and shutdown are excluded from the calculation of SAPU emission limits in § 63.1505(k), the SAPU monitoring requirements in § 63.1510(t) and the SAPU emissions calculations in § 63.1513(e).

(1) For periods of startup and shutdown, records establishing a feed/charge rate of zero, a flux rate of zero, and that the affected source or emission unit was either heated with electricity, propane or natural gas as the sole sources of heat or was not heated, may be used to demonstrate compliance with the emission limit, or

(2) For periods of startup and shutdown, divide your measured emissions in lb/hr or µg/hr or ng/hr by the feed/charge rate in tons/hr or Mg/hr from your most recent performance test associated with a production rate greater than zero, or the rated capacity of the affected source if no prior performance test data is available.

■ 9. Amend section 63.1514, as proposed to be added at 77 FR 8576 (February 14, 2012), by revising paragraph (e) to read as follows:

§ 63.1514 Change of furnace classification.

* * * * *

(e) *Limit on Frequency of changing furnace operating mode.*

(1) Changing furnace operating mode including reversion to the previous mode, as provided in paragraphs (a) through (d) of this section, may not be done more frequently than 4 times in any 6-month period.

(2) If additional changes are needed, the owner or operator must apply in advance to the permitting authority, for major sources, or the Administrator, for area sources, for approval.

■ 10. Section 63.1517 is amended by adding paragraphs (b)(18) and (19) to read as follows:

§ 63.1517 Records.

* * * * *

(b) * * *

(18) For each period of startup or shutdown for which the owner or operator chooses to demonstrate compliance for an affected source based on a feed/charge rate of zero, a flux rate of zero and the use of electricity, propane or natural gas as the sole sources of heating or the lack of heating, the owner or operator must maintain the following records:

(i) The date and time of each startup and shutdown,

(ii) The quantities of feed/charge and flux introduced during each startup and shutdown, and

(iii) The types of fuel used to heat the unit, or that no fuel was used, during startup and shutdown.

(19) For owners or operators that choose to change furnace operating modes, the following records must be maintained:

(i) The date and time of each change in furnace operating mode, and

(ii) The nature of the change in operating mode (for example, group 1 controlled furnace processing other than clean charge to group 2).

■ 11. Table 2 to subpart RRR of part 63 is amended by revising the entry for "All affected sources and emission units with an add-on air pollution control device" to read as follows:

TABLE 2 TO SUBPART RRR OF PART 63—SUMMARY OF OPERATING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS

Affected source/emission unit	Monitor type/operation/process	Operating requirements
All affected sources and emission units with an add-on air pollution control device.	Emission capture and collection system	Design and install in accordance with ACGIH Guidelines; operate in accordance with OM&M plan (sweat furnaces may be operated according to 63.1506(c)(4)).[b]
* * *	* * *	* * *

* * * * *

[b] OM&M plan—Operation, maintenance, and monitoring plan.

* * * * *

■ 12. Table 3 to subpart RRR of part 63 is amended by revising the entry for "All affected sources and emission units with an add-on air pollution control device" and revising footnote d to Table 3 to read as follows:

TABLE 3 TO SUBPART RRR OF PART 63—SUMMARY OF MONITORING REQUIREMENTS FOR NEW AND EXISTING AFFECTED SOURCES AND EMISSION UNITS

Affected source/emission unit	Monitor type/operation/process	Monitoring requirements
All affected sources and emission units with an add-on air pollution control device.	Emission capture and collection system	Annual inspection of all emission capture, collection, and transport systems to ensure that systems continue to operate in accordance with ACGIH Guidelines. Inspection includes volumetric flow rate measurements or verification of a permanent total enclosure using EPA Method 204.[d]
* * *	* * *	* * *

[d] The frequency of volumetric flow rate measurements may be decreased to once every 5 years if daily differential pressure measures or daily fan RPM measurements are made in accordance with § 63.1510(d)(ii) and (iii). The frequency of annual verification of a permanent total enclosure may be decreased to once every 5 years if negative pressure measurements in the enclosure are made daily in accordance with § 63.1510(d)(iv). In lieu of volumetric flow rate measurements or verification of permanent total enclosure, sweat furnaces may demonstrate annually negative air flow into the sweat furnace opening in accordance with § 63.1510(d)(3).

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Part IV

Environmental Protection Agency

40 CFR Part 63
National Emissions Standards for Hazardous Air Pollutants: Primary Aluminum Reduction Plants; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2011–0797; FRL–9917–44–OAR]

RIN 2060–AQ92

National Emissions Standards for Hazardous Air Pollutants: Primary Aluminum Reduction Plants

AGENCY: Environmental Protection Agency.

ACTION: Supplemental proposed rulemaking.

SUMMARY: This action supplements our proposed amendments to the national emission standards for hazardous air pollutants (NESHAP) for the Primary Aluminum Production source category published in the **Federal Register** on December 6, 2011. In that action, the Environmental Protection Agency (EPA) proposed amendments based on the initial residual risk and technology reviews (RTR) for this source category, and also proposed certain emission limits reflecting performance of Maximum Achievable Control Technology (MACT). Today's action reflects a revised technology review and a revised residual risk analysis for the Primary Aluminum Production source category and proposes new and revised emission standards based on those analyses, newly obtained emissions test data, and comments we received in response to the 2011 proposal, including certain revisions to the technology-based standards reflecting performance of MACT. This action also proposes new compliance requirements to meet the revised standards. This action, if adopted, will provide improved environmental protection regarding potential emissions of hazardous air pollutant (HAP) emissions from primary aluminum production facilities.

DATES: *Comments.* Comments must be received on or before January 22, 2015. A copy of comments on the information collection provisions should be submitted to the Office of Management and Budget (OMB) on or before January 7, 2015.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing by December 15, 2014, a public hearing will be held on December 23, 2014 at the U.S. EPA building at 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. If you are interested in requesting a public hearing or attending the public hearing, contact Ms. Virginia Hunt at (919) 541–0832 or at *hunt.virginia@epa.gov.* If the EPA holds a public hearing, the EPA will keep the record of the hearing open for 30 days after completion of the hearing to provide an opportunity for submission of rebuttal and supplementary information.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0797, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: A-and-R-docket@epa.gov.* Include Attention Docket ID No. EPA–HQ–OAR–2011–0797 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2011–0797.
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Mail Code: 28221T, Attention Docket ID No. EPA–HQ–OAR–2011–0797, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street NW., Washington, DC 20503.
- *Hand/Courier Delivery:* EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2011–0797. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0797. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at: *http://www.epa.gov/dockets.*

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2011–0797. All documents in the docket are listed in the regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.,* 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. Publicly available docket materials are available either electronically in regulations.gov or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Public Hearing: If anyone contacts the EPA requesting a public hearing by December 15, 2014, the public hearing will be held on December 23, 2014 at the EPA's campus at 109 T.W. Alexander Drive, Research Triangle Park, North Carolina. The hearing will begin at 10:00 a.m. (Eastern Standard Time) and conclude at 5:00 p.m. (Eastern Standard Time). There will be a lunch break from 12:00 p.m. to 1:00 p.m. Please contact Ms. Virginia Hunt at 919–541–0832 or at *hunt.virginia@epa.gov* to register to speak at the hearing or to inquire as to whether or not a hearing will be held. The last day to pre-register in advance to speak at the hearing will be December 22, 2014. Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk, although preferences on speaking times may not be able to be accommodated. If you require the service of a translator or

special accommodations such as audio description, please let us know at the time of registration. If you require an accommodation, we ask that you pre-register for the hearing, as we may not be able to arrange such accommodations without advance notice. The hearing will provide interested parties the opportunity to present data, views or arguments concerning the proposed action. The EPA will make every effort to accommodate all speakers who arrive and register. Because these hearing are being held at U.S. government facilities, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma or the state of Washington, you must present an additional form of identification to enter the federal building. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses and military identification cards. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building and demonstrations will not be allowed on federal property for security reasons. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Docket: The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2011–0797. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center, EPA WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Mr. David Putney, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, NC 27711; telephone (919) 541–2016; fax number: (919) 541–3207; and email address: *putney.david@epa.gov.* For specific information regarding the risk modeling methodology, contact Mr. Jim Hirtz, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov.* For information about the applicability of the NESHAP to a particular entity, contact Mr. Patrick Yellin, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, EPA WJC West Building, Mail Code 2227A, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–2970 and email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION:

Preamble Acronyms and Abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

As arsenic
ADAF age-dependent adjustment factor
AEGL acute exposure guideline levels
AERMOD air dispersion model used by the HEM–3 model
ATSDR Agency for Toxic Substances and Disease Registry
BLDS bag leak detection system
BTF beyond-the-floor
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
Cd cadmium
CE Cost Effectiveness
CFR Code of Federal Regulations
COS carbonyl sulfide
Cr chromium
Cr^{+3} trivalent chromium
Cr^{+6} hexavalent chromium
CWPB1 center-worked prebake one
CWPB2 center-worked prebake two
CWPB3 center-worked prebake three
D/Fs polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans
EF Emission Factors
EJ environmental justice
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
ERT Electronic Reporting Tool
FR Federal Register
HAP hazardous air pollutants
HEM–3 Human Exposure Model, Version 1.1.0
HF hydrogen fluoride
Hg mercury
HI Hazard Index
HQ Hazard Quotient
HSS horizontal stud Soderberg
IRIS Integrated Risk Information System
km kilometer
LOAEL lowest-observed-adverse-effect level
LOEL lowest-observed-effect level
MACT maximum achievable control technology
MCEM methylene chloride extractable matter
mg/dscm milligrams per dry standard cubic meter
mg/kg-day milligrams per kilogram-day
mg/m^3 milligrams per cubic meter
MIR maximum individual risk
Mn manganese
MRL Minimal Risk Level
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NEI National Emissions Inventory
NESHAP National Emissions Standards for Hazardous Air Pollutants
Ni nickel
NOAEL no-observed-adverse-effect level
NRC National Research Council
NTTAA National Technology Transfer and Advancement Act
OAQPS Office of Air Quality Planning and Standards
OECA Office of Enforcement and Compliance Assurance
OMB Office of Management and Budget
PAH polycyclic aromatic hydrocarbons
Pb lead
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PCB polychlorinated biphenyls
PEL probable effect level
PM particulate matter
POM polycyclic organic matter
ppm parts per million
RDL representative method detection level
REL reference exposure level
RFA Regulatory Flexibility Act
RfC reference concentration
RfD reference dose
RTR residual risk and technology review
SAB Science Advisory Board
SBA Small Business Administration
SSM startup, shutdown and malfunction
SWPB side-worked prebake
TF total fluorides
TOSHI target organ-specific hazard index
TPY tons per year

TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure model
TTN echnology Transfer Network
UF uncertainty factor
µg/dscm micrograms per dry standard cubic meter
µg/m^3 micrograms per cubic meter
UMRA Unfunded Mandates Reform Act
UPL Upper Prediction Limit
URE unit risk estimate
VCS voluntary consensus standards
VSS1 vertical stud Soderberg one
VSS2 vertical stud Soderberg two

Organization of this Document. The information in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

Table 1 of this preamble lists the industrial source category that is the subject of this supplemental proposal. Table 1 is not intended to be exhaustive but rather to provide a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local and tribal government entities would not be affected by this proposed action. As defined in the "Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990" (see 57 FR 31576, July 16, 1992), the "Primary Aluminum Production" source category is any facility which produces primary aluminum by the electrolytic reduction process.[1]

TABLE 1—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NESHAP	NAICS code [a]
Primary Aluminum Production	Primary Aluminum Reduction Plants	33131

[a] 2012 North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the Internet through EPA's Technology Transfer Network (TTN) Web site, a forum for information and technology exchange in various areas of air pollution control. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at: *http://www.epa.gov/ttn/atw/alum/alumpg.html*. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same Web site. Information on the overall RTR program is available at the following Web site: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html*.

C. What should I consider as I prepare my comments for the EPA?

Submitting CBI. Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to the 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 comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI for inclusion in the public docket. If you submit a CD–ROM or disk that does not contain CBI, mark the outside of the disk or CD–ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI

[1] U.S. EPA. Documentation for Developing the Initial Source Category List—Final Report, EPA/OAQPS, EPA–450/3–91–030, July, 1992.

only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2011–0797.

II. Background Information

A. What is the statutory authority for this action?

Section 112 of the Clean Air Act (CAA) establishes a two-stage regulatory process to address emissions of HAPs from stationary sources. In the first stage, after the EPA has identified categories of sources emitting one or more of the HAP listed in CAA section 112(b), CAA section 112(d) requires us to promulgate technology-based NESHAP for those sources. "Major sources" are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAPs. For major sources, the technology-based NESHAP must reflect the maximum degree of emission reductions of HAPs achievable (after considering cost, energy requirements and non-air quality health and environmental impacts) and are commonly referred to as MACT standards.

MACT standards must reflect the maximum degree of emissions reduction achievable through the application of measures, processes, methods, systems or techniques, including, but not limited to, measures that (1) reduce the volume of or eliminate pollutants through process changes, substitution of materials or other modifications; (2) enclose systems or processes to eliminate emissions; (3) capture or treat pollutants when released from a process, stack, storage or fugitive emissions point; (4) are design, equipment, work practice or operational standards (including requirements for operator training or certification); or (5) are a combination of the above. CAA section 112(d)(2)(A) through (E). The MACT standards may take the form of design, equipment, work practice or operational standards where the EPA first determines either that (1) a pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (2) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. CAA section 112(h)(1) and (2).

The MACT "floor" is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emissions control that is achieved in practice by the best-controlled similar source. The MACT floor for existing sources can be less stringent than floors for new sources but not less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, the EPA must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on considerations of the cost of achieving the emission reductions, any non-air quality health and environmental impacts and energy requirements.

The EPA is then required to review these technology-based standards and revise them "as necessary (taking into account developments in practices, processes, and control technologies)" no less frequently than every 8 years. CAA section 112(d)(6). In conducting this review, the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA*, 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA*, 716 F.3d 667, 672–73 (D.C. Cir. 2013).

The second stage in standard-setting focuses on reducing any remaining (*i.e.*, "residual") risk according to CAA section 112(f). CAA section 112(f)(1) required that the EPA prepare a report to Congress discussing (among other things) methods of calculating the risks posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks and the EPA's recommendations as to legislation regarding such remaining risk. The EPA prepared and submitted the *Residual Risk Report to Congress*, EPA–453/R–99–001 (*Risk Report*) in March 1999. CAA section 112(f)(2) then provides that if Congress does not act on any recommendation in the *Risk Report*, the EPA must analyze and address residual risk for each category or subcategory of sources 8 years after promulgation of such standards pursuant to CAA section 112(d).

Section 112(f)(2) of the CAA requires the EPA to determine for source categories subject to MACT standards whether the emission standards provide an ample margin of safety to protect public health. Section 112(f)(2)(B) of the CAA expressly preserves the EPA's use of the two-step process for developing standards to address any residual risk and the agency's interpretation of "ample margin of safety" developed in the *National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the *Risk Report* that the agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and in a challenge to the risk review for the Synthetic Organic Chemical Manufacturing source category, the United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008) ("[S]ubsection 112(f)(2)(B) expressly incorporates the EPA's interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the **Federal Register**."); see also, *A Legislative History of the Clean Air Act Amendments of 1990*, vol. 1, p. 877 (Senate debate on Conference Report).

The first step in the process of evaluating residual risk is the determination of acceptable risk. If risks are unacceptable, the EPA cannot consider cost in identifying the emissions standards necessary to bring risks to an acceptable level. The second step is the determination of whether standards must be further revised in order to provide an ample margin of safety to protect public health. The ample margin of safety is the level at which the standards must be set, unless an even more stringent standard is necessary to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect.

1. Step 1—Determination of Acceptability

The agency in the Benzene NESHAP concluded that "the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information" and that the "judgment on acceptability cannot be reduced to any single factor." Benzene

NESHAP at 38046. The determination of what represents an "acceptable" risk is based on a judgment of "what risks are acceptable in the world in which we live" (*Risk Report* at 178, quoting *NRDC* v. *EPA*, 824 F. 2d 1146, 1165 (D.C. Cir. 1987) (en banc) ("Vinyl Chloride"), recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that "EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately one in 10 thousand, that risk level is considered acceptable." 54 FR 38045, September 14, 1989. We discussed the maximum individual lifetime cancer risk (or maximum individual risk (MIR)) as being "the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years." *Id.* We explained that this measure of risk "is an estimate of the upper bound of risk-based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years." *Id.* We acknowledged that maximum individual lifetime cancer risk "does not necessarily reflect the true risk, but displays a conservative risk level which is an upper-bound that is unlikely to be exceeded." *Id.*

Understanding that there are both benefits and limitations to using the MIR as a metric for determining acceptability, we acknowledged in the Benzene NESHAP that "consideration of maximum individual risk * * * must take into account the strengths and weaknesses of this measure of risk." *Id.* Consequently, the presumptive risk level of 100-in-1 million (1-in-10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination. Further, in the Benzene NESHAP, we noted that:

> "[p]articular attention will also be accorded to the weight of evidence presented in the risk assessment of potential carcinogenicity or other health effects of a pollutant. While the same numerical risk may be estimated for an exposure to a pollutant judged to be a known human carcinogen, and to a pollutant considered a possible human carcinogen based on limited animal test data, the same weight cannot be accorded to both estimates. In considering the potential public health effects of the two pollutants, the Agency's judgment on acceptability, including the MIR, will be influenced by the greater weight of evidence for the known human carcinogen."

Id. at 38046. The agency also explained in the Benzene NESHAP that:

> "[i]n establishing a presumption for MIR, rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50 km exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants."

Id. At 38045. In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone.

As noted earlier, in *NRDC* v. *EPA*, the court held that CAA section 112(f)(2) "incorporates the EPA's interpretation of the Clean Air Act from the Benzene Standard." The court further held that Congress' incorporation of the Benzene standard applies equally to carcinogens and non-carcinogens. 529 F.3d at 1081–82. Accordingly, we also consider non-cancer risk metrics in our determination of risk acceptability and ample margin of safety.

2. Step 2—Determination of Ample Margin of Safety

CAA section 112(f)(2) requires the EPA to determine, for source categories subject to MACT standards, whether those standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, "the second step of the inquiry, determining an 'ample margin of safety,' again includes consideration of all of the health factors, and whether to reduce the risks even further . . . . Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties and any other relevant factors. Considering all of these factors, the agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by section 112." 54 FR 38046, September 14, 1989.

According to CAA section 112(f)(2)(A), if the MACT standards for HAP "classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million," the EPA must promulgate residual risk standards for the source category (or subcategory), as necessary to provide an ample margin of safety to protect public health. In doing so, the EPA may adopt standards equal to existing MACT standards if the EPA determines that the existing standards (*i.e.*, the MACT standards) are sufficiently protective. *NRDC* v. *EPA*, 529 F.3d 1077, 1083 (D.C. Cir. 2008) ("If EPA determines that the existing technology-based standards provide an 'ample margin of safety,' then the Agency is free to readopt those standards during the residual risk rulemaking.") The EPA must also adopt more stringent standards, if necessary, to prevent an adverse environmental effect,[2] but must consider cost, energy, safety and other relevant factors in doing so.

The CAA does not specifically define the terms "individual most exposed," "acceptable level" and "ample margin of safety." In the Benzene NESHAP, 54 FR 38044–38045, September 14, 1989, we stated as an overall objective:

> In protecting public health with an ample margin of safety under section 112, EPA strives to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million and (2) limiting to no higher than approximately 1-in-10 thousand [*i.e.*, 100-in-1 million] the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The agency further stated that "[t]he EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risks to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population." *Id.* at 38045.

In the ample margin of safety decision process, the agency again considers all of the health risks and other health information considered in the first step, including the incremental risk reduction associated with standards more stringent than the MACT standard or a more stringent standard that the EPA

[2] "Adverse environmental effect" is defined as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas. CAA section 112(a)(7).

has determined is necessary to ensure risk is acceptable. In the ample margin of safety analysis, the agency considers additional factors, including costs and economic impacts of controls, technological feasibility, uncertainties and any other relevant factors. Considering all of these factors, the agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112(f). 54 FR 38046, September 14, 1989.

B. What is this source category and how does the current NESHAP regulate its HAP emissions?

The NESHAP for Primary Aluminum Reduction Plants were promulgated on October 7, 1997 (62 FR 52407), codified at 40 CFR part 63, subpart LL (referred to as subpart LL or MACT rule in the remainder of this preamble), and amended on November 2, 2005 (70 FR 66285). The MACT rule is applicable to facilities with affected sources associated with the production of aluminum by electrolytic reduction. These facilities are described in the following paragraph and collectively comprise what is commonly known as the Primary Aluminum Production source category.

Aluminum is produced from refined bauxite ore (also known as alumina), using an electrolytic reduction process in a series of cells called a "potline." The raw materials include alumina, petroleum coke, pitch and fluoride salts. According to information available on the Web site of The Aluminum Association, Inc. (*http://www.aluminum.org*), approximately 40 percent of the aluminum produced in the U.S. comes from primary aluminum facilities. The two main potline types are prebake (a newer, higher efficiency, lower-emitting technology) and Soderberg (an older, lower efficiency, higher-emitting technology). There are currently 13 facilities located in the United States that are subject to the requirements of this NESHAP: 12 primary aluminum production plants and one carbon-only prebake anode production facility. These 12 primary aluminum production plants have approximately 45 potlines that produce aluminum. Ten primary aluminum production plants have a paste production operation, and 10 of the 12 primary aluminum production plants have anode bake furnaces. Eleven of the 12 primary aluminum facilities use prebake potlines; the other plant uses Soderberg potlines. Due to a decrease in demand for aluminum, four of the facilities are currently idle, including the Soderberg facility. The major HAPs emitted by these facilities are carbonyl sulfide (COS), hydrogen fluoride (HF), particulate HAP metals and polycyclic organic matter (POM), specifically polycyclic aromatic hydrocarbons (PAH).

The standards promulgated in 1997 and 2005 apply to emissions of HF, measured using total fluorides (TF) as a surrogate, from all potlines and anode bake furnaces and POM (as measured by methylene chloride extractables) from Soderberg potlines, anode bake furnaces, paste production plants and pitch storage tanks associated with primary aluminum production. Affected sources under the rules are each potline, each anode bake furnace (except for one that is located at a facility that only produces anodes for use off-site), each paste production plant and each new pitch storage tank.

The NESHAP designated seven subcategories of existing potlines based primarily on differences in the process operation and configuration. The control of primary emissions from the reduction process is typically achieved by a dry alumina scrubber (with a baghouse to collect the alumina and other particulate matter (PM)). The control technology typically used for anode bake furnaces is a dry alumina scrubber. A capture system vented to a dry coke scrubber is used for control of paste production plants. See Tables 2 and 3 for the applicable emission limits established under the 1997 NESHAP and the 2005 Amendments.

TABLE 2—SUMMARY OF CURRENT MACT EMISSION LIMITS FOR EXISTING SOURCES UNDER THE 1997 NESHAP, AND THE 2005 AMENDMENTS

Source	Pollutant	Emission limit
Potlines [1]		
CWPB1 potlines	TF	0.95 kg/Mg (1.9 lb/ton) of aluminum produced.
CWPB2 potlines	TF	1.5 kg/Mg (3.0 lb/ton) of aluminum produced.
CWPB3 potlines	TF	1.25 kg/Mg (2.5 lb/ton) of aluminum produced.
SWPB potlines	TF	0.8 kg/Mg (1.6 lb/ton) of aluminum produced.
VSS1 potlines	TF	1.1 kg/Mg (2.2 lb/ton) of aluminum produced.
	POM	1.2 kg/Mg (2.4 lb/ton) of aluminum produced.
VSS2 potlines	TF	1.35 kg/Mg (2.7 lb/ton) of aluminum produced.
	POM	2.85 kg/Mg (5.7 lb/ton) of aluminum produced.
HSS potlines	TF	1.35 kg/Mg (2.7 lb/ton) of aluminum produced.
	POM	2.35 kg/Mg (4.7 lb/ton) of aluminum produced.
Paste Production	POM	Install, operate and maintain equipment for capture of emissions and vent to a dry coke scrubber.
Anode Bake Furnace (collocated with a primary aluminum plant).	TF	0.10 kg/Mg (0.20 lb/ton) of green anode.
	POM	0.09 kg/Mg (0.18 lb/ton) of green anode.

[1] CWPB1 = Center-worked prebake potline with the most modern reduction cells; includes all center-worked prebake potlines not specifically identified as CWPB2 or CWPB3.

CWPB2 = Center-worked prebake potlines located at Alcoa in Rockdale, Texas; Kaiser Aluminum in Mead, Washington; Ormet Corporation in Hannibal, Ohio; Ravenswood Aluminum in Ravenswood, West Virginia; Reynolds Metals in Troutdale, Oregon; and Vanalco Aluminum in Vancouver, Washington.

CWPB3 = Center-worked prebake potline that produces very high purity aluminum, has wet scrubbers as the primary control system and is located at the Century Aluminum primary aluminum plant in Kentucky.

HSS = Horizontal stud Soderberg potline (no facilities remain in the U.S.).

SWPB = Side-worked prebake potline.

VSS1 = Vertical stud Soderberg potline (no facilities remain in the U.S.).

VSS2 = Vertical stud Soderberg potlines (located at an idle facility known as Columbia Falls Aluminum in Columbia Falls, Montana).

TABLE 3—SUMMARY OF CURRENT MACT EMISSION LIMITS FOR NEW SOURCES UNDER THE 1997 NESHAP, AND THE 2005 AMENDMENTS

Source	Pollutant	Emission limit
All Potlines	TF	0.6 kg/Mg (1.2 lb/ton) of aluminum produced.
VSS1, VSS2 and HSS potlines	POM	0.32 kg/Mg (0.63 lb/ton) of aluminum produced.
Paste Production	POM	Install, operate and maintain equipment for capture of emissions and vent to a dry coke scrubber.
Anode Bake Furnace (collocated with a primary aluminum plant).	TF	0.01 kg/Mg (0.020 lb/ton) of green anode.
	POM	0.025 kg/Mg (0.05 lb/ton) of green anode.
Pitch storage tanks	POM	Emission control system designed and operated to reduce inlet POM emissions by 95 percent or greater.

The 1997 NESHAP for primary aluminum reduction plants incorporates new source performance standards for potroom groups. These emission limits are listed in Table 3. The limits for new Soderberg facilities apply to any Soderberg facility that adds a new potroom group to an existing potline or is associated with a potroom group that meets the definition of a modified or reconstructed potroom group. Since these POM limits are very stringent, they effectively preclude the operation of any new Soderberg potlines. We expect any new potline would need to be a prebake potline to comply with the new source limits in the NESHAP.

Compliance with the emission limits in the current rule is demonstrated by performance testing which can be addressed individually for each affected source or according to emissions averaging provisions. Monitoring requirements include monthly measurements of TF secondary emissions, quarterly measurement of POM secondary emissions and annual measurement of primary emissions, continuous parametric monitoring for each emission control device, a monitoring device to track daily weight of aluminum produced and daily inspection for visible emissions. Recordkeeping for the rule is consistent with the General Provisions requirements with the addition of recordkeeping for daily production of aluminum, records supporting emissions averaging and records documenting the portion of TF measured as PM or gaseous form.

C. What is the history of the Primary Aluminum Production source category risk and technology review?

Pursuant to section 112(f)(2) of the CAA, in 2011 we conducted an initial evaluation of the residual risk associated with the NESHAP for Primary Aluminum Reduction Plants. At that time, we also conducted an initial technology review pursuant to section 112(d)(6) of the CAA. Finally, we also reviewed the 2005 MACT rule to determine whether other amendments were appropriate. Based on the results of that initial RTR, and the MACT rule review, we proposed amendments to the NESHAP (also known as subpart LL) on December 6, 2011 (76 FR 76260) (referred to as the 2011 proposal in the remainder of this FR document). The proposed amendments in the 2011 proposal which we are revisiting in today's supplemental proposal include the following:

- Proposed emission limits for POM from prebake potlines;
- Amendments to the monitoring, notification, recordkeeping and testing requirements; and
- Proposed provisions establishing an affirmative defense to civil penalties for violations caused by malfunctions.

As explained below, we are also proposing provisions which have no analogue in the 2011 proposal.

The comment period for the December 2011 proposal opened on December 6, 2011, and ended on February 1, 2012. We received significant comments from industry representatives, environmental organizations and state regulatory agencies. After reviewing the comments, and after consideration of additional data and information received since the 2011 proposal, we determined it is appropriate to revise some of our analyses and to publish a supplemental proposal. After collecting and reviewing additional data, we are proposing technology-based emission limits pursuant to CAA sections 112(d)(2) and (3) for PM, as a surrogate for particulate HAP metals, for new and existing potlines, anode bake furnaces and paste plants. We are also proposing revised technology-based emissions limits for POM emissions from prebake potlines and amendments to the monitoring, notification, recordkeeping and testing requirements to implement these emission limits. Pursuant to CAA section 112(f)(2), we are also proposing risk-based emission standards for POM, nickel (Ni) and arsenic (As) emissions from potlines in the VSS2 subcategory and proposing testing and monitoring requirements to demonstrate compliance with the standards for Ni and As. We are also proposing revisions to the testing and compliance requirements for COS emissions.

In addition, we are withdrawing our 2011 proposal to include an affirmative defense in this rule in light of a recent court decision vacating an affirmative defense in one of the EPA's CAA section 112(d) regulations. *NRDC* v. *EPA*, 749 F. 3d 1055 (D.C. Cir. 2014) (vacating affirmative defense provisions in CAA section 112(d) rule establishing emission standards for Portland cement kilns).

Today's supplemental proposed rulemaking will allow the public an opportunity to review and comment on the revised analyses and revised proposed amendments described above.

However, we also proposed other requirements in the 2011 proposal (listed below) for which we have made no revisions to the analyses, are not proposing any changes and are not reopening for public comment. These are:

- POM standards for existing pitch storage tanks and related monitoring, reporting and testing requirements;
- Emissions limits for COS from potlines;
- Elimination of startup, shutdown and malfunction (SSM) exemptions; and
- Electronic reporting.

The comment period for the December 2011 proposal opened on December 6, 2011, and ended on February 1, 2012. We will address the comments we received during the public comment period for the 2011 proposal at the time we publish final RTR amendments for the Primary Aluminum Production source category based on the 2011 proposal and today's supplemental proposal.

D. What data collection activities were conducted to support this action?

The 2011 risk assessment was based on estimates of PAH emissions derived from test measurements conducted in the 1990's on facilities that may not have been representative of current operating practices and using test methods that were inferior to those currently available. In addition, data available to estimate emissions of HAP metals from potlines were very limited, and no data were available to estimate HAP metals emissions from anode bake furnaces and paste plants. Furthermore, no data were available to estimate dioxin/furan (D/F) and polychlorinated biphenyl (PCB) emissions from potlines, anode bake furnaces and paste plants.

The proposed emission limits for POM from prebake potlines included in the 2011 proposal were based on extremely limited data. Also lacking were reliable data on which to base MACT standards for PM (as a surrogate for HAP metals) emissions from potlines, anode bake furnaces and paste plants.

Therefore, in March 2013 we sent an information request to the primary aluminum companies pursuant to section 114 of the CAA to gather additional relevant emissions test data. In response to this request, selected facilities provided the following data:

- Additional emission test data for POM emissions from prebake potlines;
- Additional emission test data for PM emissions from prebake potlines, Soderberg potlines (which have subsequently shut down), anode bake furnaces and paste plants;
- Additional emission test data for speciated PAH, speciated HAP metals, speciated PCBs and speciated polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans from potlines, anode bake furnaces and paste plants.

III. Analytical Procedures

A. For purposes of this supplemental proposal, how did we estimate the post-MACT risks posed by the Primary Aluminum Production source category?

The EPA conducted a risk assessment that provides estimates of the MIR posed by the HAP emissions from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risks within the exposed populations, cancer incidence and an evaluation of the potential for adverse environmental effects. The eight sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal.* The methods used to assess risks (as described in the eight primary steps below) are consistent with those peer-reviewed by a panel of the EPA's Science Advisory Board (SAB) in 2009 and described in their peer review report issued in 2010; [3] they are also consistent with the key recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

Using the test reports from the 2013 information request we calculated annual emission rates of PAHs, D/Fs, PCBs and HAP metals from primary and secondary potline exhausts, anode bake furnace exhausts and paste plant exhausts. Where no test data were available we calculated and applied emission factors (EF) for these pollutants and emission points based on average emission rates from similarly operated sources to estimate emissions. However, it is important to note that only two facilities tested for D/F and PCBs. Furthermore, many of the test results for D/Fs and PCBs were below detection limits. More than half of the mercury (Hg) emissions tests results were also below detection limit. Therefore, there are greater uncertainties regarding D/F, PCB and Hg emissions compared to the other HAP. To estimate emissions in cases where some, but not all, data were below the detection limit, we assumed the undetected emissions were equal to one-half the detection limit, which is the established approach for dealing with non-detects in the EPA's RTR program when developing emissions estimates for input to the risk assessments. Subsequently, we developed EF based on these limited data to estimate emissions at the other facilities. We believe the emissions estimates for D/F and PCBs are quite conservative (*i.e.*, more likely to be overestimated rather than underestimated) because we assumed undetected emissions were equal to one half the detection limit. We note that EPA may, but is not obligated to amend MACT standards. In the case of D/F, Hg and PCB, where many of the emissions tests were below detection limit, and given the uncertainties and limitations of the data (for example, we have test data for D/F and PCBs for only one of the 11 prebake facilities), the EPA is choosing not to propose standards for these HAP at this time.

We also obtained test data from recent compliance tests for TF and estimated HF emissions from primary and secondary potline exhausts and anode bake furnace exhausts. We estimated COS emissions as described in the 2011 risk assessment. We did not receive any additional test data for COS. Thus, the emissions estimates for COS have not changed since the 2011 proposal. As noted above, we are not accepting further comment on either this analysis or the proposed emission limit for COS.

We also verified information regarding emissions release characteristics such as stack heights, stack gas exit velocities, stack temperatures and source locations. In addition to the quality assurance (QA) of the source data for the facilities contained in the dataset, we also checked the coordinates of every emission source in the dataset using tools such as Google Earth. Where coordinates used in the 2011 risk assessment were found to be incorrect, we identified and corrected them. We also performed a QA assessment of the emissions data and release characteristics to ensure the data were reliable and that there were no outliers. The emissions data and the methods used to estimate emissions from all the various emissions sources are described in more detail in the technical document: *Revised Draft Development of the RTR Emissions Dataset for the Primary Aluminum Production Source Category,* which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during the specified annual time period. In some cases, these "actual" emission levels are lower than the emission levels required to comply with the current MACT standards. The emissions level allowed to be emitted by the MACT standards is referred to as the "MACT-allowable" emissions level. We discussed the use of both MACT-allowable and actual

[3] U.S. EPA SAB. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* May 2010.

emissions in the final Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP residual risk rules (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable since these risks reflect the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach.

For this supplemental proposal, we evaluated allowable emissions based on responses to the information request. We estimated that allowable emissions for the currently regulated HAP (*i.e.*, PAHs and HF) were generally about 1.5 times higher than the actual emissions. Therefore, to calculate allowable emissions of PAHs and HF, we assumed that allowable emissions were 1.5 times the actual emissions for all facilities except for one idle Soderberg facility (Columbia Falls). For Columbia Falls, which has the highest potential for emissions of all the facilities, we evaluated site-specific data and estimated that allowable emissions for the regulated HAP (*i.e.*, PAHs and HF) were about 1.9 times higher than estimated actual emissions when the plant is operating. Regarding unregulated HAP, the NESHAP currently includes no standards for COS, PCB, D/F and HAP metal emissions. Since there is no standard in place for these HAP and, therefore, no defined level of "MACT allowable" emissions levels, we assumed that allowable emissions for COS, PCB, D/F and HAP metal emissions were equal to estimated actual emissions. Further explanation is provided in the technical document: *Revised Draft Development of the RTR Emissions Dataset for the Primary Aluminum Production Source Category*, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

3. How did we conduct dispersion modeling, determine inhalation exposures and estimate individual and population inhalation risks?

Both long-term and short-term inhalation exposure concentrations and health risks from the source category addressed in this proposal were estimated using the Human Exposure Model (Community and Sector HEM–3 version 1.1.0). The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources,[4] and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The air dispersion model used by the HEM–3 model (AERMOD) is one of the EPA's preferred models for assessing pollutant concentrations from industrial facilities.[5] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2011) of hourly surface and upper air observations for more than 800 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block[6] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by the EPA for HAP and other toxic air pollutants. These values are available at *http://www2.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants* and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentrations of each HAP emitted by each source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. We calculated the MIR for each facility as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week and 52 weeks per year for a 70-year period) exposure to the maximum concentration at the centroid of inhabited census blocks. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use URE values from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without EPA IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) URE values, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with the EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate.

In the case of Ni compounds, to provide a health-protective estimate of potential cancer risks, we used the IRIS URE value for Ni subsulfide in the assessment for the 2011 proposed rule for the Primary Aluminum Production source category. Based on past scientific and technical considerations, the determination of the percent of Ni subsulfide was considered a major factor for estimating the extent and magnitude of the risks of cancer due to Ni-containing emissions. Nickel speciation information for some of the largest Ni-emitting sources (including oil combustion, coal combustion and others) suggested that at least 35 percent of total Ni emissions may be soluble compounds and that the URE for the mixture of inhaled Ni compounds (based on Ni subsulfide, and representative of pure insoluble crystalline Ni) could be derived to reflect the assumption that 65 percent of the total mass of Ni may be carcinogenic.

Based on consistent views of major scientific bodies (*i.e.*, National Toxicology Program (NTP) in their 12th Report of the Carcinogens (ROC),[7] International Agency for Research on

[4] This metric comes from the Benzene NESHAP. See 54 FR 38046.

[5] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of o Preferred General Purpose (Flot ond Complex Terroin) Dispersion Model ond Other Revisions* (70 FR 68218, November 9, 2005).

[6] A census block is the smallest geographic area for which census statistics are tabulated.

[7] National Toxicology Program (NTP), 2011. *Report on Corcinogens.* 12th ed. Research Triangle Park, NC: US Department of Health and Human Services (DHHS), Public Health Service. Available online at *http://ntp.niehs.nih.gov/ntp/roc/twelfth/roc12.pdf.*

Cancer (IARC) [8] and other international agencies) [9] that consider all Ni compounds to be carcinogenic, we currently consider all Ni compounds to have the potential of being carcinogenic to humans. The *12th Report of the Carcinogens* states that the "combined results of epidemiological studies, mechanistic studies, and carcinogenic studies in rodents support the concept that Ni compounds generate Ni ions in target cells at sites critical for carcinogenesis, thus allowing consideration and evaluation of these compounds as a single group." Although the precise Ni compound (or compounds) responsible for the carcinogenic effects in humans is not always clear, studies indicate that Ni sulfate and the combinations of Ni sulfides and oxides encountered in the Ni refining industries cause cancer in humans (these studies are summarized in a review by Grimsrud et al., 2010 [10]). The major scientific bodies mentioned above have also recognized that there are differences in toxicity and/or carcinogenic potential across the different Ni compounds.

In the inhalation risk assessment for this supplemental proposal, we chose to take a conservative approach: we considered all Ni compounds to be as carcinogenic as Ni subsulfide and applied the IRIS URE for Ni subsulfide without a factor to reflect the assumption that 100 percent of the total mass of Ni may be as carcinogenic as pure Ni subsulfide. However, given that there are two additional URE values [11] derived for exposure to mixtures of Ni compounds, as a group, that are 2–3 fold lower than the IRIS URE for Ni subsulfide, the EPA also considers it reasonable to use a value that is 50 percent of the IRIS URE for Ni subsulfide for providing an estimate of the lower end of the plausible range of cancer potency values for different mixtures of Ni compounds.

The EPA estimated incremental individual lifetime cancer risks associated with emissions from the facilities in the source category as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans and suggestive evidence of carcinogenic potential [12]) emitted by the modeled sources. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of the sources were also estimated for the source category as part of this assessment by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044, September 14, 1989) and the limitations of Gaussian dispersion models, including AERMOD.

To assess the risk of non-cancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or target organ-specific HI, TOSHI). The HQ is the estimated exposure divided by the chronic reference value, which is a value selected from one of several sources. First, the chronic reference level can be the EPA reference concentration (RfC) (*http://www.epa.gov/riskassessment/glossary.htm*), defined as "an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime." Alternatively, in cases where an RfC from the EPA's IRIS database is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic reference level can be a value from the following prioritized sources: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (MRL) (*http://www.atsdr.cdc.gov/mrls/index.asp*), which is defined as "an estimate of daily human exposure to a hazardous substance that is likely to be without an appreciable risk of adverse non-cancer health effects) over a specified duration of exposure"; (2) the CalEPA Chronic Reference Exposure Level (REL) (*http://www.oehha.ca.gov/air/hot_spots/pdf/HRAguidefinal.pdf*), which is defined as "the concentration level (that is expressed in units of micrograms per cubic meter ($\mu g/m^3$) for inhalation exposure and in a dose expressed in units of milligram per kilogram-day (mg/kg-day) for oral exposures), at or below which no adverse health effects are anticipated for a specified exposure duration"; or (3), as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA, in place of or in concert with other values.

POM, a carcinogenic HAP with a mutagenic mode of action, is emitted by the facilities in this source category.[13] For this compound group,[14] the EPA's analysis applies the age-dependent adjustment factors (ADAF) described in the EPA's *Supplemental Guidance for Assessing Susceptibility from Early-Life Exposure to Carcinogens.*[15] This adjustment has the effect of increasing the estimated lifetime risks for POM by a factor of 1.6. In addition, although primary aluminum facilities reported most of their total POM emissions as individual compounds, the EPA expresses carcinogenic potency for compounds in this group in terms of benzo[a]pyrene equivalence, based on evidence that carcinogenic POM has the same mutagenic mechanism of action as benzo[a]pyrene. For this reason, the EPA's Science Policy Council [16] recommends applying the *Supplemental Guidance* to all carcinogenic PAH for which risk estimates are based on relative potency. Accordingly, we have applied the ADAF to the benzo[a]pyrene equivalent portion of all POM mixtures.

As mentioned above, in order to characterize non-cancer chronic effects, and in response to key

[8] International Agency for Research on Cancer (IARC), 1990. *IARC Monographs on the Evaluation of Carcinogenic Risks to Humons.* Chromium, nickel, and welding. Vol. 49. Lyons, France: International Agency for Research on Cancer, World Health Organization Vol. 49:256.

[9] World Health Organization (WHO, 1991) and the European Union's Scientific Committee on Health and Environmental Risks (SCHER, 2006).

[10] Grimsrud TK and Andersen A. *Evidence of Corcinogenicity in Humons of Woter-soluble Nickel Solts.* J Occup Med Toxicol 2010, 5:1–7. Available online at *http://www.ossup-med.com/content/5/1/7.*

[11] Two UREs (other than the current IRIS values) have been derived for nickel compounds as a group: One developed by the California Department of Health Services (*http://www.arb.ca.gov/toxics/id/summory/nickel_tech_b.pdf*) and the other by the Texas Commission on Environmental Quality (*http://www.epo.gov/ttn/otw/noto1999/99pdfs/healtheffectsinfo.pdf*).

[12] These classifications also coincide with the terms "known carcinogen, probable carcinogen, and possible carcinogen," respectively, which are the terms advocated in the EPA's previous *Guidelines for Carcinogen Risk Assessment*, published in 1986 (51 FR 33992, September 24, 1986). Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled, *NATA—Evaluating the National-scole Air Toxics Assessment 1996 Data—an SAB Advisory*, available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

[13] U.S. EPA. Performing risk assessments that include carcinogens described in the *Supplemental Guidance* as having a mutagenic mode of action. *Science Policy Council Concer Guidelines Implementation Work Group Communication II:* Memo from W.H. Farland, dated October 4, 2005.

[14] See the *Risk Assessment for Source Categories* document available in the docket for a list of HAP with a mutagenic mode of action.

[15] U.S. EPA. *Supplemental Guidonce for Assessing Eorly-Life Exposure to Carcinogens.* EPA/630/R–03/003F, 2005. *http://www.epa.gov/ttn/atw/childrens_supplement_final.pdf.*

[16] U.S. EPA. *Science Policy Council Cancer Guidelines Implementation Workgroup Communication II:* Memo from W.H. Farland, dated June 14, 2006.

recommendations from the SAB, the EPA selects dose-response values that reflect the best available science for all HAP included in RTR risk assessments.[17] More specifically, for a given HAP, the EPA examines the availability of inhalation reference values from the sources included in our tiered approach (*e.g.*, IRIS first, ATSDR second, CalEPA third) and determines which inhalation reference value represents the best available science. Thus, as new inhalation reference values become available, the EPA will typically evaluate them and determine whether they should be given preference over those currently being used in RTR risk assessments.

The EPA also evaluated screening estimates of acute exposures and risks for each of the HAP (for which appropriate acute dose-response values are available) at the point of highest potential off-site exposure for each facility. To do this the EPA estimated the risks when both the peak hourly emissions rate and worst-case dispersion conditions occur. We also assume that a person is located at the point of highest impact during that same time. In accordance with the mandate of section 112(f)(2) of the CAA, we use the point of highest off-site exposure to assess the potential risk to the maximally exposed individual. The acute HQ is the estimated acute exposure divided by the acute dose-response value. In each case, the EPA calculated acute HQ values using best available, short-term dose-response values. These acute dose-response values, which are described below, include the acute REL, acute exposure guideline levels (AEGL) and emergency response planning guidelines (ERPG) for 1-hour exposure durations. As discussed below, we used conservative assumptions for emissions rates, meteorology and exposure location.

As described in the *CalEPA's Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* an acute REL value (*http://www.oehha.ca.gov/air/pdf/acuterel.pdf*) is defined as "the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration." *Id.* at page 2. Acute REL values are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. Acute REL values are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact.

AEGL values were derived in response to recommendations from the National Research Council (NRC). As described in *Standing Operating Procedures (SOP) of the National Advisory Committee on Acute Exposure Guideline Levels for Hazardous Substances* (*http://www.epa.gov/oppt/aegl/pubs/sop.pdf*),[18] "the NRC's previous name for acute exposure levels—community emergency exposure levels—was replaced by the term AEGL to reflect the broad application of these values to planning, response, and prevention in the community, the workplace, transportation, the military, and the remediation of Superfund sites." *Id.* at 2. This document also states that AEGL values "represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to eight hours." *Id.* at 2.

The document lays out the purpose and objectives of AEGL by stating that "the primary purpose of the AEGL program and the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances is to develop guideline levels for once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals." *Id.* at 21. In detailing the intended application of AEGL values, the document states that "[i]t is anticipated that the AEGL values will be used for regulatory and nonregulatory purposes by U.S. Federal and state agencies and possibly the international community in conjunction with chemical emergency response, planning and prevention programs. More specifically, the AEGL values will be used for conducting various risk assessments to aid in the development of emergency preparedness and prevention plans, as well as real-time emergency response actions, for accidental chemical releases at fixed facilities and from transport carriers." *Id.* at 31.

The AEGL–1 value is then specifically defined as "the airborne concentration (expressed as ppm (parts per million) or mg/m^3 (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic non-sensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure." *Id.* at 3. The document also notes that, "Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, non-sensory effects." *Id.* Similarly, the document defines AEGL–2 values as "the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape." *Id.*

ERPG values are derived for use in emergency response, as described in the American Industrial Hygiene Association's Emergency Response Planning (ERP) Committee document titled, *ERPGS Procedures and Responsibilities* (*https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERP-SOPs2006.pdf*), which states that, "Emergency Response Planning Guidelines were developed for emergency planning and are intended as health based guideline concentrations for single exposures to chemicals."[19] *Id.* at 1. The ERPG–1 value is defined as "the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor." *Id.* at 2. Similarly, the ERPG–2 value is defined as "the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action." *Id.* at 1.

As can be seen from the definitions above, the AEGL and ERPG values include the similarly-defined severity levels 1 and 2. For many chemicals, a severity level 1 value AEGL or ERPG has not been developed because the types of

[17] The SAB peer review of RTR Risk Assessment Methodologies is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

[18] National Academy of Sciences (NAS), 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2.

[19] *ERP Committee Procedures and Responsibilities.* November 1, 2006. American Industrial Hygiene Association.

effects for these chemicals are not consistent with the AEGL–1/ERPG–1 definitions; in these instances, we compare higher severity level AEGL–2 or ERPG–2 values to our modeled exposure levels to screen for potential acute concerns. When AEGL–1/ERPG–1 values are available, they are used in our acute risk assessments.

Acute REL values for 1-hour exposure durations are typically lower than their corresponding AEGL–1 and ERPG–1 values. Even though their definitions are slightly different, AEGL–1 values are often the same as the corresponding ERPG–1 values, and AEGL–2 values are often equal to ERPG–2 values. Maximum HQ values from our acute screening risk assessments typically result when basing them on the acute REL value for a particular pollutant. In cases where our maximum acute HQ value exceeds 1, we also report the HQ value based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1 value).

To develop screening estimates of acute exposures in the absence of hourly emissions data, generally, we first develop estimates of maximum hourly emissions rates by multiplying the average actual annual hourly emissions rates by a default factor to cover routinely variable emissions. We choose the factor to use partially based on process knowledge and engineering judgment reflecting, where appropriate, circumstances of the particular source category at issue. The factor chosen also reflects a Texas study of short-term emissions variability, which showed that most peak emission events in a heavily-industrialized four-county area (Harris, Galveston, Chambers and Brazoria Counties, Texas) were less than twice the annual average hourly emissions rate. The highest peak emissions event was 74 times the annual average hourly emissions rate, and the 99th percentile ratio of peak hourly emissions rate to the annual average hourly emissions rate was 9.[20] Considering this analysis, to account for more than 99 percent of the peak hourly emissions, we apply a conservative screening multiplication factor of 10 to the average annual hourly emissions rate in our acute exposure screening assessments as our default approach. However, we use a factor other than 10 if we have information that indicates that a different factor is appropriate for a particular source category.

For the Primary Aluminum Production source category, information was available to determine process-specific factors. The processes in this source category are typically equipped with controls which will not allow startup of the emission source until the associated control device is operating and will automatically shut down the emission source if the associated controls malfunction. Further, some processes, for example, the potlines, operate continuously so there are no significant spikes in emissions. We, thus, believe emissions from the potlines are relatively consistent over time with minimal fluctuation. However, we realize that emissions vary over time. Furthermore, as described above, we estimate the maximum allowable emissions for this source category are about 1.5 times higher than the average long-term actual emissions for these sources. Therefore, we assume that hourly emissions rates from potlines could occasionally increase by a factor of up to 1.5 times the average hourly emissions, which, for the reasons stated above, we believe is a valid multiplier to estimate maximum acute emissions from potlines. Other processes, for example paste production and anode baking, may have specific cycles, with peak emissions occurring for a part of that cycle. We assume these peak emissions could be as high as 2 times the average emissions for paste plants and bake furnaces. As discussed in sections II.D and III.A.1 of this preamble, above, we collected data regarding the emissions from these processes. Those emissions data represent emissions during periods of normal operations (as opposed to during periods of peak emissions).

Therefore, based on the modes of operation and other factors described above, we applied an acute emissions multiplier of 1.5 to all potline emissions for input to the acute risk assessment, and for paste production and anode baking we applied an acute emissions multiplier of 2. We regard these factors as conservative (*i.e.*, they are designed not to underestimate variability). Even with data available to develop process-specific factors, our assessment of acute risk reflects conservative assumptions, in particular in its assumptions that every potline operates at the same hour and that every potline has emissions 1.5 times higher than the average at the same hour, that this is the same hour as the worst-case dispersion conditions, and that a person is at the location of maximum concentration during that hour. This results in a conservative exposure scenario.

As part of our acute risk assessment process, for cases where acute HQ values from the screening step were less than or equal to 1 for modeled HAPs (even under the conservative assumptions of the screening analysis), acute impacts were deemed negligible and no further analysis was performed for these HAPs. In cases where an acute HQ from the screening step was greater than 1, for some modeled HAPs additional site-specific data were considered to develop a more refined estimate of the potential for acute impacts of concern. These refinements are discussed more fully in the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797). Ideally, we would prefer to have continuous measurements over time to see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emissions rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this screening analysis. Recognizing that this level of data is rarely available, we instead rely on the multiplier approach.

As noted above, the agency may choose to refine the acute screen by also assessing the exposure that may occur at a centroid of census block. For this source category we first used conservative assumptions for emissions rates, meteorology and exposure location for our acute analysis. We then refined the acute assessment by also estimating the HQ for As at centroids of census blocks.

To better characterize the potential health risks associated with estimated acute exposures to HAP, and in response to a key recommendation from the SAB's peer review of the EPA's RTR risk assessment methodologies,[21] we generally examine a wider range of available acute health metrics (*e.g.*, RELs, AEGLs) than we do for our chronic risk assessments. This is in response to the SAB's acknowledgement that there are generally more data gaps and inconsistencies in acute reference values than there are in chronic reference values. In some cases, when Reference Value Arrays[22] for HAP have

[20] See *http://www.tceq.state.tx.us/compliance/field_ops/eer/index.html* or the docket to access the source of these data.

[21] The SAB peer review of RTR Risk Assessment Methodologies is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

[22] U.S. EPA. (2009) Chapter 2.9 *Chemical Specific Reference Values for Formaldehyde in Graphical*

Continued

been developed, we consider additional acute values (*i.e.*, occupational and international values) to provide a more complete risk characterization.

4. How did we conduct the multipathway exposure and risk screening?

The EPA conducted a screening analysis examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.*, ingestion). We first determined whether any sources in the source category emitted any HAP known to be persistent and bioaccumulative in the environment (PB–HAP). The PB–HAP compounds or compound classes are identified for the screening from the EPA's Air Toxics Risk Assessment Library (available at *http://www2.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*).

For the Primary Aluminum Production source category, we identified emissions of cadmium (Cd) compounds, D/F, POM, divalent Hg compounds and HF. However, as we explained in section III.A.1 of this preamble, many of the emissions tests for mercury and D/F were below detection limit or detection limit limited. Nevertheless, we estimated emissions of these HAP based on the conservative assumption that undetected emissions were equal to one half the detection limit. Therefore, we consider the estimates for D/F and Hg to be conservative (*i.e.*, more likely to be overestimated rather than underestimated).

Because one or more of the PB–HAP are emitted by at least one facility in the Primary Aluminum Production source category, we proceeded to the next step of the evaluation. In this step, we determined whether the facility-specific emissions rates of the emitted PB–HAP were large enough to create the potential for significant non-inhalation human health risks under reasonable worst-case conditions. To facilitate this step, we developed emissions rate screening levels for several PB–HAP using a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with emissions rate screening levels are: Cd, lead, D/F, Hg compounds and POM. We conducted a sensitivity analysis on the screening scenario to ensure that its key design parameters would represent the upper end of the range of possible values, such that it would represent a conservative, but not impossible scenario. The facility-specific emissions rates of these PB–HAP were compared to the emission rate screening levels for these PB–HAP to assess the potential for significant human health risks via non-inhalation pathways. We call this application of the TRIM.FaTE model the Tier 1 TRIM-screen or Tier 1 screen.

For the purpose of developing emissions rates for our Tier 1 TRIM-screen, we derived emission levels for these PB–HAP (other than lead (Pb) compounds) at which the maximum excess lifetime cancer risk would be 1-in-1 million (*i.e.*, for D/F and POM) or, for HAP that cause non-cancer health effects (*i.e.*, Cd compounds and Hg compounds), the maximum HQ would be 1. If the emissions rate of any PB–HAP included in the Tier 1 screen exceeds the Tier 1 screening emissions rate for any facility, we conduct a second screen, which we call the Tier 2 TRIM-screen or Tier 2 screen.

In the Tier 2 screen, the location of each facility that exceeded the Tier 1 emission rate is used to refine the assumptions associated with the environmental scenario while maintaining the exposure scenario assumptions. A key assumption that is part of the Tier 1 screen is that a lake is located near the facility; we confirm the existence of lakes near the facility as part of the Tier 2 screen. We then adjust the risk-based Tier 1 screening level for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenarios for the subsistence fisher and the subsistence farmer change with meteorology and environmental assumptions.

PB–HAP emissions that do not exceed these new Tier 2 screening levels are considered to pose no unacceptable risks. When facilities exceed the Tier 2 screening levels, it does not mean that multipathway impacts are significant, only that we cannot rule out that possibility based on the results of the screen.

If the PB–HAP emissions for a facility exceed the Tier 2 screening emissions rate, and data are available, we may decide to conduct a more refined Tier 3 multipathway assessment. There are several analyses that can be included in a Tier 3 screen depending upon the extent of refinement warranted, including validating that the lake is fishable and considering plume-rise to estimate emissions lost above the mixing layer. If the Tier 3 screen is exceeded, the EPA may further refine the assessment. For this source category, we conducted 3 Tier 3 screening assessments at Alcoa (Ferndale, WA), Alumax (Goose Creek, SC) and Reynolds Metals (Massena, NY). The Reynolds Metals facility is a Soderberg facility which was operating at the time we sent out the information request and when we collected the emissions data and initiated the modeling assessment. However, recently this facility permanently shut down all their Soderberg potline operations. It is our understanding that this facility will either convert to a prebake facility or remain permanently shut down. A detailed discussion of the approach for this multipathway risk assessment can be found in Appendix 9 (*Technical Support Document: Human Health Multipathway Residual Risk Screening Assessment for the Primary Aluminum Production Source Category*) of the risk assessment document.

In evaluating the potential multipathway risk from emissions of Pb compounds, rather than developing a screening emissions rate for them, we compared maximum estimated chronic inhalation exposures with the level of the current National Ambient Air Quality Standard (NAAQS) for Pb.[23] Values below the level of the primary (health-based) Pb NAAQS were considered to have a low potential for multipathway risk.

For further information on the multipathway analysis approach, see the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

5. How did we assess risks considering the revised emissions control options?

In addition to assessing baseline inhalation risks and potential multipathway risks, we also estimated risks considering the emission

Arrays of Chemical-Specific Health Effect Reference Values for Inhalation Exposures (Final Report). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/061, and available online at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=211003*.

[23] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring among other things that the standard provide an "ample margin of safety"). However, the lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.*, the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since the primary lead NAAQS reflects an adequate margin of safety.

reductions that would be achieved by the control options under consideration in this supplemental proposal (*i.e.*, emission reductions reflecting the proposed standards reflecting MACT). In these cases, the expected emission reductions were applied to the specific HAP and emission points in the RTR emissions dataset to develop corresponding estimates of risk that would exist after implementation of the proposed amendments in today's action.

6. How did we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect

The EPA conducts a screening assessment to examine the potential for adverse environmental effects as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines "adverse environmental effect" as "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas."

b. Environmental HAP

The EPA focuses on seven HAP, which we refer to as "environmental HAP," in its screening analysis: Five PB–HAP and two acid gases. The five PB–HAP are Cd, D/F, POM, Hg (both inorganic Hg and methylmercury) and Pb compounds. The two acid gases are hydrogen chloride (HCl) and HF. We have no data indicating primary aluminum plants emit HCl. Therefore, our analysis for this source category does not reflect HCl emissions. The rationale for including the remaining six HAP in the environmental risk screening analysis is presented below.

The HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment and water. The PB–HAP are taken up, through sediment, soil, water and/or ingestion of other organisms, by plants or animals (*e.g.*, small fish) at the bottom of the food chain. As larger and larger predators consume these organisms, concentrations of the PB–HAP in the animal tissues increase as does the potential for adverse effects. The five PB–HAP we evaluate as part of our screening analysis account for 99.8 percent of all PB–HAP emissions nationally from stationary sources (on a mass basis from the 2005 National Emissions Inventory).

In addition to accounting for almost all of the mass of PB–HAP emitted, we note that the TRIM.FaTE model that we use to evaluate multipathway risk allows us to estimate concentrations of Cd compounds, D/F, POM and Hg in soil, sediment and water. For Pb compounds, we currently do not have the ability to calculate these concentrations using the TRIM.FaTE model. Therefore, to evaluate the potential for adverse environmental effects from Pb compounds, we compare the estimated HEM–3 modeled exposures from the source category emissions of Pb with the level of the secondary NAAQS for Pb.[24] We consider values below the level of the secondary Pb NAAQS as unlikely to cause adverse environmental effects.

Due to its well-documented potential to cause direct damage to terrestrial plants, we include the acid gas HF emitted by primary aluminum sources, in the environmental screening analysis. In addition to the potential to cause direct damage to plants, high concentrations of HF in the air have been linked to fluorosis in livestock. Air concentrations of these HAP are already calculated as part of the human multipathway exposure and risk screening analysis using the HEM3–AERMOD air dispersion model, and we are able to use the air dispersion modeling results to estimate the potential for an adverse environmental effect.

The EPA acknowledges that other HAP beyond the seven HAP discussed above may have the potential to cause adverse environmental effects. Therefore, the EPA may include other relevant HAP in its environmental risk screening in the future, as modeling science and resources allow. The EPA invites comment on the extent to which other HAP emitted by the source category may cause adverse environmental effects. Such information should include references to peer-reviewed ecological effects benchmarks that are of sufficient quality for making regulatory decisions, as well as information on the presence of organisms located near facilities within the source category that such benchmarks indicate could be adversely affected.

[24] The secondary lead NAAQS is a reasonable measure of determining whether there is an adverse environmental effect since it was established considering "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being."

c. Ecological Assessment Endpoints and Benchmarks for PB–HAP

An important consideration in the development of the EPA's screening methodology is the selection of ecological assessment endpoints and benchmarks. Ecological assessment endpoints are defined by the ecological entity (*e.g.*, aquatic communities including fish and plankton) and its attributes (*e.g.*, frequency of mortality). Ecological assessment endpoints can be established for organisms, populations, communities or assemblages and ecosystems.

For PB–HAP (other than Pb compounds), we evaluated the following community-level ecological assessment endpoints to screen for organisms directly exposed to HAP in soils, sediment and water:

- Local terrestrial communities (*i.e.*, soil invertebrates, plants) and populations of small birds and mammals that consume soil invertebrates exposed to PB–HAP in the surface soil;
- Local benthic (*i.e.*, bottom sediment dwelling insects, amphipods, isopods and crayfish) communities exposed to PB–HAP in sediment in nearby water bodies; and
- Local aquatic (water-column) communities (including fish and plankton) exposed to PB–HAP in nearby surface waters.

For PB–HAP (other than Pb compounds), we also evaluated the following population-level ecological assessment endpoint to screen for indirect HAP exposures of top consumers via the bioaccumulation of HAP in food chains:

- Piscivorous (*i.e.*, fish-eating) wildlife consuming PB–HAP-contaminated fish from nearby water bodies.

For Cd compounds, D/F, POM and Hg, we identified the available ecological benchmarks for each assessment endpoint. An ecological benchmark represents a concentration of HAP (*e.g.*, 0.77 ug of HAP per liter of water) that has been linked to a particular environmental effect level through scientific study. For PB–HAP we identified, where possible, ecological benchmarks at the following effect levels:

- Probable effect levels (PEL): Level above which adverse effects are expected to occur frequently;
- Lowest-observed-adverse-effect level (LOAEL): The lowest exposure level tested at which there are biologically significant increases in frequency or severity of adverse effects; and

• No-observed-adverse-effect levels (NOAEL): The highest exposure level tested at which there are no biologically significant increases in the frequency or severity of adverse effect.

We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. In general, the EPA sources that are used at a programmatic level (*e.g.*, Office of Water, Superfund Program) were used in the analysis, if available. If not, the EPA benchmarks used in regional programs (*e.g.*, Superfund) were used. If benchmarks were not available at a programmatic or regional level, we used benchmarks developed by other federal agencies (*e.g.*, National Oceanic and Atmospheric Administration (NOAA)) or state agencies.

Benchmarks for all effect levels are not available for all PB–HAP and assessment endpoints. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

d. Ecological Assessment Endpoints and Benchmarks for Acid Gases

The environmental screening analysis also evaluated potential damage and reduced productivity of plants due to direct exposure to acid gases in the air. For acid gases, we evaluated the following ecological assessment endpoint:

• Local terrestrial plant communities with foliage exposed to acidic gaseous HAP in the air.

The selection of ecological benchmarks for the effects of acid gases on plants followed the same approach as for PB–HAP (*i.e.*, we examine all of the available chronic benchmarks). For HCl, the EPA identified chronic benchmark concentrations. We note that the benchmark for chronic HCl exposure to plants is greater than the reference concentration for chronic inhalation exposure for human health. This means that where the EPA includes regulatory requirements to prevent an exceedance of the reference concentration for human health, additional analyses for adverse environmental effects of HCl would not be necessary.

For HF, the EPA identified chronic benchmark concentrations for plants and evaluated chronic exposures to plants in the screening analysis. High concentrations of HF in the air have also been linked to fluorosis in livestock. However, the HF concentrations at which fluorosis in livestock occur are higher than those at which plant damage begins. Therefore, the benchmarks for plants are protective of both plants and livestock.

e. Screening Methodology

For the environmental risk screening analysis, the EPA first determined whether any facilities in the Primary Aluminum Production source category emitted any of the seven environmental HAP. For the Primary Aluminum Production source category, we identified emissions of five of the PB–HAP (Cd, Hg, Pb, D/F and POM) and one acid gas (HF).

Because one or more of the seven environmental HAP evaluated are emitted by the facilities in the source category, we proceeded to the second step of the evaluation.

f. PB–HAP Methodology

For Cd, Hg, POM and D/F, the environmental screening analysis consists of two tiers, while Pb compounds are analyzed differently as discussed earlier. However, as we explained in section III.A.1 above, there are greater uncertainties in the emissions estimates for Hg or D/F because of the limitations in the available data and because a large portion of emissions tests results were below the detection limit for those HAP. Nevertheless, to be conservative (*i.e.*, more likely to overestimate risks rather than underestimate risks), we have included emissions estimates of Hg and D/F in the PB–HAP risk screen based on conservative assumptions (*i.e.*, emissions of one half the detection limit were assumed for those tests where no pollutants were detected).

In the first tier, we determined whether the maximum facility-specific emission rates of each of the emitted environmental HAP were large enough to create the potential for adverse environmental effects under reasonable worst-case environmental conditions. These are the same environmental conditions used in the human multipathway exposure and risk screening analysis.

To facilitate this step, TRIM.FaTE was run for each PB–HAP under hypothetical environmental conditions designed to provide conservatively high HAP concentrations. The model was set to maximize runoff from terrestrial parcels into the modeled lake, which in turn, maximized the chemical concentrations in the water, the sediments and the fish. The resulting media concentrations were then used to back-calculate a screening level emission rate that corresponded to the relevant exposure benchmark concentration value for each assessment endpoint. To assess emissions from a facility, the reported emission rate for each PB–HAP was compared to the screening level emission rate for that PB–HAP for each assessment endpoint. If emissions from a facility do not exceed the Tier 1 screening level, the facility "passes" the screen, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening level, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening analysis, the emission rate screening levels are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screen. The modeling domain for each facility in the Tier 2 analysis consists of eight octants. Each octant contains 5 modeled soil concentrations at various distances from the facility (5 soil concentrations × 8 octants = total of 40 soil concentrations per facility) and one lake with modeled concentrations for water, sediment and fish tissue. In the Tier 2 environmental risk screening analysis, the 40 soil concentration points are averaged to obtain an average soil concentration for each facility for each PB–HAP. For the water, sediment and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening level, the facility passes the screen, and is typically not evaluated further. If emissions from a facility exceed the Tier 2 screening level, the facility does not pass the screen and, therefore, may have the potential to cause adverse environmental effects. Such facilities are evaluated further to investigate factors such as the magnitude and characteristics of the area of exceedance.

g. Acid Gas Methodology

The environmental screening analysis evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF (we have no data regarding HCl emissions from primary aluminum facilities and, therefore, HCl was not analyzed). The environmental risk screening methodology for HF is a single-tier screen that compares the average off-site ambient air concentration over the modeling domain to ecological benchmarks for each of the acid gases. Because air concentrations are compared directly to the ecological benchmarks, emission-based screening levels are not calculated for HF as they

are in the ecological risk screening methodology for PB–HAPs.

For purposes of ecological risk screening, the EPA identifies a potential for adverse environmental effects to plant communities from exposure to acid gases when the average concentration of the HAP around a facility exceeds the LOAEL ecological benchmark. In such cases, we further investigate factors such as the magnitude and characteristics of the area of exceedance (*e.g.*, land use of exceedance area, size of exceedance area) to determine if there is an adverse environmental effect.

For further information on the environmental screening analysis approach, see the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

7. How did we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire "facility," where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category of interest, but also emissions of HAP from all other emissions sources at the facility for which we have data. We analyzed risks due to the inhalation of HAP that are emitted "facility-wide" for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. The *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks.

8. How did we consider uncertainties in risk assessment?

In the Benzene NESHAP, we concluded that risk estimation uncertainty should be considered in our decision-making under the ample margin of safety framework. Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health protective and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates and dose-response relationships follows below. A more thorough discussion of these uncertainties is included in the *Revised Draft Development of the RTR Emissions Dataset for the Primary Aluminum Production Source Category*, and the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved QA/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor for each emission process group and applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

As described above and in the *Revised Draft Development of the RTR Emissions Dataset for the Primary Aluminum Production Source Category*, we gathered a substantial amount of emissions test data from currently operating facilities (plus test data from a then-operating, now closed Soderberg facility). Required testing under the CAA section 114 request included measurements of HAP metal emissions from primary and secondary potline exhausts at seven facilities, as well as measurements of HAP metal emissions from three anode bake furnace exhausts and three paste plant exhausts. We also received additional POM emissions data from eight facilities. Furthermore, we received speciated PAH, PCB and D/F emissions data from primary and secondary exhausts of two potlines (one Soderberg potline and one prebake potline), as well as exhausts from one anode bake furnace and one paste plant. We used these data to estimate emissions from emission points for which we had no emissions test data. Also, there is additional uncertainty concerning the estimated emissions of Hg and D/F since, as discussed in sections III.A.1 and IV.A of this preamble, a substantial portion of the emissions test results for those HAP were reported as below laboratory detection limits. Finally, we received hexavalent chromium (Cr^{+6}) emissions stack test data from primary and secondary potline exhausts at two facilities and an anode bake furnace and a paste plant at one facility. We used the average results from these tests to apportion emissions of Cr^{+6} and trivalent chromium (Cr^{+3}) for the remaining facilities that did not test. Therefore, there are some uncertainties regarding the split between Cr^{+6} and Cr^{+3} for these remaining facilities. Nevertheless, we believe the test data we used are representative. Thus, the uncertainties are not significant. Furthermore, since we used the average results of the available tests, the values we used as input for the risk assessment are equally likely to be overestimates or underestimates of the actual speciated emissions.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.*, not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.*, not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.*, meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations.

c. Uncertainties in Inhalation Exposure

The EPA did not include the effects of human mobility on exposures in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling

domain were not considered.[25] The approach of not considering short or long-term population mobility does not bias the estimate of the theoretical MIR (by definition), nor does it affect the estimate of cancer incidence because the total population number remains the same. It does, however, affect the shape of the distribution of individual risks across the affected population, shifting it toward higher estimated individual risks at the upper end and reducing the number of people estimated to be at lower risks, thereby increasing the estimated number of people at specific high risk levels (*e.g.*, 1-in-10 thousand or 1-in-1 million).

In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live farther from the facility and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact, but is an unbiased estimate of average risk and incidence. We reduce this uncertainty by analyzing large census blocks near facilities using aerial imagery and adjusting the location of the block centroid to better represent the population in the block, as well as adding additional receptor locations where the block population is not well represented by a single location.

The assessment evaluates the cancer inhalation risks associated with pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emission sources at facilities actually operate (*i.e.*, more or less than 70 years) and the domestic growth or decline of the modeled industry (*i.e.*, the increase or decrease in the number or size of domestic facilities) will influence the future risks posed by a given source or source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in the unlikely scenario where a facility maintains, or even increases, its emissions levels over a period of more than 70 years, residents live beyond 70 years at the same location, and the residents spend most of their days at that location, then the cancer inhalation risks could potentially be underestimated. However, annual cancer incidence estimates from exposures to emissions from these sources would not be affected by the length of time an emissions source operates.

The exposure estimates used in these analyses assume chronic exposures to ambient (outdoor) levels of pollutants. Because most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAP, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, indoor levels are typically lower. This factor has the potential to result in an overestimate of 25 to 30 percent of exposures.[26]

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112(f) of the CAA that should be highlighted. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology and the presence of humans at the location of the maximum concentration. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and worst-case meteorological conditions co-occur, thus, resulting in maximum ambient concentrations. These two events are unlikely to occur at the same time, making these assumptions conservative. We then include the additional assumption that a person is located at this point during this same time period. For the primary aluminum source category, these assumptions would tend to be conservative worst-case actual exposures as it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and worst-case meteorological conditions occur simultaneously.

For the primary aluminum source category, we refined the acute exposure assessment by estimating the HQ at a centroid of a census block. This reduces the uncertainty in the assessment because we are evaluating the potential for exposures to occur at locations where people could actually live, rather than at the point of maximum off-site concentration.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and non-cancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in the EPA's *Guidelines for Carcinogen Risk Assessment* (EPA/630/P–03/001B, March 2005); namely, that "the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective" (*Guidelines for Carcinogen Risk Assessment,* pages 1–7). This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variability in dose-response relationships is given in the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the November 2014 Proposal,* which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a "plausible upper limit to the true value of a quantity" (although this is usually not a true statistical confidence limit).[27] In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater. When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health protection, the EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have

[25] Short-term mobility is movement from one micro-environment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

[26] U.S. EPA. *National-Scale Air Toxics Assessment for 1996.* (EPA 453/R–01–003; January 2001; page 85.)

[27] IRIS glossary (*http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

limitations for other uses (*e.g.*, priority-setting or expected benefits analysis).

Chronic non-cancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure (RfC) or a daily oral exposure (RfD) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be "without appreciable risk," the methodology relies upon an uncertainty factor (UF) approach (U.S. EPA, 1993, 1994) which considers uncertainty, variability and gaps in the available data. The UF are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UF are commonly default values,[28] *e.g.*, factors of 10 or 3, used in the absence of compound-specific data; where data are available, UF may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UF are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (*i.e.*, less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated.

While collectively termed "UF," these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UF are intended to account for: (1) Variation in susceptibility among the members of the human population (*i.e.*, inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (*i.e.*, interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (*i.e.*, extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies.

Many of the UF used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but they more often use individual UF values that may be less than 10. The UF are applied based on chemical-specific or health effect-specific information (*e.g.*, simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (see the following paragraph). The UF applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.*, 4 hours) to derive an acute reference value at another exposure duration (*e.g.*, 1 hour).

Not all acute reference values are developed for the same purpose and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Although every effort is made to identify appropriate human health effect dose-response assessment values for all pollutants emitted by the sources in this risk assessment, some HAP emitted by this source category are lacking dose-response assessments. Accordingly, these pollutants cannot be included in the quantitative risk assessment, which could result in quantitative estimates understating HAP risk.

To help to alleviate this potential underestimate, where we conclude similarity with a HAP for which a dose-response assessment value is available, we use that value as a surrogate for the assessment of the HAP for which no value is available. To the extent use of surrogates indicates appreciable risk, we may identify a need to increase priority for new IRIS assessment of that substance. We additionally note that, generally speaking, HAP of greatest concern due to environmental exposures and hazard are those for which dose-response assessments have been performed, reducing the likelihood of understating risk.

e. Uncertainties in the Multipathway Assessment

For each source category, we generally rely on site-specific levels of PB–HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary. This determination is based on the results of a three-tiered screening analysis that relies on the outputs from models that estimate environmental pollutant concentrations and human exposures for four PB–HAP. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[29]

Model uncertainty concerns whether the selected models are appropriate for the assessment being conducted and whether they adequately represent the actual processes that might occur for that situation. An example of model uncertainty is the question of whether the model adequately describes the movement of a pollutant through the soil. This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screen are appropriate and state-of-the-art for the multipathway risk assessments conducted in support of RTR.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway screen, we configured the models to avoid underestimating exposure and risk. This was

[28] According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) "[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain." The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process*, defined default option as "the option chosen on the basis of risk assessment policy that appears to be the best choice in the absence of data to the contrary" (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the agency; rather, the agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with the EPA's goal of protecting public health and the environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See EPA, 2004, *An Examination of EPA Risk Assessment Principles and Practices*, EPA/100/B–04/001 available at: *http://www.epa.gov/osa/pdfs/ratf-final.pdf*.

[29] In the context of this discussion, the term "uncertainty" as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

accomplished by selecting upper-end values from nationally-representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water and soil characteristics and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures. The multipathway screens include some hypothetical elements, namely the hypothetical farmer and fisher scenarios. It is important to note that even though EPA conducted a multipathway assessment based on these scenarios, no data exist to verify the existence of either the farmer or fisher scenario outlined above.

In Tier 2 of the multipathway assessment, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screen. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for Tier 1 and Tier 2.

For both Tiers 1 and 2 of the multipathway assessment, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do screen out, we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do not screen out, it does not mean that multipathway impacts are significant, only that we cannot rule out that possibility and that a refined multipathway analysis for the site might be necessary to obtain a more accurate risk characterization for the source category. For further information on uncertainties and the Tier 1 and 2 screening methods, refer to the risk document Appendix 5, *Technical Support Document for TRIM-Based Multipathway Tiered Screening Methodology for RTR.*

We completed a Tier 3 multipathway screen for this supplemental proposal. This assessment contains less uncertainty compared to the Tier 1 and Tier 2 screens. The Tier 3 screen improves the lake characterization used in the Tier 2 analysis and improves the screen by adjusting for emissions lost to the upper air sink through plume-rise calculations. The Tier 3 screen reduces uncertainty through improved lake evaluations used in the Tier 2 screen and by calculating the amount of mass lost to the upper air sink through plume rise. Nevertheless, some uncertainties also exist here. The Tier 3 multipathway screen and related uncertainties are described in detail in section 4 of the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

f. Uncertainties in the Environmental Risk Screening Assessment

For each source category, we generally rely on site-specific levels of environmental HAP emissions to perform an environmental screening assessment. The environmental screening assessment is based on the outputs from models that estimate environmental HAP concentrations. The same models, specifically the TRIM.FaTE multipathway model and the AERMOD air dispersion model, are used to estimate environmental HAP concentrations for both the human multipathway screening analysis and for the environmental screening analysis. Therefore, both screening assessments have similar modeling uncertainties.

Two important types of uncertainty associated with the use of these models in RTR environmental screening assessments—and inherent to any assessment that relies on environmental modeling—are model uncertainty and input uncertainty.[30]

Model uncertainty concerns whether the selected models are appropriate for the assessment being conducted and whether they adequately represent the movement and accumulation of environmental HAP emissions in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screen are appropriate and state-of-the-art for the environmental risk assessments conducted in support of our RTR analyses.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the environmental screen for PB–HAP, we configured the models to avoid underestimating exposure and risk to reduce the likelihood that the results indicate the risks are lower than they actually are. This was accomplished by selecting upper-end values from nationally-representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, the location and size of any bodies of water, meteorology, surface water and soil characteristics and structure of the aquatic food web. In Tier 1, we used the maximum facility-specific emissions for the PB–HAP (other than Pb compounds, which were evaluated by comparison to the secondary Pb NAAQS) that were included in the environmental screening assessment and each of the media when comparing to ecological benchmarks. This is consistent with the conservative design of Tier 1 of the screen. In Tier 2 of the environmental screening analysis for PB–HAP, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the locations of water bodies near the facility location. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screen. To better represent widespread impacts, the modeled soil concentrations are averaged in Tier 2 to obtain one average soil concentration value for each facility and for each PB–HAP. For PB–HAP concentrations in water, sediment and fish tissue, the highest value for each facility for each pollutant is used.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

[30] In the context of this discussion, the term "uncertainty," as it pertains to exposure and risk assessment, encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

For both Tiers 1 and 2 of the environmental screening assessment, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying potential risks for adverse environmental impacts.

Uncertainty also exists in the ecological benchmarks for the environmental risk screening analysis. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. In general, EPA benchmarks used at a programmatic level (*e.g.*, Office of Water, Superfund Program) were used if available. If not, we used EPA benchmarks used in regional programs (*e.g.*, Superfund Program). If benchmarks were not available at a programmatic or regional level, we used benchmarks developed by other agencies (*e.g.*, NOAA) or by state agencies.

In all cases (except for Pb compounds, which were evaluated through a comparison to the NAAQS for Pb and its compounds), we searched for benchmarks at the following three effect levels, as described in section III.A.6 of this preamble:

1. A no-effect level (*i.e.*, NOAEL).
2. Threshold-effect level (*i.e.*, LOAEL).
3. Probable effect level (*i.e.*, PEL).

For some ecological assessment endpoint/environmental HAP combinations, we could identify benchmarks for all three effect levels, but for most, we could not. In one case, where different agencies derived significantly different numbers to represent a threshold for effect, we included both. In several cases, only a single benchmark was available. In cases where multiple effect levels were available for a particular PB-HAP and assessment endpoint, we used all of the available effect levels to help us to determine whether risk exists and if the risks could be considered significant and widespread.

The EPA evaluates the following seven HAP in the environmental risk screening assessment: Cd, D/F, POM, Hg (both inorganic Hg and methylmercury), Pb compounds, HCl [31] and HF, where applicable. These seven HAP represent pollutants that can cause adverse impacts for plants and animals either through direct exposure to HAP in the air or through exposure to HAP that is deposited from the air onto soils and surface waters. These seven HAP also represent those HAP for which we can conduct a meaningful environmental risk screening assessment. For other HAP not included in our screening assessment, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond the seven HAP that we are evaluating may have the potential to cause adverse environmental effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

Further information on uncertainties and the Tier 1 and 2 screening methods is provided in Appendix 5 of the document "Technical Support Document for TRIM-Based Multipathway Tiered Screening Methodology for RTR: Summary of Approach and Evaluation." Also, see the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal*, available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

B. How did we consider the risk results in making decisions for this supplemental proposal?

As discussed in section II.A of this preamble, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step process to address residual risk. In the first step, the EPA determines whether risks are acceptable. This determination "considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [32] of approximately [1-in-10 thousand] [*i.e.*, 100-in-1 million]." 54 FR 38045, September 14, 1989. If risks are unacceptable, the EPA must determine the emissions standards necessary to bring risks to an acceptable level without considering costs. In the second step of the process, the EPA considers whether the emissions standards provide an ample margin of safety "in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision." *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety.

In past residual risk actions, the EPA considered a number of human health risk metrics associated with emissions from the categories under review, including the MIR, the number of persons in various risk ranges, cancer incidence, the maximum non-cancer HI and the maximum acute non-cancer hazard. See, *e.g.*, 72 FR 25138, May 3, 2007; 71 FR 42724, July 27, 2006. The EPA considered this health information for both actual and allowable emissions. See, *e.g.*, 75 FR 65068, October 21, 2010; 75 FR 80220, December 21, 2010; 76 FR 29032, May 19, 2011. The EPA also discussed risk estimation uncertainties and considered the uncertainties in the determination of acceptable risk and ample margin of safety in these past actions. The EPA considered this same type of information in support of this action.

The agency is considering these various measures of health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). As explained in the Benzene NESHAP, "the first step judgment on acceptability cannot be reduced to any single factor" and, thus, "[t]he Administrator believes that the acceptability of risk under [previous] section 112 is best judged on the basis of a broad set of health risk measures and information." 54 FR 38046, September 14, 1989. Similarly, with regard to the ample margin of safety determination, "the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors." *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. In responding to comment on our policy under the Benzene NESHAP, the EPA explained that:

"[t]he policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the

[31] As noted above, we have no data regarding HCl emissions from primary aluminum plants so the EPA did not evaluate HCl in this screening assessment for this proposal.

[32] Although defined as "maximum individual risk," MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual exposed to the maximum level of a pollutant for a lifetime.

presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health'."

See 54 FR at 38057, September 14, 1989. Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risks. The Benzene NESHAP explained that "an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors." *Id.* at 38045. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: "EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category." *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify those HAP risks that may be associated with emissions from other facilities that do not include the source categories in question, mobile source emissions, natural source emissions, persistent environmental pollution or atmospheric transformation in the vicinity of the sources in these categories.

The agency understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing non-cancer risks, where pollutant-specific exposure health reference levels (*e.g.*, RfCs) are based on the assumption that thresholds exist for adverse health effects. For example, the agency recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse non-cancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.*, other facilities) to which an individual is exposed may be sufficient to result in increased risk of adverse non-cancer health effects. In May 2010, the SAB advised the EPA "that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area." [33]

In response to the SAB recommendations, the EPA is incorporating cumulative risk analyses into its RTR risk assessments, including those reflected in this proposal. The agency is: (1) Conducting facility-wide assessments, which include source category emission points as well as other emission points within the facilities; (2) considering sources in the same category whose emissions result in exposures to the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzing the ingestion route of exposure. In addition, the RTR risk assessments have always considered aggregate cancer risk from all carcinogens and aggregate non-cancer hazard indices from all non-carcinogens affecting the same target organ system.

Although we are interested in placing source category and facility-wide HAP risks in the context of *total* HAP risks from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Because of the contribution to total HAP risk from emission sources other than those that we have studied in depth during this RTR review, such estimates of total HAP risks would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

As discussed in more detail below, based on the results of these risk analyses and evaluation of control options, we are proposing revised limits for emissions of POM from potlines, and first ever emissions limits for emissions of PM (as a surrogate for HAP metals) from potlines, anode bake furnaces and paste production plants and for emissions of Ni and As, from the VSS2 potline subcategory.

C. How did we perform the technology review?

Our technology review focused on the identification and evaluation of developments in practices, processes and control technologies that have occurred since the MACT standards were promulgated. Where we identified such developments, in order to inform our decision of whether it is "necessary" to revise the emissions standards, within the meaning of CAA section 112(d)(6), we analyzed the technical feasibility of applying these developments and the estimated costs, energy implications, non-air environmental impacts, as well as considering the emission reductions. We also considered the appropriateness of applying controls to new sources versus retrofitting existing sources.

Based on our analyses of the available data and information, we identified potential developments in practices, processes and control technologies. For this exercise, we considered any of the following to be a "development":

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards.
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emissions reduction.
- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards.
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during

[33] The EPA's responses to this and all other key recommendations of the SAB's advisory on RTR risk assessment methodologies (which is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf*) are outlined in a memo to this rulemaking docket from David Guinnup titled, *EPA's Actions in Response to the Key Recommendations of the SAB Review of RTR Risk Assessment Methodologies.*

development of the original MACT standards.

- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

Since we are proposing some first-time MACT standards in this action, we considered the same factors with respect to these proposed MACT standards. In addition to reviewing the practices, processes and control technologies that were considered at the time we originally developed (or last updated) the NESHAP, we also reviewed a variety of data sources in our investigation of potential practices, processes or controls to consider. Among the sources we reviewed were the NESHAP for various industries that were promulgated since the MACT standards being reviewed in this action. We reviewed the regulatory requirements and/or technical analyses associated with these regulatory actions to identify any practices, processes and control technologies considered in these efforts that could be applied to emission sources in the Primary Aluminum Production source category, as well as the costs, non-air impacts and energy implications associated with the use of these technologies. Additionally, we requested information from facilities regarding developments in practices, processes or control technology. Finally, we reviewed information from other sources, such as state and/or local permitting agency databases and industry-supported databases.

For the 2011 proposal, our initial technology review focused on the identification and evaluation of developments in practices, processes and control technologies that have occurred since the EPA promulgated the 1997 NESHAP. We then made decisions on whether it is necessary to propose amendments to the 1997 NESHAP to require standards reflecting performance of the identified developments. Based on our analyses of the data and information collected and our general understanding of the industry and other available information on potential controls for this industry, we identified no developments in practices, processes and control technologies, other than the proposed startup work practices described in the December 2011 proposal (76 FR 76260).

Additional details regarding the previously conducted technology review can be found in the *Draft Technology Review for Primary Aluminum Reduction Plants* (Docket ID No. EPA–HQ–OAR–2011–0797–0149) and are discussed in the preamble to the December 2011 proposal (76 FR 76260). We conducted an additional review of developments in practices, processes and control technologies since the 2011 proposal and updated the technology review to reflect changes in the number and type of currently operating and idled facilities. As noted, this analysis indicates what developments may be possible assuming the EPA adopts the proposed amendments to the MACT standards discussed in the following section of this preamble. The *Revised Draft Technology Review for the Primary Aluminum Production Source Category* is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

IV. Revised Analytical Results and Proposed Decisions for the Primary Aluminum Production Source Category

A. What actions are we proposing pursuant to CAA sections 112(d)(2) and 112(d)(3)?

As described previously, CAA section 112(d) requires the EPA to promulgate technology-based NESHAP for listed source categories, including this source category. The EPA did so in the 1997 primary aluminum NESHAP. As described above (in section II.B), the 1997 NESHAP included MACT standards for TF from all types of existing and new potlines and bake furnaces and MACT standards for POM from existing and new Soderberg potlines, paste plants, bake furnaces and new pitch storage tanks. In the 2011 proposal, we proposed emissions limits pursuant to CAA sections 112(d)(2) and (3) for a number of HAP or emissions points that were not previously covered by the NESHAP, including limits for POM from prebake potlines, COS from prebake and Soderberg potlines and POM from existing pitch storage tanks. After proposal, in response to the 2013 CAA section 114 information request, we received a substantial amount of additional data on POM emissions from prebake potlines and therefore we re-analyzed the proposed limits for emissions of POM from prebake potlines.[34] Based on those analyses we have determined it is appropriate to propose revised emission limits for POM from these existing potlines in these subcategories, and to propose different POM limits for new potlines.

Additionally, after the 2011 proposal, in response to the 2013 CAA section 114 information request, we received data regarding PM and HAP metals emissions from potlines, anode bake furnaces and paste plants. These pollutants are not covered by the 1997 NESHAP. Based on those analyses, we have determined it is appropriate to propose emission limits for PM, as a surrogate for HAP metals, from existing potlines and new potlines, as well as from new and existing anode bake furnaces and new and existing paste plants. We have used PM as a surrogate for HAP metals in many other NESHAP (*e.g.*, secondary aluminum, see 65 FR 15692 (March 23, 2000), and Portland cement, 64 FR 31900 (June 14, 1999)). The agency believes PM is an appropriate surrogate for non-mercury HAP metals because those metals and particulate are captured indiscriminately by PM control technology. See *National Lime Ass'n* v. *EPA*, 233 F. 3d 625, 639 (D.C. Cir. 2000) (upholding use of PM as a surrogate for HAP metal for purposes of CAA section 112(d) MACT standard). We do not consider TF to be a suitable surrogate for HAP metals since the HF portion of TF is very reactive and controlled very effectively via adsorption in dry alumina scrubbers in the Primary Aluminum Production source category. The HAP metals would not be as effectively controlled via these mechanisms and, therefore, we would not expect good correlation, for this source category, between HAP metal emissions and TF emissions. Similarly, we do not consider POM to be a suitable surrogate for HAP metals as POM is more effectively controlled via adsorption in the dry alumina scrubbers than HAP metals. Again, we would not expect good correlation, for this source category, between HAP metal emissions and POM emissions. See 61 FR 50592 (Sept. 26, 1996). We expect better correlations may exist between these pollutants in some other source categories that use other types of control devices to minimize emissions. However, as explained above, we do not expect good correlation in the Primary Aluminum Production source category, which uses dry alumina scrubbers as a primary control technology and is the only source category we are aware of that controls emissions with dry alumina scrubbers. Therefore, we are proposing MACT limits for both POM and PM for Primary Aluminum Production sources in this action.

In this section, we summarize how we developed the revised proposed

[34] As explained above, the EPA did not have POM emissions data for prebake potlines at the time of the December 2011 proposal. The EPA developed the POM emissions MACT floor limits for prebake potlines in that proposal by estimating POM emissions based on a ratio of POM emissions to TF emissions, an approach which found no support in the public comments. Today's proposal is based entirely on the new emission data obtained since the December 2011 proposal. See section II.D, above.

standards for POM emissions from prebake potlines and the newly proposed PM emission standards for potlines, anode bake furnaces and paste plants (including how we calculated MACT floors, how we accounted for variability in those floor calculations, and how we considered beyond-the-floor (BTF) options). For more information on these analyses, see the *Revised Draft MACT Floor Analysis for the Primary Aluminum Production Source Category,* which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

With regard to Hg, D/F and PCBs, as discussed in section III.A.1 of this preamble, there are considerable limitations in the emissions data for these HAP. For example, many of the available emissions test results were reported as below detection limit (BDL) for these HAP. Furthermore, we have test data for PCBs and D/F for only one of the 11 prebake facilities. Nevertheless, based on the available data (including applying conservative assumptions that non-detectable Hg is actually emitted), we estimate that the total Hg emissions for the entire source category are less than 60 pounds per year and the average Hg emissions per facility are less than 5 pounds per year. We estimate the total D/F toxicity equivalent (TEQ) emissions for the entire source category are less than 7 grams per year (again assuming that non-detectable D/F are actually emitted) and that the average D/F TEQ emissions per facility are less than 1 gram per year. Furthermore, there are significant uncertainties regarding these emissions and we have insufficient data to develop appropriate standards for these HAP. As discussed in section III.A.1 of this preamble, the EPA may, but is not obligated to, amend MACT standards [35] and, in the case of D/F, Hg and PCB, where data are insufficient to develop appropriate standards, the EPA is choosing not to propose standards for these HAP at this time.

1. How do we develop MACT floor limits?

As discussed in the 2011 proposal (76 FR 76260), the MACT floor limit for existing sources is calculated based on the average performance of the best performing units in each category or subcategory, and also on a consideration of these units' variability. The MACT floor for new sources cannot be less stringent than the emissions performance that is achieved in practice by the best-controlled similar source. To account for variability in the operation and emissions, the stack test data were used to calculate the average emissions and the 99 percent upper prediction limit (UPL) to derive the MACT floor limits. For more information regarding the general use of the UPL and why it is appropriate for calculating MACT floors, see the memorandum titled, *Use of the Upper Prediction Limit for Calculating MACT Floors* (UPL Memo), which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797). Furthermore, with regard to calculation of MACT floor limits based on limited datasets, we considered additional factors as summarized below and described in more detail in the memorandum titled, *Approach for Applying the Upper Prediction Limit to Limited Datasets for the Primary Aluminum Production Source Category* (*i.e.,* Limited Dataset Memo), which is available in the docket for this action.

2. What is our approach for applying the UPL to limited datasets?

The UPL approach addresses variability of emissions data from the best performing source or sources in setting MACT standards. The UPL also accounts for uncertainty associated with emission values in a dataset, which can be influenced by components, such as the number of samples available for developing MACT standards and the number of samples that will be collected to assess compliance with the emission limit. The UPL approach has been used in many environmental science applications. As explained in more detail in the UPL Memo, the EPA uses the UPL approach to reasonably estimate the emissions performance of the best performing source or sources to establish MACT floor standards.

With regard to the derivation of MACT limits using limited datasets, in a recent DC Circuit Court of Appeals decision in *National Association of Clean Water Agencies* v. *EPA (NACWA),* 734 F. 3d 1115 (2013), which involved challenges to the EPA's MACT standards for sewage sludge incinerators, questions were raised by the court regarding the application of the UPL to limited datasets. We have since addressed these questions, as explained in detail in the Limited Dataset Memo, which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797). We seek comments on the approach described in the Limited Dataset Memo and whether there are other approaches we should consider for such datasets.

3. How did we apply the approach for limited datasets to limited datasets in the Primary Aluminum Production source category?

For the Primary Aluminum Production source category, we have limited datasets for the following pollutants and subcategories: POM and PM from existing CWPB2 potlines, CWPB3 potlines and SWPB potlines; POM and PM from all new potlines; and PM from new anode bake furnaces and paste production plants. Therefore, we evaluated these specific datasets to determine whether it is appropriate to make any modifications to the approach used to calculate MACT floors for each of these datasets.

For each dataset, we performed the steps outlined in the Limited Dataset Memo, including: ensuring that we selected the data distribution that best represents each dataset; ensuring that the correct equation for the distribution was then applied to the data; and comparing individual components of each limited dataset to determine if the standards based on limited datasets reasonably represent the performance of the units included in the dataset. The results of each analysis are summarized below and described in more detail in the Limited Dataset Memo and in the *Revised Draft MACT Floor Analysis for the Primary Aluminum Production Source Category* document, which are available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

4. POM Emissions From Potlines

a. Background

As described above, since the 2011 proposal, we obtained additional data on POM emissions from prebake potlines. In particular, we obtained data from eight facilities that operate prebake potlines, including at least one facility in each prebake potline subcategory. Today's proposal is based exclusively on these new data, which the EPA regards as much more reliable than the data used in the 2011 proposal because the new data are based on direct testing of POM emissions, whereas the data used in the 2011 proposal were emissions estimates based on a ratio of POM emissions to TF emissions. Data were obtained from performance tests conducted by each of these facilities on both its primary control system exhaust and its secondary emissions. POM emissions are generated from volatilization of organic matter in anodes used to reduce alumina. All primary aluminum plants control these

[35] See, *e.g. Portland Cement Ass'n* v. *EPA,* 665 F. 3d 177, 189 (D.C. Cir. 2011).

POM emissions (and PM emissions) by capturing them from the area near the pots and directing them through a dry alumina scrubber, except for one plant which directs these emissions through wet scrubbers. The one plant with wet scrubbers produces a very high purity aluminum, is in a subcategory known as the Center-Worked Prebake 3 subcategory, and is the only facility in that subcategory. Uncaptured (secondary) emissions of POM and PM are emitted from vents in the roof of the potroom. One plant operates wet roof scrubbers to control these secondary emissions. This is the sole facility in the Side-Worked Prebake subcategory. The MACT floor limits were determined based on the sum of the primary and secondary emissions. As in the current NESHAP and the 2011 proposal, these results are normalized to units of production, and expressed as pounds of pollutant (in this case, POM) per ton of aluminum produced (lb/ton aluminum).

Pursuant to CAA sections 112(d)(2) and 112(d)(3), we are proposing to revise the 1997 NESHAP to include emission limits for POM emissions from prebake potlines. Regarding Soderberg potlines, the 1997 NESHAP already includes MACT limits for POM from Soderberg plants. Furthermore, the additional emissions data we gathered since the 2011 proposal do not support any revisions of the MACT limits for POM emissions from Soderberg potlines based solely on control technology considerations. Therefore, we are not proposing to revise the emissions limits for POM emissions from Soderberg potlines under CAA sections 112(d)(2), 112(d)(3) or 112(d)(6) in today's action. However, as described in section IV.C of this preamble, we also evaluated POM limits as part of our risk review and based on the results of the risk assessment we concluded that it was appropriate to tighten the POM limits for Soderberg facilities because of unacceptable risks. Therefore, as described in detail in section IV.C., we are proposing significantly tighter POM limits for Soderberg facilities based on our risk review pursuant to section 112(f) of the CAA.

b. Calculation of MACT Floors for POM for Potlines

As discussed in the 2011 proposal and in section II.A of this preamble, the MACT floor for existing sources is based on the performance of best performing existing sources, and the MACT floor for new sources is based on the single best performing source. These MACT floor values include a calculation of variability calculated from these best performers' test runs (76 FR 76260). More specifically, to account for normal variability in the operation and emissions, we calculated the MACT floors using the 99 percent UPLs. For more information regarding the use of the UPL and why it is appropriate for calculating MACT floors, see the UPL Memo. For more information on the calculation of the MACT floors for the Primary Aluminum Production source category, see the *Revised Draft MACT Floor Analysis for the Primary Aluminum Production Source Category* document, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

With regard to new sources, as explained above, the MACT floor for new sources cannot be less stringent than the emissions performance that is achieved in practice by the best-controlled similar source. The EPA performed a variability analysis similar to that used for existing sources to calculate a 99 percent UPL using the test runs from the lowest emitting facility without regard to subcategory to derive the new source MACT floor limit. This new source MACT floor limit for POM emissions from potlines is lower (*i.e.*, more stringent) than the MACT floor limit for POM emissions from existing potlines for all subcategories. We are not proposing separate emission limits for subcategories for new potlines because we expect that any new potlines will be designed to use the cleanest, most efficient technology available, or to improve capture and control systems to achieve emissions no greater than the best existing plant.[36] A summary of the proposed MACT floor limits for POM is provided in Table 4.

TABLE 4—PROPOSED MACT FLOOR EMISSION LIMITS FOR POM FROM POTLINES

Affected source	Emission limit (in lb POM/ton aluminum)
Existing CWPB1 Potlines ...	1.1
Existing CWPB2 Potlines ...	12
Existing CWPB3 Potlines ...	2.7
Existing SWPB Potlines	19
New or Reconstructed Potlines	0.77

c. BTF Analysis for POM for Existing Potlines

The next step in establishing MACT standards is the BTF analysis. In this step, we investigate other mechanisms for further reducing HAP emissions that are more stringent than the MACT floor level of control in order to "require the maximum degree of reduction in emissions" of HAP. In setting such standards, CAA section 112(d)(2) requires the agency to consider the cost of achieving the additional emission reductions, any non-air quality health and environmental impacts associated with more stringent standards and energy requirements associated with more stringent standards. Historically, these factors have included factors such as solid waste impacts of a control and the energy impacts of various potential control strategies.

As described below, we considered BTF control options to further reduce emissions of POM. The BTF POM control options were developed based on the application of wet roof scrubbers to the 11 facilities that currently do not have them.

We estimated the capital costs, annualized costs, emissions reductions and cost effectiveness for the BTF limits for this control technology. The details regarding how these limits were derived, and the estimated costs and expected reductions of POM and POM HAP through the installation of wet roof scrubbers, are provided in the *Revised Draft Cost Impacts for the Primary Aluminum Production Source Category* document, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

Under this option (*i.e.*, BTF controls for POM), we estimate the capital costs for installation and operation of the wet roof scrubbers at the 11 facilities would be $490 million, the annualized costs would be $155 million, and the controls would achieve about 1,000 tons per year of reductions in POM and 1.9 tons per year in speciated PAHs (a subset of POM). This results in an estimated cost effectiveness of about $155,000 per ton of POM and $82 million per ton of speciated PAHs. We believe our estimated costs are unacceptably high and not cost effective. When the primary aluminum NESHAP was proposed in 1996, we considered a cost effectiveness of $91,000 per ton of POM to be unacceptably high (*Basis and Purpose Document for the Development of Proposed Standards for the Primary Aluminum Industry*, July 19, 1996). Furthermore, industry sources provided additional information (Docket ID No. EPA–HQ–OAR–2011–0797, Johnson, C.D., Aluminum Association, July 9, 2014) indicating that most existing prebake facilities would also likely require structural modification and reinforcement to accommodate the wet roof scrubbers, which could increase our estimated costs by 2 to 3 times, or

[36] We are not reconsidering, reopening, or otherwise considering comment on the subcategorization structure for existing sources in this source category.

more. Note also that we have previously determined that there are technical problems with using these wet scrubbers at those facilities located in colder climates (see 62 FR 52392 (Oct. 7, 1997)). Furthermore, based on our memo titled, *Economic Impact Analysis for National Emissions Standards for Hazardous Air Pollutants: Primary Aluminum Reduction Plants*, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797), we project that this option would pose significant economic burden on the companies and that several facilities would be at risk of closure under this option. There would also be collateral environmental impacts (more waste generated and more energy use), although these are not the most significant factors in the EPA's proposed decision.

Based on consideration of all the factors described above, we are not proposing BTF limits for POM emissions from existing sources. A summary of the estimated costs and reductions for the BTF option of wet scrubbers is provided in Table 5.

TABLE 5—ESTIMATED COSTS AND REDUCTIONS FOR BTF CONTROL OPTIONS

Annualized costs ($/yr)	Pollutant	Reduction (ton/yr)	Cost effectiveness ($/ton)
Retrofit Wet Scrubber for Potline Secondary Emissions:			
$155 million	POM	1,000	155,000.
	Speciated PAHs	1.9	82 million.
	PM	2,900	53,000.
	PM–HAP metals	23	6.73 million.
Upgrade filter bags for anode bake furnaces:			
$7.9 million	PM	7.3	1.1 million.
	PM–HAP metals	0.027	292 million.
Upgrade filter bags for paste plants:			
$560,000	PM	5.31	110,000.
	PM–HAP metals	0.0058	96 million.

Note: As described in sections above, the potline control costs shown in Table 5 could be 2 to 3 times higher or more because of need for building modifications and reinforcement to support the wet roof scrubbers.

d. BTF Analysis for POM for New Potlines

We estimate that a new primary aluminum plant of 200,000 ton per year capacity could install wet roof scrubbers for $28 million capital cost and $11 million per year total annualized cost. This is equivalent to $55 per ton of aluminum. Assuming a new or reconstructed plant would be similar to the best performing existing source, we estimate that it would achieve reductions of 21 tons per year of POM by installing a wet roof scrubber. Therefore, the estimated cost effectiveness would be $540,000 per ton of POM reductions. We believe these costs and cost effectiveness are unacceptably high. Furthermore, the MACT floor level of control is based on the best performing existing source which already has relatively low POM emissions (which explains the poor cost effectiveness of further control). Therefore, we are not proposing BTF limits for emissions of POM from new or reconstructed sources.

e. Proposed Standards for POM for Existing, New and Reconstructed Potlines

Based on the results of all our analyses for existing, new and reconstructed sources, and after considering the estimated costs and reductions of the possible options for existing, new and reconstructed sources, we are proposing prebake potline emission standards for POM at the MACT floor for existing, new and reconstructed sources (as shown in Table 4).

As discussed earlier, these MACT floor-based standards are based on the 99 percent UPL. We estimate that all existing prebake potlines will be able to meet these MACT floor limits for POM without the need to install additional controls because the performance of all sources in the category is similar, all of the potlines within each of the subcategories utilize very similar emissions control technology and the average emissions from each source are well below the MACT floor limit. Therefore, in assessing the costs of the proposed MACT standards for potline POM emissions, the only associated additional costs we estimate are for compliance testing, monitoring and recordkeeping.

5. PM Emissions From Potlines

a. Background

The 1997 NESHAP does not contain emission limits for HAP metals (or for a surrogate). However, as described above, since the 2011 proposal, we obtained significant amounts of data on PM emissions from potlines. In particular, we obtained PM data from nine prebake potline facilities (including at least one facility in each prebake potline subcategory) and one Soderberg facility when the facility was operating. We obtained data from each of these facilities from performance tests of both the primary control system exhaust and the secondary emissions. The PM emissions are generated from suspension of alumina feed material and the condensation or precipitation of metals, organic compounds and fluoride salts emitted from the pots. The PM includes HAP metals that are in particulate form (such as Ni, Cd, Cr, Pb, manganese (Mn) and As). The particulate HAP metals emitted by primary aluminum facilities are part of their PM emissions, and, as noted above, are captured indiscriminately by the PM control equipment. All primary aluminum plants control these emissions by capturing them from the area near the pots and directing them through a dry alumina scrubber, followed by a particulate control device, except for one facility which directs the captured emissions through a wet scrubber. This one facility is in the Center-Worked Prebake 3 potline subcategory which produces a very high purity aluminum and is the only facility in that subcategory.

The uncaptured (secondary) PM emissions are emitted from vents in the roof of the potroom. One plant operates wet roof scrubbers which are assumed to provide some control (about a 50 percent reduction) of these secondary emissions. This one facility is in the Side-Worked Prebake subcategory and is the only facility in the U.S. that is in that subcategory.

The MACT floor limits were determined based on the sum of the primary and secondary emissions. As in the current NESHAP, these results were normalized to units of production, and are expressed as pounds of pollutant (in this case, PM) per ton of aluminum produced.

Pursuant to CAA sections 112(d)(2) and (3), we are proposing to revise the 1997 NESHAP to include emission limits for PM emissions (as a surrogate for particulate HAP metals) from potlines.

b. Calculation of MACT Floor Limits for PM for Potlines

As described in sections II.A and IV.A.4.b of this preamble, the MACT floor limit reflects the performance of best performing sources for existing sources (or the single best performing source, for new sources), including a calculation of variability. More specifically, to account for variability, we calculated the MACT floors using the 99 percent UPL. For more information on how we calculated the MACT floors, see the *Revised Draft MACT Floor Analysis for the Primary Aluminum Production Source Category* document, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

With regard to new sources, as explained above, the MACT floor cannot be less stringent than the emissions performance that is achieved in practice by the best-controlled similar source. The MACT floor limit for PM for new potlines was calculated based on the 99 percent UPL using the test data from the lowest emitting facility without regard to subcategory. This new source MACT floor limit for PM emissions from potlines is lower (*i.e.*, more stringent) than the MACT floor limit for PM emissions from existing potlines. This emission limit is based on the best performing source and is equal to the lowest emission limit proposed for any existing potline subcategory. We are not proposing subcategories for new potlines because we expect that any new potlines will be designed to use the cleanest, most efficient technology available, or to improve capture and control systems to achieve emissions no greater than the best existing plant. We are proposing that the MACT floor emissions limit for all types of new potlines will be based on the single best performing existing potline, which for PM is a potline at the SWPB facility. A summary of the MACT floor limits for PM for existing and new potlines is provided in Table 6.

TABLE 6—MACT FLOOR EMISSION LIMITS FOR PM FROM POTLINES

Affected source	PM emission limit (lb PM/ton aluminum)
Existing CWPB1 Potlines ...	7.2
Existing CWPB2 Potlines ...	11
Existing CWPB3 Potlines ...	20
Existing SWPB Potlines	4.6
Existing VSS2 Potlines	26
New and Reconstructed Potlines	4.6

c. BTF Analysis for PM for Existing Potlines

The next step in establishing MACT standards is the BTF analysis. In this step, we investigate other mechanisms for further reducing HAP emissions that are more stringent than the MACT floor level of control in order to "require the maximum degree of reduction in emissions" of HAP. In setting such standards, CAA section 112(d)(2) requires the agency to consider the cost of achieving the additional emission reductions, any non-air quality health and environmental impacts associated with more stringent standards and energy requirements associated with more stringent standards.

As described below, we considered BTF control options to further reduce emissions of PM. The BTF PM control options were developed based on the application of wet roof scrubbers to the 11 facilities that currently do not have them, which are the same BTF controls assessed for POM.

We estimated the capital costs, annualized costs, emissions reductions and cost effectiveness for the BTF limits for this control technology. These are the same costs used for estimating POM control costs. The details regarding calculation of these estimated costs and expected reductions of PM and HAP metals through the installation of wet roof scrubbers are provided in the *Revised Draft Cost Impacts for the Primary Aluminum Production Source Category* document which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

Under this option (*i.e.*, BTF controls for PM and HAP metals), we estimate the capital costs for 11 facilities to install and operate wet roof scrubbers would be about $490 million, annualized costs of about $155 million, and would achieve about 2,900 tons per year of reductions in PM, 780 tons per year of $PM_{2.5}$ and 23 tons per year in HAP metals, which results in estimated cost effectiveness of about $200,000 per ton of $PM_{2.5}$ and $6.7 million per ton of HAP metals. Furthermore, industry sources provided additional information (Docket ID No. EPA–HQ–OAR–2011–0797, Johnson, C.D., Aluminum Association, July 9, 2014) indicating that most existing prebake facilities would likely require structural modification and reinforcement to accommodate the wet roof scrubbers, which could increase our estimated costs by 2 to 3 times, or more. Therefore, we believe the costs for these BTF controls would be unacceptably high. Note also that we have previously determined that there are technical problems with using these wet scrubbers at those facilities located in colder climates (see 62 FR 52392, October 7, 1997). Furthermore, based on our *Economic Impact Analysis for National Emissions Standards for Hazardous Air Pollutants: Primary Aluminum Reduction Plants*, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797), we project that this option would pose significant economic burden on the companies and that several facilities would be at risk of closure. There would also be collateral environmental impacts (more waste generated and more energy use), although these are not significant factors in the EPA's proposed decision.

Based on consideration of all the factors described above, we are not proposing BTF limits for PM emissions from existing sources. A summary of the costs and reductions for the BTF option of wet scrubbers is provided in Table 5.

d. BTF Analysis for PM for New Potlines

We estimate that a new primary aluminum plant of 200,000 ton per year capacity could install wet roof scrubbers for $28 million per year capital cost and $11 million per year total annualized cost. This is equivalent to $55 per ton of aluminum. Assuming a new or reconstructed plant would be similar to the best performing existing source, we estimate that it would achieve 110 tons per year reductions of PM and 32 tons per year reductions of $PM_{2.5}$ by installing a wet roof scrubber. Therefore, the estimated cost effectiveness would be $98,000 per ton of PM reductions and $350,000 per ton of $PM_{2.5}$ reductions. We believe these costs are unacceptably high and not cost effective. Therefore, we are not proposing BTF limits for PM for new or reconstructed sources.

e. Proposed Standards for PM for Existing, New and Reconstructed Potlines

Based on the results of all our analyses for existing, new and reconstructed sources, and after considering the estimated costs and

reductions of the possible options for existing, new and reconstructed sources, we are proposing PM potline emission standards at the MACT floor for existing, new and reconstructed sources (as shown in Table 6). As discussed earlier, these MACT floor-based standards are based on the 99 percent UPL. We estimate that all existing prebake potlines will be able to meet these MACT floor limits for PM without the need to install additional controls because the performance of all sources in the category is similar, all of the potlines within each of the subcategories utilize very similar emissions control technology, the average emissions from each source are well below the MACT floor limit and emissions data from every facility that performed emissions testing were included in the dataset used to develop the MACT floor. Therefore, in assessing the costs of the proposed MACT standards for potline PM emissions, the only associated costs we estimate are for compliance testing, monitoring and recordkeeping.

6. PM Emissions From Anode Bake Furnaces

a. Background

The 1997 NESHAP does not contain emission limits for HAP metals (or for a surrogate). However, as described above, we obtained significant data on PM emissions from anode bake furnaces since the 2011 proposal. In particular, we obtained data from 7 of the 8 anode bake furnaces presently in operation. Data were obtained by facilities from performance tests of their control device exhausts. As in the current NESHAP, these results are normalized to units of production, and expressed as pounds of pollutant (in this case, PM) per ton of green anode. PM emissions are generated from dust and condensed pitch hydrocarbons and fluorides generated when green anodes are baked. All currently operating anode bake furnaces are controlled with dry alumina scrubbers and fabric filters, which capture particulate HAP metals indiscriminately as a subset of total captured PM.

Pursuant to CAA sections 112(d)(2) and (3), we are proposing to revise the 1997 NESHAP to include emission limits for PM (as a surrogate for HAP metals) from anode bake furnaces.

b. Calculation of MACT Floor Limits for PM for Anode Bake Furnaces

We followed the same general approach, using the 99 percent UPL, to calculate MACT floor limits for anode bake furnaces as we used for the potlines (described in section IV.A.4.b of this preamble). Using this approach we calculate the MACT floor limit for existing anode bake furnaces to be 0.068 lbs PM per ton of green anode (lbs/ton green anode). For more information on how we calculated the MACT floors, see the *Revised Draft MACT Floor Analysis for the Primary Aluminum Production Source Category* document, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

With regard to new sources, as explained above, the MACT floor cannot be less stringent than the emissions performance that is achieved in practice by the best-controlled similar source. A variability analysis similar to that used for existing sources was then performed to calculate a 99 percent UPL using the test data from the lowest emitting facility. This new source MACT floor limit for PM emissions from anode bake furnaces is lower (*i.e.*, more stringent) than the MACT floor limit for PM emissions from existing anode bake furnaces. The new source MACT floor limit is based on the performance of the best existing anode bake furnace. Using this approach, we calculate the MACT floor limit for new sources to be 0.036 lbs/ton green anode.

c. BTF Analysis for PM for Existing Anode Bake Furnaces

The next step in establishing MACT standards is the BTF analysis. As described above, in this step, we investigate other mechanisms for further reducing HAP emissions that are more stringent than the MACT floor level of control in order to "require the maximum degree of reduction in emissions" of HAP.

We considered BTF control options to further reduce emissions of PM from anode bake furnaces. The BTF PM control options were developed based on the replacement of cloth filter bags with membrane bags which are expected to provide better particulate control.

We estimated the capital costs, annualized costs, emissions reductions and cost effectiveness for the BTF limits for this control technology. The details regarding how these limits were derived, and the estimated costs and expected reductions of PM and HAP metals through the replacement of conventional filter bags with membrane bags are provided in the *Revised Draft Cost Impacts for the Primary Aluminum Production Source Category* document, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

Under this option (*i.e.*, BTF controls for PM and HAP metals), we estimate annualized costs for 10 facilities of about $7.9 million. This option would achieve about 7.3 tons per year of reductions in PM and 0.027 tons per year of HAP metals, which results in estimated cost effectiveness of about $1.1 million per ton of PM and $292 million per ton of HAP metals. We believe these costs and cost effectiveness are unacceptably high. There would also be collateral environmental impacts (more waste generated and more energy use), although these are not the most significant factors in the EPA's proposed decision. Based on consideration of all the factors described above, we are not proposing BTF limits for PM emissions from existing sources.

A summary of the costs and reductions for the BTF option based on the performance of fabric filters with membrane bag upgrades is given in Table 5.

d. BTF Analysis for PM for New Bake Furnaces

We estimate that a new primary aluminum plant of 200,000 ton per year capacity could use membrane filter bags in fabric filters used to control PM from anode bake furnaces for an incremental annualized cost of $680,000 per year. Cost effectiveness is expected to be comparable to that estimated for existing plants. We believe these costs and cost effectiveness are unacceptably high. Therefore, we are not proposing BTF limits for PM emissions from new anode bake furnaces.

e. Proposed Standards for PM for Existing, New and Reconstructed Anode Bake Furnaces

Based on the results of all our analyses for existing, new and reconstructed sources, and after considering the estimated costs and reductions of the possible options for existing, new and reconstructed sources, we are proposing a PM emission limit at the MACT floor for existing bake furnaces of 0.068 pounds of PM per ton of green anode (lbs PM/ton green anode) and we are proposing a MACT floor limit of 0.036 lbs PM/ton green anode for new and reconstructed sources.

As discussed earlier, these MACT floor-based standards are based on the 99 percent UPL. We estimate that all existing bake furnaces will be able to meet these MACT floor limits for PM without the need to install additional controls because the performance of all sources in the category is similar, all of these furnaces utilize very similar emissions control technology and the average emissions from each source for which we have reliable data are well below the MACT floor limit. Therefore,

the only additional costs are estimated to be for compliance testing, monitoring and recordkeeping. Therefore, in assessing the costs of the proposed MACT standards for PM for bake furnaces, the only associated costs we estimate are for compliance testing, monitoring and recordkeeping.

7. PM Emissions From Paste Plants

a. Background

The 1997 NESHAP does not contain emission limits for emissions of HAP metals (or for a surrogate) from paste plants. However, as described above, we obtained a substantial amount of data on PM emissions from paste plants since the 2011 proposal. In particular, we obtained emissions test data from seven of the eight paste plants presently in operation. Data were obtained from tests of control device exhausts. As in the current NESHAP, these results are normalized to units of production, and expressed as pounds of pollutant (in this case, PM) per ton of green anode. All currently operating paste plants are controlled with dry coke scrubbers and fabric filters. PM emissions are generated from crushing and grinding coke and mixing ground coke with heated pitch to produce green anodes.

Pursuant to CAA sections 112(d)(2) and (3), we are proposing to revise the 1997 NESHAP to include emission limits for PM emissions from paste plants.

b. Calculation of MACT Floor Limits for PM for Paste Plants

We followed the same general approach, using the 99 percent UPL, to calculate MACT floor limits for paste plants as we used for the potlines (described in section IV.A.4.b of this preamble). Using this approach, we calculate the MACT floor limit for existing paste plants to be 0.082 lbs of PM per ton of green anode. For more information on how we calculated the MACT floors, see the *Revised Draft MACT Floor Analysis for the Primary Aluminum Production Source Category* document, which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

With regard to new sources, a variability analysis similar to that used for existing sources was then performed to calculate a 99 percent UPL using the test data from the lowest emitting facility. This new source MACT floor limit for PM emissions from paste plants is based on the best performing existing paste plant and is lower (*i.e.*, more stringent) than the proposed MACT floor limit for PM emissions from existing paste plants. Using this approach, we calculate the MACT floor limit for new paste plants to be 0.0054 lbs of PM/ton green anode.

c. BTF Analysis for PM for Existing Paste Plants

The next step in establishing MACT standards is the BTF analysis. In this step, we investigate other mechanisms for further reducing HAP emissions that are more stringent than the MACT floor level of control in order to "require the maximum degree of reduction in emissions" of HAP.

We considered BTF control options to further reduce emissions of PM from paste plants. The BTF PM control options were developed based on the replacement of cloth filter bags with membrane bags which are expected to provide better particulate control.

We estimated the capital costs, annualized costs, emissions reductions and cost effectiveness for the BTF limits for this control technology. We also considered if there were non-air environmental impacts or energy usage implications. The details regarding how these limits were derived, and the estimated costs and expected reductions of PM and HAP metals through the replacement of conventional filter bags with membrane bags are provided in the *Revised Draft Cost Impacts for the Primary Aluminum Production Source Category* document which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

Under this option (*i.e.*, BTF controls for PM and HAP metals), we estimate the annualized costs for 11 facilities to be about $560,000, and would achieve about 5.3 tons per year of reductions in PM, 1.5 tons of reductions in $PM_{2.5}$ and 0.0058 tons per year of HAP metals. This results in estimated cost effectiveness of about $110,000 per ton of PM, $370,000 per ton of $PM_{2.5}$ and $96 million per ton of HAP metals. We believe these costs and cost effectiveness are unacceptably high and minimal HAP reductions would be achieved. There would also be collateral environmental impacts (more waste generated and more energy use), although these are not significant factors in the EPA's proposed decision. Therefore, we are not proposing BTF limits for PM emissions from existing paste plants.

A summary of the costs and reductions for the BTF option of membrane bag upgrades is provided in Table 5.

d. BTF Analysis for PM for New Paste Plants

We estimate that a new primary aluminum plant with the capacity of 200,000 ton per year could use membrane filter bags in fabric filters used to control PM from a paste plant for an incremental annualized cost of $51,000 per year, which would achieve approximately 0.0005 tpy reductions. This results in estimated cost effectiveness of about $98 million per ton of HAP metals. We believe these costs and cost effectiveness are unacceptably high, especially given that minimal HAP reductions would be achieved. Furthermore, the metal HAP emissions are already quite low from existing paste plants under the current NESHAP. Therefore, we are not proposing BTF limits for PM emissions from new or reconstructed paste plants.

e. Proposed Standards for PM for Existing, New and Reconstructed Paste Plants

Based on the results of all our analyses for existing, new and reconstructed sources, and after considering the estimated costs and reductions of the possible options for existing, new and reconstructed sources, we are proposing paste plant PM emission standards at the MACT floor for existing, new and reconstructed sources (as shown in Table 7). Since all of the paste plants utilize similar emissions control technology and the average emissions from each source were well below the MACT floor, all presently operating facilities are expected to meet the proposed MACT floor emission standards without the need to install additional controls. Therefore, in assessing the costs of the proposed MACT standards for PM for paste plants, the only associated costs we estimate are for compliance testing, monitoring and recordkeeping.

A summary of the proposed MACT standards pursuant to CAA sections 112(d)(2) and (3) for POM and PM for the various processes at primary aluminum reduction plants is provided in Table 7.

TABLE 7—PROPOSED MACT EMISSION LIMITS FOR POM AND PM FOR PRIMARY ALUMINUM REDUCTION PLANTS PURSUANT TO SECTION 112(d)(2)

Affected source	Pollutant	Emission limit
Existing CWPB1 Potlines	POM	1.1 lb/ton aluminum.
Existing CWPB2 Potlines	POM	12 lb/ton aluminum.
Existing CWPB3 Potlines	POM	2.7 lb/ton aluminum.
Existing SWPB Potlines	POM	19 lb/ton aluminum.
New or Reconstructed Potlines	POM	0.77 lb/ton aluminum.
Existing CWPB1 Potlines	PM	7.2 lb/ton aluminum.
Existing CWPB2 Potlines	PM	11 lb/ton aluminum.
Existing CWPB3 Potlines	PM	20 lb/ton aluminum.
Existing SWPB Potlines	PM	4.6 lb/ton aluminum.
Existing VSS2 Potlines	PM	26 lb/ton aluminum.
New and Reconstructed Potlines	PM	4.6 lb/ton aluminum.
Existing Bake Furnaces	PM	0.068 lb/ton green anode.
New Bake Furnaces	PM	0.036 lb/ton green anode.
Existing Paste Plants	PM	0.082 lb/ton green anode.
New and Reconstructed Paste Plants	PM	0.0056 lb/ton green anode.

B. What are the results of the risk assessment and analyses?

1. Inhalation Risk Assessment Results

Table 8 provides an overall summary of the results of the inhalation risk assessment.

TABLE 8—PRIMARY ALUMINUM PRODUCTION SOURCE CATEGORY INHALATION RISK ASSESSMENT RESULTS

Maximum individual cancer risk (-in-1 million) [a]	Estimated population at increased risk levels of cancer	Estimated annual cancer incidence (cases per year)	Maximum chronic non-cancer TOSHI [b]	Refined maximum acute non-cancer HQ [c]
Actual Emissions				
70	≥ 1-in-1 million: 881,000 ≥ 10-in-1 million: 65,000 ≥ 100-in-1 million: 0	0.06	1 Cadmium and Nickel Compounds.	HQ_{REL} = 10 (Arsenic Compounds). Residential.
Allowable Emissions [d]				
300	≥ 1-in-1 million: 950,000 ≥ 10-in-1 million: 76,000 ≥ 100-in-1 million: 200	0.06	2 Nickel and Arsenic Compounds.	

[a] Estimated maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[b] Maximum TOSHI. The target organ with the highest TOSHI for the Primary Aluminum Production source category for actual emissions is the kidney and respiratory system and for allowable emissions is the respiratory, immunological and developmental systems.
[c] The maximum off-site HQ acute value of 10 at a residential location for actuals is driven by emissions of As from the potline roof vents. See section III.A.3 of this preamble for explanation of acute dose-response values. Acute assessments are not performed on allowable emissions.
[d] The development of allowable emission estimates can be found in the memoranda titled, *Revised Draft Development of the RTR Emissions Dataset for the Primary Aluminum Production Source Category* which is available in the docket.

The inhalation risk modeling performed to estimate risks based on actual and allowable emissions relied primarily on emissions data from the information requests. The results of the chronic baseline inhalation cancer risk assessment indicate that, based on estimates of current actual emissions, the maximum individual lifetime cancer risk (MIR) posed by the Primary Aluminum Production source category is 70-in-1 million, with As, Ni and Cr^{+6} compounds from the potline roof vents accounting for 99 percent of the MIR. The total estimated cancer incidence from primary aluminum production sources based on actual emission levels is 0.06 excess cancer cases per year, with emissions of As, Ni and Cr^{+6} compounds contributing 64 percent, 21 percent and 8 percent, respectively, to this cancer incidence. In addition, we note that approximately 900,000 people are estimated to have cancer risks greater than or equal to 1-in-1 million as a result of actual emissions from this source category, with 65,000 people having cancer risks greater than 10-in-1 million.

When considering MACT-allowable emissions, the maximum individual lifetime cancer risk is estimated to be up to 300-in-1 million, driven by potential emissions of As, Ni and PAH compounds from the potline roof vents of the one idle Soderberg facility. The estimated cancer incidence is estimated to be 0.06 excess cancer cases per year. Approximately 950,000 people were estimated to have potential cancer risks greater than or equal to 1-in-1 million considering allowable emissions from primary aluminum plants with 76,000 people with potential cancer risks greater than 10-in-1 million and 200 people with potential cancer risks greater than 100-in-1 million. The maximum modeled chronic non-cancer

HI (TOSHI) value based on actual emissions was estimated to be 1, for both Ni and Cd compounds emissions from the potline roof vents. When considering MACT-allowable emissions, the maximum chronic non-cancer TOSHI value was estimated to be 2, for both Ni and As compounds from potline roof vent emissions.

2. Acute Risk Results

Worst-case acute HQs were calculated for every emitted HAP that has an appropriate acute benchmark. For cases where the screening HQ was greater than 1, we further determined the highest HQ value that might occur outside facility boundaries. Based on estimated actual peak baseline emissions, the highest off-site acute screening HQ is 30 for As and the highest off-site acute screening HQ for HF is 3.

We refined the acute As assessment by evaluating exposures at the centroids of census blocks—these are locations around the facilities where people could actually live. Based on this refinement, the maximum HQ was 10, for As. We estimate that about 170 people could be exposed to concentrations leading to an acute HQ of 10 for As, about 1,500 people could be exposed to a concentration leading to an acute HQ greater than 5, and that about 8,500 people could be exposed to a concentration leading to an acute HQ greater than 1. This assessment still assumes in order to reach an HQ greater than 1 that peak emissions from the source category and worst-case meteorological conditions co-occur. We then assume further that an individual will be present to be exposed at that time. These are a conservative series of assumptions. We expect that this would happen for very few hours of the 8,760 hours that are in a year.

We did not conduct any refinements to the HF acute screen because the maximum off-site HQ of 3 is at a location where we would not expect people to be for 1 hour. For more details see the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

3. Multipathway Risk Screening Results

Results of the worst-case Tier 1 screening analysis indicate that 13 facilities exceeded the PB–HAP emission screening rates (based on estimates of actual emissions) for D/F, Hg and PAH with six facilities exceeding the screening rate for Cd. For the PB–HAPs and facilities that did not screen out at Tier 1, we conducted a Tier 2 screen. The Tier 2 screen replaces some of the assumptions used in Tier 1 with site-specific data, including the location of fishable lakes, and local precipitation, wind direction and speed. The Tier 2 screen continues to rely on conservative, high-end assumptions about consumption of local fish and locally grown or raised foods (adult female angler at 99th percentile consumption for fish [37] for the subsistence fisherman scenario and 90th percentile for consumption of locally grown or raised foods [38] for the farmer scenario) which, as noted above, may not occur for this source category. It is important to note that, even with the inclusion of some site-specific information in the Tier 2 analysis, the multipathway screening analysis is still a very conservative, health-protective assessment (*e.g.*, upper-bound consumption of local fish and locally grown and/or raised foods) and in all likelihood will yield results that serve as an upper-bound multipathway risk associated with a facility.

While the screening analysis is not designed to produce a quantitative risk result, the factor by which the emissions exceed the threshold serves as a rough gauge of the "upper-limit" risks we would expect from a facility. Thus, for example, if a facility emitted a PB–HAP carcinogen at a level 2 times the screening threshold, we can say with a high degree of confidence that the actual maximum cancer risks will be less than 2-in-1 million. Likewise, if a facility emitted a noncancer PB–HAP at a level 2 times the screening threshold, the maximum noncancer hazard would represent an HQ less than 2. The high degree of confidence comes from the fact that the screens are developed using the very conservative (health-protective) assumptions that we describe above.

Based on this Tier 2 non-cancer screening analysis, emissions of Hg [39] and Cd exceeded the site-specific levels for those PB–HAP by a factor of 2 from two different facilities. With regard to the Tier 2 cancer screening analysis, 10 facilities have estimated D/F emissions, as 2,3,7,8-tetrachlorodibenzo-p-dioxin TEQ, above the Tier 2 cancer screening thresholds and 12 facilities have estimated PAH emissions, as benzo(a)pyrene (BaP), above the Tier 2 cancer screening threshold. The highest cancer exceedance for D/F was 40 times and 7 times for PAH's for the subsistence fisherman scenario (total cancer screen value of 50 for the MIR site). Thus, these results indicate that the maximum cancer risks due to multipathway exposures to D/F and PAH emissions for the subsistence fisher scenario are less than 50-in-1 million.[40] For the subsistence farmer scenario, the highest cancer exceedance for D/F was 10 times and PAHs was 4 times (total cancer screen value of 20 for the MIR site).

Results of the analysis for Pb compounds indicate that based on the baseline, actual emissions, the maximum annual off-site ambient Pb concentration was below the primary NAAQS for Pb.

4. Environmental Risk Screening Results

We conducted an environmental risk screening assessment for the Primary Aluminum Production source category for the following HAP: Cd, Hg, PAHs, D/F and HF. The results of the environmental screening analysis are summarized in Table 9.

[37] Burger, J. 2002. *Daily Consumption of Wild Fish and Game: Exposures of High End Recreationists.* International Journal of Environmental Health Research 12:343–354.

[38] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

[39] As noted earlier, mercury values used in the analysis are likely to be inflated because EPA assumed mercury was emitted even from sources where no mercury was detected.

[40] As noted earlier, D/F emissions used in this analysis are likely to be overstated because EPA imputed values for D/F congeners even from plants and process units where those D/F congeners were not detected in the emissions tests.

TABLE 9—SUMMARY OF ENVIRONMENTAL RISK SCREEN RESULTS FOR THE PRIMARY ALUMINUM PRODUCTION SOURCE CATEGORY

Environmental HAP		Number of facilities in category exceeding				Percent of modeled area in category exceeding [2]	
		Tier 1 Screen		Tier 2 Screen [1]		NOAEL (%)	LOAEL (%)
		NOAEL	LOAEL	NOAEL	LOAEL		
PB–HAP	D/F	None	None			0.40	0
	MeHg	None	None			0	0
	Cd	1	1	None	None	0	0
	PAH	1	1	1	None	[4] NA	0
Acid Gases	HF [3]	NA	None			NA	0.2

[1] Tier 2 screen is performed for PB–HAP when there are exceedances of the Tier 1 screen. The acid gas screen is a one tier screen.
[2] A value of 0% indicates that none of the modeled data points exceeded the benchmark. For PB–HAP the percent area is based on the Tier 2 results, if a Tier 2 analysis is performed. Otherwise, the percent area is based on the Tier 1 results.
[3] For HF, we evaluated two benchmarks, one from Canada and the other from the state of Washington. Although, they are both considered to be LOELs—the level between a NOAEL and a LOAEL, we have listed the results under the LOAEL column for the Canadian benchmark, which is the more protective of the two.
[4] One facility had a Tier 2 exceedance for the sediment NOAEL benchmark at one lake. For PB–HAP the percent area is calculated for soil benchmarks only.
NA = Not Applicable. MeHg = methylmercury.

In our Tier 1 analysis, emissions of D/F and methylmercury did not exceed the threshold emission rates for any of the ecological benchmarks for any facility in the source category. In our Tier 1 analysis, emissions of Cd and PAHs exceeded some ecological benchmarks for one facility. Therefore, we performed a Tier 2 analysis. In the Tier 2 analysis, emissions of Cd did not exceed the threshold emission rates for any of the ecological benchmarks for any facility in the source category. In the Tier 2 analysis, emissions of PAHs exceeded the NOAEL sediment benchmark for one lake by 2 times, but did not exceed the threshold effect level. For HF, the average modeled concentration around each facility (*i.e.*, the average concentration of all off-site data points in the modeling domain) did not exceed the ecological benchmarks. For Pb compounds, we did not estimate any exceedances of the secondary Pb NAAQS.

5. Facility-Wide Risk Assessment Results

The facility-wide chronic MIR and TOSHI are based on actual emissions from all sources. Considering facility-wide emissions, the MIR is estimated to be 70-in-1 million driven by As, Ni and Cr^{+6} emissions and the chronic non-cancer TOSHI value is calculated to be 1 driven by emissions of Cd compounds. In both cases, the source of these emissions are from potline roof vents.

6. Multipathway Refined Risk Results

In the Tier 2 screening, emissions of Cd exceeded the fisher threshold at Alcoa in Ferndale, WA (NEIWA19906), and emissions of Hg exceeded the fisher threshold at Alumax in Goose Creek, SC (NEI41217) by a factor of 2. We also conducted a refined risk assessment for the Reynolds Metals (Alcoa—Massena East) (NEI46970) plant in Massena, NY. For more details on these assessments, see the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal,* which is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797). We then proceeded to a Tier 3 screen. We examined the set of lakes from which the (hypothetical) fisher ingested fish. Any lakes that appeared to not be fishable or not publicly accessible were removed from the assessment, and the screening assessment was repeated. After we made the determination which critical lakes were fishable and their respective adjustment to the Tier 2 values, we analyzed plume rise data. All three of these sites required plume rise analysis. Approximately, 33 percent of the Cd emissions at NEIWA19906 and six percent of the Hg emissions at NEI41217 were lost due to plume rise, resulting in the Tier 2 non-cancer screening values for both sites for the fisher scenario going from 2 to 1.

Reynolds Metals (NEI46970) permanently ceased operating their Soderberg process in March of 2014. The multipathway and inhalation risk characterization for this site will not be reflective of any future operations that may be conducted at this site, but provides valuable information showing how, through the use of more efficient and cleaner technologies, the industry has improved its environmental performance. This facility had the highest Tier 2 cancer screen value for the source category based upon actual emissions of PAHs and D/F with a value of 70 for the subsistence fisher scenario and a value of 200 for the subsistence farmer scenario.

An analysis of the fishable lakes did not change the Tier 2 cancer screening values, and analysis of the hourly plume-rise data resulted in only 4 percent of the mass being lost to the upper air sink. The Tier 3 screen did not reduce the Tier 2 cancer screen values for either PAH's or D/F for this facility. The subsistence fisher and subsistence farmer scenarios are conservative screens that provide upper bound estimates of screening values with high levels of uncertainty. The multipathway scenarios for the Tier screens include some hypothetical elements, namely the location and actual site-specific ingestion rates for exposed individuals. It is important to note that even though the multipathway assessment has been conducted, no data exist to verify the existence of either the farmer or fisher for each site. With regard to the farmer scenario, the uncertainty is even higher due to lack of site-specific information on where sustainable farms are located in addition to the make-up and quantities of food ingested.

7. Demographic Analysis Results

To examine the potential for any environmental justice (EJ) issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risks to individual demographic groups, of the population close to the facilities. In this analysis, we evaluated the distribution of HAP-related cancer risks

and non-cancer hazards from the Primary Aluminum Production source category across different social, demographic and economic groups within the populations living near facilities identified as having the highest risks. The methodology and the results of the demographic analyses are included in a technical report, *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Primary Aluminum Facilities,* which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

The results of the demographic analysis are summarized in Table 10 below. These results, for various demographic groups, are based on the estimated risks from actual emissions levels for the population living within 50 km of the facilities. The results (shown in Table 10) indicate there are no significant disproportionate risks to any particular minority, low income, or indigenous population. The results of the Primary Aluminum Production source category demographic analysis indicate that emissions from the source category expose approximately 881,307 people to a cancer risk at or above 1-in-1 million. The percentages of the at-risk population in each demographic group (except for White and non-Hispanic) are similar to or lower than their respective nationwide percentages.

TABLE 10—PRIMARY ALUMINUM PRODUCTION SOURCE CATEGORY DEMOGRAPHIC RISK ANALYSIS RESULTS

	Nationwide	Population with cancer risk at or above 1-in-1 million	Population with chronic hazard index above 1
Total Population	312,861,265	881,307	0
Race by Percent			
White	72	80	0
All Other Races	28	20	0
Race by Percent			
White	71.9	80.1	0
African American	13	13	0
Native American	1.1	0.9	0
Other and Multiracial	14	6	0
Ethnicity by Percent			
Hispanic	17	5	0
Non-Hispanic	83	95	0
Income by Percent			
Below Poverty Level	14	14	0
Above Poverty Level	86	86	0
Education by Percent			
Over 25 and without High School Diploma	15	14	0
Over 25 and with a High School Diploma	85	86	0

C. What are our proposed decisions regarding risk acceptability, ample margin of safety and adverse environmental effects based on our revised analyses?

1. Risk Acceptability

As noted in section II.A.1 of this preamble, the EPA sets standards under CAA section 112(f)(2) using "a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime cancer risk (MIR) of approximately 1 in 10 thousand[41]." (54 FR 38045, September 14, 1989.)

In this proposal, the EPA estimated risks based on both actual and allowable emissions from primary aluminum facilities. In determining acceptability, we considered risks based on both actual and allowable emissions.

a. Estimated Risks From Actual Emissions

The baseline inhalation cancer risk to the individual most exposed to emissions from sources regulated by subpart LL is 70-in-1 million based on actual emissions from prebake facilities. The estimated incidence of cancer due to inhalation exposures is 0.06 excess cancer cases per year, or 1 case every 17 years. Approximately 881,000 people face an estimated increased cancer risk greater than 1-in-1 million due to inhalation exposure to actual HAP emissions from the Primary Aluminum Production source category, and approximately 65,000 people face an estimated increased risk greater than 10-in-1 million and up to 70-in-1 million. The agency estimates that the maximum chronic non-cancer TOSHI from inhalation exposure is 1. As, Ni, Cd and chromium (Cr) are the main HAP contributing to the estimated chronic cancer and chronic non-cancer risks.

The Tier 2 multipathway screening analysis of actual emissions from operating plants indicates the potential for PAH and D/F emissions is about 50 times the screening level for cancer for the fisher scenario and 20 times the cancer threshold for the farming scenario. These results indicate that the maximum cancer risks due to multipathway exposures to D/F and PAH emissions from this source category are less than 50-in-1 million. Non-cancer impacts from Cd and Hg were at the Tier 2 screening thresholds,

[41] 1-in-10 thousand is equivalent to 100-in-1 million. The EPA currently describes cancer risks as "n-in-1 million."

which indicates that the maximum HI due to multipathway exposures to Hg and Cd emissions from this source category is less than 1.

As noted above, the Tier 2 multipathway screen is conservative in that it incorporates many health-protective assumptions (and, as noted, reflects further assumptions here as to amounts of certain HAP being emitted). For example, the EPA chooses inputs from the upper end of the range of possible values for the influential parameters used in the Tier 2 screen and assumes that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. A Tier 2 exceedance cannot be equated with a risk value or a HQ or HI. Rather, it represents a high-end bounding estimate of what the risk or hazard may be. For example, an exceedance of 2 for a non-carcinogen can be interpreted to mean that we have high confidence that the HI would be lower than 2. Similarly, an exceedance of 30 for a carcinogen means that we have high confidence that the risk is lower than 30-in-1-million. Confidence comes from the conservative, or health-protective, assumptions that are used in the Tier 2 screen.

The refined multipathway analysis that the EPA conducted for one specific Soderberg facility which has recently permanently shut down its Soderberg potlines found that the Tier 3 cancer screen resulted in the same potential risk as identified in the Tier 2 analysis with a cancer screen value of 70 for the subsistence fisher and 200 for the subsistence farmer. These results indicate that the maximum cancer risks due to multipathway exposures to emissions from that facility could have been up to 200-in-1 million. However, since that plant has permanently ceased operations of the Soderberg potlines (*i.e.*, the emissions sources that were driving the risk at that facility), the future risks due to emissions at this location (*i.e.*, if the company decides to replace its Soderberg potlines with lower-emitting prebake potlines and resume operations) will be substantially less than 100-in-1 million.

The assessment of maximum acute inhalation impacts from baseline actual peak emissions (*i.e.*, based on the standards in the 1997 NESHAP and the proposed standards in the 2011 proposal and this supplemental proposal) indicates the potential for As to exceed an HQ value of 1 based on the REL value, with an estimated maximum off-site acute HQ of 30 based on the REL value and 10 at a residential location. There are no AEGL values for comparison. We refined the acute As assessment by evaluating exposures at the centroids of census blocks—these are locations around the facilities where people could actually live. Based on this refinement, the maximum HQ was 10. We estimate that about 170 people could be exposed to concentrations leading to an acute HQ of 10, about 1,500 people could be exposed to a concentration leading to an acute HQ greater than 5, and about 8,500 people could be exposed to a concentration leading to an acute HQ greater than 1. This assessment still assumes in order to reach an HQ greater than one, peak emissions from each emission source at the source category and worst-case meteorological conditions co-occur at a time when an individual is present. In other words, the analysis includes the conservative assumption that every process releases its peak emissions at the same hour as the worst-case dispersion conditions. We expect that this would happen for very few hours of the 8,760 hours that are in a year.

We did not conduct any refinements to the HF acute screen because the maximum off-site HQ of 3 is at a location where we would not expect people to be for 1 hour.

For more information, refer to Appendix 8 of the *Residual Risk Assessment for the Primary Aluminum Production Source Category in Support of the 2014 Supplemental Proposal* (Docket ID No. EPA–HQ–OAR–2011–0797).

b. Estimated Risks from Allowable Emissions

The EPA estimates that the baseline inhalation cancer risk to the individual most exposed to emissions from sources regulated by subpart LL is up to 300-in-1 million based on allowable emissions from Soderberg facilities, with As, Ni and POM driving the risks. The EPA estimates that the incidence of cancer due to inhalation exposures could be up to 0.06 excess cancer cases per year, or 1 case approximately every 17 years. About 950,000 people could face an increased cancer risk greater than 1-in-1 million due to inhalation exposure to allowable HAP emissions from this source category (assuming facilities emit at allowable levels for much of their operations, a highly conservative assumption), and approximately 76,000 people could face an increased risk greater than 10-in-1 million and 200 people to excess cancer risks up to 300-in-1 million due to allowable emissions.

The risk assessment estimates that the maximum chronic non-cancer TOSHI from inhalation exposure values is up to 2, driven by allowable Ni and As emissions with approximately 30 people exposed at this value.

c. Acceptability Determination

In proposing a determination of whether risks are acceptable for this source category, the EPA considered all available health information and risk estimation uncertainty as described above.

The risk results indicate that actual inhalation cancer risks from the Primary Aluminum Production source category to the individual most exposed are up to, but no greater than, approximately 70-in-1 million and that allowable inhalation cancer risks to the individual most exposed are up to, but no greater than, approximately 300-in-1 million, which is 3 times higher than the presumptive limit of acceptability. The MIR based on actual emissions is well below the presumptive limit, while the MIR based on allowable emissions is well above the presumptive limit. The maximum chronic non-cancer results show no exceedance of the human health values for actual emissions and exceedance by up to a factor of approximately 2 based on allowable emissions.

Regarding the acute risks, the refined maximum HQ at a residential location is 10 for As. We expect that these exceedances would happen for very few hours of the 8,760 hours that are in a year. For HF the maximum off-site HQ of 3 is at a location where we would not expect people to be for 1 hour.

The excess cancer risks from the multipathway screen from actual D/F emissions from operating plants indicate that the risk to the individual most exposed could be up to but no greater than 50-in-1 million for the fisher scenario and 20-in-1 million for the farmer scenario. These results (which reflect very conservative assumptions) are considerably less than 100-in-1 million, the presumptive limit of acceptability. The multipathway Tier 2 screen for non-cancer is at the Tier 2 screening value of 1 for Hg and Cd. The estimated cancer risks from the multipathway assessment for operating facilities were well below 100-in-1 million. The refined multipathway results for the Massena East Soderberg plant indicated potential cancer risks of up to 200-in-1 million at that location. However, since this facility has permanently shut down its Soderberg operations, we are not concerned about the potential future emissions from this facility.

Nevertheless, given all the information presented above, the EPA proposes that the risks due to potential HAP emissions at baseline from the

Soderberg subcategory are unacceptable due to the allowable cancer risks of 300-in-1 million based on potential emissions from the idle Soderberg facility (Columbia Falls Aluminum Company).

Regarding the prebake subcategories, the EPA has some concerns regarding the potential acute risks due to As emissions (with a maximum acute HQ of 10). However, given the conservative nature of the acute analysis (described above), and the fact that the inhalation cancer MIR is well below 100-in-1 million (MIR = 70-in-1 million), the chronic non-cancer risks are low (*e.g.*, HI = 1) and that the multipathway assessment indicated the maximum cancer risks due to multipathway exposures to HAP from prebake facilities was no higher than 50-in-1 million, we propose that the risks due to actual emissions from the prebake subcategories are acceptable.

2. Proposed Controls To Address Unacceptable Risks for Soderberg Facilities

a. VSS2 Potline Emissions

In order to ensure that the risks associated with Soderberg facilities are acceptable, we evaluated the potential to reduce MACT-allowable VSS2 potline emissions for the primary HAP driving the cancer risks (*i.e.*, POM, As and Ni). Regarding POM, the current NESHAP includes an emissions limit for POM of 5.7 lbs/ton of aluminum. As noted above, the one facility driving the allowable risks has been idle for 5 years. All indications are that this facility will not reopen. However, based on available data from the most recent years that they were operating, we estimate that if this one VSS2 facility did reopen and if they installed wet roof top scrubbers that they could achieve a POM emissions limit of 1.9 lb/ton (0.85 Kg/Mg) of aluminum, which would be a significant reduction in potential POM emissions. This limit is 3 times lower than the current limit for POM. Furthermore, given that there would be variability in emissions, in order for the facility to comply with a limit of 1.9 lbs/ton at all times, they would need to have average POM emissions considerably lower than 1.9 lb/ton. Therefore, under the authority of CAA section 112(f)(2), we propose a POM emission limit for VSS2 potlines of 1.9 lb/ton (0.85 Kg/Mg) of aluminum. As mentioned above, the one remaining Soderberg plant has been idle for 5 years and we believe it is highly unlikely that the facility will reopen, due to its less efficient aluminum production method. However, if it does reopen, we estimate that the capital costs for the roof top wet scrubbers would be about $30 million and that annualized costs would be about $8 million.

These controls would also achieve reductions of HAP metal emissions. We estimate that wet roof scrubbers would achieve a 50 percent reduction in secondary potline emissions of metals. See *CFAC BART Analysis* in the docket (Docket ID No. EPA–HQ–OAR–2011–0797). Nevertheless, to ensure that the primary HAP metals (*i.e.*, As and Ni) that are driving the allowable cancer risks are limited to acceptable levels of emissions, we are proposing facility-wide total potline emissions limits for As and Ni that reflect a 50 percent reduction in the estimated facility-wide secondary potline emissions of those metals. We are doing so pursuant to CAA section 112(f)(2) in order to ensure risks will be acceptable from the VSS2 subcategory. Given that these reductions would be achieved using the same controls used for POM, there would be no added cost of control, and there would be risk reductions associated with reduced HAP metal emissions. Based on our analysis of available data, we estimated that, if this facility resumed operations, facility-wide emissions of Ni would be less than 0.14 pounds per ton of aluminum produced and facility-wide emissions of As would be less than 0.012 pounds per ton of aluminum produced, using their current controls. Assuming wet roof scrubbers are installed, and assuming the wet roof scrubbers would achieve a 50 percent reduction in HAP metal emissions, and assuming the facility would run 3 potlines, which is the most potlines it operated in the past 13 years, we estimate that the roof top wet scrubbers would be able to limit emissions of Ni and As from potlines to no more than 0.07 pounds of Ni per ton of aluminum produced and no more than 0.006 pounds of As per ton of aluminum produced, on a facility-wide basis. Therefore, under the authority of CAA section 112(f), we are proposing potline emission limits of 0.07 pounds of Ni per ton of aluminum produced and 0.006 pounds of As per ton of aluminum produced. For more information regarding the development of these risk-based standards, see the memorandum titled, *Development of Emissions Standards to Address Risks for the Primary Aluminum Production Source Category Pursuant to Section 112(f) of the Clean Air Act,* in the docket for this action (Docket ID No. EPA–HQ–OAR–2011–0797).

Regarding post-control risks, we estimate that with a POM emission limit that is 3 times lower than the current POM emission limit and with Ni and As emission limits that reflect a 50 percent reduction in potential emissions of those metals, that the post control risks would be approximately 100-in-1 million, if the plant did reopen.

Based on our analyses, we conclude that the one existing VSS2 facility, if it chose to reopen, could meet these limits with the installation of wet roof scrubbers on their potrooms. We note that it is very unlikely that any new Soderberg plants would be constructed in the U.S. because the Soderberg method of aluminum reduction is less cost effective than the prebake method and due to the cost that would be incurred to comply with the stringent POM limits for any new or reconstructed potline in the NESHAP. New or reconstructed sources would be subject to a POM limit of 0.77 pounds per ton of aluminum produced as opposed to existing sources being subject to a POM limit of 5.7 pounds per ton of aluminum produced under the 1997 NESHAP, or 1.9 pounds per ton of aluminum produced if the proposed revised limit of 1.9 pounds per ton of aluminum produced in this supplemental proposal is adopted. Nevertheless, to ensure that any possible future Soderberg plant has acceptable metals emissions, we are proposing that any new Soderberg potlines would need to meet new source MACT limits for POM and the risk-based standards for As and Ni.

We propose that compliance with the As and Ni emissions limits for existing VSS2 potlines and new Soderberg potlines will be demonstrated by annual performance testing along with various parametric monitoring on a more frequent basis. The proposed compliance testing requirements for POM are described in section IV.E of this preamble.

3. Ample Margin of Safety Analysis

Under the ample margin of safety analysis, we again consider all of the health factors and evaluate the cost and feasibility of available control technologies and other measures (including the controls, measures and costs reviewed under the technology review) that could be applied in this source category to further reduce the risks due to emissions of HAP identified in our risk assessment.

Under the ample margin of safety analysis, we evaluated possible options to reduce HAP metal and POM emissions from the prebake potline roof vents. The main option we evaluated is based on requiring most prebake facilities to install wet roof scrubbers to reduce secondary HAP metals emissions

from their potline roof vents. Under this option we estimate that post-control cancer MIR would be 40-in-1 million for prebake facilities (down from 70-in-1 million). We estimate that under this option chronic non-cancer hazards would be below 1. The As maximum acute HQ would be reduced from 10 down to 7. With regard to the acute As exposures, we estimate that about 60 people could be exposed to concentrations leading to an acute HQ of 7, about 154 people could be exposed to a concentration leading to an acute HQ greater than 5, and that about 3,600 people could be exposed to a concentration leading to an acute HQ greater than 1. This assessment still assumes, in order to reach an HQ greater than 1, peak emissions from the source category and worst-case meteorological conditions co-occur. We expect that this would happen for very few hours of the 8,760 hours that are in a year. For HF, the maximum off-site HQ would be reduced from 3 to 2 and is at a location where we would not expect people to be for 1 hour.

We estimate that the total capital costs would be at least $415 million ($46 million per facility), annualized costs would be at least $133 million ($15 million per facility), with cost effectiveness (CE) of $6 million per ton HAP metals and $130,000 per ton POM or higher. This option would also achieve 715 tpy $PM_{2.5}$ reductions with CE of $185,000 per ton $PM_{2.5}$. We believe these costs are substantial. Furthermore, based on our economic analysis, we project that this option would pose a significant economic burden on the companies and that several facilities would be at risk of closure under this option. The option would also be associated with potentially adverse environmental effects (more wastewater discharge), and increased energy usage (with attendant carbon pollution), although these are not the most significant factors in the EPA's proposed decision. Therefore, given all the factors described above, we are not proposing this option in today's action.

In regards to the Soderberg facilities, we estimate that the actions proposed under CAA section 112(f)(2), as described above to address unacceptable risks, will reduce the MIR associated with allowable emissions of As, Ni and PAHs from 300-in-1 million to 100-in-1 million (assuming the highly unlikely scenario wherein the Soderberg plant was to resume operation). The potential cancer incidence due to allowable emissions from this one facility will be reduced from 0.007 to 0.003 with a potential of 1 case every 330 years versus 1 case every 170 years, and the number of people estimated to potentially have cancer risks greater than 1-in-1 million will remain the same at 65,000 people. The chronic noncancer inhalation TOSHI due to allowable emissions will be reduced from 2 to 1. Based on our research and analysis, we did not identify any cost effective controls beyond those proposed above that would achieve further reduction in risk. Therefore, we conclude that the controls to achieve acceptable risks (described above) will also achieve an ample margin of safety.

4. Adverse Environmental Effects

Based on the results of our environmental risk screening assessment, we conclude that there is not an adverse environmental effect as a result of HAP emissions from the Primary Aluminum Production source category. We are proposing that it is not necessary to set a more stringent standard to prevent, taking into consideration costs, energy, safety and other relevant factors, an adverse environmental effect.

D. What are the results and proposed decisions based on our technology review?

We updated the technology review conducted for the 2011 proposal and determined that there have been no developments in practices, processes and control technologies that would be considered feasible and cost effective to apply to this source category since the 2011 proposal. The analysis is very similar to that outlined above with respect to potential BTF standards. Additional details regarding the technology review can be found in the *Revised Draft Technology Review for the Primary Aluminum Production Plant Source Category,* which can be found in the docket (Docket ID No. EPA–HQ–OAR–2011–0797). This same information underlies the EPA's determination not to propose BTF limits and is summarized above.

E. What other actions are we proposing?

In addition to the proposed actions described above, we re-evaluated compliance requirements associated with the 2011 proposed amendments to determine whether we should make changes to those proposed amendments. Based on this re-evaluation, we are proposing the following changes to what was proposed in the 2011 proposal.

1. Frequency for Testing of Prebake Potline POM

The December 2011 proposal included a testing frequency of once every 5 years for POM from prebake potlines and provisions for estimating potline roof vent emissions based on potline stack POM emissions and potline stack and vent TF emissions. These provisions were proposed based on a belief that prebake potline POM emissions would be relatively low and that potline vent POM emissions would be difficult to determine. Based on the results of testing conducted in response to our 2013 information request, we determined that POM emissions from prebake potlines are higher than we expected and that methods exist for testing prebake vent emissions. As a result, we are proposing annual testing of POM emissions from prebake potline stacks and testing three times each semiannual period for POM emissions from prebake potline roof vents, with compliance demonstrated by summing emissions from these two locations.

2. Reduced Testing Frequency for TF From Potlines and POM From Soderberg Potlines

The NESHAP currently requires the owner/operator of an affected source to measure and record the emission rate of TF from potline stacks at least three times each year and from potline roof vents at least three times each month, unless they apply for, and receive, authorization to measure and record the roof vent TF emission rate three times per quarter. The NESHAP currently requires the owner/operator to measure and record the emission rate of POM from Soderberg potline stacks at least three times each year and from their roof vents at least three times per quarter. We are proposing to decrease the required frequencies of measuring and recording emission rates of TF from potline roof vents and POM from Soderberg roof vents to three times each semiannual period because, based on the consistency of previous test results and considering the potline work practices included in this supplemental proposal, we believe that this testing frequency is adequate to determine compliance with these emission limits. However, as discussed in section VI of this preamble, we are seeking comments regarding other potential testing frequencies.

3. Testing, Monitoring and Reporting for PM, Metals and COS

We are proposing testing, monitoring and reporting requirements to demonstrate compliance with the proposed emission limits for PM, Ni and As emissions, including the use of EPA Method 29 for determination of the emission rates of Ni and As. Furthermore, based on comments

received on the December 2011 proposal, we are proposing the use of an alternate method of determination of sulfur in coke, for use in demonstrating compliance with the potline COS emission limit.

4. Revisions to the Tables of Emission Limits for Averaging

The current NESHAP allows emissions averaging across similar process vents. In this action, we are proposing revised limits applicable to the emission averaging to reflect the proposed revised and proposed additional emission standards described in section IV.A of this preamble.

5. Alternative Emissions Limits for Co-Controlled New and Existing Anode Bake Furnaces

We are proposing alternative emission limits for certain co-controlled new and existing anode bake furnaces to simplify compliance demonstration. This provision will allow a facility which uses one control device to control TF and POM emissions from a comingled exhaust from new and existing anode bake furnaces to comply with alternative production weighted average emission limits for those pollutants. These production weighted average emission limits are more protective than the emission limits that would otherwise apply to those sources, but will simplify compliance determinations and reduce costs for the sources because multiple emissions sources can be controlled and monitored at a single location.

6. Deletion of Provisions for HSS Potlines

Following the publication of the December 2011 proposal, the only existing HSS potlines were permanently shut down and have been dismantled. We are proposing to remove the definition and emissions standards for this subcategory.

7. Startup, Shutdown, Malfunction

In the 2011 proposal, we proposed to eliminate two provisions that exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standards during periods of SSM. We also included provisions for affirmative defense to civil penalties for violations of emission standards caused by malfunctions. Periods of startup, normal operations and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition sudden, infrequent and not reasonably preventable failures of emissions control, process or monitoring equipment. As explained in the 2011 proposal, the EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards. Under CAA section 112, emissions standards for new sources must be no less stringent than the level "achieved" by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation "achieved" by the best performing 12 percent of sources in the category. There is nothing in CAA section 112 that directs the agency to consider malfunctions in determining the level "achieved" by the best performing sources when setting emission standards. As the United States Court of Appeals for the District of Columbia Circuit has recognized, the phrase "average emissions limitation achieved by the best performing 12 percent of" sources "says nothing about how the performance of the best units is to be calculated." *Nat'l Ass'n of Clean Water Agencies* v. *EPA*, 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the agency to consider malfunctions as part of that analysis. A malfunction should not be treated in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a "normal or usual manner" and no statutory language compels the EPA to consider such events in setting CAA section 112 standards.

Further, accounting for malfunctions in setting emission standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree and duration of various malfunctions that might occur. Therefore, the performance of units that are malfunctioning is not "reasonably" foreseeable. See, *e.g.*, *Sierra Club* v. *EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) ("The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' ") See also, *Weyerhaeuser* v. *Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978) ("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation."). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99 percent removal goes off-line as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99 percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. Therefore, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well-performing non-malfunctioning source. It is reasonable to interpret CAA section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable and was not instead caused in part by poor maintenance or careless operation.

Further, to the extent the EPA files an enforcement action against a source for violation of an emission standard, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions.

Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

As noted above, the 2011 proposal included an affirmative defense to civil penalties for violations caused by malfunctions. The EPA included the affirmative defense in the 2011 proposal as it had in several prior rules in an effort to create a system that incorporates some flexibility, recognizing that there is a tension, inherent in many types of air regulation, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission standards may be violated under circumstances entirely beyond the control of the source. Although the EPA recognized that its case-by-case enforcement discretion provides sufficient flexibility in these circumstances, it included the affirmative defense in the 2011 proposal and in several prior rules to provide a more formalized approach and more regulatory clarity. See *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1057–58 (D.C. Cir. 1978) (holding that an informal case-by-case enforcement discretion approach is adequate); but see *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977) (requiring a more formalized approach to consideration of "upsets beyond the control of the permit holder."). Under the EPA's regulatory affirmative defense provisions, if a source could demonstrate in a judicial or administrative proceeding that it had met the requirements of the affirmative defense in the regulation, civil penalties would not be assessed. Recently, the United States Court of Appeals for the District of Columbia Circuit vacated an affirmative defense in one of the EPA's CAA section 112(d) regulations. *NRDC* v. *EPA*, 749 F. 3d 1055 (D.C. Cir. 2014) 2014 U.S. App. LEXIS 7281 (vacating affirmative defense provisions in CAA section 112(d) rule establishing emission standards for Portland cement kilns). The court found that the EPA lacked authority to establish an affirmative defense for private civil suits and held that under the CAA, the authority to determine civil penalty amounts lies exclusively with the courts, not the EPA. Specifically, the court found: "As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are 'appropriate.'" See *NRDC* v. *EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) ("[U]nder this statute, deciding whether penalties are 'appropriate' in a given private civil suit is a job for the courts, not EPA."). In light of NRDC, the EPA is withdrawing its proposal to include a regulatory affirmative defense provision in this rulemaking. As explained above, if a source is unable to comply with emissions standards as a result of a malfunction, the EPA may use its case-by-case enforcement discretion to provide flexibility, as appropriate. Further, as the United States Court of Appeals for the District of Columbia Circuit recognized, in an EPA or citizen enforcement action, the court has the discretion to consider any defense raised and determine whether penalties are appropriate. Cf. *NRDC* v. *EPA*, 749 F. 3d 1055, 1064 (D.C. Cir. 2014) (arguments that violation were caused by unavoidable technology failure can be made to the courts in future civil cases when the issue arises). The same logic applies to the EPA administrative enforcement actions.

F. What compliance dates are we proposing?

In this supplementary proposal we are proposing changes to some of the compliance dates that we proposed in 2011. Specifically, we propose that facilities must comply with the changes set out in this supplementary proposal which are being proposed under CAA section 112(d) no later than one year after the effective date of the final rule. In the 2011 proposal, we proposed that the facilities would be allowed up to three years after the effective date of the final rule to comply with the proposed changes under CAA section 112(d). Upon further review and analysis of available data, we believe that one year will be sufficient time to comply with the proposed CAA section 112(d) standards, which would include: conducting testing to demonstrate compliance with the proposed MACT standards for POM from existing prebake potlines and COS emissions from all existing potlines; implementing the proposed work practice standards for potlines, paste production plants and anode bake furnaces; and installing any necessary controls on existing pitch tanks.

We also believe that one year will be sufficient time to conduct testing to demonstrate compliance with the new MACT standards in this supplemental proposal for PM emissions from existing potlines, paste production plants and anode bake furnaces, since equipment modifications will not be necessary.

Finally, we propose that facilities must comply with the risk-based emission limits for POM, Ni and As emissions from VSS2 potlines and new Soderberg potlines no later than two years after the effective date of the final rule. We believe that it is appropriate to allow the maximum amount of time for compliance with these risk-based standards permissible pursuant to CAA section 112(f) (*i.e.*, 2 years) since a subject facility would be required to install wet roof scrubbers in order to comply with those standards.

V. Summary of the Revised Cost, Environmental and Economic Impacts

A. What are the affected sources?

The affected sources are new and existing potlines, new and existing pitch storage tanks, new and existing anode bake furnaces (except for one that is located at a facility that only produces anodes for use off-site) and new and existing paste plants.

B. What are the air quality impacts?

We estimate that the proposed lower VSS2 potline POM emissions limits would reduce POM emissions from the one VSS2 facility by approximately 53 tons per year if the facility were to resume operation. Furthermore, we estimate that these proposed standards would also result in about 1 tpy reduction of HAP metals and 40 tpy reduction of $PM_{2.5}$ if the one Soderberg facility reopened.

C. What are the cost impacts?

Under the proposed amendments, prebake facilities would be required to conduct annual POM testing on potlines, and all facilities would be required to conduct annual PM testing on potlines, anode bake furnaces and paste plants. Facilities would also be required to monitor 12 anode bake furnaces and 11 paste plants at an estimated cost of $129,375 per year. These testing costs are offset by reduced frequency testing of TF from all potlines, resulting in a reduction in testing costs of $2,050,000 per year. The total estimated cost of the rule is a savings of $959,000 assuming that the Columbia Falls Soderberg plant does not reopen.

The one Soderberg facility, if it reopens, will be expected to install and operate wet roof scrubbers on their potrooms to comply with risk-based standards for POM, As and Ni at a total estimated capital cost of $30 million and annual cost of $8 million. This facility, if it reopens, would be also required to conduct annual Ni and As emissions tests on three potlines. Under this scenario, the total estimated cost of the rule is $7,100,000 per year. The memorandum, *Revised Draft Cost Impacts for the Primary Aluminum Production Source Category* includes a

description of the assumptions used for this analysis and is available in the docket (Docket ID No. EPA–HQ–OAR–2011–0797).

D. What are the economic impacts?

We performed an economic impact analysis for the proposed modifications in this action. That analysis estimates a net savings for each open facility based on the assumption that the Columbia Falls Soderberg facility will not reopen. If Columbia Falls does reopen, the total estimated cost of the rule is $7,100,000 per year. For more information, please refer to the memo titled, *Economic Impact Analysis for National Emissions Standards for Hazardous Air Pollutants: Primary Aluminum Reduction Plants* for this proposed rulemaking that is available in the public docket for this proposed rulemaking.

E. What are the benefits?

If the Soderberg facility were to resume operations, the proposed standards in this supplemental proposal would achieve an estimated reduction in annual HAP emissions of about 53 tons, which would provide significant benefits to public health. In addition to the HAP reductions, which would ensure an ample margin of safety, we also estimate that this supplemental proposal would achieve about 230 tons of reductions in PM (including 40 tons of $PM_{2.5}$) emissions as a co-benefit of the HAP reductions annually (again assuming resumption of the Soderberg plant operations).

This rulemaking is not an "economically significant regulatory action" under Executive Order 12866 because it is not likely to have an annual effect on the economy of $100 million or more. Therefore, we have not conducted a Regulatory Impact Analysis (RIA) for this rulemaking or a benefits analysis. While we expect that these avoided emissions will improve air quality and reduce health effects associated with exposure to air pollution associated with these emissions, we have not quantified or monetized the benefits of reducing these emissions for this rulemaking. This does not imply that there are no benefits associated with these emission reductions. We provide a qualitative description of benefits associated with reducing these pollutants below. When determining whether the benefits of an action exceed its costs, Executive Orders 12866 and 13563 direct the agency to consider qualitative benefits that are difficult to quantify but nevertheless essential to consider.

Directly emitted particles are precursors to secondary formation of fine particles ($PM_{2.5}$). Controls installed to reduce HAP would also reduce ambient concentrations of $PM_{2.5}$ as a co-benefit. Reducing exposure to $PM_{2.5}$ is associated with significant human health benefits, including avoiding mortality and morbidity from cardiovascular and respiratory illnesses. Researchers have associated $PM_{2.5}$ exposure with adverse health effects in numerous toxicological, clinical and epidemiological studies (U.S. EPA, 2009).[42] When adequate data and resources are available and an RIA is required, the EPA generally quantifies several health effects associated with exposure to $PM_{2.5}$ (*e.g.*, U.S. EPA, 2012).[43] These health effects include premature mortality for adults and infants, cardiovascular morbidities such as heart attacks, hospital admissions and respiratory morbidities such as asthma attacks, acute bronchitis, hospital and emergency department visits, work loss days, restricted activity days and respiratory symptoms. The scientific literature also suggests that exposure to $PM_{2.5}$ is associated with adverse effects on birth weight, pre-term births, pulmonary function and other cardiovascular and respiratory effects (U.S. EPA, 2009), but the EPA has not quantified these impacts in its benefits analyses. $PM_{2.5}$ also increases light extinction, which is an important aspect of visibility.

The supplemental proposed rulemaking is also anticipated to reduce emissions of other HAP, including HAP metals (As, Cd, Cr (both total and hexavalent), Pb, Mn and Ni) and PAHs, assuming the Soderberg plant resumes operations. Some of these HAP are carcinogenic (*e.g.*, As, PAHs) and some have effects other than cancer (*e.g.*, kidney disease from Cd, respiratory and immunological effects from Ni). While we cannot quantitatively estimate the benefits achieved by reducing emissions of these HAP, we would expect benefits by reducing exposures to these HAP. More information about the health effects of these HAP can be found on the IRIS,[44] ATSDR,[45] and California EPA[46] Web pages.

VI. Request for Comments

As stated above, we are not opening comment on aspects of the 2011 proposal (76 FR 76260) that have not changed and are not addressed in this supplemental proposal. Comments received on the 2011 proposal along with comments received on this supplemental proposal will be addressed in the EPA's Response to Comment document and final rule preamble for the Primary Aluminum Production source category.

We are soliciting comments on the revised risk assessment and technology review and proposed changes to the previously-proposed amendments.

We are seeking comments on an alternative approach for demonstrating compliance with the emissions limits for potlines. Facilities face challenges when measuring secondary emissions from potlines, as these emissions are fugitive in nature. Some facilities employ a manifold system which captures a portion of the emissions that would exit the roof of the building. These emissions can be sampled using standard EPA reference methods, and the results can be extrapolated to account for the emissions from the entire roof. Other facilities sample the emissions near the roof using a series of elevated cassettes that contain removable filters. The EPA has a standard reference method for the measurement of TF using these cassettes, but there is not a standard reference method for other pollutants.

In the 2013 CAA section 114 information request, we requested facilities use filters meeting the requirements of EPA Method 315 in the cassettes and then recover and analyze the filters for filterable PM and POM using Method 315. In reviewing the results, we noted that there was no appreciable difference in the results of facilities that tested using the reference method in the manifold and facilities that tested using filters in cassettes. We, therefore, think it is reasonable to require facilities with manifolds to test at ambient conditions instead of heating the filter and probe. We also think it is reasonable to allow facilities that

[42] U.S. Environmental Protection Agency (U.S. EPA). 2009. *Integrated Science Assessment for Particulate Matter* (Final Report). EPA–600–R–08–139F. National Center for Environmental Assessment—RTP Division. Available on the Internet at *http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=216546.*

[43] U.S. Environmental Protection Agency (U.S. EPA). 2012. *Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter.* Office of Air and Radiation, Research Triangle Park, NC. Available on the Internet at *http://www.epa.gov/ttn/ecas/regdata/RIAs/finalria.pdf.*

[44] US EPA, 2006. Integrated Risk Information System. *http://www.epa.gov/iris/index.html.*

[45] US Agency for Toxic Substances and Disease Registry, 2013. Minimum Risk Levels (MRLs) for Hazardous Substances. *http://www.atsdr.cdc.gov/mrls/index.html.*

[46] CA Office of Environmental Health Hazard Assessment. Chronic Reference Exposure Levels Adopted by OEHHA as of December 2008. *http://www.oehha.ca.gov/air/chronic_rels.*

sample in manifolds to forego the use of the back half of the train altogether. In this case, the filterable POM results would be a surrogate for total POM, and the measurement data for the cassettes and manifolds would be most directly comparable.

We are seeking comments on the frequency with which the owner/operator of affected potlines must measure and record emission rates of TF, POM and PM from roof vents. The frequency proposed in this action is at least three times each semiannual period. However, we are considering frequencies of at least three times each quarter or at least three times each year. We request that any commenter who would like the EPA to consider a different frequency include specific rationale and factual basis, including supporting data, for why a different frequency would be appropriate.

VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR Web site at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern and provide any "improved" data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR page, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.
2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number and revision comments).
3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations, etc.).
4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2011–0797 (through one of the methods described in the **ADDRESSES** section of this preamble).
5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the RTR Web site at: *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.*

VIII. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the OMB under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by the EPA has been assigned EPA ICR number 2447.01.

We are proposing changes to the paperwork requirements to the Primary Aluminum Production source category. In this supplemental proposal, we are proposing less frequent testing of POM emissions from Soderberg potlines and less frequent testing of TF emissions from all potlines. In addition, we are removing from this proposal the burden associated with the affirmative defense provisions included in the December 2011 proposal.

We estimate 13 regulated entities are currently subject to subpart LL (NESHAP for Primary Aluminum Reduction Plants) and will be subject to this action. The annual monitoring, reporting and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the standards) as a result of the supplemental proposal revised amendments to subpart LL is estimated to be −$1,179,000 per year.

This includes −427 labor hours per year at a total labor cost of −$32,350 per year, and total non-labor capital and operation and maintenance costs of −$1,212,000 per year. This estimate includes performance tests, notifications, reporting and recordkeeping associated with the new requirements for primary aluminum reduction plant operations. The total burden for the federal government (averaged over the first 3 years after the effective date of the standard) is estimated to be 199 hours per year at a total labor cost of $9,072 per year. Burden is defined at 5 CFR 1320.3(b).

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.

To comment on the agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden, the EPA has established a public docket for this rule, which includes this ICR, under Docket ID No. EPA–HQ–OAR–2011–0797. Submit any comments related to the ICR to the EPA and OMB. See **ADDRESSES** section at the beginning of this preamble for where to submit comments to the EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 8, 2014, a comment to OMB is best assured of having its full effect if OMB receives it by January 7, 2015. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. For this source category, which has the NAICS code 331312, the SBA small business size standard is 1,000

employees according to the SBA small business standards definitions.

After considering the economic impacts of today's action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. None of the companies affected by this rule is considered to be a small entity per the definition provided in this section.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local or tribal governments, or the private sector. The action would not result in expenditures of $100 million or more for state, local and tribal governments, in aggregate, or the private sector in any 1 year. This supplemental proposal imposes no enforceable duties on any state, local or tribal governments, or the private sector. Thus, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments as it contains no requirements that apply to such governments nor does it impose obligations upon them.

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, as specified in Executive Order 13132. None of the facilities subject to this action are owned or operated by state governments and, because no new requirements are being promulgated, nothing in this action will supersede state regulations. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communication between the EPA and state and local governments, the EPA specifically solicits comment on this proposed action from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000) because it does not have substantial direct effects on any Indian tribe(s), on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

The EPA specifically solicits comment on this action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the agency does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children.

This rule is expected to reduce environmental impacts for everyone, including children. This action establishes emissions limits at the levels based on MACT, as required by the CAA. Based on our analysis, we believe that this rule does not have a disproportionate impact on children.

The public is invited to submit comments or identify peer-reviewed studies and data that assess effects of early life exposure to HAP emitted from the Primary Aluminum Production source category.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards (VCS) in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by VCS bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable VCS.

This proposed rulemaking involves technical standards. The rule requires the use of either ASTM D3177–02 (2007), Standard Test Methods for Total Sulfur in the Analysis Sample of Coal and Coke, or ASTM D–6376–06, Test Method for Determination of Trace Metals in Petroleum Coke by Wavelength Dispersive X-ray Fluorescence Spectroscopy. These are voluntary consensus methods. These methods can be obtained from the American Society for Testing and Materials, 100 Bar Harbor Drive, West Conshohocken, Pennsylvania 19428 (telephone number (610) 832–9500). These methods were proposed in the rule because they are commonly used by primary aluminum production facilities to demonstrate compliance with sulfur dioxide emission limitations imposed in their current Title V permits.

Under 40 CFR 63.7(f) and 40 CFR 63.8(f) of subpart A of the General Provisions, a source may apply to the EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications or procedures in the proposed rule.

The EPA welcomes comments on this aspect of the proposed rulemaking and specifically invites the public to identify potentially applicable VCS and to explain why such standards should be used in this regulation.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States. For the Primary Aluminum Production source category, the EPA has determined that the current health risks posed to anyone by actual emissions from this source category are within the acceptable range, and that the proposed rulemaking will provide and ample margin of safety to protect public health of all demographic groups.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority, low income or indigenous populations because it increases the level of environmental protection for all

affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority, low income or indigenous populations.

These proposed standards will improve public health and welfare, now and in the future, by reducing HAP emissions contributing to environmental and human health impacts. These reductions in HAP associated with the rule are expected to benefit all populations.

To examine the potential for any environmental justice issues that might be associated with the Primary Aluminum Production source category, we evaluated the distributions of HAP-related cancer and non-cancer risks across different social, demographic and economic groups within the populations living near the facilities where this source category is located. The methods used to conduct demographic analyses for this proposed rule are described in the document, *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Primary Aluminum Facilities,* which may be found in the docket for this rulemaking (Docket ID No. EPA–HQ–OAR–2011–0797).

In the demographics analysis, we focused on populations within 50 km of the facilities in this source category with emissions sources subject to the MACT standard. More specifically, for these populations, we evaluated exposures to HAP that could result in cancer risks of 1-in-1 million or greater. We compared the percentages of particular demographic groups within the focused populations to the total percentages of those demographic groups nationwide. The results of this analysis are documented in the document, *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Primary Aluminum Facilities,* in the docket for this rulemaking.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: November 13, 2014.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, Title 40, chapter I, of the Code of Federal Regulations (CFR) is proposed to be amended as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart LL—National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants

■ 2. Section 63.840 is amended by revising paragraph (a) to read as follows:

§ 63.840 Applicability.

(a) Except as provided in paragraph (b) of this section, the requirements of this subpart apply to the owner or operator of each new or existing pitch storage tank, potline, paste production plant and anode bake furnace associated with primary aluminum production and located at a major source as defined in § 63.2.

* * * * *

■ 3. Section 63.841 is amended by:

■ a. Revising paragraphs (a)(1) and (2); and

■ b. Adding paragraphs (a)(3) and (4).

The revisions and additions read as follows:

§ 63.841 Incorporation by reference.

(a) * * *

(1) Chapter 3, "Local Exhaust Hoods" and Chapter 5, "Exhaust System Design Procedure" of "Industrial Ventilation: A Manual of Recommended Practice," American Conference of Governmental Industrial Hygienists, 22nd edition, 1995, IBR approved for §§ 63.843(b) and 63.844(b);

(2) ASTM D 2986–95A, Standard Practice for Evaluation of Air Assay Media by the Monodisperse DOP (Dioctyl Phthalate) Smoke Test, IBR approved for section 7.1.1 of Method 315 in appendix A to this part;

(3) ASTM D4239–13e1, Standard Test Method for Sulfur in the Analysis Sample of Coal and Coke Using High Temperature Tube Furnace Combustion; and

(4) ASTM D6376–10, Standard Test Method for Determination of Trace Metals in Petroleum Coke by Wavelength Dispersive X-Ray Fluorescence Spectroscopy.

* * * * *

■ 4. Section 63.842 is amended by:

■ a. Adding, in alphabetical order, definitions of "Particulate matter (PM)," and "Startup of an anode bake furnace";

■ b. Removing the definitions for "Horizontal stud Soderberg (HSS) process" and "Vertical stud Soderberg one (VSS1)"; and

■ c. Revising the definition for "Paste production plant".

The revisions and additions read as follows:

§ 63.842 Definitions.

* * * * *

Particulate matter (PM) means, for the purposes of this subpart, emissions of particulate matter that serve as a measure of total particulate emissions and as a surrogate for metal hazardous air pollutants contained in the particulates, including but not limited to, antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel and selenium.

Paste production plant means the processes whereby calcined petroleum coke, coal tar pitch (hard or liquid) and/or other materials are mixed, transferred and formed into briquettes or paste for vertical stud Soderberg (VSS) processes or into green anodes for a prebake process. This definition includes all operations from initial mixing to final forming (*i.e.,* briquettes, paste, green anodes) within the paste production plant, including conveyors and units managing heated liquid pitch.

* * * * *

Startup of an anode bake furnace means the process of initiating heating to the anode baking furnace where all sections of the furnace have previously been at ambient temperature. The startup or re-start of the furnace begins when the heating begins. The startup concludes at the start of the second anode bake cycle if the furnace was at ambient temperature upon startup. The re-start concludes when the anode bake cycle resumes if the furnace was not at ambient temperature upon re-start.

* * * * *

■ 5. Section 63.843 is amended by:

■ a. Revising paragraph (a)introductory text;

■ b. Revising paragraph (a)(1)(iv);

■ c. Removing and reserving paragraph (a)(1)(v);

■ d. Revising paragraph (a)(1)(vi);

■ e. Removing paragraph (a)(1)(vii);

■ f. Removing and reserving paragraphs (a)(2)(i) and (ii);

■ g. Revising paragraph (a)(2)(iii);

■ h. Adding paragraphs (a)(2)(iv) through (vii);

■ i. Redesignating paragraph (a)(3) as (a)(6);

■ j. Adding new paragraph (a)(3)and paragraphs (a)(4) and (5);

■ k. Revising paragraph (b) introductory text;

■ l. Adding paragraph (b)(4);

■ m. Revising paragraph (c) introductory text;

■ n. Revising paragraphs (c)(1) and (2);

■ o. Adding paragraph (c)(3); and
■ p. Adding paragraphs (d), (e) and (f).

The revisions and additions read as follows:

§ 63.843 Emission limits for existing sources.

(a) *Potlines.* The owner or operator shall not discharge or cause to be discharged into the atmosphere any emissions of TF, POM, PM, nickel or arsenic in excess of the applicable limits in paragraphs (a)(1) through (a)(5) of this section.

(1) * * *

(iv) 0.8 kg/Mg (1.6 lb/ton) of aluminum produced for each SWPB potline; and

(v) [Reserved]

(vi) 1.35 kg/Mg (2.7 lb/ton) of aluminum produced for each VSS2 potline.

(2) * * *

(i) [Reserved]

(ii) [Reserved]

(iii) 1.9 kg/Mg (3.8 lb/ton) of aluminum produced for each VSS2 potline;

(iv) 0.55 kg/Mg (1.1 lb/ton) of aluminum produced for each CWPB1 prebake potline;

(v) 6.0 kg/Mg (12 lb/ton) of aluminum produced for each CWPB2 prebake potline;

(vi) 1.4 kg/Mg (2.7 lb/ton) of aluminum produced for each CWPB3 prebake potline; and

(vii) 9.5 kg/Mg (19 lb/ton) of aluminum produced for each SWPB prebake potline.

(3) *PM limits.* Emissions of PM shall not exceed:

(i) 3.6 kg/Mg (7.2 lb/ton) of aluminum produced for each CWPB1 potline;

(ii) 5.5 kg/Mg (11 lb/ton) of aluminum produced for each CWPB2 potline;

(iii) 10 kg/Mg (20 lb/ton) of aluminum produced for each CWPB3 potline;

(iv) 2.3 kg/Mg (4.6 lb/ton) of aluminum produced for each SWPB potline; and

(v) 13 kg/Mg (26 lb/ton) of aluminum produced for each VSS2 potline.

(4) *Nickel limits.* Emissions of nickel shall not exceed 0.07 lb/ton from all VSS2 potlines at a primary aluminum reduction plant.

(5) *Arsenic limits.* Emissions of arsenic shall not exceed 0.006 lb/ton from all VSS2 potlines at a primary aluminum reduction plant.

(6) *Change in subcategory.* Any potline, other than a reconstructed potline, that is changed such that its applicable subcategory also changes shall meet the applicable emission limit in this subpart for the original subcategory or the new subcategory, whichever is more stringent.

(b) *Paste production plants.* The owner or operator shall install, operate and maintain equipment to capture and control POM and PM emissions from each paste production plant.

* * * * *

(4) *PM limits.* Emissions of PM shall not exceed 0.041 kg/Mg (0.082 lb/ton) of green anode.

(c) *Anode bake furnaces.* The owner or operator shall not discharge or cause to be discharged into the atmosphere any emissions of TF, POM or PM in excess of the limits in paragraphs (c)(1) through (3) of this section.

(1) *TF limit.* Emissions of TF shall not exceed 0.10 kg/Mg (0.20 lb/ton) of green anode;

(2) *POM limit.* Emissions of POM shall not exceed 0.09 kg/Mg (0.18 lb/ton) of green anode; and

(3) *PM limit.* Emissions of PM shall not exceed 0.034 kg/Mg (0.068 lb/ton) of green anode.

(d) *Pitch storage tanks.* Each pitch storage tank shall be equipped with an emission control system designed and operated to reduce inlet emissions of POM by 95 percent or greater.

(e) *COS limit.* Emissions of COS must not exceed 1.95 kg/Mg (3.9 lb/ton) of aluminum produced for each potline.

(f) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records and inspection of the source.

■ 6. Section 63.844 is amended by:
■ a. Revising paragraph (a) introductory text;
■ b. Revising paragraph (a)(2);
■ c. Adding paragraphs (a)(3) through (5);
■ d. Revising paragraph (b) introductory text;
■ e. Adding paragraphs (b)(1) and (2);
■ f. Revising paragraph (c) introductory text;
■ g. Revising paragraphs (c)(1) and (2);
■ h. Adding paragraph (c)(3); and
■ i. Adding paragraphs (e) and (f).

The revisions and additions read as follows:

§ 63.844 Emission limits for new or reconstructed sources.

(a) *Potlines.* The owner or operator shall not discharge or cause to be discharged into the atmosphere any emissions of TF, POM, PM, nickel or arsenic in excess of the applicable limits in paragraphs (a)(1) through (a)(5) of this section.

* * * * *

(2) *POM limit.* Emissions of POM from potlines must not exceed 0.39 kg/Mg (0.77 lb/ton) of aluminum produced.

(3) *PM limit.* Emissions of PM from potlines must not exceed 2.3 kg/Mg (4.6 lb/ton) of aluminum produced.

(4) *Nickel limits.* Emissions of nickel shall not exceed 0.07 lb/ton from all Soderberg potlines at a primary aluminum reduction plant.

(5) *Arsenic limits.* Emissions of arsenic shall not exceed 0.006 lb/ton from all Soderberg potlines at a primary aluminum reduction plant.

(b) *Paste production plants.*

(1) The owner or operator shall meet the requirements in § 63.843(b)(1) through (3) for existing paste production plants and shall not discharge or cause to be discharged into the atmosphere any emissions of PM in excess of the limit in paragraph (b)(2) of this section.

(2) Emissions of PM shall not exceed 0.0028 kg/Mg (0.0056 lb/ton) of green anode.

(c) *Anode bake furnaces.* The owner or operator shall not discharge or cause to be discharged into the atmosphere any emissions of TF, PM or POM in excess of the limits in paragraphs (c)(1) through (3) of this section.

(1) *TF limit.* Emissions of TF shall not exceed 0.01 kg/Mg (0.02 lb/ton) of green anode;

(2) *POM limit.* Emissions of POM shall not exceed 0.025 kg/Mg (0.05 lb/ton) of green anode; and

(3) *PM limit.* Emissions of PM shall not exceed 0.018 kg/Mg (0.036 lb/ton) of green anode.

* * * * *

(e) *COS limit.* Emissions of COS must not exceed 3.1 lb/ton of aluminum produced for each potline.

(f) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records and inspection of the source.

■ 7. Section 63.846 is amended by:

■ a. Revising paragraph (b) introductory text;
■ b. Revising paragraphs (b)(1) through (3);
■ c. Revising paragraph (c) introductory text;
■ d. Revising paragraphs (c)(1) and (2);
■ e. Revising paragraphs (d)(2)(ii) through (iv);
■ f. Revising paragraphs (d)(4)(i) through (iii); and
■ g. Removing (d)(4)(iv).

The revisions read as follows:

§ 63.846 Emission averaging.

* * * * *

(b) *Potlines.* The owner or operator may average emissions from potlines and demonstrate compliance with the limits in Tables 1 through 3 of this subpart using the procedures in paragraphs (b)(1) through (3) of this section.

(1) Annual average emissions of TF shall not exceed the applicable emission limit in Table 1 of this subpart. The emission rate shall be calculated based on the total primary and secondary emissions from all potlines over the period divided by the quantity of aluminum produced during the period, from all potlines comprising the averaging group. To determine compliance with the applicable emission limit in Table 1 of this subpart for TF emissions, the owner or operator shall determine the average emissions (in lb/ton) from each potline from at least three runs per potline semiannually for TF secondary emissions and at least three runs per potline primary control system each year using the procedures and methods in §§ 63.847 and 63.849. The owner or operator shall combine the results of secondary TF average emissions with the TF results for the primary control system and divide total emissions by total aluminum production.

(2) Annual average emissions of POM shall not exceed the applicable emission limit in Table 2 of this subpart. The emission rate shall be calculated based on the total primary and secondary emissions from all potlines over the period divided by the quantity of aluminum produced during the period, from all potlines comprising the averaging group. To determine compliance with the applicable emission limit in Table 2 of this subpart for POM emissions, the owner or operator shall determine the average emissions (in lb/ton) from each potline from at least three runs per potline semiannually for POM secondary emissions and at least three runs per potline primary control system each year for POM primary emissions using the procedures and methods in §§ 63.847 and 63.849. The owner or operator shall combine the results of secondary POM average emissions with the POM results for the primary control system and divide total emissions by total aluminum production.

(3) Annual average emissions of PM shall not exceed the applicable emission limit in Table 3 of this subpart. The emission rate shall be calculated based on the total primary and secondary emissions from all potlines over the period divided by the quantity of aluminum produced during the period, from all potlines comprising the averaging group. To determine compliance with the applicable emission limit in Table 3 of this subpart for PM emissions, the owner or operator shall determine the average emissions (in lb/ton) from each potline from at least three runs per potline semiannually for PM secondary emissions and at least three runs per potline primary control system each year for PM primary emissions using the procedures and methods in §§ 63.847 and 63.849. The owner or operator shall combine the results of secondary PM average emissions with the PM results for the primary control system and divide total emissions by total aluminum production.

(c) *Anode bake furnaces.* The owner or operator may average TF emissions from anode bake furnaces and demonstrate compliance with the limits in Table 4 of this subpart using the procedures in paragraphs (c)(1) and (2) of this section. The owner or operator also may average POM emissions from anode bake furnaces and demonstrate compliance with the limits in Table 4 of this subpart using the procedures in paragraphs (c)(1) and (2) of this section. The owner or operator also may average PM emissions from anode bake furnaces and demonstrate compliance with the limits in Table 4 of this subpart using the procedures in paragraphs (c)(1) and (2) of this section.

(1) Annual emissions of TF, POM and/or PM from a given number of anode bake furnaces making up each averaging group shall not exceed the applicable emission limit in Table 4 of this subpart in any one year; and

(2) To determine compliance with the applicable emission limit in Table 4 of this subpart for anode bake furnaces, the owner or operator shall determine TF, POM and/or PM emissions from the control device for each furnace at least once each year using the procedures and methods in §§ 63.847 and 63.849.

(d) * * *

(2) * * *

(ii) The assigned TF, POM or PM emission limit for each averaging group of potlines or anode bake furnaces;

(iii) The specific control technologies or pollution prevention measures to be used for each emission source in the averaging group and the date of its installation or application. If the pollution prevention measures reduce or eliminate emissions from multiple sources, the owner or operator must identify each source;

(iv) The test plan for the measurement of TF, POM or PM emissions in accordance with the requirements in § 63.847(b) and (k);

* * * * *

(4) * * *

(i) Any averaging between emissions of differing pollutants or between differing sources. Emission averaging shall not be allowed between TF, POM and PM, and emission averaging shall not be allowed between potlines and anode bake furnaces;

(ii) The inclusion of any emission source other than an existing potline or existing anode bake furnace or the inclusion of any potline or anode bake furnace not subject to the same operating permit; or

(iii) The inclusion of any potline or anode bake furnace while it is shut down, in the emission calculations.

* * * * *

■ 8. Section 63.847 is amended by:
■ a. Revising paragraph (a) introductory text;
■ b. Revising paragraphs (a)(1) and (2);
■ c. Removing and reserving paragraph (a)(3);
■ d. Removing and reserving paragraph (b)(6);
■ e. Revising paragraphs (c)(1) through (3);
■ f. Revising paragraph (d) introductory text;
■ g. Revising paragraph (d)(1);
■ h. Removing and reserving paragraph (d)(2);
■ i. Revising paragraph (d)(4);
■ j. Adding paragraphs (d)(5) and (6);
■ k. Revising paragraphs (e)(1) and (4);
■ l. Adding paragraphs (e)(8) and (e)(9);
■ m. Revising paragraph (f);
■ n. Revising paragraph (g) introductory text;
■ o. Revising paragraphs (g)(2)(ii) and (iv);
■ p. Adding and reserving paragraph (i); and
■ q. Adding paragraphs (j), (k), (l) and (m).

The revisions and additions read as follows:

§ 63.847 Compliance provisions.

(a) *Compliance dates.* The owner operator of a primary aluminum

reduction plant must comply with the requirements of this subpart by the applicable compliance date in paragraph (a)(1), (a)(2), (a)(3) or (a)(4) of this section:

(1) Except as noted in paragraph (2) of this section, the compliance date for an owner or operator of an existing plant or source subject to the provisions of this subpart is October 7, 1999.

(2) The compliance dates for existing plants and sources are:

(i) [DATE OF PUBLICATION OF FINAL RULE] for the malfunction provisions of §§ 63.850(d)(2) and (e)(4)(xvi) and (xvii) and the electronic reporting provisions of §§ 63.850(c) and (f) which became effective [DATE OF PUBLICATION OF FINAL RULE].

(ii) [DATE 1 YEAR AFTER DATE OF PUBLICATION OF FINAL RULE] for prebake potlines subject to emission limits in §§ 63.843(a)(2)(iv) through (vii); for potlines subject to the work practice standards in § 63.854(a), the COS emission limit provisions of § 63.843(e) and the PM emissions limit provisions of §§ 63.843(a)(3)(i) through (v); for anode bake furnaces subject to the startup practices in § 63.847(l) and PM emission limits in § 63.843(c)(3); for compliance with the pitch storage tank POM limit provisions of § 63.843(d); for paste production plants subject to the startup practices in § 63.847(m) and PM emission limits in § 63.843(b)(4) which became effective [DATE OF PUBLICATION OF FINAL RULE].

(iii) [DATE 2 YEARS AFTER DATE OF PUBLICATION OF FINAL RULE] for Soderberg potlines subject to emission limits in § 63.843(a)(2)(iii), (a)(4) and (a)(5) which became effective [DATE OF PUBLICATION OF FINAL RULE].

(3) [Reserved]

* * * * *

(b) * * *

(6) [Reserved]

* * * * *

(c) * * *

(1) During the first month following the compliance date for an existing potline (or potroom group), anode bake furnace or pitch storage tank.

(2) By the 180th day following startup for a potline or potroom group for which the owner or operator elects to conduct an initial performance test. The 180-day period starts when the first pot in a potline or potroom group is energized.

(3) By the 180th day following startup for a potline or potroom group that was shut down at the time compliance would have otherwise been required and is subsequently restarted. The 180-day period starts when the first pot in a potline or potroom group is energized.

(d) *Performance test requirements.* The initial performance test and all subsequent performance tests must be conducted in accordance with the requirements of the general provisions in subpart A of this part, the approved test plan and the procedures in this section. Performance tests must be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator must make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

(1) *TF, POM and PM emissions from potlines.* For each potline, the owner or operator shall measure and record the emission rates of TF, POM and PM exiting the outlet of the primary control system for each potline and the rate of secondary emissions exiting through each roof monitor, or for a plant with roof scrubbers, exiting through the scrubbers. Using the equation in paragraph (e)(1) of this section, the owner or operator shall compute and record the average of at least three runs semiannually for secondary emissions and at least three runs each year for the primary control system to determine compliance with the applicable emission limit. Compliance is demonstrated when the emission rate of TF is equal to or less than the applicable emission limit in § 63.843, § 63.844, or § 63.846.

(2) [Reserved]

* * * * *

(4) *TF, POM and PM emissions from anode bake furnaces.* For each anode bake furnace, the owner or operator shall measure and record the emission rate of TF, POM and PM exiting the exhaust stacks(s) of the primary emission control system for each anode bake furnace. In accordance with paragraphs (e)(3), (4) and (8) of this section, the owner or operator shall compute and record the average of at least three runs each year to determine compliance with the applicable emission limits for TF, POM and PM. Compliance is demonstrated when the emission rates of TF, POM and PM are equal to or less than the applicable TF, POM and PM emission limits in § 63.843, § 63.844, or § 63.846.

(5) *Nickel Emissions from VSS2 Potlines and new Soderberg potlines.* (i) For each VSS2 potline, and for each new Soderberg potline, the owner or operator must measure and record the emission rate of nickel exiting the primary emission control system and the rate of secondary emissions of nickel exiting through each roof monitor, or for a plant with roof scrubbers, exiting through the scrubbers. Using the procedure in paragraph (e)(10) of this section, the owner or operator must compute and record the average of at least three runs each year for secondary emissions and at least three runs each year for primary emissions.

(ii) Compliance is demonstrated when the emissions of nickel are equal to or less than the applicable emission limit in § 63.843(a)(4) or § 63.844(a)(4).

(6) *Arsenic Emissions from VSS2 Potlines and from new Soderberg potlines.* (i) For each VSS2 potline, and for each new Soderberg potline, the owner or operator must measure and record the emission rate of arsenic exiting the primary emission control system and the rate of secondary emissions of arsenic exiting through each roof monitor, or for a plant with roof scrubbers, exiting through the scrubbers. Using the procedure in paragraph (e)(11) of this section, the owner or operator must compute and record the average of at least three runs each year for secondary emissions and at least three runs each year for primary emissions.

(ii) Compliance is demonstrated when the emissions of arsenic are equal to or less than the applicable emission limit in § 63.843(a)(5) or § 63.844(a)(5).

(e) * * *

(1) Compute the emission rate (E_p) of TF, POM or PM from each potline using Equation 1:

$$E_p = \frac{\left[\left(C_{s1} \times Q_{sd}\right)_1 + \left(C_{s2} \times Q_{sd}\right)_2\right]}{\left(P \times K\right)} \qquad \textit{(Equation 1)}$$

Where:
E_p = emission rate of TF, POM or PM from a potline, kg/Mg (lb/ton);
C_{s1} = concentration of TF, POM or PM from the primary control system, mg/dscm (mg/dscf);
Q_{sd} = volumetric flow rate of effluent gas corresponding to the appropriate subscript location, dscm/hr (dscf/hr);
C_{s2} = concentration of TF, POM or PM as measured for roof monitor emissions, mg/dscm (mg/dscf);
P = aluminum production rate, Mg/hr (ton/hr);
K = conversion factor, 10^6 mg/kg (453,600 mg/lb);
1 = subscript for primary control system effluent gas; and
2 = subscript for secondary control system or roof monitor effluent gas.

* * * * *

(4) Compute the emission rate of POM from each anode bake furnace using Equation 2,

Where:
E_b = emission rate of POM, kg/mg (lb/ton) of green anodes produced; and
C_s = concentration of POM, mg/dscm (mg/dscf).

* * * * *

(8) Compute the emission rate of PM from each anode bake furnace using Equation 2,

Where:
E_b = emission rate of PM, kg/mg (lb/ton) of green anodes produced; and
C_s = concentration of PM, mg/dscm (mg/dscf).

(9) Compute the emission rate (E_{PMpp}) of PM from each paste production plant using Equation 3,

$$E_{PMpp} = \frac{(C_s \times Q_{sd})}{(P_b \times K)} \qquad \textit{Equation 3}$$

Where:
E_{PMpp} = emission rate of PM, kg/mg (lb/ton) of green anodes produced;
C_s = concentration of PM, mg/dscm (mg/dscf);
Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr);
P_b = quantity of green anode material placed in the anode bake furnace, mg/hr (ton/hr); and
K = conversion factor, 10^6 mg/kg (453,600 mg/lb).

(f) *Paste production plants.* (1) Initial compliance with the POM standards for existing and new paste production plants in §§ 63.843(b) and 63.844(b) will be demonstrated through site inspection(s) and review of site records by the applicable regulatory authority.

(2) For each paste production plant, the owner or operator shall measure and record the emission rate of PM exiting the exhaust stacks(s) of the primary emission control system. Using the equations in paragraph (e)(9) of this section, the owner or operator shall compute and record the average of at least three runs each year to determine compliance with the applicable emission limits for PM. Compliance with the PM standards for existing and new paste production plants is demonstrated when the PM emission rates are less than or equal to the applicable PM emission limits in §§ 63.843(b)(4) and 63.844(b)(2).

(g) *Pitch storage tanks.* The owner or operator must demonstrate initial compliance with the standard for pitch storage tanks in §§ 63.843(d) and 63.844(d) by preparing a design evaluation or by conducting a performance test. The owner or operator must submit for approval by the regulatory authority the information specified in paragraph (g)(1) of this section, along with the information specified in paragraph (g)(2) of this section where a design evaluation is performed or the information specified in paragraph (g)(3) of this section where a performance test is conducted.

* * * * *

(2) * * *

(ii) If an enclosed combustion device with a minimum residence time of 0.5 seconds and a minimum temperature of 760 degrees C (1,400 degrees F) is used to meet the emission reduction requirement specified in § 83.843(d) and § 83.844(d), documentation that those conditions exist is sufficient to meet the requirements of § 83.843(d) and § 83.844(d);

* * * * *

(iv) If the pitch storage tank is vented to the emission control system installed for control of emissions from the paste production plant pursuant to § 63.843(b) or § 63.844(b)(1), documentation of compliance with the requirements of § 63.843(b) is sufficient to meet the requirements of § 63.843(b) or § 63.844(d);

* * * * *

(i) [Reserved]

(j) *COS emissions.* The owner operator of each plant must calculate, for each potline, the emission rate of COS for each calendar month of operation using Equation 5:

$$E_{COS} = [K] \times \left[\frac{Y}{Z}\right] \times [S] \quad \cdots \textit{(Equation 5)}$$

Where:
E_{COS} = the emission rate of COS during the calendar month in pounds per ton of aluminum produced;
K = factor accounting for molecular weights and conversion of sulfur to carbonyl sulfide = 234;
Y = the tons of anode consumed in the potline during the calendar month;
Z = the tons of aluminum produced by the potline during the calendar month; and
S = the weighted average fraction of sulfur in the anode coke consumed in the production of aluminum during the calendar month (*e.g.*, if the weighted average sulfur content of the anode coke consumed during the calendar month was 2.5 percent, then S = 0.025). The weight of anode coke used during the month of each different concentration of sulfur is used to calculate the overall weighted average fraction of sulfur.

Compliance is demonstrated if the calculated value of E_{COS} is less than the applicable standard for COS emissions in §§ 63.843(e) and 63.844(e).

(k) *Startup of potlines.* The owner or operator must develop a written startup plan as described in § 63.854 that contains specific procedures to be followed during startup periods of potline(s). Compliance with the applicable standards in § 63.854 will be demonstrated through site inspection(s) and review of site records by the regulatory authority.

(l) *Startup of anode bake furnaces.* If you own or operate a new or existing anode bake furnace, you must develop a written startup plan as described in paragraphs (l)(1) through (4) of this

section. Compliance with the startup plan will be demonstrated through site inspection(s) and review of site records by the regulatory authority. The written startup plan must contain specific procedures to be followed during startup periods of anode bake furnaces, including the following:

(1) A requirement to develop an anode bake furnace startup schedule.

(2) Records of time, date, duration of anode bake furnace startup and any nonroutine actions taken during startup of the furnaces.

(3) A requirement that the associated emission control system should be operating within normal parametric limits prior to startup of the anode bake furnace.

(4) A requirement to shut down the anode bake furnaces immediately if the associated emission control system is off line at any time during startup. The anode bake furnace restart may resume once the associated emission control system is back on line and operating within normal parametric limits.

(m) *Startup of paste production plants.* If you own or operate a new or existing paste production plant, you must develop a written startup plan as described in paragraphs (m)(1) through (3) of this section. Compliance with the startup plan will be demonstrated through site inspection(s) and review of site records by the regulatory authority. The written startup plan must contain specific procedures to be followed during startup periods of paste production plants, including the following:

(1) Records of time, date, duration of paste production plant startup and any nonroutine actions taken during startup of the paste production plants.

(2) A requirement that the associated emission control system should be operating within normal parametric limits prior to startup of the paste production plant.

(3) A requirement to shut down the paste production plant immediately if the associated emission control system is off line at any time during startup. The paste production plant restart may resume once the associated emission control system is back on line and operating within normal parametric limits.

■ 9. Section 63.848 is amended by:

■ a. Revising paragraphs (a) and (b);

■ b. Removing and reserving paragraph (e);

■ c. Adding paragraphs (f)(6) and (7); and

■ d. Adding paragraphs (n), (o) and (p).

The revisions and additions read as follows:

§ 63.848 Emission monitoring requirements.

(a) *TF and PM emissions from potlines.* Using the procedures in § 63.847 and in the approved test plan, the owner or operator shall monitor emissions of TF and PM from each potline by conducting annual performance tests on the primary control system and semiannual performance tests on the secondary emissions. The owner or operator shall compute and record the average from at least three runs for secondary emissions and the average from at least three runs for the primary control system to determine compliance with the applicable emission limit. The owner or operator must include all valid runs in the semiannual average. The duration of each run for secondary emissions must represent a complete operating cycle. Potline emissions shall be recorded as the sum of the average of at least three runs from the primary control system and the average of at least three runs from the roof monitor or secondary control device.

(b) *POM emissions from potlines.* Using the procedures in § 63.847 and in the approved test plan, the owner or operator must monitor emissions of POM from each potline stack annually and secondary potline POM emissions semiannually. The owner or operator must compute and record the semiannual average from at least three runs per year for secondary emissions and at least three runs per year for the primary control systems to determine compliance with the applicable emission limit. The owner or operator must include all valid runs in the semiannual average. The duration of each run for secondary emissions must represent a complete operating cycle. The primary control system must be sampled over an 8-hour period, unless site-specific factors dictate an alternative sampling time subject to the approval of the regulatory authority. Potline emissions shall be recorded as the sum of the average of at least three runs from the primary control system and the average of at least three runs from the roof monitor or secondary control device.

* * * * *

(e) [Reserved]

(f) * * *

(6) For emission sources with fabric filters that choose to demonstrate continuous compliance through bag leak detection systems you must install a bag leak detection system according to the requirements in paragraph (o) of this section, and you must set your operating limit such that the sum of the durations of bag leak detection system alarms does not exceed 5 percent of the process operating time during a 6-month period.

(7) If you choose to demonstrate continuous compliance through a particulate matter CEMS, you must determine continuous compliance averaged on a rolling 30 operating day basis. All valid hours of data from 30 successive operating days shall be included in the average.

* * * * *

(n) *PM emissions from anode bake furnaces and paste production plants.* Using the procedures in § 63.847 and in the approved test plan, the owner or operator shall monitor PM emissions from each anode bake furnace and paste production plant on an annual basis. The owner or operator shall compute and record the annual average of PM emissions from at least three runs to determine compliance with the applicable emission limits. The owner or operator must include all valid runs in the annual average.

(o) *Bag leak detection system.* For each baghouse used to control PM emissions, you must install, operate and maintain a bag leak detection system according to paragraphs (o)(1) through (3) of this section, unless a system meeting the requirements of paragraph (p) of this section, for a CEMS and continuous emissions rate monitoring system, is installed for monitoring the concentration of particulate matter.

(1) You must develop and implement written procedures for baghouse maintenance that include, at a minimum, a preventative maintenance schedule that is consistent with the baghouse manufacturer's instructions for routine and long-term maintenance.

(2) Each bag leak detection system must meet the specifications and requirements in paragraphs (o)(2)(i) through (viii) of this section.

(i) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 1.0 milligram per dry standard cubic meter (0.00044 grains per actual cubic foot) or less.

(ii) The bag leak detection system sensor must provide output of relative PM loadings.

(iii) The bag leak detection system must be equipped with an alarm system that will alarm when an increase in relative particulate loadings is detected over a preset level.

(iv) You must install, calibrate, operate and maintain the bag leak detection system according to the manufacturer's written specifications and recommendations.

(v) The initial adjustment of the system must, at a minimum, consist of

establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device and establishing the alarm set points and the alarm delay time.

(vi) Following initial adjustment, you must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except in accordance with the procedures developed under paragraph (o)(1) of this section. You cannot increase the sensitivity by more than 100 percent or decrease the sensitivity by more than 50 percent over a 365-day period unless such adjustment follows a complete baghouse inspection that demonstrates that the baghouse is in good operating condition.

(vii) You must install the bag leak detector downstream of the baghouse.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(3) You must include in the written procedures required by paragraph (o)(1) of this section a corrective action plan that specifies the procedures to be followed in the case of a bag leak detection system alarm. The corrective action plan must include, at a minimum, the procedures that you will use to determine and record the time and cause of the alarm as well as the corrective actions taken to minimize emissions as specified in paragraphs (o)(3)(i) and (ii) of this section.

(i) The procedures used to determine the cause of the alarm must be initiated within 30 minutes of the alarm.

(ii) The cause of the alarm must be alleviated by taking the necessary corrective action(s) that may include, but not be limited to, those listed in paragraphs (o)(3)(ii)(A) through (F) of this section.

(A) Inspecting the baghouse for air leaks, torn or broken filter elements, or any other malfunction that may cause an increase in emissions.

(B) Sealing off defective bags or filter media.

(C) Replacing defective bags or filter media, or otherwise repairing the control device.

(D) Sealing off a defective baghouse compartment.

(E) Cleaning the bag leak detection system probe, or otherwise repairing the bag leak detection system.

(F) Shutting down the process producing the particulate emissions.

(p) *Particulate Matter CEMS.* If you are using a CEMS to measure particulate matter emissions to meet requirements of this subpart, you must install, certify, operate and maintain the particulate matter CEMS as specified in paragraphs (p)(1) through (4) of this section.

(1) You must conduct a performance evaluation of the PM CEMS according to the applicable requirements of § 60.13, and Performance Specification 11 at 40 CFR part 60, Appendix B of this chapter.

(2) During each PM correlation testing run of the CEMS required by Performance Specification 11 at 40 CFR part 60, Appendix B of this chapter, collect data concurrently (or within a 30- to 60-minute period) by both the CEMS and by conducting performance tests using Method 5, 5D or 5I at 40 CFR part 60, Appendix A–3 or Method 17 at 40 CFR part 60, Appendix A–6 of this chapter.

(3) Perform quarterly accuracy determinations and daily calibration drift tests in accordance with Procedure 2 at 40 CFR part 60, Appendix F of this chapter. Relative Response Audits must be performed annually and Response Correlation Audits must be performed every three years.

(4) Within 60 days after the date of completing each CEMS response audit or performance test conducted to demonstrate compliance with this subpart, you must submit the response audit data as specified in § 63.850(c) and the results of the performance test as specified in § 63.850(b).

■ 10. Section 63.849 is amended by:

■ a. Revising paragraphs (a)(6) and (7);

■ b. Adding paragraphs (a)(8) through (11); and

■ c. Adding paragraph (f).

The revisions and additions read as follows:

§ 63.849 Test methods and procedures.

(a) * * *

(6) Method 315 in appendix A to this part or an approved alternative method for the concentration of POM where stack or duct emissions are sampled;

(7) Method 315 in appendix A to this part and Method 14A in appendix A to part 60 of this chapter or an approved alternative method for the concentration of POM where emissions are sampled from roof monitors not employing wet roof scrubbers. Method 315 need not be set up as required in the method. Instead, replace the Method 14A monitor cassette filter with the filter specified by Method 315. Recover and analyze the filter according to Method 315;

(8) Method 5 in appendix A to part 60 of this chapter or an approved alternative method for the concentration of PM where stack or duct emissions are sampled;

(9) Method 17 and Method 14A in appendix A to part 60 of this chapter or an approved alternative method for the concentration of PM where emissions are sampled from roof monitors not employing wet roof scrubbers. Method 17 need not be set up as required in the method. Instead, replace the Method 14A monitor cassette filter with the filter specified by Method 17. Recover and analyze the filter according to Method 17;

(10) Method 29 in appendix A to part 60 of this chapter or an approved alternative method for the concentration of nickel and arsenic where stack or duct emissions are sampled; and

(11) Method 29 and Method 14A in appendix A to part 60 of this chapter or an approved alternative method for the concentration of nickel and arsenic where emissions are sampled from roof monitors not employing wet roof scrubbers. Method 29 need not be set up as required in the method. Instead, replace the Method 14A monitor cassette filter with the filter specified by Method 29. Recover and analyze the filter according to Method 29.

* * * * *

(f) The owner or operator must use either ASTM D4239–13e1 or ASTM D6376–10 for determination of the sulfur content in anode coke shipments to determine compliance with the applicable emission limit for COS emissions.

■ 11. Section 63.850 is amended by:

■ a. Revising paragraphs (b), (c) and (d);

■ b. Removing and reserving paragraph (e)(4)(iii);

■ c. Revising paragraphs (e)(4)(xiv) and (xv);

■ d. Adding paragraphs (e)(4)(xvi) and (xvii); and

■ e. Adding paragraph (f).

The revisions and additions read as follows:

§ 63.850 Notification, reporting and recordkeeping requirements.

* * * * *

(b) *Performance test reports.* Within 60 days after the date of completing each performance test required by this subpart, the owner or operator shall submit the results of the performance test following the procedure specified in either paragraph (b)(1) or (b)(2) of this section.

(1) For data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT Web site (*http://www.epa.gov/ttn/chief/ert/index.html*) at the time of the test, the owner or operator shall submit the results of the performance test to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI). (CEDRI can be accessed through the EPA's Central Data Exchange (CDX) (*http://cdx.epa.gov/epa_home.asp*).)

Performance test data shall be submitted in a file format generated through the use of the EPA's ERT. Instead of submitting performance test data in a file format generated through the use of the EPA's ERT, you may submit an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the EPA's ERT Web site, once the XML schema is available. Owners or operators who claim that some of the performance test information being submitted is confidential business information (CBI) shall submit a complete file generated through the use of the EPA's ERT (or an alternate electronic file consistent with the XML schema listed on the EPA's ERT Web site once the XML schema is available), including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media shall be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Road, Durham, NC 27703. The same ERT or alternate file with the CBI omitted shall be submitted to the EPA via the EPA's CDX as described earlier in this paragraph.

(2) For data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT Web site at the time of the test, the owner or operator shall submit the results of the performance test to the Administrator at the appropriate address listed in § 63.13.

(c) *Performance evaluation reports.* Within 60 days after the date of completing each CEMS performance evaluation, submit the results of the performance evaluation following the procedure specified in either paragraph (c)(1) or (2) of this section.

(1) For performance evaluations of continuous monitoring systems measuring pollutants that are supported by the EPA's ERT as listed on the EPA's ERT Web site, you must submit the results of the performance evaluation to the EPA via the CEDRI. (CEDRI can be accessed through the EPA's CDX.) Performance evaluation data must be submitted in a file format generated through the use of the EPA's ERT. Instead of submitting performance test data in a file format generated through the use of the EPA's ERT, you may submit an alternate electronic file format consistent with the XML schema listed on the EPA's ERT Web site, once the XML schema is available. If you claim that some of the performance evaluation information being submitted is CBI, you must submit a complete file generated through the use of the EPA's ERT (or an alternate electronic file consistent with the XML schema listed on the EPA's ERT Web site once the XML schema is available), including information claimed to be CBI, on a compact disc, flash drive or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Road, Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph.

(2) For any performance evaluations of continuous monitoring systems measuring pollutants that are not supported by the EPA's ERT as listed on the EPA's ERT Web site, submit the results of the performance evaluation to the Administrator at the appropriate address listed in § 63.13.

(d) *Reporting.* In addition to the information required under § 63.10 of the General Provisions, the owner or operator must provide semiannual reports containing the information specified in paragraphs (d)(1) and (2) of this section to the Administrator or designated authority.

(1) Excess emissions report. As required by § 63.10(e)(3), the owner or operator must submit a report (or a summary report) if measured emissions are in excess of the applicable standard. The report must contain the information specified in § 63.10(e)(3)(v) and be submitted semiannually unless quarterly reports are required as a result of excess emissions.

(2) If there was a malfunction during the reporting period, the owner or operator must submit a report that includes the number, duration and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with §§ 63.843(f) and 63.844(f), including actions taken to correct a malfunction.

(e) * * *

(4) * * *

(iii) [Reserved]

* * * * *

(xiv) Records documenting any POM data that are invalidated due to the installation and startup of a cathode;

(xv) Records documenting the portion of TF that is measured as particulate matter and the portion that is measured as gaseous when the particulate and gaseous fractions are quantified separately using an approved test method;

(xvi) Records of the occurrence and duration of each malfunction of operation (*i.e.*, process equipment) or the air pollution control equipment and monitoring equipment; and

(xvii) Records of actions taken during periods of malfunction to minimize emissions in accordance with §§ 63.843 and 63.844, including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(f) All reports required by this subpart not subject to the requirements in paragraph (b) of this section must be sent to the Administrator at the appropriate address listed in § 63.13. If acceptable to both the Administrator and the owner or operator of a source, these reports may be submitted on electronic media. The Administrator retains the right to require submittal of reports subject to paragraph (b) of this section in paper format.

■ 12. Section 63.854 is added to read as follows:

§ 63.854 Work Practice Standards for Potlines.

(a) *Periods of operation other than startup.* If you own or operate a new or existing primary aluminum reduction affected source, you must comply with the requirements of paragraphs (a)(1) through (4) of this section during periods of operation other than startup.

(1) Ensure the potline scrubbers and exhaust fans are operational at all times.

(2) Ensure that the primary capture and control system is operating at all times.

(3) Keep pots covered as much as practicable to include but not limited to minimizing the removal of covers or panels of the pots on which work is being performed.

(4) Inspect potlines daily and perform the work practices specified in paragraphs (a)(4)(i) through (iii) of this section.

(i) Identify unstable pots as soon as practicable but in no case more than 12 hours from the time the pot became unstable;

(ii) Reduce cell temperatures to as low as practicable, and follow the written operating plan described in paragraph (b)(4) of this section if the cell temperature exceeds the specified high temperature limit; and

(iii) Reseal pot crusts that have been broken as often and as soon as practicable.

(b) *Periods of startup.* If you own or operate a new or existing primary aluminum reduction affected source, you must comply with the requirements of paragraphs (a)(1) through (4) and (b)(1) through (4) of this section during periods of startup for each affected potline.

(1) Develop a potline startup schedule before starting up the potline.

(2) Keep records of the number of pots started each day.

(3) Inspect potlines daily and adjust pot parameters to their optimum levels, as specified in the operating plan described in paragraph (b)(4) of this section, including, but not limited to: Alumina addition rate, exhaust air flow rate, cell voltage, feeding level, anode current and liquid and solid bath levels.

(4) Prepare a written operating plan to minimize emissions during startup to include, but not limited to, the requirements in (b)(1) through (3) of this section. The operating plan must include a specified high temperature limit for pots that will trigger corrective action.

■ 13. Section 63.855 is added to read as follows:

§ 63.855 Alternative Emissions Limits for Co-controlled New and Existing Anode Bake Furnaces.

(a) *Applicability.* The owner or operator of a new anode bake furnace meeting the criteria of paragraphs (a)(1) and (2) of this section may demonstrate compliance with alternative TF and POM emission limits according to the procedures of this section.

(1) The new anode bake furnace must have been permitted to operate prior to May 1, 1998; and

(2) The new anode bake furnace must share a common control device with one or more existing anode bake furnaces.

(b) *TF emission limit.* (1) Prior to the date on which each TF emission test is required to be conducted, the owner or operator must determine the applicable TF emission limit using Equation 6–A,

$$L_{TFC} = [(L_{TFE} \times P_E) + (0.018 \times P_N)]/(P_E + P_N) \qquad \text{Eq. 6-A}$$

Where:

L_{TFC} = Combined emission limit for TF, lb/ton green anode material placed in the bake furnace;

L_{TFE} = TF limit for emission averaging for the total number of new and existing anode bake furnaces from Table 4 to this subpart;

P_E = Mass of green anode placed in existing anode bake furnaces in the twelve months preceding the compliance test, ton/year; and

P_N = Mass of green anode placed in new anode bake furnaces in the twelve months preceding the compliance test, ton/year.

(2) The owner or operator of a new anode bake furnace that is controlled by a control device that also controls emissions of TF from one or more existing anode bake furnaces must not discharge, or cause to be discharged into the atmosphere, any emissions of TF in excess of the emission limits established in paragraph (b)(1) of this section.

(c) *POM emission limits.* (1) Prior to the date on which each POM emission test is required to be conducted, the owner or operator must determine the applicable POM emission limit using Equation 6–B,

$$L_{POMC} = [(0.17 \times P_E) + (0.045 \times P_N)]/(P_E + P_N) \qquad \text{Eq. 6-B}$$

Where:

L_{POMC} = Combined emission limit for POM, lb/ton green anode material placed in the bake furnace.

(2) The owner or operator of a new anode bake furnace that is controlled by a control device that also controls emissions of POM from one or more existing anode bake furnaces must not discharge, or cause to be discharged into the atmosphere, any emissions of TF in excess of the emission limits established in paragraph (c)(1) of this section.

■ 14. Table 1 to Subpart LL of Part 63—Potline TF Limits for Emission Averaging is revised to read as follows:

TABLE 1 TO SUBPART LL OF PART 63—POTLINE TF LIMITS FOR EMISSION AVERAGING

Type	Monthly TF limit (lb/ton) [for given number of potlines]						
	2 lines	3 lines	4 lines	5 lines	6 lines	7 lines	8 lines
CWPB1	1.7	1.6	1.5	1.5	1.4	1.4	1.4
CWPB2	2.9	2.8	2.7	2.7	2.6	2.6	2.6
CWPB3	2.3	2.2	2.2	2.1	2.1	2.1	2.1
SWPB	1.4	1.3	1.3	1.2	1.2	1.2	1.2
VSS2	2.6	2.5	2.5	2.4	2.4	2.4	2.4

■ 15. Table 2 to Subpart LL of Part 63—Potline POM Limits for Emission Averaging is revised to read as follows:

TABLE 2 TO SUBPART LL OF PART 63—POTLINE POM LIMITS FOR EMISSION AVERAGING

Type	Quarterly POM limit (lb/ton) [for given number of potlines]						
	2 lines	3 lines	4 lines	5 lines	6 lines	7 lines	8 lines
CWPB1	1	0.9	0.9	0.9	0.8	0.8	0.8
CWPB2	11.6	11.2	10.8	10.8	10.4	10.4	10.4
CWPB3	2.5	2.4	2.4	2.3	2.3	2.3	2.3

TABLE 2 TO SUBPART LL OF PART 63—POTLINE POM LIMITS FOR EMISSION AVERAGING—Continued

Type	Quarterly POM limit (lb/ton) [for given number of potlines]						
	2 lines	3 lines	4 lines	5 lines	6 lines	7 lines	8 lines
SWPB	16.6	15.4	15.4	14.3	14.3	14.3	14.3
VSS2	3.3	3.1	3.0	2.9	2.9	2.8	2.7

■ 16. Table 3 to subpart LL is redesignated as Table 4 to Subpart LL of Part 63—Anode Bake Furnace Limits for Emission Averaging and revised to read as follows:

TABLE 4 TO SUBPART LL OF PART 63—ANODE BAKE FURNACE LIMITS FOR EMISSION AVERAGING

Number of furnaces	Emission limit (lb/ton of anode)		
	TF	POM	PM
2	0.11	0.17	0.037
3	0.09	0.17	0.031
4	0.077	0.17	0.026
5	0.07	0.17	0.024

■ 17. New Table 3 to Subpart LL of Part 63—Potline PM Limits for Emission Averaging is added to read as follows:

TABLE 3 TO SUBPART LL OF PART 63—POTLINE PM LIMITS FOR EMISSION AVERAGING

Type	Monthly PM limit (lb/ton) [for given number of potlines]						
	2 lines	3 lines	4 lines	5 lines	6 lines	7 lines	8 lines
CWPB1	5.9	5.6	5.2	5.2	4.9	4.9	4.9
CWPB2	10.6	10.3	9.9	9.9	9.5	9.5	9.5
CWPB3	18.4	17.6	17.6	16.8	16.8	16.8	16.8
SWPB	4	3.7	3.7	3.5	3.5	3.5	3.5
VSS2	25	24.1	24.1	23.1	23.1	23.1	23.1

■ 18. Appendix A to Subpart LL of Part 63—Applicability of General Provisions is revised to read as follows:

APPENDIX A TO SUBPART LL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

[40 CFR Part 63, Subpart A]

Reference section(s) . . .	Requirement	Applies to subpart LL	Comment
63.1(a)(1) through (4)	General Applicability	Yes.	
63.5(a)(5)		Yes.	
63.1(a)(6)		Yes.	
63.1(a)(7) through (9)		No	[Reserved].
63.1(a)(10) through (12).		Yes.	
63.1(b)(1) through (3)	Initial Applicability Determination	Yes	(b)(2) Reserved.
63.1(c)(1)	Applicability after standard Established	Yes.	
63.1(c)(2)		Yes.	
63.1(c)(3) and (4)		No	[Reserved].
63.1(c)(5)		Yes.	
63.1(d)		Yes	[Reserved].
63.1(e)	Applicability of Permit Program	Yes.	
63.2	Definitions	Yes.	
63.3	Units and Abbreviations	Yes	
63.4(a)(1) and (2)	Prohibited activities	Yes.	
63.4(a)(3) through (5)		No	[Reserved].
63.4(b) and (c)	Circumvention/Severability	Yes.	
63.5(a)(5)	Construction/Reconstruction Applicability	Yes.	

APPENDIX A TO SUBPART LL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

[40 CFR Part 63, Subpart A]

Reference section(s) . . .	Requirement	Applies to subpart LL	Comment
63.5(b)(1)	Existing, New, Reconstructed Sources Requirements.	Yes.	
63.5(b)(2)		No	[Reserved].
63.5(b)(3) and (4)		Yes.	
63.5(b)(5)		No	[Reserved].
63.5(b)(6)		Yes.	
63.5(c)		No	[Reserved].
63.5(d)	Application for Approval of Construction/Reconstruction.	Yes.	
63.5(e)	Approval of Construction/Reconstruction	Yes.	
63.5(f)	Approval of Construction/Reconstruction Based on State Review.	Yes	
63.6(a)	Compliance with Standards and Maintenance Applicability.	Yes	
63.6(b)(1) through (5)	New and Reconstructed Source Dates	Yes.	
63.6(b)(6) and (7)		No	[Reserved].
63.6(c)(1)	Existing Source Dates	Yes.	
63.6(c)(2)		Yes.	
63.6(c)(3) and (4)		No	[Reserved].
63.6(c)(5)		Yes.	
63.6(d)		No	[Reserved].
63.6(e)(1)(i)		No	See §§ 63.843(f) and 63.844(f) for general duty requirement.
63.6(e)(1)(ii)		No	
63.6(e)(1)(iii)		Yes.	
63.6(e)(2)		No	[Reserved].
63.6(e)(3)	Startup, Shutdown and Malfunction Plan	No.	
63.6(f)(1)	Compliance with Emissions Standards	No.	
63.6(f)(1) and (2)	Methods/Finding of Compliance	Yes.	
63.6(g)	Alternative Standard	Yes.	
63.6(h)	Compliance with Opacity/VE Standards	Only in § 63.845	Opacity standards applicable only when incorporating the NSPS requirements under § 63.845
63.6(i)(1) through (14)	Extension of Compliance	Yes.	
63.6(i)(15)		No.	[Reserved].
63.6(i)(16)		Yes.	
63.6(j)	Exemption from Compliance	Yes.	
63.7(a)	Performance Test Requirements Applicability	Yes.	
63.7(b)	Notification	Yes.	
63.7(c)	Quality Assurance/Test Plan	Yes.	
63.7(d)	Testing facilities	Yes.	
63.7(e)(1)	Conduct of Tests	No	See § 63.847(d)
63.7(e)(2) through (4)		Yes.	
63.7(f),(g), (h)	Alternative Test Method	Yes.	
63.8(a)	Monitoring Requirements Applicability	Yes.	
63.8(b)	Conduct of Monitoring	Yes.	
63.8(c)(1)(i)		No	See §§ 63.843(f) and 63.844(f) for general duty requirement.
63.8(c)(1)(ii)		Yes.	
63.8(c)(1)(iii)		No.	
63.8(c)(2) through (d)(2).		Yes.	
63.8(d)(3)		Yes, except for last sentence.	
63.8(e) through (g)		Yes.	
63.9(a),(b),(c),(e),(g),(h)(1) through (3), (h)(5) and (6), (i) and (j).		Yes.	
63.9(a)	Notification Requirements Applicability	Yes.	
63.9(b)	Initial Notifications	Yes.	
63.9(c)	Request for Compliance Extension	Yes.	
63.9(d)	New Source Notification for Special Compliance Requirements.	Yes.	
63.9(e)	Notification of Performance Test	Yes.	
63.9(f)	Notification of VE/Opacity Test	Yes.	
63.9(g)	Additional CMS Notifications	Yes.	
63.9(h)(1) through (3)	Notification of Compliance Status	Yes.	
63.9(h)(4)		No	[Reserved].
63.9(h)(5) and (6)		Yes.	
63.9(i)	Adjustment of Deadlines	Yes.	

APPENDIX A TO SUBPART LL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

[40 CFR Part 63, Subpart A]

Reference section(s) . . .	Requirement	Applies to subpart LL	Comment
63.9(j)	Change in Previous Information	Yes.	
63.10(a)	Recordkeeping/Reporting Applicability	Yes.	
63.10(b)(1)	General Recordkeeping Requirements	Yes.	
63.10(b)(2)(i)		No.	
63.10(b)(2)(ii)		No	See §§ 63.850(e)(4)(xvi) and (xvii) for recordkeeping of occurrence and duration of malfunctions and recordkeeping of actions taken during malfunction.
63.10(b)(2)(iii)		Yes.	
63.10(b)(2)(iv) and (v)		No.	
63.10(b)(2)(vi) through (xiv).		Yes.	
63.(10)(b)(3)		Yes.	
63.10(c)(1) through (9)		Yes.	
63.10(c)(10) and (11) ..		No	See §§ 63.850(e)(4)(xvi) and (xvii)for recordkeeping of malfunctions.
63.10(c)(12) through (14).		Yes.	
63.10(c)(15)		No.	
63.10(d)(1) through (4)	General Reporting Requirements	Yes.	
63.10(d)(5)	Startup-Shutdown and Malfunction Reports ...	No	See § 63.850(d)(2) for reporting of malfunctions.
63.10(e) and (f)	Additional CMS Reports and Recordkeeping/ Reporting Waiver.	Yes.	
63.11	Control Device/work practices requirements Applicability.	No.	
63.12	State Authority and Delegations	Yes.	
63.13	Addresses	Yes.	
63.14	Incorporation by Reference	Yes.	
63.15	Information Availability/Confidentiality	Yes.	
63.16	Performance Track Provisions	No.	

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